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IN THE MATTER OF THE ARBITRATION BETWEEN: *

Ohio Civil Service Employees Association, *
Local 11, AFSCME, AFL-CIO

* Case Number:
12-00-9108-26-
* 0009-01-13

-and-

Ohio Environmental Protection Agency *

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the Association:

Penny Lewis, Chief Advocate
Mike Moschell, Grievant
Patrick Mayer, Second Chair
Kim Browne, Arbitration Clerk

For the State:

Rachael Livengood, Assistant Chief, Arbitration Services
Elliot Fishman, Legal Counsel, Second Chair
Eugene Brundige, Human Resource Consultant
Rodney Spain, Training, OPEA
Susan Day, Human Resource Specialist, OPEA
Bill Kirk, Labor Relations Administrator, OPEA
Greg Myers, Benefits Analyst, OPEA

The Hearing was held at 1:00 p.m. on August 12, 1992, in the 6th Floor Conference Room, Office of Collective Bargaining, 106 North High Street, Columbus, Ohio. Both parties were represented and had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the record was left open for the following two, agreed

1 Mr. Myers could not be present at the Hearing. At the suggestion of the parties, a conference call was made to the Arbitrator by Ms. Livengood and Ms. Lewis, with Mr. Myers present in Columbus, for direct and cross-examination of his testimony.

upon purposes: (1) the conference call involving testimony provided by Mr. Myers on August 27, 1992; and (2) the subsequent submission, by both parties, of written closing statements to be mailed by them to her on August 31, 1992. The statements were received by the Arbitrator on September 4, 1992, and exchange by mail to the parties.

ISSUE

The parties were unable to agree on a statement of the issue(s) involved in this case. After considering the record in its entirety, the Arbitrator has determined that the issues are as follows:

- (1) Is the issue of non-payment of a life insurance claim procedurally and/or substantively arbitrable?; and
- (2) If so, did the State of Ohio violate the collective bargaining agreement when it denied life insurance benefits to the estate of Ms. Cynthia Pelley because she had not been employed with the State for one year? If so, what shall the remedy be?

STATEMENT OF CASE

The facts of this case are largely undisputed. The Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO (hereinafter "the Association") and the Ohio Environmental Protection Agency (hereinafter "the State" or "the Agency") agree that this is a case of first impression.²

² Mr. Brundige testified that, while he was Director of the Office of Collective Bargaining, he thought a similar question on the merits had been raised. He could not recall any of the particulars but thought he responded, "I don't know how to do it [provide life insurance benefits, under Section 35.04 or its predecessor, Section 35.02 of the collective bargaining

Ms Cynthia Pelley is the deceased State employee whose estate entitlement to life insurance benefits is in question in this case. She was employed by the Agency on November 5, 1990, and was killed in a traffic accident on August 12, 1991. Mr. Moschell testified that he initiated the grievance at bar on August 26, 1991, because:

(1) He attended Ms. Pelley's funeral where her parents appealed to him for assistance because their efforts to obtain her life insurance benefit from the State had been unsuccessful;

(2) He thereafter checked with several people at the Association, but found no one who was aware of a one year service eligibility requirement for entitlement to contractually established life insurance benefits; and

(3) He was advised to file a grievance. (JX-3)

There are two life insurance programs which are available to State employees under the collective bargaining agreement in effect from 1989-1991. (JX-1) One is the life insurance set forth for all State employees under Article 35.04 - Amount, which is fully funded by the State. For the purposes of this case, the parties agree that this language is substantially similar to the language contained in Article 35.02 - Amount of the Agreement in effect between 1986 and 1989. (JX-2) They also agree that no service eligibility requirement is stated in this language or elsewhere in the Agreement.

Mr. Spain testified that the one year service eligibility

agreement, to the estate of an employee who had worked for the State less than one year[.]"

requirement for this life insurance is explained at new employee orientation. State Exhibit 3 shows that Ms. Pelley attended such orientation on November 21, 1990. Mr. Spain also testified that the one year eligibility requirement is brought to employees' attention while they have their orientation books (SX-1) open to Section 3, BENEFITS, 5. which states the following:

Life Insurance - Full-time permanent employees are covered after one year of service. The amount is based upon the annual salary, rounded to the next highest thousand dollars.

According to Mr. Spain, at the outset of orientation, each employee is also provided with a checklist of topics to be discussed and is told to advise the Instructor if any topics have been missed before signing the document. State Exhibit 4 is the Orientation Checklist signed by Ms. Pelley on November 21, 1990, and shows that life insurance benefits were covered in her orientation.

Ms. Day testified that, among her duties, she handles all benefit claims related to the collective bargaining agreement in question.(JX-1) During the term of her employment as a Human Resource Specialists for the State since 1979, Ms Day stated that there has always been a one year eligibility requirement for fully funded, State provided life insurance. According to Ms. Day, there is also no indication in Ms. Pelley's personnel file that she was sent the beneficiary cards necessary for induction into the fully funded plan.

The parties agree that the other type of life insurance available to State employees is the optional, Supplemental and Dependent Life Plans (JX-1, Article 35.05 & SX-2), which can be

obtained at the election of an employee. They also agree that there is no eligibility requirement for the Supplemental Plan and that Ms. Pelley had no such coverage.

In addition to the merits, the State has challenged the arbitrability of this case on both procedural and substantive grounds. The Association maintains that the grievance is arbitrable.

The parties have been unable to reach a mutually acceptable resolution of their differences on the matter of arbitrability and on the merits of this case. It is, therefore, before this Arbitrator for decision.

ASSOCIATION POSITION

The Association has more than one reason for maintaining that this grievance was timely filed. It alleges that Ms. Pelley's family was first notified, on August 16, 1991, that her estate was not eligible to receive the State sponsored life insurance benefits because she had not been employed by the State for one full year at the time of her death. Accordingly, the Association argues, on the basis of Article 25.02 of the collective bargaining Agreement, that the instant grievance was timely filed within the ten (10) working day limit set forth in this provision. Thus, the Association contends that the State cannot prevail in asserting that the grievance, to be timely, should have been filed within ten (10) working days of the date Ms. Pelley learned of the one year eligibility requirement for State sponsored life insurance at orientation in November, 1990.

As additional support for its position on timeliness, the

Association asserts that:

. . . the State's refusal to provide life insurance to the deceased is a continuing violation of the Collective Bargaining Agreement, and as such, the reference date for the 10-day time limit is 10 days after the occurrence of any one of the continuing violations including the date the deceased's family was notified of her ineligibility. (Closing Statement, p. 2)

This assertion is used by the Association for two purposes. First, to counter the parol testimony provided by Mr. Brundige alleging that the State sponsored life insurance played a de minimis role in the 1986 and 1989 contract negotiations between the parties.

Second, to contradict the State's position that the Association waived its right to grieve the one year eligibility requirement in question. In this regard, the Association stresses Mr. Brundige's testimony that a challenge similar to the instant case had been raised by "someone" while he was Director of the Office of Collective Bargaining. The Association cited both Fairweather, Practice and Procedure in Labor Arbitration, 1986, p. 103 and Arbitrator Smith's award in Edgar and Raber (04-00-(88-01-07)-0003-01-07),³ to show that, ". . . when the violation imposes a continuing injury, the time limit on the filing of the grievance recommences each day and the filing of the grievance is never precluded." The Association therefore concludes that it has established that a continuing violation has existed and that notification to Ms. Pelley's family that her estate was not entitled to State sponsored life insurance

³ This case was not supplied for review by the Arbitrator.

benefits is the trigger for tolling the timeliness of this grievance.

With respect to the State's challenge to the substantive arbitrability of this case, the Association contends that the language contained in Article 35.04 of the collective bargaining agreement (JX-1) is clear, unambiguous, and not limited by this or any other provision(s) of the Agreement. It stresses that Article 35.04 obligates the State to provide sponsored life insurance benefits to "all" employees. According to the Association, it:

. . . has proven, through numerous arbitration decisions, that Arbitrators have consistently concluded that a group insurance contract which conflicts or fails to comport with the Agreement between the Employer and Union does not constitute a part of the Collective Bargaining Agreement. (Closing Statement, p. 4)

As further support for its position, the Association cites, How Arbitration Works, 4th edition, pp. 363-365, and the awards of six other arbitrators published in Labor Arbitration Reports.

Another Association defense is that Article 35.02 and Appendix M of Joint Exhibit 1, shows that " . . . the State successfully articulated its intention to require a one year waiting period to qualify for dental and vision care benefits." The Association concedes that Mr. Brundige is a very capable negotiator. It therefore argues that, if, as Mr. Brundige claimed in his testimony, the State intended the language contained in Article 35.04 "to mirror that of Article 35.02" (Closing Statement, p. 5) of the Agreement, then he "certainly would have inserted language which set forth specific eligibility

requirements" for the provisions contained in Article 35.04; but did not.

With respect to the merits, the Association rejects the State's attempt to convince the Arbitrator that its interpretation of Article 35.04 is a matter of past practice. According to the Association, the State's position is based upon an erroneous argument that employees were made aware of the one year eligibility period to qualify for State sponsored life insurance. In the Association's view, ". . . employee awareness is not at issue." (Closing Argument, p.5) Rather, the Association maintains that, "The State failed to introduce any concrete evidence to support its claim that the waiting period is an established past practice." (Closing Statement, p. 5) Additionally, the Association claims that arbitrators "only" utilize past practice as a deciding factor in circumstances where the contract language is unclear and ambiguous; which is not the instant case.

Consequently, the Association believes that it should prevail on both arbitrability and the merits, and thus, that the State should be directed to pay Ms. Pelley's estate the benefits of her life insurance accrued under Article 35.04 of the collective bargaining agreement.

STATE POSITION

The State challenges both the arbitrability and the merits of this grievance. With respect to the former, first, the State claims that this case is not arbitrable because the grievance was not timely filed in accordance with Article 25.02 of the

collective bargaining agreement.(JX-1) This language states, in relevant part, that:

. . . All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event.

According to the State, Mr. Spain's testimony together with its Exhibits 1 and 3, clearly show that Ms. Pelley was apprised of the one year eligibility requirement for life insurance fully funded by the State at orientation on November 21, 1990. It therefore maintains that the time limit for filing a grievance tolled on this date; not after her death on August 12, 1991, or after her estate was denied such benefit allegedly on August 16, 1991.

As further support for its position on timeliness, the State relies upon:

(1) the language contained in Article 35.02 (JX-2), Article 35.04 (JX-1) of Argeements between the parties;

(2) the parol testimony of Mr. Brundige about the origin and circumstances under which the language pertaining to State sponsored life insurance was first negotiated and, thereafter, rolled over into the subsequent Agreement; and

(3) the incontroverted, historical testimony of Ms. Day, dating from 1979.

This information is used by the State to prove that: the Association was well aware of the one year eligibility requirement for entitlement to State sponsored life insurance; through two, successive contract negotiations, this requirement

was not challenged or even an issue.

The State also cited the 1965 award of Sam Tatum in Chattanooga Bos and Lumber Co., (44 LA 373). While the issues in that case were timeliness and denial of maternity leave, the State believes the reasoning is pertinent to the instant case. Specifically:

[The Company] has consistently since 1947 refused to permit a leave for this purpose [maternity], and it has only permitted one who had gone out for maternity reasons to return as a new employee. To this the Union has acquiesced until the filing of this grievance. The argument by the Union [stated] that it did not know of the practice of the Company because such had not been communicated to it by the members. It must be concluded that employees through the years have known of the policy of the Company and the knowledge of the employee must be the knowledge of the Union; and, too, in the plant the Union has its officials or committeemen who are in daily contact with the employees. Therefore, through the years the committeemen must have known of the position of the company. The knowledge of the committeemen must be the knowledge of the Union.

According to the State, this dispute also is not substantively arbitrable. The basis for this claim is that there is a third party, Medical Life Insurance Company of Cleveland, Ohio, involved which the Arbitrator has no authority to bind under the terms and conditions of the collective bargaining agreement. The State cites Article 25.03 of Agreement (JX-1) regarding her authority to add to, subtract from, or modify the terms of this Agreement. It argues that an award contrary to these limitations would be tantamount to making the insurance company a party to the collective bargaining agreement; a result which the State characterizes as "absurd."

If these threshold arguments fail, then the State argues

that it did not violate the collective bargaining agreement by denying State sponsored life insurance benefits to Ms. Pelley's estate. It relies, in part, upon Mr. Brundige's testimony to assert that:

. . . the Language contained in Article 35, section .02 of the 1986 Agreement was placed there to provide for the continuation of the existing life insurance benefit. (Closing Statement, p. 3)

The State stresses that this language was expressly placed into the Agreement to respond to the Association's interest in continuing the existing life insurance program. Furthermore, the State points out that this language was rolled over into the 1989 Agreement without controversy or more than "two minutes" of discussion in negotiations.

Based upon testimony provided by Messrs. Brundige and Myers, and Ms. Day, the State asserts that "the one year service eligibility requirement was in effect prior to the first collective bargaining agreement and is still in effect today." (Closing Statement, p. 3) This testimony is also used by the State to show that the service requirement is not ambiguous since none of these three witness could recall a claim for State sponsored life insurance being paid for an employee with less than one year of service. Coupled with the facts that Ms. Pelley was aware of the requirement and that the Union acquiesced in two contract negotiations to the manner in which sponsored life insurance was administered, the State contends that it has met tests for proving the existence of an established past practice set forth in Jules Justin's landmark award, Celanese Corp. of

America, 24 LA 168, 172 (1954).

The State rejects the Association's attempt to argue its case by analogy to Appendix M of the collective bargaining agreement. Key points the State asks the Arbitrator to consider include:

(1) The language in Article 35.02 pre-dates that contained in Appendix M, so it could not draw its essence or intent from this Appendix;

(2) The Association offered no parol evidence or testimony to show that the intent of the negotiators in 1986 and in 1989 was anything other than to perpetuate the ~~existing~~ sponsored life insurance benefit; and

(3) The law, Ohio Administrative rule 125-03, pertaining to vision and dental care in effect at the time the 1986 Agreement was negotiated contained a one year eligibility requirement, thus the Appendix M language negotiated in 1989 simply corresponded with the law.

In conclusion, the State requests that a decision be made on the threshold issues before proceeding to the merits of the case. It also maintains that the Association has not met its burden of proof and, thus, this grievance should be denied.

DECISION

Arbitrability:

After carefully considering the evidence and testimony of record, and the closing statements of the parties, the Arbitrator concluded this dispute is arbitrable. There is no dispute about the timeliness of Mr. Moschell's filing. With respect to other

elements of the timeliness challenge, the Arbitrator found the matter was not ripe to be grieved until Ms. Pelley's heirs sought a benefit on behalf of her estate and were denied.

The Arbitrator rejected the parallel the State attempted to draw between the principles in Chattanooga Box and Lumber Co., 44LA 373,376 (1965), and the instant case. A significant fact is that Ms. Pelley is deceased, so it is only possible to speculate about what she knew or did not know about State sponsored life insurance at the time she received orientation training or about whether she ever contemplated filing a grievance. In contrast, affected employees at Chattanooga Box came back to work, albeit in the status of new hires, and could communicate the company's policy to their union representatives. Thus, this Arbitrator agrees that the union, in Chattanooga Box, had constructive knowledge of the maternity policy and a timely cause of action if it had decided to pursue it. In the instant case, however, even the State's best evidence is that this might be the second time since 1986 that the issue at bar was raised. The Arbitrator therefore found this grievance to be timely filed.

She also holds that this grievance is substantively arbitrable. Article 35.04 is a part of the collective bargaining agreement. It is a principle well established by courts (including the Supreme Court) and in industrial jurisprudence that unless there is express, exclusionary language limiting the grievability and/or arbitrability of any contract provision, that provision is grievable and arbitrable. This ruling in no way exceeds the authority granted to an arbitrator in Article 25.03

of the Agreement nor does it bind any third party. What the State has done is to confuse the eligibility of a dispute over a contract provision to be arbitrated with the implications of winning the case on the merits.

Merits:

The Arbitrator found that the Association failed to meet its burden of proving that the State violated Article 35.04 of the Agreement by denying sponsored life insurance benefits to Ms. Pelley's estate. The State successfully demonstrated through its Exhibits 1,3 and 4, and through Mr. Spain's testimony, that it has a process to provide all employees information about the sponsored life insurance, including eligibility requirements, and that Ms. Pelley participated in that process. Furthermore, eligibility requirements are not only common in most sponsored insurance plans, but also Section 3, 5. of the orientation book clearly and unambiguously sets forth such requirement. As Arbitrator Holley held in Barber Coleman Co., 78 LA 433, 437, an arbitrator cannot control whether Ms. Pelley read the orientation book or asked for advice on eligibility. She only determine that the State met its obligation to provide her with information about eligibility for sponsored life insurance.

The remaining facts of this case reinforce the Arbitrator's conclusion that the State shall prevail. The insurance plan in dispute was not new to the labor-management relationship, even before the first collective bargaining agreement was negotiated. With respect to eligibility, the record is uncontroverted that this requirement has been part of the plan provided by Medical

Life Insurance Company of Cleveland, Ohio since at least 1979. Although the Association came to this proceeding to protest the requirement, it is a fact that the Association also participated in negotiations for two separate Agreements in which the pre-existing life insurance plan was incorporated into and rolled over with a minimum of discussion. Additionally, the record is clear that the State has never paid a sponsored life claim to anyone who was employed with it less than one year. Thus, the State has established that a bona fide past practice, meaning that it is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as fixed established practice accepted by both parties, exists in the instant case.

Nevertheless, the Association tried to persuade the Arbitrator that a time limit appearing in Appendix M of the 1989 Agreement (JX-1) has significance for the instant proceeding. The Arbitrator disagrees. The State has been convincing in showing, first, that the language in Appendix M post-dated the first negotiations on sponsored life insurance benefits. Second, even with the addition of Appendix M, the bargaining history provided indicates that the language in Article 35.02 was rolled over essentially untouched. The Arbitrator must conclude, therefore, that the intent of the parties is evidenced by their action which was to perpetuate the sponsored life insurance plan that had been in existence since at least 1979, and which included a one year service eligibility requirement. If this was not the Association's intent, then it was incumbent upon the

Association to raise this issue at the negotiating table rather than to endeavor to obtain a benefit not bargained for through arbitration.

AWARD

The grievance is denied.

Mollie H. Bowers
ARBITRATOR

September 15, 1992
DATE