AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration
between

DEPARTMENT OF MENTAL HEALTH,
NORTHVILLE STATE HOSPITAL

and

LOCAL 960, AMERICAN FEDERATION
OF STATE, COUNTY, AND MUNICIPAL
EMPLOYEES, AFL-CIO

Case No. 54 39 1212 76
Grievance No. 29: Layoffs
and Demotions

OPINION AND AWARD
OF ARBITRATOR

* * * * * * * * * * * * * * * * * *

Dept. of Mental Health

ROBERT G. HOWLETT
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American Arbitration Association

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Department of Mental Health,
Northville State Hospital

and

Local 960, American Federation
of State, County, and Municipal
Employees, AFL-CIO
CASE NUMBER: 54 39 1212 76

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated November 1, 1973 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

Grievance No. 29 filed by 30 employees of the Northville State Hospital is denied as applicable to employees Lillian Foster, Irene Calloway, Gladys Martin and Betty Hughley because they did not sign the grievance and as to Channie Green, Dorothy Foster and Samilee Harmon on the merits.

April 20, 1977

Robert G. Howlett

Arbitrator's signature (dated)

Robert G. Howlett

STATE OF
COUNTY OF } ss.:

On this day of , 19 , before me personally came and appeared

to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

FORM L14-AAA-24M-10-76

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OPINION AND AWARD
OF ARBITRATOR

* * * * * * * * * * * * * * * * * * *

A p p e a r a n c e s:

For the State:

John G. Pouch, Assistant
Personnel Director,
Department of Mental Health
Ed Pierson, Personnel Director,
Northville State Hospital
Dr. Fulvio Ferrari, Chief of
Clinical Affairs,
Northville State Hospital
Dr. Edward Benson, Administration
Officer, Northville State
Hospital
Jon McNeil, Director,
Personnel Processing
Division, Department of
Civil Service

For the Union:

Philip W. Helms, Staff
Representative
Julian VanSlyke, Staff
Representative
Betty Pearson, President,
Local 960
Samilee Harmon, Nursing
Service Supervisor
Dorothy Foster, Attendant
Nurse

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Grievance No. 29 arising from a reduction in force due to budgetary restrictions at Northville State Hospital (Hospital) administered by the Michigan Department of Mental Health (Department) was submitted to arbitration by Local 960 of the American Federation

of State, County, and Municipal Employees (Local 960), pursuant to the Grievance and Appeals Procedure for employees in the State Civil Service dated November 1, 1973. A hearing was held at the Northville State Hospital, where both parties presented evidence. Thereafter, additional documents were submitted by the parties, and both parties filed briefs.

In February, 1976, when the reduction in force which caused the grievance occurred, there were no collective bargaining or meet and confer rights for employees of the State Civil Service. A state employee relations policy which enunciated rights and obligations of the state departments and employees had been in effect for many years and had been changed from time to time. This policy was adopted by the Department of Civil Service, of which the Civil Service Commission is the policy body. A revision of the policy, in effect in February, 1976, was dated February 1, 1971.

The policy establishes a five step procedure, commencing with oral discussion by an employee with his immediate supervisor and

terminating with appeal to the Civil Service Commission pursuant to No. 33.2 of the Civil Service Commission Rules.[1]

The procedure provides that with the exception of "separations from employment" an employee may select final and binding arbitration of a grievance as defined in Section 1 of Article II. A grievance is defined as:

> ". . . a complaint of violation of personnel law, policy, rules, regulation, procedure, condition of employment, past practice, or agreement, or a dispute over its application and interpretation, or a claim of discipline without just cause."

Grievance No. 29, which was signed by 30 Northville State Hospital employees, protests layoffs, demotions and abolishment of positions at the Hospital during February, 1976.

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1. Section 1 of Article V of the Grievance and Appeals Procedure provides:

> "V. APPEAL TO CIVIL SERVICE COMMISSION
>
> 1. APPEAL FROM HEARING OFFICER OR ARBITRATOR TO COMMISSION
>
> The decision of a Civil Service Hearing Officer or Arbitrator may be appealed upon a satisfactory written showing of the grounds specified in Rule 33.2:
>
> 'Violation of the constitutional provisions for civil service or of Commission rule or regulation and, except as limited by the grievance procedure standards, involuntary separation from employment without just cause, or capricious personnel action, may be appealed to the Commission by an employee, appointing authority, or citizen.'"

In December, 1975, Dr. Floyd Westendorp, Department Administrator for the State Mental Hospitals and Facilities, notified the several hospital directors of budgetary reductions directed by state government and caused by reduced state income. Northville State Hospital was to lose $255,000.

Hospital Director John J. Zugich determined that the budget reduction required release of 26 employees for the remainder of fiscal 1975-76. This reduction in force would effect a savings of $130,000. Director Zugich notified Administrator Westendorp of the program of implementation on February 10, 1975. The program included the layoff of employees in classifications as follows:

1	Psychiatrist 16 (vacancy)
1	Institutional Social Worker 9
1	Typist Clerk 04
1	Nursing Supervisor 06
1	Nursing Supervisor 05
7	Nursing Attendants 03
9	Nursing Attendants 04
4	Patient Home Visitors
1	Plumber
26	

The program also provided for eliminating one ward and combining two wards.

The State of Michigan is an equal opportunity employer. The laws of the State of Michigan so provide.[2] An executive directive

2. MCLA 423.301-423.311, MSA 17.458(1)-(11).

issued by Governor William G. Milliken on June 30, 1975, requires it. An amendment of March 24, 1972 to Title VII of the Civil Rights Act decreed inclusion of "any governmental . . . activity" of a "state of the United States" and "employees subject to the civil service laws of the state government".[3]

These equal opportunity requirements specify that there shall be no discrimination in hiring and employment based on sex, except due to a "bona fide occupational qualification".

In recognition of the fact that there are certain positions which require either a male or female employee, the Department of Civil Service instituted a program of "selective certification by sex". Employees are classified pursuant to the established Civil Service classifications, but males and females are certified separately for jobs where sex is a bona fide occupational qualification. Prior to and at the time of the February, 1976 reduction in force, certain employees at the Hospital held "selective certifications by sex".

The Hospital administration prepared a list of the employees who it appeared would be affected by the reduction of 26 positions. Sixty-seven employees were listed who might be affected through layoff, transfer or demotion. On February 10, 1976 a notice was sent to employees as follows:

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3. 42 USA 2000e

"TO: EMPLOYEES WHO MAY BE AFFECTED BY POSITION REDUCTIONS

FROM: Mr. John Zugich, Director

SUBJECT: Reduction of Positions and Employment Preference Rights

In order to balance the Northville State Hospital budget, it will be necessary to reduce expenditures by $250,000.00 by June 30, 1976. Of this amount one half will be saved by continuing the hiring freeze and in obtaining financial support from the Community Mental Health sources. The remainder of the amount must be saved by other means.

Position reductions are related to a phasing out of a small portion of some hospital programs and consolidation of 2 hospital wards.

On the attached sheets are the positions affected by the bumping procedure and those employees who would be affected.

This will be effective February 24, 1976. Employees filling these positions may (1) Accept a layoff and have their name made available to all other Mental Health Agencies which have vacancies that can be filled or (2) Exercise employment preference and bump into the next classification shown on the attached sheets.

At the present time, Plymouth Center for Human Development is interviewing to fill some vacant positions. Employees wishing to be considered by Plymouth, please notify the Northville State Hospital Personnel Office immediately.

Please notify the Personnel Office of your decision to take either a layoff or bump into the next level shown. This notification should be done no later than Friday 2-13-76.

"Any questions on the above may be directed to the Personnel Office or to your departmental head. Mr. Pierson will also be available to meet with you individually to discuss the implications of this layoff.

We are indeed sorry that it is necessary to take these steps due to the lack of incoming funds."

On February 17, 1976 a meeting of the employees who might be affected by the reduction in force (RIF) was held at which the projected RIF was discussed. The employees were notified that employees selected for layoff could "bump" another employee if they had the requisite seniority and qualifications, could accept voluntary layoff or could transfer (based on seniority and qualifications) to the nearby Plymouth Center for Human Development where additional employees were being hired.

The RIF became effective February 24, 1976. Forty-four employees were affected as follows:

Transfer to Plymouth Center for Human Development	11
Transfer to Social Services Department	1
Demotions	18
Voluntary layoff	1
Involuntary layoff	13
	44

Because of the RIF, the elimination of one ward and the combination of two wards, there was a reallocation of the assignments of some of the selective certification positions. Thus, some women employees were affected by the RIF, while male employees, with less seniority, were not affected.

Between the announcement of the RIF on February 17, 1976 and its implementation on February 24, 1976, 30 employees filed a grievance.[4]

The grievance reads:

> "EMPLOYEE'S STATEMENT OF GRIEVANCE
>
> My grievance is: My job has been unfairly and unjustly affected by the present lay-offs, demotions, and abolishment of positions at Northville. These actions have been in violation of Civil Service Rules Nos. 1.2, 27, 29, 16.5, and the employment preference rule (21).
>
> A just and fair solution of my grievance is:
> 1) Immediate halt to present plans to abolish, lay-off or/and demote positions and employees;
> 2) Reinstatement with full rights and benefits of anyone affected by the plans described above. (reinstatement to original positions)"

Several of the employees who signed the grievance, including Local 960 President Pearson, were not affected by the RIF.[5]

Department Director Donald C. Smith answered the grievance on April 12, 1976 at Step 3 as follows:

> "A review of the CS-G1 discloses that the 30 signors [sic] believe that their jobs

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4. They signed a paper, attached to the text of the grievance, which is headed "Please Sign Your Name for Mass Grievance to Be Sent to Department of Mental Health".

5. If the grievance was filed before the employees were advised as to the particular individuals affected, some employees may have signed believeing that they would be laid off, transferred, or demoted.

"have been unfairly and unjustly affected by the layoffs, demotions, and abolishment of positions and believe violations of civil service rules 1.2, 16.5, 27, 29, and 21 have occurred as a result. The above personnel transactions became necessary due to limited financial resources that necessitated the realighment [sic] of expenditures to meet available levels of funding. It is reported from the second step conference that the appellants [sic] complaints concern themselves with the procedure followed in using selective certification and thus, in their opinion becomes the basis for violation of the Civil Service Rules involving discrimination, layoffs, and employee preference. The agency reports that the use of selective certification in the layoff (2/24/76) and the demotions effective the same date were approved by Civil Service. It is noted that the effect was to layoff [sic] female employees with more seniority than male employees. The approval of the Department of Civil Service resulted in over 40 positions being filled by means of selective certification.

The demotions of Ms. Calloway, Ms. Foster, and Ms. Green were effected because they had a choice of layoff or demotion and they elected the latter. The agency reports that their total service put them in a position on the layoff list to have to make this decision. The agency reports that the abolishment of positions is a separate action from the layoff and demotions and is the right of the appointing authority, through the Constitution of the State of Michigan, XI, Section 5, ('The appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission.')

Following is a pertinent extract under date of February 26, 1976 from a letter addressed to the personnel officer at Northville State Hospital from the director of the personnel processing division of the Department of Civil Service.

"'As discussed during my visit to Northville State Hospital on February 17, 1976, layoffs on the basis of selective certification are permissible.

For example a position which was authorized to be filled on a selective certification basis need only be refilled at the time of layoff by someone with greater employment preference who possesses the qualifications for the position.

The position which was originally approved to be filled by males only did not automatically lose that approval as a result of a reduction in force.'

Mr. Zugich rendered the following decision at the second step of the grievance procedure on March 9, 1976.

'The layoffs and demotions were processed in compliance with Civil Service rules. The use of selective certification has the approval of Civil Service which was reaffirmed at the time of the layoffs and demotions.

The abolishment of positions is a separate action from the layoffs and demotions.'

I have examined the presented facts and find Mr. Zugich's decision to be proper. It is hereby affirmed."

As "separation from employment" may not be the subject of arbitration, the grievants who were involuntarily laid off processed their grievances through the appeal procedures of the Civil Service Commission.

Local 960 contends that seven employees, who were demoted, are involved in the arbitration procedure; the Department contends that only three employees who signed the grievance are involved. The three employees who signed the grievance are Channie Green, Dorothy Foster and Samilee Harmon. Lillian Foster, Irene Calloway, Gladys Martin and Betty Hughley were demoted, but did not sign the grievance.

Local 960 avers that the grievance is a class grievance. The Department answers that the Grievance and Appeals Procedure does not recognize class grievances.

The Department is correct that the Grievance and Appeals Procedure is silent with respect to class grievances. It does provide for group grievances:

> "I. GENERAL PROVISIONS
>
> . . . .
>
> 8. SHORTENED STEPS
>
> . . . .
>
> b. Group Grievance
>
> Employees having a common complaint may sign and file one group grievance, indicating a maximum of three fellow employee spokesmen and a representative of their choice. The grievance shall be filed at the lowest step of the grievance procedure involving a common supervisor."

Arbitrators prefer to decide grievances on the merits rather than on a procedural ground, and to include in an award all

employees who allege, or for whom a union alleges, are damaged because of an employer's alleged breach of contract or policy. However, as a grievance and arbitration procedure exists solely by contract or policy, an arbitrator may not decide an issue on the merits if there has been an unwaived procedural error.

Although employers often waive technicalities to secure a decision on the merits, recognizing that this is both equitable and in the interest of employee morale, the Department has chosen not to waive the procedural defense.

The evidence establishes that the Department must prevail on the procedural defense.

The Grievance and Appeals Procedure does not afford a union the right to file a class grievance involving employees it represents in a bargaining unit.

Under the Grievance and Appeals Procedure, grievances are individual complaints. The procedure provides that "the purpose of the grievance . . . procedure shall be to provide an orderly system of resolving employee grievances in an equitable and timely manner . . ." But the text that follows renders it crystal clear that individual employees--not a union--have the privilege to file grievances. At Step 1 "the grievant" is authorized to have one fellow employee representative and thereafter "[t]he grievant" has a choice as to the procedure which he wishes to follow.

Grievances are to be presented "within ten weekdays of the employee" becoming aware of the incident which caused his grievance. It is "an employee" who may select between an appeal to a Civil Service Hearing Officer or final and binding arbitration; and it is "the employee" who is to file his request for an arbitration with the selecting agency or acknowledge acceptance of a mutually agreed arbitrator.

The only provision for multiple grievances is the provision for a Group Grievance. And Group Grievances must be filed by "[e]mployees"--not by their union.

Even though the Grievance and Appeals Procedure authorized Local 960 to institute a grievance in behalf of employees consisting of a "class", in this instance Local 960 failed to do so. The grievance was filed by 30 individual employees who designated it as a "mass" grievance, a phrase which may mean "group grievance", but cannot be transformed into a class action filed by a bargaining representative.[6]

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6. Following the hearing Local 960, pursuant to agreement at the hearing, submitted two examples of grievances at the Clifton Valley Center of the Department of Mental Health in which AFSCME Local 40 filed grievances "representing" members of the union. In view of the fact that the grievance before me is not filed as a "class" grievance, it is unnecessary for me to determine whether the two instances would amount to such a waiver or estoppel as cause a change in the rules to the extent that AFSCME local unions may file class grievances. None of the other documents submitted following the hearing established a waiver or estoppel in this case.

Local 960 President Pearson testified that she circulated the sheet on which the 30 employees, including herself, signed their names. Neither Betty Pearson nor any other of the 30 employees signed the document as an official of Local 960. There was no evidence to support the statement in Local 960's post-hearing brief that "the Department has accepted [President Pearson] as primary grievant throughout, thereby acknowledging the right of Mrs. Pearson, as president of Local 960, to initiate such an action on behalf of the membership". The fact that President Pearson "intended" to institute a class action has no impact on decision as there is no showing that any such "intent" was ever communicated to the Department, either orally or in writing.

Additionally, the proceedings at the pre-arbitration conference held pursuant to the Grievance and Appeals Procedure disclose a "class" grievance is not before me. Following the pre-arbitration conference, Civil Service Commission Arbitration Officer John R. Connor prepared and issued a report dated September 7, 1976 in which he stated that "[t]he parties to this proceeding are Dorothy Foster and Samile [sic] Harmon,

grievants, and the Department of Mental Health, employer". Through clerical error Channie Green was omitted from the report. The Department concedes that her name should have been included, and that she is a party to the grievance.

No representative of Local 960 or AFSCME Michigan Council 11, of which Local 960 is a part, protested the report of the pre-hearing conference.

It was not until December 8, 1976 that a staff representative of Michigan Council 11 wrote to Richard Meyers, Director of the Hearings Division of the Civil Service Department, concerning the inclusion of employees Lillian Foster, Irene Calloway, Gladys Martin and Betty Hughley as grievants. In the letter there was no reference to the grievance as a "class grievance"; to the contrary, reference was made to "similar complaints arising from the same source, i.e., selective certification of positions by sex" as having been scheduled for arbitration. Attached to the letter is a list of 28 employees designed as "List of Grievants on Grievance Regarding Layoffs" and

the six employees as "List of Grievants on Grievance Regarding Demotions".7

The Civil Service Rules which are cited in the grievance follow.

"SECTION 1

BASIC REQUIREMENTS OF CIVIL SERVICE

. . . .

1.2 No Discrimination . . . No person shall be discriminated against in any conditions of his employment because of age or sex, except when it has been determined that age or sex is a bona fide occupational qualification."

"SECTION 16

POSITIONS IN STATE CIVIL SERVICE

. . . .

16.5 Procedure in Abolishment of Positions.--An appointing authority may abolish a position for reasons of administrative efficiency. The state personnel director shall be given prior notice of

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7. The names of two employees, Bertha Howell and Glorius Erwin, were on the list of grievants involved in the Civil Service Appeals Procedure although they were not signators to the grievance. Local 960 did not argue that the willingness of the Department to submit the complaints of these two employees, if such was the case, to the Civil Service Appeals Procedure amounted to a waiver of the requirement that Lillian Foster, Calloway and Hughley must have signed the grievance in order that their grievances might be processed to arbitration. Such an argument might have prevailed. Samilee Harmon was included on the layoff list, apparently in error.

"each position so abolished. Employees separated as the result of abolishment of positions shall have reemployment preference in accordance with Section 21."

"SECTION 21

EMPLOYMENT PREFERENCE

21.1 Application.--Employment preference shall be applied within each principal department to provide an orderly system for the handling of layoffs and demotions.

21.2 Method of Determining.--Employment preference shall be determined by the total service at a level, including service at a higher level.

. . . .

21.3 Ties in Service.--All ties which exist between and among employees shall be resolved on the following basis:

. . . .

21.4 Exercise of Employment Preference in Job Retention.--An employee with greater employment preference . . . may displace an employee with lesser employment preference or ranking within the principal department, on the condition that he meets the basic qualifications for the position held by that employee.

. . . .

21.6 Departmental Employment Preference Plans.--Each principal department shall submit a plan of employment preference based on

"the organizational or geographical distribution of its employees, for approval by the state personnel director."[8]

"SECTION 27

DEMOTION

27.1 Definition.--A demotion is defined as a transfer of a status employee from a position which he occupies in one class to a position in another class at a lower classification level.

27.2 Conditions.--A demotion may be made under any of the following conditions:

. . . .

27.2e When the position occupied by the employee is discontinued because of lack of work or lack of funds. (Section 21)

27.2f When the employee is displaced by the return to duty of another employee entitled to the position. (Section 21)

27.2g When the employee is displaced by another employee with more seniority during a reduction in force. (Section 21)

27.3 Procedure.--An appointing authority shall give 15 calendar days prior written notice to the state personnel director and to the employee concerned of his intention to make the demotion, giving specific reasons.

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8. This is a revision of a prior Section 21 which was in effect when the RIF occurred on February 24, 1976. The revision was pending on that date; the State Personnel Director authorized the Hospital to use the revised section in the RIF because it "appears to provide greater employee equity".

"The state personnel director shall approve or disapprove the eligibility of the employee to transfer to a position in the class and level proposed."[9]

Grievants Dorothy Foster, Samilee Harmon and Channie Green were demoted from Attendant Nurse 04 to Domestic Services Aide I, a position lower in the classification scale. Three male employees, with less seniority (employment preference), were retained in the Attendant Nurse classification.

Local 960 directs its argument to two issues; (1) the selective certification procedure which it contends involves sex discrimination and (2) the lack of necessity for the male employees to the exclusion of the three grievants in the Hospital wards.

The Department recognizes that under both federal and state law a distinction may be made in job assignments based on sex only if such distinction is necessary as "a bona fide occupational qualification". Some assignments in Hospital wards are, the Department contends, necessarily based on selective certification by sex; and this was the case with the positions occupied by the three male employees, and which grievants would have filled had it not been for the selective certification procedure.

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9. Section 29, cited in the grievance, involves "LAYOFFS", which is subject to the Civil Service Appeals Procedure.

For many years there have been positions in the Hospital which have been filled by either a male employee or a female employee based on selective certification, even though an employee of the opposite sex had greater seniority.

In an opinion dated April 12, 1976, the Attorney General upheld the legality of the procedure. The Attorney General was asked by the State Personnel Director:

> "3. Does the need for female employees to provide personal hygiene care to female residents who are capable of body awareness constitute a bona fide occupational qualification as defined by state and federal civil rights statutes governing sex discrimination, when a written opinion from the professional staff of Michigan Mental Health Institutions indicates that the involvement of males in providing such care may be detrimental to the residents' developing emotional and psychic structure?"[10]

The Attorney General answered:

> "Thus, in response to your third question, it is clear that the determination of whether being a member of a particular sex is a bona fide occupational qualification for a particular job involves a detailed analysis of the position for which there is a vacancy. This determination must be made on a vacancy-by-vacancy basis. While job assignments can be made so that female employees provide personal hygiene care to female residents and male employees provide such care to male residents within institutions of the Department of Mental Health, this does not necessarily mean that positions in female institutions or on female

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10. This was the third of three questions.

> "wards can be limited to female employees or that similar positions in male institutions or male wards can be limited to male employees. Such factors as the duties of the position, the extent to which such duties involve administering personal hygiene care to residents, the patients' right to privacy, the kind of institution or ward (male only, female only, sexually integrated), the kind of patients, etc. must also be considered."

The Hospital offered evidence on the certification of positions restricted to male only. The evidence commenced with a request dated March 18, 1974 and ended with a request dated September 5, 1975. As far as the record discloses, no protest was made by Local 960 to the establishment of Attendant Nurse positions selectively certified for male employees only. In each instance the request for selective certification was supported by a statement of a doctor or registered nurse supervisor affirming the need for the selective certified position.

The evidence discloses that the officials making such request exercised due care in their decisions to seek selective

certification approval. Local 960 offered no evidence to question the correctness of the Hospital's action.

Local 960's post-hearing brief attacked the evidence of the requests for selective certification for male employees only charging that the "documentation provided fails miserably to meet the standards indicated by Attorney General Kelley". Not only does the charge come too late, but it is clear from the exhibits which Local 960 now questions that requests were considered on a case-by-case basis consistent with the Attorney General's opinion.

The Department offered as an expert witness Dr. Fulvio Ferrari, a psychiatrist who has been a Department staff member since 1966, to testify concerning the procedure of, and need for, selective certification. He testified:

> Exceptions are made in hiring because of sex according to the specific needs in mental health facility staffs.
>
> Patients are admitted to mental hospitals because of conflicts in their lives. Many of them become mentally disturbed because of conflicts with a parent. The conflict is often a conflict with a parent of the opposite sex, especially a male patient who

has had a domineering mother which has provoked resentment. This resentment "spreads over to other women". A patient who is mentally disturbed because of the mother problem reacts to a female staff member in the same way as he reacts to his mother. The reaction may be to any female who is in a position to give orders, regardless of how tender or respectful the female staff member may be. This continued conflict affects treatment and slows down therapy.

Because of this it is both desirable and necessary that there be some male staff members. This is particularly true at the Hospital where most of the patients are in the 22 to 30 year age bracket. (He testified that the reverse, i.e. female resentment of a father is also true, but the case here involves the preference of male attendants.)

The male attendant who can give advice and counseling on a male-to-male basis tends to do away with prejudices. It is a person-to-person relationship. This practice which is known as "role identification" has been accepted profesionally for the past 15 to 20 years and in (Michigan) state institutions since 1963. The practice was in effect when he joined the staff in 1966. Indeed at that time there were no females in male units, a practice which has changed.

There is now a "mix" in both male and female wards.

The matter of personal hygiene and dignity, i.e. having matters affecting personal hygiene and dignity handled by a person of the same sex is also a factor, although "not an absolute".

The decision to request selective certification is made on a case by case basis and he (as Chief of Clinical Affairs at the Hospital) personally reviews each case for selective certification. This practice was followed before he became chief of clinical affairs.

On cross-examination Dr. Ferrari testified:

He was not personally familiar with some of the selective certifications concerning which evidence was offered as they had occurred before he "returned" to the Hospital in 1976. Fifty percent of the 600 patients in the Hospital have had a "domineering parent" experience. "Role identification" involves dressing, grooming, play, planning work, social relationships. The aim of the Hospital staff is to try to return the person to the "work market" as soon as possible.

Local 960 offered no witness to refuse the testimony of Dr. Ferrari.

An affidavit by Dr. Teresa Bernardez-Bonesatti, a psychiatrist at Michigan State University, was presented. I accepted it over objection by the Department representative, pointing out that in arbitrations affidavits are accepted and hearsay evidence often

admitted, although direct testimony which contradicts an affidavit or hearsay evidence will generally prevail.

Dr. Bernardez-Bonesatti did not contradict Dr. Ferrari's testimony. Her affidavit stated that "it is desirable from a therapeutic viewpoint to have female staff in addition to male staff to work with male patients, particularly in all male wards", pointing out that this "tends to reduce the level of agressive [sic] behaviors among male patients and to encourage more appropriate behavior on the part of males". She stated that "[b]enefits arise to patients when a mixture of male and female staff exists".

Nowhere in her affidavit did she state that it was unnecessary or undesirable to have certain positions filled by either male attendants or by female attendants. Indeed, her affidavit expresses approval of a "mix" in the wards. It appears from the evidence that there was a "mix" in the wards where grievants would have worked had they replaced three junior male employees.

Local 960 cited Rodrequez v East Texas Motor Freight, Southern Conference of Teamsters, 505 F2d 40, 8 FEP Cases 1246 (5 CA, 1974) as support for the rule that in a discrimination case the charging party must first establish a prima facie case, whereupon the burden of proof shifts to the employer. This rule

was enunciated by the Supreme Court in McDonnell-Douglas Corporation v Green, 411 US 792, 98 S Ct 1817, 36 L Ed 2d 668, 5 FEP Cases 965, 969 (1973).[11] Local 960 states the Federal courts' rule correctly.

Unfortunately, neither the Hospital nor Local 960 addressed themselves specifically to the three positions which the three female attendant nurses did not secure because junior male attendant nurses were retained.

Under the Supreme Court rule, Local 960 is required to establish a prima facie case that the three positions could be filled by female attendant nurses. No such evidence was forthcoming.

The most relevant testimony offered by the Union was through Julian VanSlyke, who spent 14 years as a boys supervisor in a Michigan Boys Training School and 5 years in a VA Hospital. He testified that it was common practice for females to care for males and for males to care for females. But he did not counter the testimony that in certain instances, it is desirable, if not necessary, that male employees care for male patients and female employees care for female patients.

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11. The Sixth Circuit followed the rule in Franklin v Troxel Manufacturing Co, 501 F 2d 1013, 8 FEP Cases 654 (1974).

Other than the testimony of VanSlyke, the Union directed its evidence toward the selective certification by sex procedure. As discussed above, the Hospital established by evidence, including the Attorney General's opinion, that the procedure is legal, and, further, that the Hospital followed the procedural requirements in establishing male attendant nurse positions.

The Hospital offered some evidence in support of its position. In a letter dated February 26, 1976, Jon McNeil, Director of the Personnel Processing Division of the Department of Civil Service, notified Hospital Personnel Officer Pierson that "[a] position which was originally approved to be filled by males only does not automatically lose that approval as a result of a reduction in force". Although the Hospital did not "name names", the evidence tends to prove that the three male attendant nurses who were retained were filling positions previously established and identified as selective certification by sex positions.

Local 960, to support its position, cited an opinion and award involving the Kalamazoo County Juvenile Home and The Kalamazoo County Juvenile Home Employees Chapter of Local 1670, AFSCME Council #55, by Arbitrator B.J. George, Jr. The case is

not apposite. It involved a probate court which, in a juvenile home administered by it, maintained separate seniority lists for males and females. A female employee was denied a transfer to a posted vacancy solely because she was a female. There was no evidence of any need to fill the vacant job by a male employee. In his opinion the arbitrator stated that "no consideration whatever was given to actual qualifications of [grievant] or other female applicants for a boys unit position". Here the issue is not general qualifications, but the need for male certification. The arbitrator further found that

> "all that the employer has advanced in support of its actions affecting [grievant] and other female applicants for vacancies in boys units is that the judges of the Kalamazoo County Probate Court, the superintendent of the juvenile home, and an unspecified number of Kalamazoo County residents prefer to maintain sex-discriminatory practices despite federal and Michigan law to the contrary."

Clearly, neither the judges of the Kalamazoo County Probate Court nor the superintendent of the juvenile home were vested with such power; and the Kalamazoo County residents had no legal right to convert their preference into action. Here the evidence establishes a bona fide occupational qualification for some attendant nurses based on sex; and Local 960 did not make a prima facie

case that the Department and Hospital erred when they retained three male nurses in positions which the three grievants would have filled except for their sex.

A W A R D

Grievance No. 29 filed by 30 employees of the Northville State Hospital is denied as applicable to employees Lillian Foster, Irene Calloway, Gladys Martin and Betty Hughley because they did not sign the grievance and as to Channie Green, Dorothy Foster and Samilee Harmon on the merits.

Robert G. Howlett, Arbitrator

Dated: April 20, 1977