#1151

State of Ohio, Rehabilitation Services Commission and District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO
Labor Arbitration Proceeding

In The Matter of the Arbitration Between:

State of Ohio, Rehabilitation Services Commission

-and-

District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO

Grievant(s): Tom Keller, Celia Rogers et. al.
Case Number(s): 29-02(12-14-94) 408-02-12

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: July 31, 1996

Appearances

For the Employer
Bob Thornton — Second Chair
Darla J. Burns — Advocate

For the Union
Peggy Kearsey — Organizer

Introduction

This is a proceeding under Article 7 - Grievance Procedure, Section 7.08 - Arbitration of the Agreement between the State of Ohio, Rehabilitation Services Commission, hereinafter referred to as the Employer, and District 1199, The Health Care and Social Service union, SEIU, AFL-CIO, hereinafter referred to as the Union, for June 1, 1994 - May 31, 1997, (Joint Exhibit 5).[1]

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. Both parties indicated they would submit written closing arguments.

Issue

Is the disputed matter properly before the Arbitrator? If not, what shall the remedy be?

[1] The matter before the Arbitrator deals with a threshold arbitrability issue. Both sides have referenced different collective bargaining agreements with the Union referencing the lates agreement (Joint Exhibit 5), and the Employer referencing the predecessor agreement (Joint Exhibit 4). It should be noted that the grievance processing language is identical, while the subcontracting language contained in the agreements does differ significantly.

PERTINENT CONTRACT PROVISIONS[2]

Article 7 - Grievance Procedure

7.01 Purpose

The State of Ohio and the Union recognize that in the interest of harmonious relations, a procedure is necessary whereby employees can be assured of prompt, impartial and fair processing of their grievance. Such procedure shall be available to all bargaining unit employees and no reprisals of any kind shall be taken against any employee initiating or participating in the grievance procedure. 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.

***

7.04 Grievant

A grievance under this procedure may be brought by any bargaining unit member who believes himself/herself to be aggrieved by a specific violation of this

[2] The contract language specified below references language contained in the Agreement (1994-1997) (Joint Exhibit 5) presently in effect. The date of the submitted grievances caused me to utilize this approach and in no way minimizes the timeliness concerns raised by the Employer. Both agreements (Joint Exhibits 4 and 5) contain identical grievance processing language.

Agreement. When a group of bargaining unit employees desires to file a grievance involving an alleged violation that affects more than one (1) employee in the same way, the grievance may be filed by the Union. A grievance so initiated shall be called a Class Grievance. Class Grievance shall be filed by the Union within fifteen (15) days of the date on which the grievant(s) knew or reasonably could have known of the event giving rise to the Class Grievance. Class Grievances shall be initiated directly at Step 2 of the grievance procedure if the entire class is under the jurisdiction of the Step 2 management representative, or at Step 3 of the grievance procedure if the class is under the jurisdiction of more than one (1) Step 2 management representative. The Union shall identify the class involved, including the names if necessary, if requested by the agency head or designee.

Union representatives, officers or bargaining unit members shall not attempt to process as grievances matters which do not constitute an alleged violation of this Agreement.

(Joint Exhibit 1, Pgs. 8-10)

7.6 Grievance Steps

***

Step 1 - Immediate Supervisor or Agency Designee

A member having a grievance shall present it to the immediate supervisor or agency designee within fifteen (15) days of the date on which the grievant knew or reasonably should have had knowledge of the event.

Grievances submitted beyond the fifteen (15) day limit will not be honored. The grievance at this step, shall be submitted to the immediate supervisor or designee on

the grievance form. The immediate supervisor or designee shall indicate the date and time of receipt of the form.

***

(Joint Exhibit 5, Pg. 11)

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.

***

(Joint Exhibit 5, Pg. 17)

CASE HISTORY

It should be noted that at the arbitration hearing held on May 31,1996, the Union's advocate did not dispute the relevance nor the accuracy of the various exhibits introduced by the Employer. She, moreover, did not dispute the dates associated with these various exhibits and the sequence of events described below. What is, however, at issue is the filing of the grievance and whether it was done in a timely manner to render it arbitrable.

The record indicates that approximately eighty percent of the Employer's operating funds are provided by the United States Department of Education, Rehabilitation Services Administration (RSA). The remaining operating funds are

provided by the State of Ohio. Federal grants, however, only come about if matched by state money. All federal dollars which are not matched at the end of the federal fiscal year must be returned to the federal government. As such, non-matched federal dollars can not be "drawn down."

In the summer of 1992, the Employer was faced with a serious fiscal dilemma. A potential loss of federal dollars and a growing list of potential consumers placed the organization in a tenuous situation. During this time period, a committee was established with the mission of providing an innovative program for vocational rehabilitation services. The committee had a diverse membership which included RSC staff and District 1199 bargaining unit members.

It should be noted the Committee continued to meet during the Spring and Summer of 1993. Guidance and information concerning the Pathways project were provided to the Employer. Specific suggestions dealing with the structuring of the project and the relationship to the Pathways' contractors served as critical areas of interest. This dialogue led to a final project dealing with a Request for Proposal for Contracts for the Provision of Services to individuals eligible under Title I of the Vocational Rehabilitation Act (Employee Exhibit 10).

On August 9, 1993, a pre-bidders conference was held to address various questions raised by those interested in bidding on the contracts. The general public was also interested in the process, these questions were answered as well.

During September of 1993, the Committee reviewed the various bids authored in response to the previously identified proposal. The membership of the Committee, however, was slightly modified. Sue Haffner, an 1199 Delegate serving on the

Committee, informed the Administrator in August of 1993 that she would have to sever her relationship. Kathy Kramer, another 1199 Delegate serving on the Committee, continued to participate after Haffner's departure.

In September and October of 1993, the Pathways' contracts were finally awarded. The Employer publicized the awarding of these contracts by issuing announcements through internal and external communication devices. The Union and bargaining unit members were also notified via memo and through discussions held at Agency-wide Professional meetings held throughout 1993 and early 1994.

Two grievances were filed contesting the awarding of these contracts. The original grievance was dated December 15, 1994. It cites the date the grievance arose as December 14, 1994. The Statement of Grievance contains the following relevant particulars:

***

> RSC continues to contract out bargaining unit work through the Pathways program in violation of the contract and federal law.

***

(Joint Exhibit 1)

A "new" grievance was sent to the Employer on December 16, 1994. A cover letter attached to the grievance provides the following rationale for the new submission:

***

> Enclosed is our new grievance on the contracting out of counselor's work. The date the grievance arose is the date we learned from RSA that contracting out is, in fact, a violation of federal law.

***

(Joint Exhibit 3)

The parties were unable to resolve the grievance. The arbitrability issue must be decided prior to a determination on the merits.

THE ARBITRABILITY ISSUE

The Employer's Position

The Employer opined that the grievances were not arbitrable based on specific timeliness defects. These defects deal with limitations contained in Article 7.04 and Article 7.06. Both provisions contain fifteen (15) day provisions. Article 7.04 deals with the filing of class grievances by the Union once "the Grievant's knew or reasonably could have known of the event giving rise to the Class Grievance." Article 7.06, moreover, states grievances filed beyond the fifteen (15) day time period referenced in Article 7.04 will not be honored.

The Employer provided two rationales in support of the timeliness theory. The Union did not file the grievance within fifteen (15) days it knew or reasonably should have known of the proposal to contract out specific vocational rehabilitation services. As early as the Fall of 1992, the Union was placed on notice regarding the proposal to contract out specific services. Haffner and Kramer, 1199 Delegates, were members of the Committee which fashioned the proposal and its contents. As such, a grievance could have been filed by these individuals during the developmental stages or once the proposal was finalized prior to the bidding process.

Even if the Union did not file a grievance during the earlier stages of the process, it should have filed a grievance once it had knowledge that contracts were

awarded. This circumstance took place as early as September of 1993. Additional notice took place via a number of sources.

On September 13, 1993, a public hearing was held by the Commissioners and the matter was discussed. Also, internal newspapers and newsletters (Employer Exhibits 15 and 21) specific to the Commission publicized the Pathways contracts. This information was, moreover, disseminated with a press release (Employer Exhibit 18) throughout the State of Ohio. On two occasions, in November/December 1993 and March/April 1994, an internally developed newsletter called Newsnet (Employer Exhibit 36) publicized the Pathways contracts. Interestingly, two Union officials are on the mailing list and receive the newsletter.

Other correspondence and memos strongly indicate the Union and its members were properly placed on notice, and were clearly aware of the consequences to its membership once the Pathways contracts were awarded. As early as October of 1993, bargaining unit members were advised of potential appointments as counselor liaisons to the Pathways' contractors (Employer Exhibit 23). In November of 1993, the Union, in a memo (Joint Exhibit 6) to its members, voiced concerns regarding the disputed contracts. A rebuttal in memo form (Employer Exhibit 29), was subsequently sent by Administrator Rabe on December 8, 1993 to individual staff members. Obvious notice was further acknowledged in a letter (Joint Exhibit 7) sent by Haffner to the office of Collective Bargaining on February 11, 1994. She discussed her role on the Committee, the mission of the project team and the result and outcome of the process. Finally, the Union was specifically placed on notice in a letter (Joint Exhibit 8) sent by Bruce

Meofka on July 18, 1994. This document discussed the Employer's intention to expand the Pathways contracts to political subdivisions located in other areas of the state.

The Employer strongly urged the Arbitrator to disregard the Union's "tolling" argument. Nothing in the Agreement (Joint Exhibits 4 and 5) tolls the statute of limitations for filing a grievance based on a forthcoming determination made by the United States Department of Education, Rehabilitation Services Administration. A ruling in the Union's favor, based upon this theory, would result in a violation of Article 7.08. By modifying specific terms and conditions negotiated by the parties, the Arbitrator would expand time limit language clearly and unambiguously negotiated by the parties.

Reliance, on a letter (Union Exhibit 1) authored by Terry Conour, Regional Commissioner working for the United States Department of Education, does not provide the disputed grievances with proper standing. Nothing in this document references the Pathways contracts; instead the ABRAXAS project appears to be at issue. Conour, moreover, never declared that contracts of this sort were ipso facto a violation of federal law. In fact, Conour provided the Employer with an opportunity to submit a corrective plan to assure that ABRAXAS and subsequent contracts are in compliance with federal law.

A determination by the United States Department of Education, Rehabilitation Services Commission that the Pathways contracts violate federal law, does not cloth the Arbitrator with substantive jurisdiction over the disputed matter. Article 7.04 and Article 7.08(E)(1) limit an Arbitrator's scope of authority in matters dealing with the

violation of the Agreement (Joint Exhibits 4 and 5). Matters dealing with federal compliance are outside the scope of an arbitrator's jurisdiction.

Even if the Union's interpretation of the Pathways contract and an Arbitrator's authority to rule on the matter were found to be valid, a ruling by the Department of Education moots the Union's arguments. A report issued on January 18, 1996 (Employer Exhibit 35) concluded the Employer was in compliance with various regulations and guidelines to substantiate sufficient control over the Pathways' process.

The Union's Position

The Union argued the disputed grievances were arbitrable and ripe for adjudication. Timelines violations referenced by the Employer were not properly supported by the record.

It would be ludicrous to believe proper filing of the grievances was required during the program development process. At that juncture, neither the Union nor the bargaining unit members knew, nor could have know, whether any bargaining unit jobs would be effected by the Pathways Program. Only after the implementation of the contracts did bargaining unit members feel threatened in terms of potential job security issues.

Actual realization of the potential contract violation came about in a letter (Joint Exhibit 3) sent to Celia Rogers and other Union Delegates from Terry D. Conour, Regional Commissioner. Even though the contents of the letter dealt with another project, the disputed project and the project referenced in the Conour's letter raised

significant concern dealing with bargaining unit erosion and subcontracting ramifications.

The grievances were filed in a timely basis if one views Conour's letter as the relevant critical benchmark. Rogers received the letter on December 14, 1994, and she filed the "new" grievance on December 16, 1994. As such, there was no violation of Article 7.04. The grievance was filed well-within the fifteen (15) day proviso contained in this Article.

The Union acknowledge that at this juncture of the dispute, it was not asking for a ruling regarding "the legality of these jobs". As such, the Union is not asking for a determination regarding potential violations of the United States Department of Education's guidelines as they may apply to the Pathways contracts. The Union recognizes a determination of this sort would more than likely violate Article 7.04(E)(1).

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, a complete review of the record including pertinent contract provisions, it is the Arbitrator's opinion that the grievances were not filed in a timely fashion. As such, Article 7.04 was violated because the fifteen (15) day provision was not met by the Union and/or the relevant bargaining unit members. They are, therefore, viewed as procedurally defective and non-arbitrable. The record, moreover, does not indicate the Employer had waived this procedural defect. The parties, themselves, have limited the cases which they agree to arbitratrate according to the term of the Agreements (Joint Exhibits 4 and 5). As such, this Arbitrator lacks authority to hear untimely grievances.

Here, the grievances were untimely because the class grievance [3] were not filed by the Union within fifteen (15) days of the date in which the Grievant(s) knew or reasonably could have know of the event giving rise to the class grievances. In this instance, the event giving rise to the class grievance took place when the Union and/or bargaining unit members knew or should have known of the actual awarding of the Pathway contracts, and the potential negative consequences placed on relevant bargaining unit members. At that point in time, which the record indicated was as early as September/October 1993, the Union was obliged to file a grievance in accordance with Article 7.06. The Pathways contracts applicable to the bargaining unit members was in final form and its impact could be reliably determined.

A series of circumstances and direct and specific responses initiated by the Union and/or its membership evidence they had been sufficiently placed on notice, or were aware of the alluded to ramifications prior to the filing of the grievances on December 24, 1994.

Haffner and Kramer participated in the committee's project development process prior to the actual bidding arrangements. Both individuals enjoyed Delegate status and had to be aware of the subcontracting ramifications. In fact, it appears Haffner had certain misgivings regarding her participation while holding a Union position as early as August 19, 1993 (Employer Exhibit 12). On or around that date, she informed Director Rabe that she was "no longer able to serve as one of 1199's representatives on the project team." She reaffirmed and clarified her role on the project team on a letter (Joint Exhibit 7) sent on February 11, 1994 to the Office of Collective Bargaining. Her

[3] The parties, at the hearing, stipulated the grievances were in reality class grievances filed by the union.

disclaimers clearly indicate a hesitancy regarding her and Kramer's involvement. One can, however, draw a reasonable inference that she was uniquely and aware of the Pathways contracts ramifications on the bargaining unit.

Probably the most glaring endorsement of a defective filing decision is ascertained by reviewing a memo (Joint Exhibit 6) authored and distributed by the Union in November of 1993 to all RSC counselors. The document is specific in terms of documenting the financial and professional consequences of the Pathways contracts on its members. It, moreover, clearly dissects particular portions of the Pathways contracts in terms of process limitations, legal ramifications and a variety of process outcome concerns. The depth of analysis undertaken by the Union clearly indicates that as of this date, the Union, in no uncertain terms, knew or reasonably should have known of the events giving rise to the class grievance. In a like fashion, all impacted bargaining unit members were placed on notice regarding the subcontracting decision and should have filed grievances in accordance with Article 7.04. Further, clarity of the situation was offered to the Union and its members in a rebuttal memo (Employer Exhibit 29) issued on December 8, 1993.

Within these circumstances, the Union's reliance on the Conour letter (Union Exhibit 1) seems a bit misplaced. Clearly, the evidence discloses that the letter did not serve as the appropriate triggering event for the disputed grievances. There was no misconception regarding the impact of the Pathways contracts prior to Conour's correspondence.

The Union's theory also appears to be circular. It acknowledges a ruling concerning the legal standing of the Pathways contracts is outside the scope of my

The Union's theory also appears to be circular. It acknowledges a ruling concerning the legal standing of the Pathways contracts is outside the scope of my authority based on language contained in Article 7.07(E)(1); and I concur. And yet, it attempts to apply Conour's observations, which are not Pathways contracts specific and collateral at best, as justification for its timely filing hypothesis.

Award

The grievances are denied. The Union violated Article7.04 when it filed its grievances in an untimely manner. As such, the grievances are not properly before the Arbitrator and nonarbitrable because of a clear and unambiguous procedural defect.

July 31, 1996

Dr. David M. Pincus
Arbitrator