#1347

In the Matter of Arbitration		
Between		Case Number:
OCSEA/AFSCME Local 11		02-10-980816-0054-01-00
and		Before: Harry Graham
The State of Ohio, Rehabilitation Services Commission and Public Utilities Commission		

APPEARANCES: For OCSEA/AFSCME Local 11:

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For The State of Ohio:

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INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument in Columbus, OH. on January 27, 1999.

ISSUES: At the hearing the parties stipulated to the issues in dispute between them. These issues are:

1. At what step does Section 25.08 of the Collective Bargaining Agreement entitle the Union to access to

"specific documents, books, papers or witnesses reasonably available and relevant to the grievance under consideration?"

2. May the Employer charge a fee for copies provided to the Union pursuant to 25.08? If so, for what type of requests may such a fee be charged?

3. Is the Public Utilities Commission violating the Collective Bargaining Agreement when charging the Union for copies of documents requested pursuant to Section 25.08 of the Collective Bargaining Agreement?

4. Is the Rehabilitation Services Commission violating the Collective Bargaining Commission when charging the Union for copies of documents requested pursuant to Section 25.08 of the Collective Bargaining Agreement?

ISSUE 1, POSITION OF THE UNION: As the Union urges Section 25.08 of the Agreement be read, it must apply at all stages of the grievance procedure. Section 25.08 provides that:

> The Union may request specific documents, books, papers, or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

There is no exclusion to restrict is applicability whatsoever. A claim by the Employer that it should be limited to those requests for documents etc. at the arbitration stage of the grievance procedure must be rejected the Union contends.

Section 25.01 F of the Agreement commits the parties to the goal of resolving grievances "at the earliest possible time and the lowest level of the grievance procedure." Were the Employer able to withhold material from the Union at the early stages of grievance processing that goal would be

frustrated.

In fact, arbitration decisions received by the parties have tangentially touched on this issue. In Case No. G-87-0205 Arbitrator Rhonda Rivera took the view that "Article 25.08 on its face includes broad discovery. The document need only to be relevant to the grievance in question." I expressed a similar sentiment in Case No. 31-08-88-08-12-0073-06-01, involving the Department of Transportation and this Union. In that case I was of the view that:

> It is not within the province of the Employer to determine which documents are necessary for the Union to make its case. Should the State be able to unilaterally withhold evidence that the Union regards as relevant to its case the grievance and arbitration procedure will be fatally compromised. In this situation it was not until after the close of the oral phase of the arbitration proceeding that the State provided documents that had been requested by the Union. The behavior of the State throughout the immediate pre-arbitration stage of the hearing and extending to the period after the hearing itself is in violation of Section 25.08 of the Agreement.

I directed that the Employer produce documents requested by the Union in order that it might process grievances and prepare for arbitration hearings. Various National Labor Relations Board decisions have come to the same conclusion. (Citations omitted). Accordingly, the Union contends that Section 25.08 should be interpreted to require that documents etc. be made available at all stages of the grievance procedure.

POSITION OF THE EMPLOYER: In the State's opinion, the text of

Section 25.08 should be applied "reasonably" on a case-by-case basis. Further, the Union's right to documents is limited to those occasions when it is preparing for arbitration. This is shown by the placement of Section 25.08 in the Agreement in the State's view. It is found in the Agreement in the context of grievance arbitration, not within the grievance procedure itself. The implication is that the terms of 25.08 to refer to the immediate pre-arbitration stage of dispute resolution, not to the grievance procedure itself in the State's view.

In Case No. 07-00-6-12-89-41-01-07, Arbitrator Rhonda Rivera was of the view that discovery by the Union was limited by the terms of Section 24.04. In Case No. G87-1299 Arbitrator Rivera was also of the view that the Employer did not violate the Agreement when it failed to provide a pre-disciplinary report to the Union prior to imposition of discipline. (pp. 10-11). The Union does not possess the wide-ranging discovery right it seeks to assert in this instance the State asserts. In its view, such discovery rights as are possessed by the Union relate only to the stage of grievance processing immediately preceeding arbitration itself.

DISCUSSION: Article 25 is entitled "Grievance Procedure." Spanning pages 87-100 it sets forth in very detailed fashion the manner in which grievances are to be processed by the

parties, up through arbitration, if necessary. Section 25.08, cited above, does not contain any restriction on the Union, save that any request for documents etc. be "reasonably available" from the Employer. It continues to provide that a request for information from the Union "shall not be unreasonably denied." That language does not permit the Employer to withhold documentation etc. at the early or lower steps of the grievance procedure. No restriction other than that of resonableness is found in the Agreement.

Section 25.01 F supports the position of the Union. It expresses the goal of the parties that grievances be resolved promptly and at the lowest level of the grievance procedure. The Union cannot be expected to carry out its end of the bargain and move to resolve grievances promptly, at lower steps of the grievance procedure if it is denied information upon which to make an informed decision concerning the merits of a grievance.

It is in the interest of the Employer to provide more information, rather than less in the grievance procedure. To the extent the parties are able to make informed judgements concerning the merit, or lack of merit, of specific grievances, attainment of the mutual goal of prompt grievance resolution (Section 25.01 F) is facilitated. Taken with the clear phraseology of Section Section 25.08 itself, there is

no doubt that the obligation of the Employer to provide "specific documents, books, papers or witnessess" extends to the first step of the grievance procedure.

ISSUE 2, POSITION OF THE UNION: As the Union relates history on this issue, the Employer has commonly provided requested documents to the Union gratis. From time to time a dispute has arisen between the parties on this matter. In 1992 they came to consider the issue directly. (Jt. Exs. 6A and 6B). The State sought to charge a copy cost of .10 per page. In addition, agencies were to determine the direct labor cost involved in fulfilling an information request from the Union and charge accordingly. The Union demurred. It referenced an understanding that no charge would be levied for "incidental copying" (Jt. Ex 6B). It also referenced its understanding that no charge would be imposed for labor costs if the copy project was less than 90 minutes. In 1992 as well the Union and Employer conducted a joint training session. It was video-taped by the parties. A copy of the tape was furnished to the Arbitrator. This issue is addressed directly by the presenters and reflects the understanding set forth above. To require the Union to pay for discovery incidental to administration of the Agreement has not found favor over the years. In Machinists v. United Aircraft Corp., 90 LRRM 2272, the Court determined that only "substantial" costs associated

with contract administration be borne by the Union. Similarly, when the Company levied a fee to provide information to the Union it was stricken down by an Arbitrator. (United States Steel, 79 LA 249, Neyland, 1982). Hence, the Employer should bear the costs of providing documents to the Union it insists.

POSITION OF THE EMPLOYER: The State largely agrees with the Union on the matter of payment for documents and the labor associated with their production for the Union. As a generalization, State agencies do not charge the Union for document production. That said, some do, specifically the Public Utilities Commission and the Rehabilitation Services Commission. Further, on occasion the Union has engaged in what the State regards as petty or harassing requests for documents. On other occasions the amount of material has been voluminous. In order to discourage this sort of behavior the State has retained the authority to charge it asserts.

The Employer is well aware of Joint Exhibits 6A and 6B as well as the video tape. It asserts the comments on the tape were never implemented. In spite of the understanding reflected on the tape concerning documents, the State has continued to charge on occasion. As the Agreement does not explicitly provide that documents be furnished without cost to the Union, the State contends its authority to charge

whenever it desires to do so remains unabridged.

DISCUSSION: Joint Exhibit 6B reflects the view of the Union that the parties had an understanding that no charge would be levied for "incidental copying" and that no charge would be made for labor costs in cases where under 90 minutes of work time was involved. This document was never rebutted by the State. Further, the video tape (Jt. Ex. 3) indicates the understanding that the Union would ordinarily receive needed documents without charge. The record in this dispute reflects the commonplace practice that copying of documents arguably relevant to grievance processing has normally been done without charge by the State.

The ordinary practice of document provision gratis is so well accepted as to give life to the words of Section 25.08. The Union has requested documents routinely since the advent of collective bargaining and they have normally been provided without cost.

That conclusion is tempered with two observations: one, the concern of the State that inordinate requests for documents, requiring a great deal of time and supplies, represent a burden and cost it should not bear and two, that such requests will be used to harass the Employer and serve as a "fishing expedition" in pursuit of evidence that may or may not exist are well taken. The parties came to address

this situation in two exhibits in this proceeding, Jt. Ex. 3 and Jt. Ex 6B. The record in this situation reveals the understanding that in instances when the Union makes a voluminous documentation request that a .10 per page copy fee can be billed to the Union in cases where 90 or more minutes are taken to meet the Union request. This is not unreasonable. The Union should not be able to use a request for documents to be provided gratis to harass the Employer or "fish" for evidence that may or may not exist.

From time to time there develop situations in the grievance procedure where the State provides substantial amounts of material to the Union and says "see if anything in there is what you want" eg. when material is provided in boxed form. If it were to be determined that the Union desires a great amount of material from such sources it should pay to the extent it is over the 90 minute threshold. In instances where the Employer permits examination of boxed material the Union should not pay for examining the documents or to the extent any material deemed relevant takes under 90 minutes to copy.

ISSUES 3 AND 4, PUCO and RSC:

POSITION OF THE UNION: The Union asserts that both PUCO and RSC should provide documents in the same manner as all other State agencies. At the arbitration hearing documentary

evidence was received from Union stewards at PUCO concerning the policy of the agency regarding provision of documents to the Union. On one occasion the PUCO has sought payment from the Union. As a generalization, the agency has not sought payment. (Union Ex. 6). No reason exists why the PUCO should be treated differently than any other State agency the Union asserts.

The Union makes the same argument with respect to RSC. Further, while PUCO can point to a provision of the Ohio Administrative Code in support of its position in this proceeding, RSC cannot. It is relying on a memo initially issued in 1992 (Jt. Ex. 4) which referenced the material promulgated by the Office of Collective Bargaining in that year. (Jt. Ex. 6A). As set forth above, that memo was mooted by the subsequent agreement of the parties. Nothing exists that would exempt RSC from the provisions of the Agreement with respect to provision of documents necessary for processing of grievances the Union insists.

POSITION OF THE EMPLOYER: The State points out that PUCO is governed by Section 4903.23 "Fees" of the Ohio Administrative Code. It provides that:

> The Public Utilities Commission and Power Siting Board shall charge and collect, for furnishing any copy of any paper, record, testimony or writing made, taken, or filed under Chapters 4901, 4903, 4906, 4907, 4909, 4921 and 4923 of the Revised Code...."

Section 4903.23 of the Administrative Code permits the PUCO to charge for documents it asserts.

The PUCO disputes the account of the Union concerning the history of provision of documents. In its view, it has always charged the Union for documents in the same fashion it charges all others. In spite of this, it has collected a "minute" amount from the Union since 1992: $25.00 at the maximum. Nonetheless, it retains the authority to charge and has done so it asserts.

The RSC points to its memo of 1992 as amplified in 1996. (Jt. Ex. 4). As it has been collecting it should be permitted to continue to do so it asserts.

DISCUSSION: The Administrative Code is specific to Chapters 4901, 4903, 4905, 4906, 4907, 4909, 4921 and 4923 of the Revised Code. It does not mention the Agreement. No cogent reason was advanced by the State why the PUCO should be treated differently than any other State agency with respect to provision of documents to the Union. Further, as a generalization Section 4117.10(A) of the Revised Code deals with laws which supercede a collective bargaining agreement. It does not indicate that any requirement for fee for document production levied by the PUCO would supercede the Agreement. The record, as testified to by witnesses called by the Employer and the Union indicates that the authority

claimed by the Employer has been honored in the breach. In fact, it has not routinely collected from the Union for documents. The PUCO should be subject to the same requirements for document production as other State agencies as outlined above.

The same is true of the RSC. Its reliance upon Jt. Ex. 4 is misplaced. Those internal memos have been supplanted by the Agreement of the parties and the history of behavior on this issue by other State agencies. The RSC must be subject to the same requirements for document production as all other State agencies.

AWARD: The provisions of Section 25.08 of the Collective Bargaining Agreement apply at the first step of the grievance procedure.

The Employer is expected to provide copies of "documents books, papers..." (Section 25.08) without charge to the Union in the normal course of events. In situations requiring production of a voluminous amount of material, defined as requiring more than 90 minutes to produce or copy, the Employer may charge at the rate of .10 per page for copy service.

Both the PUCO and the RSC are subject to the provisions of the Agreement at Section 25.08 and this award without alteration.

Signed and dated this 17th day of February, 1999 at Solon, OH.

Harry Graham
Arbitrator