#853

REVIEWED BY
JAN 09 2004
GRIEVANCE COORDINATOR

ARBITRATION DECISION

January 7, 2004

In the Matter of:

State of Ohio, Department of Mental Health,)
Northcoast Behavioral Healthcare)
)
and)
)
Ohio Civil Service Employees Association,)
AFSCME Local 11)

Case No. 23-07-011210-0027-01-09
Monica Norman, Grievant / Mary Wilson

APPEARANCES

For the State:

Linda Thernes, Labor Relations Officer
Ray Mussio, Labor Relations Specialist, Office of Collective Bargaining
Roger Beyer, Director, Human Resources
Marvin Phillips, Human Resources
Eugene Briers, Vice President, Human Resources

For the Union:

Robert Robinson, Staff Representative
Earnest Wibley, Local Chapter President
Mary Ann Wilson, Local Chapter Vice President
Monica Norman, Grievant
Willie May Mims, Witness

Arbitrator:

Nels E. Nelson

BACKGROUND

The events giving rise to the instant grievance began in the fall of 2001. At that time the Department of Mental Health was hit with a budget cut that meant that each hospital had to abolish positions. Northcoast Behavioral Healthcare planned to eliminate 45 positions and scheduled a paper layoff for November 1, 2001.

Among the positions being cut were a number of Office Assistant III jobs on patient units. One of those jobs was held by Barbara Butler. She bumped Monica Norman, the grievant, whose job was not being cut. In addition, the Office Assistant III position held by Willie May Mims was eliminated. She used her seniority to fill a vacant Office Assistant III job at Northfield.

At the same time, five new Health Information Technician I positions were created in Cleveland. The positions were not posted but were held open for the paper layoff and possible 18.14 agreements for employees who otherwise would have to be laid off. The grievant and four other employees who were to be laid off signed 18.14 agreements. The agreements indicated that the Health Information Technician I positions required applicants to type 50 words per minute with 95% accuracy.

The grievant and the four other employees took the typing test. The grievant failed the test and declined the opportunity to retake the test. She was notified on November 15, 2001, that she would be laid off on December 1, 2001. The four other employees passed the test and were awarded jobs.

The remaining Health Information Technician I position was posted on November 16, 2001, with an ending date of November 27, 2001. When Mims saw the posting, she

bid on it. On November 27, 2001, it was determined that she was the successful bidder. Two days later Mims passed the typing test and was awarded the job.

When Mims took the Health Information Technician I position, it left the Office Assistant III position at Northfield vacant. Mims; Mary Wilson, the chapter president; and Robert Robinson, a staff representative, urged the state to contact the grievant about the position. It refused to do so, claiming that it was considering changing the opening to a Health Information Technician I position.

On December 6, 2001, the state posted the Office Assistant III position with a December 17, 2001, closing date. Since the job was subject to recall, the state contacted the Department of Administrative Services for a recall list. It initially received a list indicating that Carla Curry was eligible for recall. However, the state realized that the grievant should have been the first to be recalled and requested a corrected list. The new list showed the grievant as eligible to be recalled to the job.

The revised recall list raised a problem. It showed a different address for the grievant than the address in the payroll department's records. The state decided to send certified letters to both addresses informing the grievant of the available position. One of the letters was returned as undeliverable and the other was returned as unclaimed after three delivery attempts. The grievant acknowledged that the address payroll had was correct but insisted that she never got the letter. In any event, the state exhausted the recall list and then filled the job through the bidding process.

The union filed a grievance on behalf of the grievant on December 10, 2001. It charged:

> Management acted in a discriminatory manner against the grievant who was displaced as an office assistant 3. This position was reposted

with a typing stipulation specifically to keep the grievant out of the job. Operators were displaced/laid off and given positions before the lay off took place without any added stipulations.

The union requested that the grievant be made whole.

When the grievance was not resolved, it was appealed to arbitration. The arbitration hearing was held on November 19, 2003. Written closing statements were received on December 9, 2003.

RELEVANT CONTRACT PROVISIONS

Article 2.

ISSUE

The issue as agreed to by the parties is:

Did management violate Article 2 and if so, what should the remedy be?

UNION POSITION

The union argues that management discriminated against the grievant during the layoff process. It states that neither the grievant's Office Assistant III position nor the new Office Assistant III position had required a typing test. The union claims that the typing test was included when the Office Assistant III job was posted on December 6, 2001, to exclude the grievant.

The union rejects the testimony of Roger Beyer, the human resources director, that the state did not know who would be affected by the layoff. It contends that it was obvious that the grievant would be affected because there were only two Office Assistant III positions and the grievant was third in seniority. The union maintains that this meant

that either Butler or Mims had to bump the grievant and the other had to take the vacant position.

The union questions the state's imposition of a typing requirement for the Health Information Technician I positions. It points out that when the Office Assistant III positions were abolished, employees holding those jobs were required to take typing tests despite the fact that all of them except the grievant had extensive backgrounds in typing. The union asserts that the requirement to type 50 words per minute is not consistent with the requirement for three months experience because three months of experience would not result in typing even 30 words per minute.

The union charges that the grievant was treated differently than the other employees. It points out that Nancy Mullen and Stephanie Grace, part-time telephone operators, were due to be laid off but when Jean Sumlin, a telephone operator, bid on and was granted a Therapeutic Program Worker position, Beyer called and offered her position to Mullen. The union reports that when she declined the job, the state contacted Grace who accepted it.

The union complains that the state did not follow the past practice in the grievant's case. It states that it has always been the practice during layoffs to offer positions that became vacant to employees scheduled for layoff. The union indicates that it has commended the state for acting immediately to circumvent potential layoffs.

The union accuses the state of setting out to exclude the grievant from the Office Assistant III position vacated by Mims. It observes that the state knew that it would have to use the recall list to fill the job and that the grievant's name would appear first on the

list. The union asserts that the state added the 50-words-per-minute typing requirement to keep the grievant from qualifying for the position.

The union argues that it does not matter that the grievant did not get the recall letter. It observes that if she had received the letter, she would have been denied the job just as she had the Health Information Technician I position because of the typing requirement. The union acknowledges that Beyer testified that he would not have held the grievant to the 50-word-per-minute typing requirement but it stresses that the letter sent to the grievant did not contain this information.

The union contends that there were those in management who resented the grievant for being party to a successful lawsuit against the department. It claims that this "was immediately indicated by the supervisor giving her an excellent evaluation and the month after learning of the lawsuit, made derogatory comments and sent a negative letter to DAS." (Union Brief, page 5) The union insists that the grievant, whose work was impeccable and who had done the Office Assistant III job for years without typing being an issue, would have received the Office Assistant III job had it not been for the lawsuit.

The union asks the Arbitrator to sustain the grievance and to make the grievant whole for all losses and medical expenses. It also requests that union dues be deducted from the grievant's pay and be remitted to its central office.

STATE POSITION

The state argues that it did not violate Article 2. It notes that the union was able to cite only one case of alleged disparate treatment. The state claims that it demonstrated that "the grievant's case and the disparate treatment case cited were not similarly

situated." (State Brief, page 1) It adds that it is a "well settled precedent in arbitration cases, that one case alone does not make for disparate treatment." (Ibid.)

The state contends that the grievant was properly disqualified from a Health Information Technician I job. It points out that her 18.14 agreement stated that a minimum qualification for the position was the ability to type 50 words per minute with 95% accuracy. The state notes that the agreement also indicated that failure to meet the minimum qualifications would result in layoff effective December 1, 2001.

The state suggests that the grievant should have been able to pass the typing test. It observes that she worked in the clerical field for twelve years, which should have given her the opportunity to practice typing. The state adds that it gave her the option of practicing and re-taking the typing test but she declined because she was certain that she would not do any better.

The state maintains that it properly notified the grievant of the vacant Office Assistant III position. It points out that it sent the recall notice to both the address from DAS and the one on record with the payroll department. The state notes that the letter sent to the DAS address was returned as undeliverable and the one sent to the payroll address came back as unclaimed. It stresses that the grievant acknowledged that the three dates on the undeliverable letter indicate that three attempts had been made to deliver it.

The state insists that it has to trust the post office to deliver mail. It contends that if no attempt was made to deliver the recall letters, the grievant has an issue with the post office. The state observes that the union presented no evidence that the post office did not do its job.

The state rejects the union's claim that the typing requirement for the Office Assistant III job was a problem. It acknowledges that the letter sent to the grievant included the typing requirement. The state stresses, however, that the grievant never received it so the typing requirement was not an impediment.

The state contends that the crux of the case is whether the grievant should have been treated as Mullen and Grace. It reports that when Sumlin was awarded a position as a TPW on November 20, 2001, creating an opening for a telephone operator, it contacted Mullen and offered her the job. The state indicates that after she declined the position, it offered the job to Grace who accepted it.

The state insists that the grievant's case can be distinguished from Mullen and Grace. It observes that the Office Assistant III position vacated by Mims was not available until the day before the layoff at which time all of the paperwork had to be completed and in Columbus. The state indicates that in the case of Mullen and Grace it had ten days to contact them.

The state also claims that when Mims vacated the Office Assistant III position, it was considering changing it to a Health Information Technician I position. It claims that by the time it was determined that the position would not be reclassified, the grievant had already been laid off. The state reports that in the case of Mullen and Grace there was no question about reclassifying the vacant job.

The state rejects the union's argument that the abolishment of 45 positions was a ruse to get rid of the grievant. It acknowledges that the grievant was part of a lawsuit but points out that this occurred nearly nine years before her layoff. The state adds that there

was no way to know who would be displaced or laid off until the paper layoff process was complete.

The state concludes that the grievance should be denied. It claims that it followed the contract to the letter and went "above and beyond the call of duty to insure that the grievant was the employee recalled to the vacant position." (State Brief, page 6) The state asserts that the grievant failed to claim her mail and should not be rewarded for her irresponsibility. It asks the Arbitrator to deny the grievance in its entirety.

ANALYSIS

The basic facts are undisputed. In the fall of 2001 a cut in the budget of the Department of Mental Health required Northcoast Behavioral Healthcare to abolish a number of positions. As a result, the grievant was displaced from her Office Assistant III position at the paper layoff on November 1, 2001. On November 3, 2001, the grievant sought a position as a Health Information Technician I under Section 18.14 but was unable to pass the test that required applicants to type 50 words per minute with 95% accuracy. Subsequently, a vacancy was created when Mims bid off an Office Assistant III job, which she had bumped into at the paper layoff. The union urged management to offer the grievant the position so she would not be laid off on December 1, 2001, but it refused and the grievant was laid off. On December 17, 2001, recall notices for the position were sent to the grievant by certified mail. The notices indicated that the job required an applicant to type 50 words per minute with 95% accuracy. The notices were returned as undeliverable or unclaimed and another employee filled the position.

The union charges that the state discriminated against the grievant in violation of Article 2 of the collective bargaining agreement. First, it claims that the state treated the

grievant differently than Mullen and Grace by refusing to offer her the vacancy created when Mims bid off her Office Assistant III job at Northfield. Second, the union complains that when the state posted the job, it included the 50-words-per-minute typing requirement to prevent the grievant from filling it.

The Arbitrator must reject the union's charge that the state engaged in disparate treatment when it failed to offer the grievant the job vacated by Mims before her layoff on December 1, 2001. While Mullen and Grace were offered the telephone operator's job when Sumlin bid off her job, the circumstances were different from the grievant's case. Eugene Briers, the vice president for human resources, testified that when Mims bid off the Office Assistant III job, management was unsure whether the opening would be posted as an Office Assistant III job or Health Information Technician I job. He stated that by the time the decision was made to post the opening as an Office Assistant III position, the grievant had already been laid off. In the case of Mullen and Grace there was no question when Sumlin bid off her job as a telephone operator that the job would be posted as an opening for a telephone operator. In addition, there was more than sufficient time to offer the job to Mullen and Grace before the scheduled layoff on December 1, 2001.

The Arbitrator must also reject the charge that when Mims bid off her Office Assistant III position, it was posted with a 50-word-per-minute typing requirement to prevent the grievant from filling the job. While Mims may not have been required to take a typing test when she filled the position, her typing skills may not have been in question. When the job was posted after she bid off, the state had the right to be sure that whoever filled the job had the necessary typing skills.

The union's charge that management was determined to prevent the grievant from getting the job is not consistent with its actions. When the recall list arrived from DAS, the state believed that the address shown for the grievant might have been incorrect. It responded by sending certified letters to the grievant at the address supplied by DAS as well as the address in its payroll records. If the state were anxious to avoid recalling the grievant, it would not have gone to the extra trouble.

The Arbitrator also believes that the union failed to provide any credible motive for its claim that the state was discriminating against the grievant. While the grievant was party to a lawsuit against the department, the lawsuit was filed in the 1990s and was settled in September 2000. Furthermore, there was no evidence that any of the other twenty or so employees who were party to the suit were the subject of retaliation.

Most importantly, the 50-words-per-minute typing requirement for the Office Assistant III position never became an issue. The state sent the grievant two certified letters notifying her of the position but one was returned as unclaimed and the other as undeliverable. If the grievant had picked up the letters, she could have addressed her concern about the typing requirement. In fact, Briers testified that he would not have required the grievant to take a typing test.

Based on the above analysis, the Arbitrator must deny the grievance. The union was unable to show that the grievant was treated differently than similarly situated employees or that the state had any motive to discriminate against her.

AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

January 7, 2004
Russell Township
Geauga County, Ohio