

*State Government Contract Grievances &
Investigation*

Case Studies

*Participant's Guide
2019 Edition*

Prepared by the CSEA State Operations Department

Case Study 1- Kris Drefahl Decision

CASE STUDY 1-

KRIS DREFAHL DECISION

Facts of the Case

1. Grievant is employed by DOCCS as Keyboard Specialist (KBS) SG-6 assigned to the Security Unit in Building 11.
2. Building 11 is located inside the security perimeter of the facility and grievant receives hazardous duty pay while working such assignment.
3. On or around 10/30/98 – grievant was reassigned to the security wing of Building 1.
4. Grievant's duties remained the same but since Building 1 is located outside of the secure perimeter she no longer received the hazardous duty pay.
5. The less senior KBS working in Building 11 was not reassigned to Building 1.
6. Remedy sought is for Grievant to be returned to the KBS assignment in Building 11.

Illustration of Assignment to a Work Location and Seniority (ASU Article 44)

Contract Provisions- Article 44 Seniority

§44.2 Assignment of employees to shifts, pass days, work locations (e.g., main office, college, hospital, district office, or buildings thereof), alternative work schedules and vacations shall be made on the basis of seniority where there is no distinction between employees with respect to factors relevant to the ability of the employees to perform the required duties and responsibilities satisfactorily, or subject to the operating needs of a department or agency or component thereof.

Discussion-

The Union contends that the less senior KBS should have been reassigned to Building 1.

The State maintains Grievant was moved in the interests of operational efficiency. The less senior employee worked in medical records and did not perform security support duties; thus, she would have required training to properly function in the Building 1 assignment.

Group activity. Read the decision and discuss relevant points of the Arbitrator's decision. Be prepared to share in large group discussion.

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STATE OF NEW YORK
ADMINISTRATIVE SERVICES UNIT

Director of
Labor Relations

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,	:	
-and-	:	OPINION
STATE OF NEW YORK, DOCS	:	
(Cape Vincent CF)	:	AND
Grievance: Drefahl, Kris	:	
Case No. 99-02-0109	:	AWARD

On 4/7/00, an arbitration was held in Albany before the undersigned Master Arbitrator, regarding the grievance filed by the Union on behalf of Kris Drefahl (Grievant), an employee of DOCS assigned to Cape Vincent CF (Facility). Grievant appeared for the arbitration and was represented by Jerome Lefkowitz, Esq., Deputy Counsel for CSEA. The State was represented by Michael Volforte, Esq., Assistant Counsel, Governor's Office of Employee Relations.

The grievance alleged a violation of Article 44.2 of the State/CSEA ASU Agreement in that Grievant claims that her work location was wrongfully changed on 10/30/98 when she was reassigned from Building 11 to Building 1 of the Facility.

The facts indicate that Grievant is employed as a Keyboard Specialist (KBS), SG-6, and was assigned to the Security Unit, and worked in Building 11. As Building 11 is located inside the security perimeter of the Facility, Grievant received hazardous duty pay while working such assignment. On or about 10/30/98, Grievant was reassigned to the security wing of Building 1. Her duties did not change, but she was no longer eligible to receive

hazardous duty pay, as Building 1 is located outside of the secure perimeter.

The Union argues that since there was a less senior KBS working in Building 11 at the time of Grievant's reassignment, the less senior KBS should have been reassigned to Building 1 and not Grievant. The Union contends that Grievant was reassigned to Building 1 because she was unwilling to volunteer for switchboard coverage and was moved in retaliation.

The State maintains that Grievant was moved in the interests of operational efficiency and was not moved in retaliation for any activity or lack thereof. As testified to by Deputy Superintendent for Administration Taylor, Grievant was assigned to security support and although she was located in Building 11, the majority of that function is performed in Building 1. In an effort to consolidate staff and make more efficient use of resources, Grievant was moved to Building 1, where in addition to her previous security related duties for the inmate disciplinary program, she would be able to perform other related administrative duties. Since Grievant was already performing security related functions, she was moved rather than Sandra Catalfano, the less senior KBS in Building 11. Since Catalfano worked in medical records and did not perform security support duties, she would have required training in order to properly function in the Building 1 assignment. The State maintains that Grievant was not moved in retaliation, but

rather was moved in an effort to make better and more efficient use of Facility staff.

Upon review, the Arbitrator finds that the instant grievance must be sustained, and that Grievant shall be immediately reassigned to the Building 11 work location in place of the less senior KBS currently performing medical records unit duties in that location. This determination is based on several factors. First and foremost, the Arbitrator finds that Article 44.2 of the ASU Agreement suggests that individual buildings may be separate work locations. While such language does not mean that an individual building is always a separate work location, in the instant case, the facts support the Union's claim that Buildings 1 and 11 at Cape Vincent CF are indeed separate work locations. This finding is consistent with a previous holding, involving similar location circumstances in the *Wagner Award* [CSEA and NYS DOCS (Downstate CF) OER File 97-02-1549, Award dated 7/7/98].

Next, Article 44.2 of the ASU Agreement expressly provides that assignment of employees to work locations shall be made on the basis of seniority, unless there is a distinction between employees with respect to the ability to perform the duties or subject to operating needs of the Facility. In the instant case, there is no question that Grievant could perform the duties of the less senior KBS who remained in the medical records unit in Building 11.

In fact, in a settlement of an earlier grievance involving the same Facility, this Arbitrator indicated that:

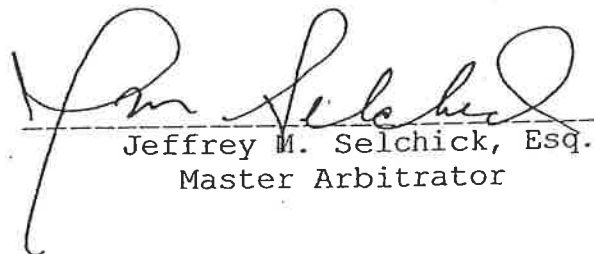
"Based on current staffing, the Facility agrees that other KBS assignments, with the exception of the Personnel Office, can be performed by both more senior and less senior employees serving in KBS positions." [see *Clark Award*, CSEA and NYS DOCS (Cape Vincent CF) OER Case No. 95-02-0126, Award dated 4/27/95]

To this Arbitrator that means a KBS is a KBS and each can do the duties assigned to the other. There is no relevant distinction as applied to the assignments currently being performed by the various employees assigned to KBS positions at the Facility.

While the Facility management may have been well intentioned in trying not to disrupt two employees, the fact remains that when the determination was made to move a KBS from Building 11, it should have been the least senior employee in a KBS title, and not Grievant. As each is capable of doing the work of each other in a competent manner, the Facility is unable to assert operational need as a valid reason for reassigning Grievant, who was the more senior employee in a KBS title.

Having determined the outcome of this grievance on the plain language of the Agreement, the Arbitrator has no need to address the other issues raised at the arbitration hearing. The Arbitrator accepts the testimony of Dep. Taylor that he was never aware of any threats of any kind which Grievant alleges were made regarding her work location. Nor is it necessary to discuss the selection process for the vacancy created by the transfer of Catalfano.

Accordingly, the grievance is sustained. The Arbitrator directs that Grievant be immediately assigned to the KBS position located at Building 11 and shall receive hazardous duty pay retroactive to 10/30/98. Any change in work location thereafter shall be in accordance with the provisions of Article 44 of the ASU Agreement.



Jeffrey M. Selchick, Esq.
Master Arbitrator

DATED: 4/10/00



RELEVANT POINTS OF THIS CONTRACT
PROVISION-

SUGGESTS INDIVIDUAL BUILDINGS MAY BE
SEPARATE WORK LOCATIONS.

THE BURDEN TO PROVE OPERATIONAL NEED
RESTS ON MANAGEMENT.

Arbitrator's Decision-

- The grievance is sustained.
- The facts in the instant grievance support the Union's claim that Buildings 1 and 11 at the Facility are indeed separate work locations (consistent with the cited Wagner Award).
- Expressly provides that assignment of employees to work locations shall be made on the basis of seniority, unless there is a distinction between employees with respect to the ability to perform the duties or subject to operating needs of the Facility.
- In a previous grievance involving the same Facility, the Arbitrator indicated that:
 - "Based on the current staffing, the Facility agrees that other KBS assignments, with the exception of the Personnel Office, can be performed by both more senior and less senior employees serving in KBS positions." [see Clark Award, CSEA and NYS DOCS (Cape Vincent CF) OER case No. 95-02-0126, Award dated 4/27/95].
 - A KBS is a KBS and there is no relevant distinction as applied to the assignments currently being performed by the various employees assigned to KBS positions at the Facility. Therefore, should have been the least senior employee in a KBS title as each is capable of doing the work of each other in a competent manner, **the Facility is unable to assert operational need as a valid reason for reassigning Grievant.**
 - Grievant is to be immediately assigned to the KBS position located at Building 11 and shall receive hazardous duty pay retroactive to 10/30/98.

Case Study 2- Gerald Kroger Decision

CASE STUDY 2-

GERALD KROGER DECISION

Facts of the Case-

1. On 8/2/02, the Facility posted an assignment for "Adirondack Pathways/ Float Team" in the MHTA (Mental Health Therapy Aide) title.
2. Posting noted:
Currently employed MHTA's may apply for this reassignment
Preferred qualification was "Wilderness First Responder" and "CPR Certifications"
3. Grievant and three other MHTA's applied for the position.
4. Undisputed that Grievant was the most senior applicant.
5. Grievant and one other applicant did not have the Wilderness First Responder training.
6. Both remaining two applicants did have the Wilderness First Responder training. The more senior of the two was awarded the assignment.
7. Remedy sought is for Grievant to be awarded the Adirondack Pathways/ Float Team

Illustration of Operating Need Exception (ISU Articles 44/45)

Contract Provisions-

Article 44 Seniority

§44.2 Assignments and promotions to vacant positions in the non-competitive service or assignment of employees to work locations and shifts shall be and on the basis of seniority, subject to the operating needs of a department or agency or component thereof, or subject to an identification of differences between employees with respect to the relevant factors concerning the employee's ability to perform the required duties and responsibilities satisfactorily.

Article 45 Posting and Bidding for Job Vacancies

§45.1(b) When such vacancies are announced as provide herein, employees who wish to be considered for appointment or reassignments to such vacancies shall be allowed to bid for such vacancies; provided, however, that such bid must be filed with the appointing authority within 10 days following announcement of the vacancy. In such cases appointments and promotions shall be made on the basis off seniority, as defined in the Seniority Article of this Agreement, subject to the operating needs of a department or agency component thereof, or subject to an identification of differences between employees with respect to relevant factors concerning employees' ability to perform the required duties and responsibilities satisfactorily.

Discussion-

The Pathways Program involves taking 10-15 adult patients into the wilderness to expose them to a variety of challenges and intended to increase self-esteem through the experiences of overcoming these challenges.

Assigned staff consists of one RN and one MHTA. Length of each outing is two nights in the woods. Pathways programs runs throughout the year.

Employees assigned should be able to handle any emergency in the wilderness and the MHTA position would require more than First Aid or CPR skills.

Group activity. Read the decision and discuss relevant points of the Arbitrator's decision. Be prepared to share in large group discussion.

STATE OF NEW YORK
INSTITUTIONAL SERVICES UNIT

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.
LOCAL 1000 AFSCME, AFL-CIO,

Union,

OPINION

AND

-and-

AWARD

STATE OF NEW YORK, OMH,
(St. Lawrence PC),

Employer.

Grievance: Kroeger, Gerald
GOER File No. 03-04-0081

On 12/12/03, an arbitration was held before the Master Arbitrator regarding a grievance filed by CSEA on behalf of Gerald Kroeger ("Grievant"), who is employed by OMH as a MHTA at the St. Lawrence Psychiatric Center. The Union was represented by Steven A. Crain, Esq., Deputy Counsel, CSEA, and the State was represented by Michael N. Volforte, Esq., Assistant Counsel, Governor's Office of Employee Relations.

The grievance alleged a violation of Article 44.2 and 45.1 of the Agreement, based on Grievant's claim that he was not selected for an available assignment in the Adirondack Pathways Program. The record indicates that on 8/2/02, the Facility posted an assignment for "Adirondack Pathways/float team" in the MHTA title. The posting noted that "currently employed MHTA's may apply for this reassignment," and also noted that a "preferred qualification" was "Wilderness First Responder" and "CPR" certifications.

Grievant and three other MHTA's applied for the position. Of the applicants, there is no dispute that Grievant was the most senior. The parties stipulated that Grievant had the

CPR certification. The record is clear, however, that Grievant and one of the other three applicants did not have the Wilderness First Responder training. Of the two remaining applicants, both had the First Responder training. The most senior of these two applicants was awarded the assignment. The parties also stipulated that Grievant was not seeking either additional pay or damages, and that the relief sought by Grievant was assignment to the Adirondack Pathways program. It is clear that the essence of the parties' dispute is whether the State was justified in not selecting Grievant, the most senior applicant, for the Adirondack Pathways assignment solely because he had not completed the Wilderness First Responder training and subsequent certification.

The assignment to the Adirondack Pathways/float team is non-competitive and, therefore, is governed by Article 45.1(b) of the Agreement. As the most senior applicant for the position, Grievant was entitled to the assignment unless the State has established a contractual justification for appointing a less senior employee. As the parties' submission sets forth, the State's burden in this expedited arbitration is to establish that Grievant did not meet the State's "operating needs." More specifically, the question is whether the State was justified in reaching the conclusion that Grievant did not meet "operating needs" because he did not have Wilderness First Responder training and certification.

The Adirondack Pathways Program was designed to address needs of chronic long term patients who are not responsive to other treatments. The Pathways Program involves taking ten to fifteen adult patients into the wilderness to expose them to a variety of challenges and, hopefully, to allow them to experience a number of successes and

achievements with an attendant increase in self esteem. The staff assigned to a given outing consists of a RN and one MHTA; the length of each outing involves two nights "in the woods." The Pathways Program runs throughout the year.

According to the testimony of Dr. Samuel Bastien, the Chief of Mental Health Treatment services at the Facility, the Wilderness First Responder training was developed by the Wilderness Medical Association and the successful completion thereof leads to a national certification. Dr. Bastien testified that the training is considered by the State as a "necessary skill" because it "goes to the nature of the program itself." Employees assigned to the program, Dr. Bastien also testified, should be able to handle any emergency in the wilderness and the MHTA position therefore requires more than first aid or CPR skills.

The record shows that the Pathways Program began in 1994 and the First Responder certification was set forth as a preferred qualification for the first time in the job posting at issue. It would appear that the first MHTA assigned to the program was employee Bouchard, who is now retired. Bouchard did not have certification in the First Responder training when he obtained the position but obtained the certification after his selection. According to Dr. Bastien, it was considered necessary that Bouchard obtain the certification to keep the assignment.

The record shows that, before applying for the position, Grievant sometimes filled in for Bouchard when the latter was absent. Dr. Bastien noted that no problems were encountered during the periods of time Grievant filled in for Bouchard. Other MHTA's filled in for Bouchard, Dr. Bastien testified, and these MHTA's also did not have the


Responder Training certification.

As noted, two of the four applicants for the position, including the one awarded the position, had the First Responder certification at the time of the posting. Dr. Bastien observed that various staff had asked in advance about Bouchard's position with the Pathways Program before Bouchard retired and what the requirements were for the position. Both Dr. Bastien and Grievant testified that Grievant was one of the individuals who expressed interest in Bouchard's position. Grievant testified he was not aware that First Responder Training would be required. At some point, Grievant asked treatment team leader Ramsey if he could be sent for training but was informed that he could not be allowed time off from work to obtain the training. It would appear that the two individuals who had the First Responder training obtained their certifications on their own time. Grievant noted that he never "formally" sought time off to take the training and did not know, before he applied for the assignment, where or when the training was being offered.

Upon consideration of the parties' Agreement and the record evidence, the Master Arbitrator finds that the State has met its burden in justifying its decision not to appoint Grievant, the most senior applicant, to the assignment at issue. The State has the managerial rights to establish qualifications for a position or assignment, provided that the qualifications set bear a reasonable nexus to the position or assignment. In setting forth qualifications, the State need not "freeze" qualifications at any point in time. Put differently, the State's managerial rights include the ability to change or add qualifications to any particular position or assignment as circumstances and needs may change.

On the record herein, it is evident to the Master Arbitrator that the First Responder training qualification for the Adirondack Pathways Program is reasonably related to the MHTA position in the Program. In taking adult patients into the wilderness for overnight camping and other activities, the State has accepted a great responsibility in caring for the safety and health of these patients under difficult circumstances. That the State has determined it is necessary to meet this responsibility by requiring participating staff to have special training related to health and safety is both reasonable and logical. The record indicates that the successful applicant for the position had the First Responder Wilderness Training and Grievant did not have such training, and that this is the sole reason that Grievant was not selected for the assignment. The Master Arbitrator finds that such certification was a *bona fide* operating need for the assignment and therefore, the Facility made a reasonable decision to appoint an employee less senior than Grievant to the assignment. Finally, the Master Arbitrator notes that no evidence exists that the successful applicant was given any greater opportunity than Grievant to obtain certification in the First Responder Wilderness Training.

Therefore, there has been no violation of the Agreement, and accordingly, the instant grievance is denied.


JEFFREY M. SELCHICK, ESQ.
Master Arbitrator

Dated: December 26, 2003
Albany, New York



RELEVANT POINTS OF THIS CONTRACT PROVISION-

THE BURDEN TO PROVE A LEGITIMATE OPERATING NEED
RESTS ON MANAGEMENT IN ORDER TO BYPASS
SENIORITY.

Arbitrator's Decision-

- The grievance is denied.
- The State has the managerial right to establish qualifications for a position or assignment, provided that the qualifications set bear a reasonable nexus to the position or assignment.
- The State's managerial rights include the ability to change or add qualifications to any particular position or assignment as circumstances and needs may change.
- The certification was a *bona fide* operating need for the assignment and therefore, the Facility made a reasonable decision to appoint an employee less senior than Grievant to the assignment.
- The successful applicant for the position had the First Responder Wilderness Training and Grievant did not have such training, and that is the sole reason Grievant was not selected for the assignment.
- No evidence exists that the successful applicant was given any greater opportunity than Grievant to obtain certification in the First Responder Wilderness Training.
- OMH did not violate Article 45 when it did not appoint Grievant to the Adirondack Pathways program, because he lacked the necessary first responder training. The Arbitrator said that management can add to the minimum qualifications as long as there is reasonable nexus to the position or assignment. Since the program involves taking adult patients into the wilderness it was reasonable to require that staff have special training related to health and safety.

Case Study 3- Andrew Banarer Decision

CASE STUDY 3-

ANDREW BANARER DECISION

Facts of the Case-

1. Grievant is a Direct Support Assistant (formerly Developmental Aide). SG-9, seniority date 9/7/82.

2. Briarcliff IRA had 10 residents- 7 males and 3 females. All females required supervision when performing daily living skills but did toilet independently, with occasional assistance.

3. June 1998-

Grievant worked at the Briarcliff IRA- day shift with Sunday/ Monday pass days.

Two staff were assigned to day shift Monday through Friday. Grievant was one staff and the other was a female employee.

Program Manager (DA 2) worked a flexible schedule and was often at the residence during the day shift.

Weekdays - Residents attend day programs, leaving approximately 7:30 to 8:15m and returning approximately 2:30 to 4:00pm.

Weekends- Residents do not attend programs. Three staff assigned to day shift, one of which is female.

4. On or around 10/7/98, Grievant, a male employee, had his shift and pass days changed due to his gender.

5. Remedy sought is for Grievant to be returned to his shift and pass days held prior to the change.

Case Illustration of Operating Need for Gender Based Assignment (ISU Article 44)

Contract Provisions-

Article 44 Seniority

§44.2 Assignments and promotions to vacant positions in the non-competitive service or assignment of employees to work locations and shifts shall be and on the basis of seniority, subject to the operating needs of a department or agency or component thereof, or subject to an identification of differences between employees with respect to the relevant factors concerning the employee's ability to perform the required duties and responsibilities satisfactorily.

Discussion-

During Summer 1998- Management made the determination to change staffing configurations to one staff during weekdays and three staff on weekends. The one staff on weekdays would be a female employee in order to aid the female residents with personal care and in the event of transport needed for various reasons.

The State did not dispute Grievant was most senior, but since only one female staff was needed for weekdays.

The State further cited Section 33.17 of the NYS Mental Hygiene Law which requires that all female residents be transported with a female staff member in attendance to support their decision for the gender-based assignment.

Group activity. Read the decision and discuss relevant points of the Arbitrator's decision. Be prepared to share in large group discussion.

SHIFT + PD Change - 9/6/82

*Dominic
John
Bender*

STATE OF NEW YORK
INSTITUTIONAL SERVICES UNIT

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
-and-
STATE OF NEW YORK, OMRDD
(Letchworth-DDSO)

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FEB 24 2000

Grievance: Banarer, Andrew
Case No. 99-04-0341

Director of
Labor Relations

OPINION
AND
AWARD

On 1/7/00, an arbitration was held in Albany before the undersigned Master Arbitrator, regarding the grievance filed by the Union on behalf of Andrew Banarer (Grievant), an employee of OMRDD assigned to the Letchworth DDSO. Grievant appeared for the arbitration and was represented by Jerome Lefkowitz, Esq., Deputy Counsel for CSEA. The State was represented by Amy Petraghani, Esq., Assistant Counsel, Governor's Office of Employee Relations.

The grievance alleged a violation of Article 44 of the State/CSEA ISU Agreement in that Grievant, who is male, had his shift and pass days changed on or about 10/7/98, due to his gender.

The facts indicate that Grievant is a Developmental Aide, SG-9 and has a seniority date of 9/7/82. In June of 1998, he was assigned to the Briarcliff IRA, working the day shift, with pass days of Sunday and Monday. There were 10 residents at Briarcliff: 7 males and 3 females. All were severely and profoundly retarded and require close supervision and daily care. All of the females required supervision when performing daily living skills but did toilet independently, with occasional assistance.

In June 1998, there were 2 staff assigned to the day shift on Mondays through Fridays: 1 of which was Grievant and the other was a female. There was also a Program Manager (DA2) who worked a flexible schedule and was often at the residence during the day shift. Residents attend programs from Mondays through Fridays and generally leave from 7:30 to 8:15 a.m. and return from 2:30 to 4:00 p.m. On weekends, when the residents did not go to programs, there were 3 staff assigned to the day shift, 1 of which was a female.

Cheryl Dickinson, Treatment Team Leader, testified that she had overall responsibility for Briarcliff IRA during Summer 1998, and was told by her supervision to reduce the day staffing to 1 staff during weekdays, and 3 staff during weekends. As a result, on or about 10/7/98, Grievant was moved from his day shift assignment to a 3:00 to 11:00 p.m. shift on Wednesdays, Thursdays and Fridays, and a 7:00 a.m. to 3:00 p.m. shift on Saturdays and Sundays, with pass days of Monday and Tuesday.

According to Dickinson, although Grievant was the most senior employee on the day shift, he was moved due to the need to have the 1 staff assigned during days be a female. A female staff is necessary in order to aid the female residents with personal care and in the event transport is needed for various reasons. The State cites Section 33.17 of the NYS Mental Hygiene Law which requires that all female residents be transported with a female staff member in attendance.

OPINION

There has been no person more sensitive than this Arbitrator to the privacy needs and concerns of female residents under the care of the State. In a long line of cases, this Arbitrator has made it clear that privacy concerns of female residents are treated as paramount to staffing issues and allow for the selection of gender based staffing. This Arbitrator has even gone so far as to state that "...as long as the real possibility exists that at some point male staff would be required to perform intimate care tasks on female consumers, the selection of staff by gender is in my view a *bona fide* occupational qualification and does not represent a violation of the Agreement." [see *Green* (OER File 97-04-0767, Award dated 4/6/98); *Falconio*, (OER File Nos. 88-04-753/754; Award dated 11/8/91); *Trudeau*, (OER File No. 96-04-1374, Award dated 10/6/97) and *Busch*, (OER File No. 97-04-0328, Award dated 2/19/98)]

With the above line of cases as the backdrop for this Arbitrator's stated view on gender staffing to meet privacy concerns of female residents, the particular facts of the instant case must be reviewed to determine if in fact, a gender based assignment was required herein.

First and foremost, the Arbitrator notes that the transportation issue of female residents was provided by the State at Step 2 of the grievance procedure as the operational reason for the gender based transfer of Grievant. This position was further


argued at the arbitration held before me, although it was no longer cited as the primary reason for the gender based shifting of Grievant. It is clear to this Arbitrator that the transportation issue cannot stand as a valid operational need since by all accounts there are always 2 staff present for safety reasons when a resident is transported. Grievant testified that during this period when he was assigned to transport female residents, he was always accompanied by a female staff member. Oftentimes this person would be held over from the night shift or borrowed from another location. To require a female staff on the day shift does not solve the transport problem. The Arbitrator is simply not convinced that it is not just as easy to require that this second staff person be a female, therefore allowing Grievant to maintain his seniority rights and keep his day shift assignment.

Further, it is my finding that the intimate care needs of female residents as argued by the State do not rise to the very minimum level I have previously established. In the instant case, during weekdays, when Grievant worked the day shift, the residents are at program for almost the entire work day. While the State argues that the need for a female staff to be present for resident physician appointments presents a continuing concern, there appear to be several ways to handle that issue without the need for female staff. Almost all physicians insist upon a female staff member of the office being present for exams of females; for that brief period a male staff could be available outside the examining room. Or, in

the infrequent instance that a female staff was required to be in the examining room, another female staff could be made available with proper scheduling.

A review of the Briarcliff IRA schedule for the period commencing December 16, 1999 indicates that Grievant was replaced on the day shift by Hemingway, a female DA. On her days off, her shift is covered by Rojas, another female, who rotates between the day shift and the evening shift. Backing them both up is Heckstall, a female DA I. Contrary to the State's claim, the DA I position does count in the staffing mix. Based on my review of the schedules, a schedule can be worked out to provide availability of the DA I during sufficient day shift hours to allow Grievant, a male staff, to work the day shift as currently assigned to Hemingway. Scheduled physician appointments can be planned for; unscheduled needs can be handled by the DA I or perhaps a female DA II.

While this Arbitrator has considered even possibilities to allow for gender based staffing, this case does not reach that minimal threshold. Accordingly, the grievance is sustained and Grievant shall replace Hemingway on the day shift when the next monthly schedule is planned. No other remedy is provided.


Jeffrey M. Selchick, Esq.
Master Arbitrator

DATED: 2/21/00



RELEVANT POINTS OF THE CONTRACT
PROVISION-

THE BURDEN TO PROVE A LEGITIMATE
OPERATING NEED RESTS ON MANAGEMENT
IN ORDER TO BYPASS SENIORITY

Arbitrator's Decision-

- The grievance is sustained.
- This case does not meet the minimal threshold to allow for gender-based assignments.
- The Master Arbitrator reiterates his long-standing position that privacy concerns of female residents are treated as paramount to staffing issues and allow for the selection of gender-based staffing.
- As stated in previous decisions:
“...as long as the real possibility exists that at some point male staff would be required to perform intimate care tasks on female consumers, the selection of staff by gender is in my view a *bona fide* occupational qualification and does not represent a violation of the Agreement.”
- The State did not meet its burden of a valid operational need because of transportation since there was always two staff present for safety reasons and one was always a female staff member.
- The State failed to meet the threshold for a bona fide occupational qualification for performing intimate care tasks since during weekdays, when Grievant worked the day shift, the residents are at program for almost the entire work day.
- The State failed to meet its burden for operational need for physician appointments for female examinations since a male staff could be available outside of the examining room during that brief period of time.
- Lastly, despite the State's contention, the Arbitrator held that a female DA 1 could be counted in the staffing mix for unscheduled needs.

Case Study 4- Gregory Adams Decision

CASE STUDY 4-

GREGORY ADAMS DECISION

Facts of the Case-

1. Grievant is employed at SUNY Stony Brook as a Carpenter, SG-12, with seniority date of 6/26/75.
2. Grievant has been employed as a Carpenter since 8/18/88, and has prior service as a Maintenance Assistant, SG- 9 at Stony Brook.
3. On or about 3/15/96, Stony Brook posted a vacancy of Maintenance Supervisor I, SG-14.
4. Qualifications: One-year experience as a skilled building trades journeyman, subsequent to the completion of an apprenticeship or equivalent training and experience. Hospital experience preferred. Ability to take and pass all necessary licensing exams. Training shall be provided by the division. Those required to take and pass these tests must do so prior to passing probation.
5. On or about 4/3/96, Grievant applied for the vacancy by submitting an application form although he did not show how he met the minimum posted qualifications on the application.
6. Grievant was not interviewed for the position.
7. On 7/25/96 an appointment was made to a less senior applicant.
8. Remedy sought is for Grievant to be awarded the Maintenance Supervisor I position.

Illustration of Grievant Not Interviewed Because Campus Felt Not Qualified (OSU Article 45)

Contract Provisions-

Article 45 Posting and Job Vacancies §45.1(d) (formerly 45.1(c))

Appointment to higher salaried vacant positions in the non-competitive class shall be made on the basis of seniority from among the employees bidding pursuant to Section 45.1(b), provided the candidate meets the posting qualifications required, meet the legitimate operating needs of the department or agency, and has the ability to perform duties and responsibilities satisfactorily. The requirement to prove the qualification shall rest with the employee.

Discussion-

The State maintains that the burden is on the Grievant to meet the minimum posted qualifications and since he did not identify that on the application, an interview was not warranted.

The Union contends that Grievant did meet the minimum posted qualifications by virtue of having worked since 8/18/88 as a Carpenter at Stony Brook.

Group activity. Read the decision and discuss relevant points of the Arbitrator's decision. Be prepared to share in large group discussion.

GRIEVANT NOT GIVEN AN INTERVIEW
BECAUSE CAMPOS FELT HE WAS
NOT QUALIFIED.

STATE OF NEW YORK
OPERATIONAL SERVICES UNIT

45.1(c)

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,	:	
-and-	:	OPINION
STATE OF NEW YORK, SUNY	:	
(SUNY Stony Brook)	:	AND
Grievance: Adams, Gregory	:	AWARD
Case No. 97-03-0603	:	

On 6/25/98, an arbitration was held in Albany before the undersigned Master Arbitrator, regarding the grievance filed by the Union on behalf of Gregory Adams (Grievant), an employee of SUNY Stony Brook. Grievant appeared for the arbitration and was represented by Jerome Lefkowitz, Esq., Deputy Counsel for CSEA. The State was represented by Michael N. Volforte, Esq., Assistant Counsel, Governor's Office of Employee Relations.

The grievance alleged a violation of Article 45 of the State/CSEA OSU Agreement in that Grievant claims that he was not selected for the position of Maintenance Supervisor I although he was the most senior applicant.

The facts indicate that Grievant is currently employed at SUNY Stony Brook as a Carpenter, SG-12, with a seniority date of 6/26/75. Grievant has been a Carpenter since 8/18/88, and has prior service as a Maintenance Assistant, SG-9-at Stony Brook. On or about 3/15/96, Stony Brook posted a vacancy for the position of Maintenance Supervisor I, SG-14. Grievant applied for the vacancy on or about 4/3/96 by submitting an application form.

Grievant was not interviewed for the position. The State maintains that Grievant did not meet the minimum posted qualifications for the position and therefore, an interview was not warranted. Grievant submitted an application form but did not indicate how he met the minimum posted qualifications. An appointment was made to a less senior applicant on 7/25/96.

The posting for the vacancy of Maintenance Supervisor I indicates the following:

QUALIFICATIONS: One year experience as a skilled building trades journeyman, subsequent to the completion of an apprenticeship or equivalent training and experience. Hospital experience preferred. Ability to take and pass all necessary licensing exams. Training shall be provided by the division. Those required to take and pass these tests must do so prior to passing probation.

On behalf of Grievant, ~~the Union argues that Grievant did meet the minimum posted qualifications listed above by virtue of having worked since 8/18/88 as a Carpenter at Stony Brook.~~ The Union maintains that a carpenter is a "skilled building trades journeyman" and therefore, Grievant was qualified for the position of Maintenance Supervisor I and should have been interviewed.

The State argues that Grievant had the burden to establish his qualifications and that his mere application did not accomplish that. Stony Brook should not be required to investigate and seek out the qualifications of individual applicants for positions. Further, the State also argues that even if Grievant was qualified, he did not have plumbing or electrical experience and would not

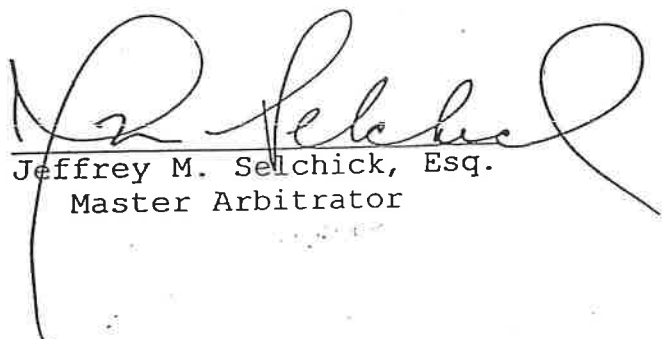
have met the operating needs of the position.

Upon review, the Arbitrator finds that the instant grievance must be sustained. Grievant had the burden of establishing his qualifications for the position. He did so by stating on the application form that he was working at Stony Brook as a Carpenter. A Carpenter is clearly a "skilled" building trades journeyman" position. Accordingly, Grievant is qualified for the position. Although Stony Brook is not required to investigate or seek out an employee's qualifications, in this case, Grievant's current employment and prior service at Stony Brook as a Carpenter was a sufficient statement of his qualifications. Stony Brook should know what a Carpenter employed by it does on a daily basis. At the very least, it was apparent that Grievant did have one year of experience as a "skilled building trades journeyman" as required by the posting.

On the basis of Grievant's application which showed his employment at Stony Brook as a Carpenter, management was obligated to offer Grievant an interview for the position, as he was qualified and was in fact the most senior applicant. During that interview, management would have had an opportunity to determine if Grievant met the operating needs of the position. By not allowing Grievant an interview, management has precluded any determination as to whether or not Grievant did meet the operating needs of the position.

As remedy for the contract violation found herein, Grievant shall be appointed to the position of Maintenance Supervisor I, SG-14, effective 7/25/96, with full backpay for the difference in salary from his current position as Carpenter, SG-12. The remedy suggested by the State, to now allow Grievant an interview for the position, would not be sufficient. It is unrealistic to set back the clock and provide Grievant with a fair and impartial interview at this point in time. In future instances, Stony Brook would be well advised to interview current employees whose job titles inherently show qualification for promotional positions.

Accordingly, the instant grievance is sustained. Grievant shall be appointed to the position of Maintenance Supervisor I, SG-14, effective 7/25/96, with full backpay as indicated above.



Jeffrey M. Selchick, Esq.
Master Arbitrator

DATED: 7/8/98



RELEVANT POINTS OF THIS CONTRACT
PROVISION

Arbitrator's Decision-

THE BURDEN TO PROVE MEETING POSTED
MINIMUM QUALIFICATIONS RESTS ON THE
UNION.

- The grievance is sustained.
- A Carpenter is clearly a “skilled building trades journeyman” position and accordingly is qualified for the position.
- Although Stony Brook is not required to investigate or seek out an employee’s qualifications, in this case, Grievant’s current employment and prior service at Stony Brook as a Carpenter, management was obligated to offer Grievant an interview for the position, as he was qualified and was in fact the most senior applicant.
- During the interview, management would have had an opportunity to determine if Grievant met the operating needs of the position.
- By not allowing Grievant an interview, management has precluded any determination as to whether or not Grievant did meet the operating needs of the position.
- The remedy suggested by the State, to now allow Grievant an interview for the position, would not be sufficient. It is unrealistic to set back the clock and provide Grievant with a fair and impartial interview at this point in time.
- In future instances, Stony Brook would be well advised to interview current employees whose job titles inherently show qualification for promotional positions.
- Grievant shall be appointed to the position of Maintenance Supervisor I, SG-14, effective 7/25/96, with full backpay for the difference in salary from his current position as Carpenter, SG-12.

Case Study 5- Ursula Williams Decision

CASE STUDY 5-

URSULA WILLIAMS DECISION

Facts of the Case-

1. Grievant is employed at Rochester PC as a Mental Health Therapy Aide (MHTA), SG-9, with a seniority date of 9/25/80.
2. On or about 5/23/97, Rochester PC posted three (3) positions of SCTA I to be assigned to the Alternatives to Aggressive Behavior Program (AABP).
3. Grievant applied for consideration for one of the vacancies and was interviewed by AABP unit supervisors for the position.
4. Remedy sought is for Grievant to be awarded the SCTA 1 position assigned to the AABP.

Illustration of an Identification of Differences (ISU Article 45)

Contract Provisions-

Article 45 Posting and Bidding for Job Vacancies

§45.1(b) When such vacancies are announced as provide herein, employees who wish to be considered for appointment or reassignments to such vacancies shall be allowed to bid for such vacancies; provided, however, that such bid must be filed with the appointing authority within 10 days following announcement of the vacancy. In such cases appointments and promotions shall be made on the basis of seniority, as defined in the Seniority Article of this Agreement, subject to the operating needs of a department or agency component thereof, or subject to an identification of differences between employees with respect to relevant factors concerning employees' ability to perform the required duties and responsibilities satisfactorily.

Discussion-

The State argued that Grievant was properly non-selected for promotion to the SCTA I position as there was a nexus between her time and attendance and insubordination disciplinary history and the nature of the acute care unit to which she sought assignment.

The Union argued that Grievant has previous experience working in the AABP as a substitute and was well liked, even recommended for the position at one time.

The Union contended that the time and attendance history was due to Grievant's husband being seriously ill since March 1997 and she also has custody of her grandchildren.

Lastly, the Union cited the Brown Award in which the Arbitrator found that "An employee should not be non-selected for a promotional position, if otherwise qualified, due to a time and attendance disciplinary record."

The State maintained, "The AABP unit requires a consistent approach from direct care staff in a structured program environment...changes on the unit including absence of regular staff, could result in behavior problems on the unit."

Group activity. Read the decision and discuss relevant points of the Arbitrator's decision. Be prepared to share in large group discussion.

RECEIVED

JAN - 6 1998

Director of
Labor Relations

STATE OF NEW YORK
INSTITUTIONAL SERVICES UNIT

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

-and-

STATE OF NEW YORK, OMH
(Rochester PC)

Grievance: Williams, Ursula
Case No. 98-04-0077

OPINION

AND

AWARD

On 12/14/98, an arbitration was held in Albany before the undersigned Master Arbitrator, regarding the grievance filed by the Union on behalf of Ursula Williams (Grievant), an employee of OMH at Rochester PC. Grievant appeared for the arbitration and was represented by Jerome Lefkowitz, Esq., Deputy Counsel for CSEA. The State was represented by Michael N. Volforte, Esq., Assistant Counsel, Governor's Office of Employee Relations.

The grievance alleged a violation of Article 45 of the State/CSEA ISU Agreement in that Grievant claims that she was not selected for the position of Secure Care Treatment Aide I (SCTA I), SG-11, although she was the most senior applicant.

The facts indicate that Grievant is currently employed at Rochester PC as a Mental Health Therapy Aide (MHTA), SG-9, with a seniority date of 9/25/80. On or about 5/23/97, Rochester PC posted a vacancy notice for three (3) positions of SCTA I to be assigned to the Alternatives to Aggressive Behavior Program (AABP). Grievant applied for consideration for one of the vacancies and was interviewed by AABP unit supervisors for the position.

Although the unit supervisors, Philips and Murray, recommended that Grievant be appointed to one of the SCTA I vacancies, Grievant was not selected. Marcia Alissandrello, Director of Nursing at Rochester PC, testified that she reviewed Grievant's work history and determined that Grievant would not be selected for one of the SCTA I vacancies due to her time and attendance record and a recent Notice of Discipline for insubordination in refusal of mandatory overtime.

On behalf of Grievant, the Union argues that Grievant was the most senior applicant and is an outstanding employee who should have been selected to fill one of the vacant SCTA I positions. The Union indicates that Grievant had previously worked on the AABP unit as a substitute and was well known and liked by her supervisors, who in fact recommended that Grievant be appointed to one of the vacancies. The AABP supervisors were familiar with Grievant's work as she had floated on the unit when needed. Grievant's evaluations show that except for her time and attendance problem, she was an outstanding employee. Regarding her time and attendance, Grievant testified that her husband was seriously ill since 3/97 and further, that she has had custody of her grandchildren, which resulted in additional absences.

The Union further argues that under the *Brown Award* [CSEA and NYS OMRDD (Wilton DC) OER Case No. 91-03-0178, Award dated 5/8/93], an employee should not be non-selected for a promotional position,

if otherwise qualified, due to a time and attendance disciplinary record. The Union maintains that as held by this Arbitrator in the *Brown Award*, Grievant should be appointed to the promotional position and the State may evaluate her time and attendance problem during the probationary period of the SCTA I position.

The State argues that Grievant was properly non-selected for promotion to the SCTA I position as there was a nexus between her time and attendance and insubordination disciplinary history and the nature of the acute care unit to which she sought assignment. The State argues that it had a valid operational need to have an employee with an acceptable time and attendance record assigned to the AABP unit. Grievant's long term attendance problem would have been an impediment to her performance on the AABP unit. The State maintains that it acted within the bounds of the Agreement when it did not select Grievant for the promotional position.

Upon review, the Arbitrator finds that the instant grievance must be denied. The record is clear that the AABP unit, which is comprised of 20 patients who require acute care, is one of the most difficult within Rochester PC. Patients are aggressive and often require specialized interventions. Additionally, there are security needs which is the reason the unit is staffed by SCTA's.

As testified to by Director of Nursing Alissandrello, this unit requires a consistent approach from direct care staff in a structured program environment. Changes on the unit, including the

absence of regular staff, could result in behavior problems on the unit. While the patients generally respond well to consistency and structure, it is also true that behavior problems are evidenced when the routine and/or staff are changed. Additionally, if there is an unexpected absence of regular staff, another staff member would have to be called to work overtime. This creates problems for both the staff held over or called in and the Facility, which is currently short staffed due to budget restraints.

The record indicates that Grievant has a long history of time and attendance problems, dating back to 1981. While Grievant claims that her time and attendance problems are due to the recent illness of her husband, and caring for her grandchildren, the record indicates that before these problems, Grievant had other problems which impacted on her attendance. ~~The fact is,~~ Grievant has had a poor time and attendance record since she began her employment at Rochester PC, and continuing throughout her employment.

As I held in the *Brown Award*, having a disciplinary history of time and attendance violations is not conclusive on the issue of an employee's ability to perform in a particular position. In that case, the State claimed that an applicant for a Maintenance Assistant position in the Facility's Paint Shop should not have been selected due to his having two prior NOD's for time and attendance. Pointing out to the parties that Grievant was to be

assigned to a Paint Shop and not a hospital emergency room, this Arbitrator was of the view that his attendance problem would not severely interfere with the ability of the paint shop to perform daily required assignments. This Arbitrator held that:

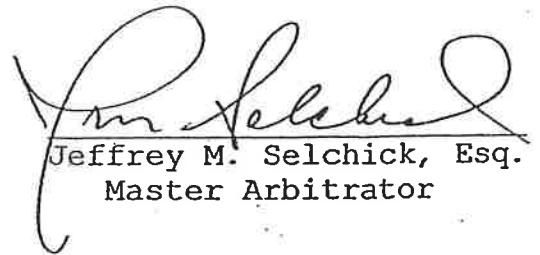
"Under the specific facts and circumstances of the instant case, the mere fact that Grievant had been disciplined for time and attendance abuse did not serve as a proper basis to conclude that he did not have the ability to perform the duties and responsibilities of a Maintenance Assistant in a satisfactory manner."

In the instant case, the AABP unit is markedly different from a Facility Paint Shop. In the event Grievant is absent from the AABP unit, as it is likely she will be based on her longstanding past history, the work of the AABP unit will be disrupted and problems will result. The Arbitrator distinguishes the instant case from the *Brown Award* in that here, there is a direct relationship to attendance and the ability to perform the required work of the unit. Grievant's absence from the AABP unit would severely interfere with the ability of the unit to perform its daily work without creating additional problems. That was not the case in the *Brown* situation.

Further, this Arbitrator, based on a review of Grievant's longstanding time and attendance record, is clearly not convinced that Grievant would be able to maintain an acceptable time and attendance record if appointed to the AABP unit. This is a legitimate and reasonable operational concern for Facility management.

For future guidance of the parties, this Arbitrator advises that if Grievant had maintained a satisfactory time and attendance record for the one (1) year preceding her application to the SCTA I vacancy, Grievant would have been in a much stronger position to convince this Arbitrator that she should have been the successful applicant.

Accordingly, for the reasons stated herein, the instant grievance is denied.



Jeffrey M. Selchick, Esq.
Master Arbitrator

DATED: 1/4/99



RELEVANT POINTS OF THIS CONTRACT
PROVISION

THE BURDEN TO PROVE AN IDENTIFICATION
OF DIFFERENCES RESTS ON MANAGEMENT
IN ORDER TO BYPASS SENIORITY.

Arbitrator's Decision-

- The grievance is denied.
- The record held that Grievant had poor time and attendance since beginning her employment in 1981.
- The Brown Award was distinguishably different to the instant grievance:
 - In Brown, the Arbitrator held a time and attendance disciplinary history is not conclusive on the issue of an employee's ability to perform in a particular position. Grievant was assigned to a Paint Shop and not a hospital emergency room; therefore, did not view the attendance to severely interfere with the ability to perform daily assignments.
 - The record is clear the AAPB unit, which is comprised of 20 patients who require acute care, is one of the most difficult within Rochester PC. Patients are aggressive and often require specialist interventions. Additionally, there are security needs which is the reason the unit is staffed by SCTA's.
 - There is a direct relationship to attendance and the ability to perform the required work of the unit, in which, absences would severely interfere with that required work. This is a legitimate and reasonable operational concern for Facility management.
- For future guidance of the parties, this Arbitrator advises that if Grievant had maintained a satisfactory time and attendance record for one (1) year preceding her application to the SCTA I vacancy, Grievant would have been in a much stronger position to convince this Arbitrator that she should have been the successful applicant.

