

ARBITRATION AWARD SUMMARY

OCB Award Number: 127
OCB Grievance Number: 87-067 / Dirk
Union: 1199
Department: Rehab. Services Com.
Arbitrator: Sharpe
Management Advocate: Chesler
Union Advocate: Woodruff
Arbitration Date: 11/10/87
Decision Date: 12/7/87
Decision: Issue is arbitrable

PERMANENT ARBITRATION PANEL

In the Matter of an Arbitration:

--between--

STATE OF OHIO

--and--

OHIO HEALTH CARE EMPLOYEES
UNION DISTRICT 1199

OCB Grievance No. G87-067

ARBITRATOR'S OPINION AND AWARD

Steven Chesler
Asst. Attorney General
For the State

Tom Woodruff
President District 1199
For the Union

December 7, 1987

Calvin William Sharpe
Arbitrator

On March 30, 1987, Robert J. Dirk filed a grievance against the Ohio Rehabilitation Service Commission (Commission) protesting his termination on March 27, 1987. The Commission denied the grievance at each step in the contractual grievance procedure. Being dissatisfied with the relief obtained at earlier stages, the Ohio Health Care Employees Union District 1199 has now brought the matter to arbitration. A hearing was held on November 10, 1987, at Cleveland, Ohio. The parties have stipulated to procedural arbitrability but disagree about whether the issue has substantive arbitrability.

I. STATEMENT OF THE CASE

A. ISSUE

Is the termination of Robert J. Dirk arbitrable under the terms of the 1986 - 1989 collective bargaining agreement between the parties?

B. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 1 - PURPOSE AND INTENT OF THE AGREEMENT

* * *

Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this agreement and which are not specifically provided for or abridged by this agreement, will continue in effect under conditions upon which they had previously been granted throughout the life of this agreement unless altered by mutual consent of the employer and the union.

ARTICLE 7 - GRIEVANCE PROCEDURE

[Section] 7.01 Purpose

* * *

Since this agreement provides for final and binding arbitration of grievances, pursuant to Section 4117.10 of the Ohio Revised Code, the State Personnel Board of Review

shall have no jurisdiction to receive and determine any appeals relating to matters that are the subject of this grievance procedure.

[7.02 Definitions

A. Grievance as used in this agreement refers to an alleged violation, misinterpretation, or misapplication of specific article(s) or section (s) of the agreement.

[Section] 7.07 Arbitration

* * *

E. Arbitrator Limitations

1. Only disputes involving the interpretation, application, or alleged violation of a provision of this 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.

ARTICLE 8 - DISCIPLINE

[Section] 8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

C. THE FACTS

Mr. Dirk filed a grievance on March 30, 1987, protesting his termination from the Commission's work force on March 27, 1987. The grievance was processed within the Commission at steps two and three of the contractual grievance procedure. The Commission denied the grievance at each step on the grounds that the termination was a disability separation and not a discharge. The Ohio Office of Collective Bargaining also denied the grievance at step four. The Union filed for arbitration on May 11, 1987.

While Mr. Dirk's case was advancing through the grievance procedure, he appealed his termination to the State Personnel

Board of Review (PBR). On April 15, 1987 the PBR issued a notice of hearing set for May 26, 1987. Shortly before the hearing Mr. Woodruff and then Assistant Director of the Office of Collective Bargaining (OCB), Sybil Griffin, discussed whether the grievance should be properly heard by the PBR or an arbitrator under the contract. Mr. Woodruff testified that he and Ms. Griffin agreed that the matter should be arbitrated. According to Mr. Woodruff he and former Director of the Office of Collective Bargaining, Edward H. Sidler, also agreed that the parties should arbitrate rather than proceed before the PBR.

Apparently, the PBR was not informed of the agreement between the OCB and the Union, since it proceeded with the scheduled hearing before an Administrative Law Judge (ALJ) on May 26, 1987. Assistant Attorney General Greg Finnerty appeared on behalf of the Commission, but neither Mr. Dirk nor anyone on his behalf appeared before the PBR. Pursuant to the Commission's motion the ALJ dismissed the case.

On August 21, 1986, Shirley Tegethoff filed a class grievance protesting the Mental Health Department's refusal to make hazardous duty payments. The State denied the grievance at steps one through three and, initially, at step four. The Union filed for arbitration on January 22, 1987. On May 20, 1987 Mr. Sidler granted the grievance. The Agreement is silent on hazardous duty pay.

II. CONTENTIONS OF THE PARTIES

A. THE UNION'S POSITION

The Union argues that the dispute is arbitrable for three reasons. First, Mr. Dirk's termination was effectively a

disciplinary discharge, which only an arbitrator and not the PBR has jurisdiction to hear. In any event, the Union continues, an arbitrator must hear the facts of the case in order to determine whether such a discharge or a disability separation is at issue. Second, even if the termination is deemed a disability separation, arbitration rather than the PBR provides the appropriate forum. In support of this argument the Union cites the final paragraph of Article 1 of the Agreement providing for the preservation of unspecified employee statutory rights. Since such rights are specifically made a part of the contract, it concludes, they must be enforceable under the contractual grievance-arbitration procedure. The Union cites the Tegethoff grievance, involving Article 1 rights, that was granted at step four of the procedure after arbitration had been scheduled but before it occurred. Finally, the Union argues that the Commission is bound by the agreement of the former administration of the OCB, which proposed during contract negotiations that the PBR be deprived of all jurisdiction over matters subject to the grievance procedure and agreed to arbitrate the grievance.

B. THE COMMISSION'S POSITION

The Commission argues that the grievance is not arbitrable. It first directs the Arbitrator's attention to Article 7, Section 7.07 E. of the Agreement that limits the authority of the Arbitrator to disputes involving the interpretation, application, or alleged violation of the agreement. It then points out that the collective bargaining agreement is silent regarding disability separations. Since the agreement is silent, the

Commission continues, the grievant's only remedy is in the pre-contractual forum--the PBR--that has historically considered appeals from disability terminations. The Commission points out that a disability separation is different from a disciplinary discharge, since the underlying problems are related to incapacity rather than employment misconduct that can potentially be improved with discipline. The Commission further argues that Article 1 rights are enjoyed by employers as well as employees and that Article 7 provides no support for the Union's claim of arbitrability, since it only deprives the PBR of jurisdiction over disputes that (unlike disability separations) are subject to the grievance procedure. The Commission questions the purported agreement to arbitrate between the Union and the former OCB administration and argues that if it existed, it could not render arbitrable those matters excluded from arbitration by the contract.

III. DISCUSSION AND OPINION

As a matter of sound labor policy, it is well-settled that grievance disputes are presumed arbitrable unless the parties manifest a specific intent to exclude certain subjects from the arbitration clause of the Agreement. See United Steelworkers Of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). The instant agreement defines not only the jurisdiction of the Arbitrator but also that of the PBR. Section 7.07E subjects only "disputes involving the interpretation, application, or alleged violation of a provision of this agreement" to arbitration. Section 7.01 deprives the PBR of jurisdiction over "matters that

are subject of this grievance procedure".

The pivotal issue in this case, therefore, is whether Mr. Dirk's grievance is subject to the grievance procedure. If it is, not only is the dispute arbitrable but the PBR has no jurisdiction to hear the dispute under the parties' Agreement. If Mr. Dirk's complaint is not subject to the grievance procedure, the Arbitrator is without authority to hear the case, and the Grievant is left to pursue other remedies.

Although the Commission disagrees, the Union argues that Mr. Dirk's termination is an effective discharge. The Commission argues, on the other hand, that a disability separation is different from discipline since it is not designed to improve improper work performance. Rather, a disability separation is based upon the employee's lack of physical capacity to perform the work. In support of this argument the Commission cites Section 123:1-33-03 of the Civil Service Laws and Rules, which permits reinstatement within three years after a disability separation.

Notwithstanding the Commission's well-founded argument distinguishing disciplinary and disability separations, the Arbitrator cannot anticipate at this stage of the arbitration whether the claimed disability separation is actually a disciplinary discharge. The facts adduced at hearing may or may support that conclusion. The point is that the Arbitrator must receive evidence on the merits to determine whether Section 8.01 has been violated. Since a violation of the Agreement may exist, the grievance must be deemed arbitrable.

The dispute is also arbitrable, because it is a grievance as defined by the Agreement. Under the Agreement only the Arbitrator can hear a grievance. Section 7.01 creates a procedure for the "prompt, impartial and fair processing of . . . grievances" and deprives the PBR of jurisdiction over matters subject to this procedure. Under Section 7.02 a grievance is "an alleged violation, misinterpretation, or misapplication of specific article(s) or section (s) of the agreement". The Dirk grievance alleges violations of Article 1 and Article 8.01, two specific articles of the Agreement. Since the matter is subject to the grievance procedure by definition, the PBR is deprived of jurisdiction and the matter is arbitrable.¹

¹ These conclusions are buttressed by the Commission's granting of the Tegethoff grievance, which alleged entitlement to hazardous duty pay covered under the Code but not specifically contained in the agreement.

Since the Arbitrator holds that the grievance is arbitrable, it is not necessary to decide whether an agreement between the Union and the predecessor administration of the Commission's representative supersedes a specific exclusion from the arbitration clause.

IV.

AWARD

The grievance is arbitrable. In the absence of settlement, the parties shall proceed to hearing on the merits of the case.

DATE

12/7/87

CALVIN WILLIAM SHARPE

Calvin W. Sharpe