

Arbitration Decision and Award

Arbitrator: Jack Buettner
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In the Matter of:

**Service Employees International
Union, District 1199**

and

**The Department of Rehabilitation and
Correction**

Grievant: Nancy Greathouse

Case #: DRC-2018-01811-11

Date of Hearing: August 24, 2021

Date of Receipt of Closing Briefs: October 8, 2021

Date Decision Issued: November 2, 2021

Advocate for the Union:

Jaclyn Tipton
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Advocate for the Employer:

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Appearances for the Union:

Nancy Greathouse

Grievant

Appearances for the Employer:

Michelle Crace

HCMSA - Quality Assurance Coordinator
ODRC - Bureau of Personnel

Victor Dandridge

Labor Relations Administrator
DAS – Office of Collective Bargaining

Joint Exhibits:

- #1. Collective Bargaining Agreement between the State of Ohio and SEIU-1199 effective 2015-2018
- #2. Grievance Snapshot
- #3. ORC 131.02- Collecting amounts due to the state
- #4. 35-PAY-04 (effective 5/11/2017)
- #5. Notification of Overpayment (5/15/2018)
- #6. Payroll Audit
- #7. Payroll Coding for Retention/Recruitment Supplements
- #8. Punch Detail Report 1/1/2012 to 5/14/2016
- #9. Notification of Overpayment for TWL Error (8/13/2013)
- #10. Payroll Audit for TWL Error (8/13/2013)

Union Exhibits:

- #1. Arbitration Proceeding, Award dated 2/24/2020
- #2. Arbitration Proceeding, Award dated 4/8/2021
- #3. Pay Inquiry: Multiple Paychecks
- #4. Ohio Checkbook- Salaries State

BACKGROUND AND PROCEDURES:

The Parties in this arbitration are the Service Employees International Union, District 1199, (the “Union”) and the State of Ohio Department of Rehabilitation and Correction, (the “Employer”). The Parties are operating under a collective bargaining agreement (CBA) that is effective from 2015 to 2018.

The Grievant, Nancy Greathouse, has served as a registered nurse for the past fourteen (14) years for the Ohio Department of Rehabilitation and Corrections (DRC). During approximately ten (10) of those fourteen (14) years she also served as a union representative for SEIU District 1199. On April 27, 2018, the Grievant was issued a letter stating that her paychecks between January 28, 2012 and July 22, 2017 had been audited. It was found that as the result of an error in calculating her Recruitment and Retention (R/R) supplement, she had been overpaid \$40,451.91. The Grievant was told she would need to repay the funds and was placed on a repayment plan whereby \$50.00 was deducted from each of her paychecks, beginning on May 25, 2018. A grievance regarding the alleged overpayment was filed on May 29, 2018 and proceeded through the steps of the grievance process without resolution.

By mutual agreement of the Parties, John F. Buettner was selected as arbitrator for this case. The Parties agreed to hold the arbitration electronically via Zoom on August 24, 2021. The Parties jointly agreed to delay the submission of closing briefs until October 8, 2021.

The following are joint stipulations by the Parties:

1. The Grievant (Nancy Greathouse) was working as Registered Nurse at the Franklin Medical Center.
2. The Grievant was notified regarding overpayment of \$40,451.91 and repayment plan on 4/27/2018.
3. Overpayment occurred from January 2012 to July 2017.

PROCEDURAL OBJECTION:

The Employer raised an objection regarding the arbitrability of said issue. The Employer stated that there is no language negotiated or agreed upon in the Collective Bargaining Agreement (CBA) that addresses the issue of overpayments made to employees. Thus, the Employer contends that ORC 131.02, Collecting Amounts Due to the State (Joint Exhibit # 3), prevails and must then govern the authority and process for which overpayments must be recovered. ORC 131.02 states in part, "...whenever any amount is payable to the state, the officer, employee, or agent responsible for administering the law under which the amount is payable shall immediately proceed to collect the amount or cause the amount to be collected and shall pay the amount into the state treasury or into the appropriate custodial fund ..." It allows for agreement on a payment plan specifically in areas in where, "... the payment arises from an overpayment of money by the state to another person, when the overpayment is discovered." Further, the Employer cited a Department of Rehabilitation and Correction policy, Payroll and Timekeeping, that addresses overpayments. Policy 35-PAY-04 (Joint Exhibit #4) states if an employee is over paid, appropriate steps will be taken to identify and correct the error and that employees must reimburse all monies paid in error. Since the overpayment is not directly addressed in the CBA but is addressed in ORC and DRC policy, the Employer asked that the Arbitrator find the matter not substantively arbitrable.

In determining arbitrability, the Golden Rule is that if the dispute is covered by an Arbitration agreement, the said dispute should be resolved by Arbitration. The CBA itself states in Article 7.07, Arbitration Procedure, Section E, Arbitrator Limits, (Joint Exhibit #1) that:

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this Agreement. Questions of

arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

While the issue of overpayment is not addressed in the CBA per se, Article 43 – Wages and specifically Section 43.11 – Recruitment/Retention, are the basis for this arbitration.

The Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. Disputes like criminal offences of a public nature or disputes arising out of illegal agreements cannot be referred to arbitration. In this instant case, there was no criminal intent and no intent to fraud but a managerial clerical error that caused the overpayment. Due to these factors, this Arbitrator has determined that the case is, indeed, arbitrable and this Arbitrator will proceed to determine the merits of this case.

ISSUE:

Did the Employer violate the Collective Bargaining Agreement when it required the Grievant to reimburse State monies due to (an alleged) overpayment of public funds from January 2012 to July 2017?

SUMMARY OF THE UNION'S POSITION:

The Union contended that the Employer failed to conclusively establish that an overpayment existed. The Quality Assurance Coordinator, Michele Crace, testified that the audit she performed looked only at one aspect of the Grievant's pay, the Recruitment and Retention (R/R) supplement. The Grievant had her personal CPA, Joe

Roche, review the Employer's calculations. He found errors in her hourly rate which directly affects her overtime rate of pay. He contends that the Grievant was actually underpaid in many pay periods. The Grievant also researched her hourly wage. She created a chart (Union Exhibit #4) using public records that shows less senior employees earning higher wages than hers. Further, the Employer failed to provide documentation via time punch cards for the entirety of the timeframe in question. Joint Exhibit #8, the Punch Detail Report, shows data only through May 14, 2016. There is no verification for the time period of May 15, 2016 through July 22, 2017.

The Union further contends that if an overpayment was established, the Employer should not be entitled to collect the funds from the Grievant since the error should have been caught earlier during a 2013 audit. The Grievant was informed of an overpayment of \$2361.60 on August 13, 2013 that occurred between April 6, 2013 and July 27, 2013 (Joint Exhibit #9). She successfully completed a repayment plan. Since her pay was audited at this time, the Grievant had the expectation that her pay checks would now be correct going forward and that any other error would have been addressed.

The Employer argued that the Grievant should bear responsibility for the accuracy of her pay checks. Wages, however, are controlled by the CBA and administered through the Employer. The Grievant has no control over the calculations. Because the Grievant's paychecks varied from pay period to pay period due to overtime calculations, the increase in pay was not readily noticeable. It is the Employer who has a legal and contractual obligation to ensure that employees are paid properly and consistently with the CBA.

The Union also addressed the issue of timeliness in the discovery and recovery of the alleged overpayment. ORC 131.02 calls for "immediate" action. The Employer became aware of the error in August of 2017 but did not notify the Grievant until eight months later. Additionally, the error went unnoticed for years even though audits are conducted regularly as testified to by Ms. Crace.

SUMMARY OF THE EMPLOYER'S POSITION:

From approximately January of 2012 through July of 2017, the Grievant was overpaid due to an error in calculating the amount of her R/R supplement. Once the error was found, the correct R/R supplement began to be paid to the Grievant. This error was discovered while reviewing the R/R supplement of several other nurses working at Franklin Medical Center. A comprehensive audit was conducted by Quality Control Coordinator Michelle Grace which took several months to complete. After the audit was completed, staff were notified as required by ODRC Policy 35-PAY-04. Staff who were overpaid were set up on a repayment plan that followed both the ODRC policy as well as ORC 131.02.

Ms. Grace referenced payroll reports (Joint Exhibit #6) and punch detail reports (Joint Exhibit #8) as the documents used to determine the R/R supplement for the Grievant. She also explained that as a result of contractual bidding for different shifts, the R/R supplement changes. The change in pay code must be manually entered by the payroll officer each time a nurse moves to a different shift. This change in pay codes depends on the timely communication from the nurse supervisor to the payroll officer. During this time, there was a change in supervision in both nursing and in human resources which may have contributed to the error. The Employer contends, however, that the employee also bears responsibility for monitoring and reviewing their earning statements.

Victor Danbridge from the Office of Collective Bargaining testified on behalf of the Employer. He reiterated the requirement of agencies to recover overpayments as specified in ORC 131.02. He also stated that since the CBA is silent on overpayments, ORC would take precedence.

In conclusion, the Employer contends that the agency has a statutory obligation to recover the overpayment from the Grievant. ORC does not reference any timeframe after which an overpayment would be forgiven. Thus, the grievance should be denied.

DECISION AND AWARD:

This issue centers around an alleged overpayment in the R/R supplement. The Employer calculated the overpayment for the R/R supplement error to be \$40 451.91 for the time period of January 28, 2012 and July 22, 2017. The Union argued that other payroll errors were made that resulted in underpayment, and that according to a private CPA, the Grievant was most likely owed money due to these errors. The Union submitted Union Exhibit #3 showing multiple paychecks from January 1, 2012 through July 22, 2017 in support of their position. The Union offered no expert testimony and presented no substantial data to explicitly provide the amount of any underpayments to support their allegation. Any question of other violations regarding wages and their calculation were not fully explored. Thus, this Arbitrator must revert to the language which does address overpayments. ORC 131.02 states in part, "... whenever any amount is payable to the state, the officer, employee, or agent responsible for administering the law under which the amount is payable shall immediately proceed to collect the amount or cause the amount to be collected and shall pay the amount into the state treasury or into the appropriate custodial fund." Further, DRC policy address the issue and states, "Employees who are overpaid must reimburse the state all monies paid in error."

The question of responsibility was raised by both Parties. According to DRC Policy 35-PAY-04 (Joint Exhibit #4), the DRC has the responsibility "...to report and record employee time and attendance, and pay employees accurately and in accordance with all applicable state and federal rules, laws, policies, schedules, and collective bargaining agreements." This same policy further states, "Employees are responsible for monitoring their earning statements every pay period to ensure the accuracy of all payments, deductions, taxes, service credit and leave balances. Employees are responsible for bringing any discrepancies or errors to their personnel office immediately for review and correction." The Grievant did raise a question about her wage calculations after meeting with her CPA but was unable to communicate with the Employer because she was on administrative leave. As a Union representative, she

should have been aware of other methods to contact the Agency such as via phone or email. The DRC policy illustrates that there is a shared responsibility for monitoring the accuracy of earning statements yet, unfortunately, only one party is bearing the burden of this error. The DRC Policy does not make exceptions for whom is ultimately responsible.

The unanswered question is why it took five (5) years for the Quality Control Department to discover the error in calculating the Grievant's R/R supplement. ORC 131.02 requires the Employer to "immediately proceed" to collect overpayments. "Immediate" refers to the action taken after an error is discovered. The error was discovered in August of 2017 and the Grievant was not notified until April of 2018. Ms. Crace testified that the audit took longer than expected. She personally performed the audit on the Grievant. She had to manually enter the data for every pay period going back five (5) plus years. DRC policy does give a time frame by which overpayments would be forgiven or negated.

As stated in the Parties' CBA, Article 7 – Grievance Procedure, Section 7.07 E – Arbitrator Limits:

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this Agreement. Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The arbitrator's role in any case is limited to interpretation and application of the CBA. While an arbitrator can look outside the contract for guidance, "he does not sit to dispense his own brand of industrial justice." (Elkouri and Elkouri, 5th Edition, p. 142) It is not in the power of this Arbitrator to rule that the Employer must violate ORC and their

own DRC policy by forgiving the overpayment. The Employer has a statutory requirement to recover tax payer dollars.

The issue is: did the Employer violate the Collective Bargaining Agreement when it required the Grievant to reimburse State monies due to an overpayment of public funds. There is no article in the CBA that addresses the procedure for handling the overpayment of funds. Therefore, there is no violation of the contract.

Thus, this Arbitrator finds in favor of the Employer and the Union's grievance is denied.

CERTIFICATE OF SERVICE

The foregoing report was delivered via email on this the
2th day of November, 2021, to

Jaclyn Tipton
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and

Don Overstreet
Don.Overstreet@odrc.state.oh.us

Jack Buettner
Jack Buettner