VOLUNTARY LABOR ARBITRATION TRIBUNAL

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In the Matter of Arbitration Between OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LOCAL 11, AFSCME, AFL/CIO and OHIO DEPARTMENT OF REHABILITATION AND CORRECTION	OPINION AND AWARD Anna DuVal Smith, Arbitrator Case No. 27-04-020701-0860-01-09 Lisa A. Good, Grievant Recall

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APPEARANCES

For the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO:

Robert Steele, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Rehabilitation and Correction:

Michael Duco
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on June 30, 2005, at the offices of the Ohio Civil Service Employees Association in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO (the "Union") was the Grievant, Lisa A. Good. Testifying for the Ohio Department of Rehabilitation and Correction (the "Employer") was Teri Decker, Labor Relations Administrator 2. Also in attendance were Chapter 2572 President Paul Salveto and Marissa Harney, Legal Intern. A number of documents were entered into evidence: Joint Exhibits 1-3 and Union Exhibit 1. The record was closed following oral argument at 10:15 a.m. on June 30. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The facts of this case are not in dispute. The Grievant is an LPN employed by the Ohio Department of Rehabilitation and Correction where she began her employment on April 12, 1997. On December 16, 2001, she was laid off from her full-time position at Ross Correctional Institution in Chillicothe. The Grievant was eligible to bump into a position at Lebanon Correctional Institution, which is in the same geographic jurisdiction (as defined by the Contract) as Ross, but she was also offered a position under Article 18.14 of the Collective Bargaining Agreement at the Correctional Medical Center ("CMC") in Columbus. This facility is closer to her home than Lebanon is but is in a different geographic jurisdiction than Ross. The Grievant preferred the relative proximity of CMC and so entered into a 18.14 agreement, filling the CMC position effective December 16, 2001.

In February 2002, the Grievant was offered a part-time LPN position at the Gallipolis Developmental Center. She declined this position understanding that her refusal would remove her from the part-time recall list. This did happen but she was also erroneously and without her knowledge removed from the full-time recall list in violation of Article 18.11. On July 1, 2002, the Grievant became aware that there was a full-time LPN position open for application at Ross. Because she had not been recalled to or offered this position she filed a grievance on July 1, 2002.

While the grievance was pending another employee, Beth Mougey, who had less seniority than the Grievant, was appointed full-time LPN at Ross effective August 25, 2002. Two months later on October 24, the State reactivated the Grievant on the full-time recall list. However, she remained in the CMC position until June 1, 2003, when she was recalled to and accepted a full-time LPN position at Ross.

Despite the fact that the Grievant had suffered no loss in pay during the entire period of her layoff and had finally been returned to her preferred institution, she was not completely satisfied. The reason for this is that she had a longer commute to CMC than to Ross. Her grievance was therefore appealed to arbitration in order to recover the additional expense of the longer commute between the date she should have been recalled to Ross and the date she actually was. The Union calculates this sum to be $5,392.80 (214 84-mile round trips at 30¢ per mile).

The Employer resists for two reasons. For one, the Arbitrator should apply the doctrine of substantial compliance and find harmless error. Although the Employer made a mistake, the Grievant and Employer had voluntarily entered into an agreement wherein she suffered no loss in pay as a result of her layoff. She was not required to have a motor vehicle and she could have moved closer to CMC. Second, while employed at CMC the Grievant worked considerable overtime between the date Ms. Mougey held the Ross position and the date the Grievant was recalled to Ross. Her overtime earnings during this period were $19,055.04 whereas the overtime worked by the two LPNs at Ross during the same period came to $8,843.77. In the

Employer's view, whatever additional costs the Grievant incurred should be offset by the overtime opportunities she had because of the State's error. And this calculation, it points out, has her money ahead.

III. STIPULATED ISSUE

Did the Employer violate Article 18? If so, what is the remedy?

IV. PERTINENT CONTRACT PROVISIONS

Article 18 - Layoffs

18.11– Recall

When it is determined by the Agency to fill a vacancy or to recall employees in a classification where the layoff occurred, the following procedure shall be adhered to:

The laid-off employee with the most state seniority from the same, similar or related classification series for whom the position does not constitute a promotion as defined in Article 17, and who prior to his/her layoff, held a classification which carried with it the same or higher pay range as the vacancy, shall be recalled first (see Appendix I). All employees who are laid-off or displaced out of their classification shall be placed on the recall list by the effective date of their layoff. An employee shall be recalled to a position provided the affected employee is qualified to perform the duties. Any employee recalled under this Article shall not serve a new probationary period, except for any employee laid off who was serving an original or promotional probationary period which shall be completed. Employees shall have recall rights for a period of twenty-four (24) months.

Notification of recall shall be by certified mail to the employee's last known address or hand delivered to the employee with proof of receipt. Employees shall maintain a current address on file with the Agency. Recall rights shall be within the Agency and within recall jurisdictions as outlined in Appendix J. If the employee fails to notify the Agency of his/her intent to report to work within seven (7) days of receipt of the notice of recall, he/she shall forfeit recall rights. Likewise, if the recalled employee does not actually return to work within thirty (30) days, recall rights shall be forfeited.

Any employee accepting or declining recall to the same, similar or related classification series and the same appointment category (type) from which the employee was laid-off or displaced shall be removed from the recall and reemployment list if recalled to his/her original classification and appointment category (type). Except that any employee declining recall to a different appointment category (type) than that from which he/she was laid-of or displaced shall be removed from the recall list for that appointment category (type).

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18.14 – Placement

Notwithstanding any other provisions of Article 17, the Union and the agency or agencies may agree, in writing, to place an employee to be laid off in an existing vacancy which may not be otherwise available. Such agreement shall take precedence over any other Section/Article of this Agreement. However, such placement shall not result in the promotion of the affected employee. All employees placed into existing vacancies under this Section shall retain recall and reemployment rights pursuant to the provisions of this Article.

V. OPINION OF THE ARBITRATOR

Admitting that it did not strictly and technically comply with the procedural requirements of Article 18, the Employer urges that I find harmless error and a lack of prejudice to the Grievant. The question, then, is whether the result would have been the same had the Employer strictly complied with the procedural requirement to maintain the Grievant on the full-time recall list and, as a result, timely recalled her to Ross. This depends on whether the Grievant's

employment at CMC was substantially equivalent to what she would have had at Ross. It was unquestionably equivalent in terms of duties, rank, working conditions and wages inasmuch as she was working within her classification at her usual rate of pay in another corrections facility. But these are not the only factors to be considered in determining position equivalency. Also relevant are location and hours. The first of these required her either to move or to commute 42 miles each way across two counties, costing her fuel, depreciation and other automobile costs. The Grievant's overtime hours at CMC were longer than they would have been at Ross (as evidenced by the overtime worked by the LPNs at Ross during the relevant period). Some of this was voluntary, some mandatory. However, the fact that the Grievant was also working as a contract nurse during this same period indicates that hours were not, on balance, an entirely unwelcome difference. However, the length of the commute and the fact that, despite the greater overtime opportunities at CMC, the Grievant returned to Ross when she next had the opportunity to do so persuades me that the position at CMC was not substantially equivalent to the one she would have had but for the Employer's error. Therefore, the Employer's claim of substantial compliance and harmless error fails and the Grievant is entitled to the reasonable travel expenses she incurred to maintain her employment when she should have been recalled to Ross.

Turning now to remedy, the question is whether the overtime worked by the Grievant while at CMC should mitigate her expenses. The rule of thumb in the calculation of back pay is to reduce the award by the amount of compensation from other employment provided that such income was not a normal part of the grievant's income prior to the employer's violation of the contract. The Grievant's employment at CMC fully compensated her for all hours she would have worked at Ross (both straight and overtime) had the Employer not removed her from the full-time recall list. The excess must be treated as supplemental pay or earnings from moonlighting as if the Grievant worked them in a second job to supplement her income rather than to replace earnings lost because of the Employer's error. Because she worked more hours to

earn additional overtime pay than she would have at Ross, she is entitled to keep it without using it to offset reasonable expenses.

VI. AWARD

The Employer violated Article 18. The grievance is granted. The Grievant is awarded $5,392.80 in expenses necessary and reasonable to maintain her employment while improperly off the full-time recall list.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
June 11, 2005

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