#90

86-0586

ARBITRATION

between

DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES
and DEPARTMENT OF MENTAL HEALTH, STATE OF OHIO

and

STATE COUNCIL OF PROFESSIONAL EDUCATORS/OHIO EDUCATION ASSOCIATION/
NATIONAL EDUCATION ASSOCIATION

Issue

The Association raised the issue of the refusal of management to bargain over a matter covered by the collective bargaining agreement. The State Council (Ass'n) contended that the refusal by management to bargain over the terms and conditions of the implementation of the new state employee time keeping system, was a refusal to bargain. The claim was made of a violation of the Ohio Revised Code.

Management responded that, if there was a violation of the Revised Code, such a charge should have been brought before the State Employment Relations Board, as a claim of an unfair labor practice. No such claim was filed.

The arbitrator holds that a decision on the arbitrability is properly within the scope of the arbitration process. This action in no way diminishes any legal right of the Association (Unit 10) to bring a charge before the State Employment Relations Board, on the grounds of an unfair labor practice. In private sector disputes, individuals, unions and management have certain rights to bring actions into federal or state agencies/courts on the basis of claimed violations of statutory rights. Such procedures do not necessarily take away the pursuit of a parallel action to arbitration.

The arbitrator has phrased the arbitrability issue as follows:

> Did management have the general right, under the terms of the labor agreement, to take actions regarding a new time keeping system?

The second issue is related to the first matter of arbitrability. The parties disagree over the powers given to management to institute changes in systems such as time keeping, without negotiations with the Association. The arbitrator has stated the question to be decided as follows:

> Did the State of Ohio violate the agreement effective for 1986-1989 (jt 1), when changes were made in the time keeping method for the Department of Mental Retardation and Developmental Disabilities and the Department of Mental Health? If so, what is the remedy?

Background

A hearing was held by the arbitrator on June 17, 1987 at the State Office of Collective Bargaining, Columbus, Ohio. The Office of Collective Bargaining and the Association submitted the testimony of witnesses, joint exhibits and separate exhibits. The parties were represented by the following persons:

Jennifer Dworkin
Labor Relations Specialist
Office of Collective Bargaining
Ohio Department of Administrative Services
Columbus, Ohio

Henry L. Stevens
UniServ Consultant
Ohio Education Association
Westerville, Ohio

No transcript was made of the hearing; post-hearing briefs were filed by the State and the Association.

Union Position

Article 1, §1.02 of the labor agreement between the Association and State of Ohio states that (jt 1):

> The Employer hereby recognizes the Association as the sole and exclusive bargaining representative for the purpose of collective bargaining on all matters pertaining to wages, hours, or terms and other conditions of employment ....

Article 40, §40.02 of the same agreement (jt 1) commits the parties to bargain in accordance with Chapter 4117 of the Ohio Revised Code.

During the course of negotiations, management did not make any suggestion or express any concern over the methods of the time keeping. Instead, management waited until the labor agreement was signed then moved to introduce an electronic time keeping system designed and installed by Tech Time, Inc.. Such an action was in direct violation of the commitment to bargain over the matters of wages, hours and other terms of employment (Article 1, §1.02).

The action was unilateral. It violated the labor agreement for the following reasons:

1. A sign-in and sign-out system had been used for many years for the teachers in Unit 10 of the Association. The system was continued through the time of negotiations and shortly after the conclusion of the negotiations. In late 1986 and early 1987, management made the change to the new system.

2. The traditional system was a perquisite of the jobs of the members of Unit 10. Such perquisites included the develop-

ment of flex time for teachers and the convenience of the traditional system.

3. An example of the change, about which the union is protesting, is found in the Inter-Office memorandum issued by Richard Windard, Superintendent of the Western Reserve facility, which states that (A 4, p 2):

> Employees are expected to be on duty at the start of their shift; therefore, there is no grace period for tardiness on the time clocks, i.e. an employee due in at 7:00 a.m. must clock in at or before 7:00 a.m. ....

Such a move by a facility superintendent is in direct violation of the right of the Association to bargain with the employer over the terms and conditions of employment. The existence of a grace period is a term of employment; it was taken away by the time clock installation system; the contract has been violated.

4. A charge of $5.00 (A 3) was installed for the replacement of system cards that are lost or not turned in upon the resignation of an employee. Such a charge is a reduction in wages. It must be bargained.

5. Negotiations took place between the State of Ohio and other unions over the use of time clocks. See, Association exhibit 11. Such negotiation should be ordered in this dispute.

The actions of the employer were in violation of the labor agreement. In addition, the refusal to bargain over the installation of the terms of the new system constitutes an unfair labor practice.

Management should be required to bargain over the terms of employment. If any discipline has been issued over violations, such as the failure to pay the $5.00 for a lost card, such discipline should be rescinded.

Management Position

The Ohio Revised Code in §4117.08 (A) and §4117.11 (A) and (5) requires that the State of Ohio bargain over matters such as wages, hours, terms and other conditions of employment. If such bargaining is refused by management, the Association has the responsibility of filing charges with the State Employment Relations Board (ORC, §4117.12). The arbitrator should not decide the matter of an unfair labor practice. That is a right reserved to the State Employment Relations Board.

On the merits of the issue, the question is:

> Did the Department of Mental Health and Department of Mental Retardation and Developmental Disabilities and and the Office of Collective Bargaining/State of Ohio, violate the 1986-89 Master Agreement between the State

> Council of Professional Educators/OEA/NEA and the State of Ohio when changes were made in the time keeping method for the Department of Mental Retardation and Development Disabilities and the Department of Mental Health? If so, what shall the appropriate remedy be?
> (management post-hearing brief, p 4)

No violation of the labor agreement occurred for the following reasons:

1. Negotiations between the various unions that represent the employee groups and the State of Ohio management must stand on their own two feet. That is, each union and each management group must negotiate a labor agreement that represents the best bargain that each side can develop to meet the needs of the groups represented. A labor arbitrator cannot insert a provision in an agreement just because it is found in other agreements.

2. The Association argued that the time clock system was a surprise. Testimony was submitted by state witnesses, however, that pointed out some facilities had used time clocks for years. State witness Mike Fuscardo testified that some centers had used time clocks for 25 years.

3. The employer has the right to institute work rules for the management of the work force of teachers in Unit 10 (Article 14, §14.01). Management always had the right to discipline employees for not following correct procedures. Violation of time clock procedures are no different in principle from violations of hand sign-in and sign-out procedures.

4. Other arbitrators have held that time clocks are not a change that must be bargained with a union.

5. Such "benefits" as flex time were not abolished by the introduction of the time clock system. The Fiscal Services Section Manager, Stephen Scoles, testified that the programing under the proposed new time clock system was designed to include such items as flex time.

The fact that the entire system had to be abandoned is not relevant to the dispute. The contractor did not fulfill the terms of the contract. The State of Ohio cancelled the agreement. Currently, the State is using the hand time keeping arrangement, which in some cases, are the "old" time clocks.

There was no contract violation. The grievance should be denied.

Discussion

The arbitrator holds that the issue of arbitrability is before him for resolution (above under Issue). If the arbitrator did not have the power to make an award, there would be no point in consideration of the issue on its merits. As mentioned previously, such a holding does not

restrict the Association from filing charges with the State Employment Relations Board. It is held that:

> Management did have the general right, under the terms of the labor agreement, to take actions regarding a new time keeping system.

The merits of the issue must be used to resolve whether the dispute over the installation of a new electronic system versus the old system. Record keeping and the payment of employees are based upon the fulfillment of responsibilities. The management of record keeping rests with the administrators of the various State of Ohio facilities. Record keeping is not the responsibility of the Association or of the bargaining process. The record keeping cannot infringe upon any rights specified or implied in the labor agreement. The function, however, is a management function.

The facts in this dispute are confusing. A new system of electronic record keeping of employees' time was installed but it never worked satisfactorily. The old manual and/or time clock system was kept. Currently there is an attempt to explore other electronic systems and presumably negotiate and/or sue over the previous system.

The testimony of witness Mike Fuscardo was rather definite. Some state institutions have had time clocks for years. Witnesses testifying for the Association did not cite any specific grievances or complaints of specific instances of items such as flex time that were lost with the aborted electronic system. The citations were prospective. An exception might have been the requirement that employees check-in at a small number of buildings rather than the individual building to which each person is assigned.

The arbitrator has treated this dispute as primarily a dispute over possibilities and rights rather than a dispute over individual grievances that individual workers have filed claiming individual losses. This approach fits the approach of the parties to the statement of the merit question before the arbitrator.

Testimony was clear from management witness Stephen Scoles. The old system was or is inadequate, labor intensive and probably full of chances for errors. Witness Fuscardo testified to the same effect. The arbitrator has had enough experience with record keeping systems outside the dispute in question to understand the various problems a hand system creates for employees, management and unions.

It is also evident that the old system has been something of a "mishmash". Some centers kept time records strictly by hand. Other places used time clocks. Apparently, the Developmental Centers and the Mental Health Centers had somewhat different approaches. Some used time clocks, while others had the history of hand card systems (McBee, M 1).

The electronic system had a goal of flexibility. Mr. Scoles stated that each institution had its own policies regarding such matters as grace periods, lunch periods and flex time. Some of these differences probably arose out of different client/patient needs among the various

centers and institutions. Presumably, a new system must be flexible. Such differences must reflect varying institutional needs and the implicit professional and semi-professional expectations that have been build up over the years. Such matters cannot be changed by unilateral introduction of some form of a rigid record keeping system.

The arbitrator holds that management does have the right to introduce an electronic, programmable time keeping system that reflects the needs and practices of the various institutions. This right does not mean that the system must override implicit or stated practices that are true benefits. The fact of going from one building to another in order to "sign-in" under the new system, is not the loss of a true benefit. An exception might be that if a person was required to walk a significant distance under the new system versus the old hand sign-in arrangement. If a true flex system existed, it cannot be removed by merely changing the record keeping from hand to electronic means.

These variations, however, can be worked out by the parties over the months after a new system is introduced. That is, grievances may be filed complaining about alleged changes in benefits as a result of electronic versus hand time keeping. These grievances must be dropped if there has been no loss of benefits. If losses have been partially demonstrated, presumably settlements and/or arbitration will occur.

Record keeping is a management function. Management has the right under the terms of the labor agreement (Article 3), not to bargain with the union over the principles of the introduction of an electronic system of keeping track of employees work time.

Award

Management had the general right, under the terms of the labor agreement, to take actions regarding a new time keeping system. The Association has the right to take any charges of unfair labor practice to the State Employment Relations Board.

The State of Ohio did not violate the agreement, effective for 1986-89 (jt 1), when changes were made in the time keeping methods for the Department of Mental Retardation and Developmental Disabilities and the Department of Mental Health. Specific complaints may be filed by the union objecting to claims of specific loss of alleged benefits. The grievances may be processed though the contractual procedures for such matters.

Arthur R. Porter, Jr.
Arbitrator

August 27, 1987