Decision and Award in the Matter of Arbitration between:

Service Employees International Union
District 1199, WV/KY/OH

and

Ohio Department of Youth Services
Indian River Juvenile Correctional Facility

Grievance #: DYS - 2018- 02275-12
Grievant: David Ziegler, et. al.

Arbitrator: Jack Buettner

Date of Hearing: July 17, 2019
Date Briefs Received: August 12, 2019
Date Decision Issued: October 1, 2019

Advocate for the Union:
Amanda Schulte
SEIU/District 1199
1395 Dublin Road
Columbus, Ohio 43215

Advocate for the Employer:
Larry L. Blake
Ohio Department of Youth Services
4545 Fisher Road – 2nd Floor
Columbus, Ohio 43228

By mutual agreement the Hearing was convened on July 17, 2019, at 9:00 AM. The Hearing was held at the office of Department of Youth Services Indian River Juvenile Correctional Facility in Massillon, Ohio. Jack Buettner was selected by the parties to arbitrate this matter as a member of the panel of permanent umpires pursuant to Article 7 of the parties' respective Collective Bargaining Agreement (CBA) effective 2015-2018.

The parties each stipulated to the statement of the issue, a series of background facts, and the admission of joint exhibits. The parties have also agreed to the arbitration of this matter. No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is now properly before the arbitrator for a determination of the merits.

In attendance for the Union:

Amanda Schulte	First Chair
Danielle Brison	SEIU 1199
David Ziegler	Grievant
Pat Hahn	Witness
Josh Norris	Witness - EVP

In attendance for the Employer:

Larry L. Blake	LRO3 - DYS
Victor Dandridge	LRA - OCB

The parties were asked to submit exhibits into the record.

The following were submitted as Joint Exhibits:

Joint Exhibit #1	Issue Statement and Stipulations of Fact
Joint Exhibit #2	Collective Bargaining Agreement 2015-2019
Joint Exhibit #3	June 29, 2018 email from Cassandra Hill-Gunn

Joint Exhibit #4	CPS Schedule before alleged violation
Joint Exhibit #5	CPS Schedule after alleged violation

The following were submitted as Union Exhibits:

Union Exhibit #1	Canvas documents dating back to 2003
Union Exhibit #2	Management Proposals and Union Counters dated 2015

The following were submitted as Management Exhibits:

Management Exhibit #1	Consent for Promotion dated August 29, 2018
Management Exhibit #2	Job Data, Mary Wyant
Management Exhibit #3	Job Data, Austin Chaney
Management Exhibit #4	Collective Bargaining Agreement, Article 24, 2012-2015
Management Exhibit #5	Email sent July 3, 2019, Revised IRJCF PREA Timelines

Background:

The Ohio Department of Youth Services (DYS) runs the Indian River Juvenile Correctional Facility. There are different units within the facility that are based on the individual needs of the youths. Corrections Program Specialists (CPS) and Social Workers (SW) are assigned to specific units. In July of 2018, the assignments of several CPSs and Social Workers were changed. No canvassing by Management was done prior to the changes. David Ziegler filed a Class Action Grievance on 7/13/2018 to include all SEIU CPSs and Social Workers at the institution including the following Co-Grievants:

- CPS: Michael Gardner, Courtney Prather, Vena Banner, Debra Vasilev, Montoyia Weir, Zakiya Hawkins, and William Benjamin, and
- SW: Mary Wyant, Austin Chaney, Keeleigh Masters, and Stephani Ascani.

Issue:

Did the Employer violate Article 24 of the CBA when it changed the units of several Correctional Program Specialists and Social Workers without canvassing by seniority? If so, what shall the remedy be?

Union Position:

The Union contends that the Employer violated Article 24.16, Shift and Assignment Openings, of the CBA when specific CPSs and SWs were moved to different unit assignments without first doing a seniority canvass. Article 24.16 states, "When applicable, shift and assignment openings within institutions shall be filled by the qualified employee within the classification at the worksite having the greatest State seniority who desires the opening." No canvass was done to determine if other employees were interested in the openings nor was seniority used to determine the moves.

The Union argued that the moves did indeed qualify as an "assignment opening." Citing Arbitrator Howard Silver's prior decision about this language, an "assignment opening" could be a newly created position or "…an existing position which is vacated." [SEIU/1199 v. Ohio Dep't of Rehab. & Corrections, No. 262, p 20 (1989 Silver)] Thus, the positions to which the Grievants were moved should be considered assignment openings.

The Union further argued that assignment openings do not require a shift change to be covered under the umbrella of Article 24.16. Union Exhibit #2 showed the proposals and counterproposals on Article 24 that were posited during bargaining in 2015. Management made proposals to change the language to make a shift change an integral part of the language and to remove canvassing but those proposals were rejected. In five (5) contracts bargained from 2000 to 2015, the language was not changed, and staff were canvassed for assignment openings. The Union contends that management would not have tried to change the contract language if they felt they already had the power to fill positions without seniority canvasses.

The CBA language of Article 24.16 remained unchanged since the CBA dated 2000-2003 until the CBA dated 2012-2015. The Union showed in Union Exhibit # 1 that DYS did, indeed, canvass for openings that were solely assignment openings with no mention of a shift change. Shift change came into play when SWs went from a single shift to multiple shifts. Even then, the parties consistently applied the Shift and Assignment Opening language to assignment-only openings.

Further, the Union disputes the Employer's use of the language "when applicable" in Article 24.16A to justify it actions, contending that the condition of both an assignment opening AND a shift opening are not needed to trigger a canvass.

Article 24.16B states that the Employer retains the right to change an assignment for a "rational management purpose". The Employer argued that the personnel moves were made due to unit closures during construction. While three (3) of the moves could be attributed to construction, two (2) additional moves were made without any rationale. Ultimately, there were openings created by relocations that were filled, and they were filled without regard to seniority or without a canvass.

In regards to Article 24.18, Canvass, the Union argued that while this article states, "Nothing in this Article prevents a canvass by seniority when mutually agreed upon," this language was added to the CBA to insure that non-institutional agencies were still provided the right to canvass even though not addressed in 24.16 A. 24.18 was not intended to allow the Employer to opt in or out of canvassing.

Employer Position:

The Employer contends that there were no contractual violations when in five (5) separate actions employees were move to different positions. At least two (2) of the moves were based solely on the closure of various units due to construction. The Float position was created to allow placement of a worker only while a particular unit as closed. This did not create an "opening."

The Employer argued that Article 24.16 (A) includes the words "when applicable" in reference to filling shift and assignment openings by seniority. This language does not force a canvass in all cases, only "when applicable". The Employer contends that there must be a shift AND assignment opening to trigger seniority placement. In each scenario, these two (2) conditions did not exist.

Article 5, Management Rights, further provides that the Employer maintains the right to determine the work assignments of their employees.

Additionally, Article 24.18, Canvass, provides for canvassing by seniority only when "mutually agreed upon". Thus, canvassing was not mandated in these instant cases.

DISCUSSION AND DECISION:

The article in dispute is Article 24.16, Shift and Assignment Openings. The language in this article was unchanged through four (4) contracts dating from 2003 to 2015. During those years, the Union presented evidence that seniority canvassing was, indeed, conducted (Union Exhibit # 1). With the negotiations of the 2015-2018 contract, the only change in 24.16 was the addition of the words "when applicable". The language remains the same in the 2018-2021 CBA. Union Exhibit #1 also showed that canvassing was done in 2016 under the new language. One of the issues then becomes what exactly "when applicable" means. Each Party contends that their definition applies.

"If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators." (Elkouri and Elkouri, How Arbitration Works. Washington, DC: BNA Books, 1997.) The Employer argued that the clear meaning of "when applicable" could be tied back to the dictionary meaning of the words. Using Merriam Webster words, they interpreted the language to read, *"At or during a time its capable and/or suitable for being applied*, shift and assignment openings within institutions shall be filled by the qualified employee with the classification at the worksite having the greatest State seniority who desires the opening." (Emphasis added by Arbitrator.) Using the Employer's interpretation, this Arbitrator must question the idea of capability. The employer presented no evidence that it was unable to do a canvass. Canvasses had been conducted for years. A notice was sent out telling employees of their assignment change on June 29, 2018. (Exhibit #3) This change was necessitated, according to Management, by construction issues. Two of the changes, however, were not due to construction. Construction had been ongoing and the need to reassign staff did not just come up without warning. The Employer should have had time to canvass.

The question, using the Employer's definition, then comes down to suitability. The Employer must then infer these assignment changes were not suitable for consideration. They were, indeed, "assignment openings". In a prior arbitration by Arbitrator Howard Silver, he stated, "The term 'assignment openings' denotes new vacancies of some configuration. A newly created position would create such an 'assignment opening', as would an existing position which is vacated.' [SEIU/1199 v. Ohio Dept of Rehab. & Corrections, No. 262, p 20 (1989 Silver)] Thus, the positions being filled were newly vacated. The Employer also contends that since the openings did not include both an assignment and shift change they did not qualify under Article 24.16. Past practice has shown, however, that canvassing was done where openings were solely assignment openings. (Union Exhibit #1, p 23-92)

This Arbitrator also must consider the intent of the negotiated language. The Union brought forth evidence from prior bargaining (Union Exhibit # 2) that showed attempts

by the Employer to eliminate canvassing language and the requirement that both a shift and an assignment change be present to trigger a canvass. All attempts to eliminate these provisions were rejected. Thus, it cannot be interpreted that now, years after the negotiations, the meaning has changed to allow Management to not canvass. As the Union cited in *Elkouri and Elkouri, How Arbitration Works*, "…a party may not obtain through arbitration what it could not acquire through negotiation." (Ruben, A.M. (Ed.) (2003, p. 627).

The Employer did argue that under Article 24.16(B) it could move employees if there was a "rational management purpose". Construction was the reason for three of the five moves. No rational management reason was given for the other two. In a domino effect, openings were created by these moves and no canvass was done to fill them.

The Employer also referred to Article 24.18, Canvass, which states, "Nothing in this Article prevents a canvass by seniority when mutually agreed upon." The employer contended that there can only be a canvass if there is mutual agreement between the parties. The Union, however, referred back to the bargaining language from a previous CBA. The union argued that 24.18 was included in the contract to allow *non-institutional* agencies the right to canvass since Article 24.16 refers specifically to *institutions*. Article 24.18 cannot be deemed to hold more power than 24.16.

While Article 24.17 was not mentioned, it refers to Pulling and Movement of Personnel. It states, "The qualified employee in the designated class having the greatest State seniority who desires to be pulled or moved shall be." Thus, two (2) articles having to do with assignment of personnel reference State seniority as the determining factor along with desire. State seniority prevails. Adding the language of "mutually agreeable" to Article 24.18, Canvass, does not allow Management to neglect using State seniority in filling openings.

Additionally, a reading of **Article 24.16 Shift and Assignment Openings**: states that openings within institutions **shall** be filled by the qualified employee within the classification at the worksite having the **greatest State seniority who desires the opening.** In order to determine the **desire** of an employee when filling openings or where to move employees, seniority canvassing of some sort would be necessitated.

(bolding added by the arbitrator)

AWARD:

For the reasons stated above, the grievance is sustained. The Grievant's will be made whole, including but not limited to, refilling by seniority canvass any assignment openings that came available after the grievance was filed. Any future assignment openings will be filled by seniority canvassing.

This closes the arbitration.

Respectfully submitted this 2st day of October, 2019,

John F. Buettner, Arbitrator

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy each of the Arbitration report was delivered via email on the 2nd day of October, 2019, to

Ms. Amanda Schulte, Advocate for the Grievant

And

Mr. Larry L. Blake, Advocate for the Employer

Jack Buettner

Jack Buettner