#1784

OPINION AND AWARD

In the matter of Arbitration

Between

SEIU/District 1199
The Health Care and Social Services Union, AFL-CIO (1199)

And

The State of Ohio, Office of Collective Bargaining and the Department of Mental Retardation and Developmental Disabilities (MRDD)

Regarding

Grievance # 24-02-(9-24-03)-2149-02-12

APPEARANCES:

FOR THE STATE:

Krista Weida, Advocate
Mike Duco, Second Chair
Kristin Rankin, Intern OCB
Michael Denny, OPERS (witness)
Jon Weiser, ODNR (Witness)
Brenda Gerhardstein, Agency Rep.
Ellen Leach, OPERS
Michael Snow, Deputy Director ODMR

FOR THE UNION:

Mary Ann Hupp, Advocate & Organizer
Lee Alvis, Organizer
Madelyn Rodriguez, Chief Steward
Tom Weigard, Grievant

An arbitration hearing was conducted August 4, 2004 at the Offices of SEIU/District 1199, Columbus, Ohio. The parties provided the arbitrator with a list of stipulated documents.

This is a class action grievance affecting the employees of the Apple Creek and Springview Developmental Centers.

The state raised an objection regarding the substantive arbitrability of the grievance arguing that the subject matter is outside the four corners of the collective bargaining agreement, and asking the arbitrator to issue a bench ruling declaring the matter not to be arbitrable. 1199 argued that since the agreement is silent on the subject, then applicable state statute governs the matter and since such are mentioned in the agreement, the arbitrator should be able to rule on the application of that statute.

The arbitrator declined to issue a bench ruling and indicated that the issue of arbitrability would be ruled upon as a part of the written award. The matter proceeded with the parties first arguing the arbitrability issue, and then presenting their respective cases on the merits.

Beyond the threshold issue of arbitrability, the parties agreed to the following issue: "In the matter of the Early Retirement Incentive Plan for Springview and Apple Creek Developmental Centers, did the State violate the collective bargaining agreement, if so what shall be remedy be?"

The advocates for both parties presented their respective positions clearly, and convincingly.

Background:

The State of Ohio has been subject to major budgetary challenges for some time. In an effort to balance the state budget, Governor Taft announced his intent to close two MR/DD facilities and one Department of Rehabilitation and Corrections Institution in the January 2003 State of the State message.

The decision was made by MR/DD to close Springview and Apple Creek institutions in 2005 and 2006 respectively.

The disagreement relates to the application of the statutory requirements for *Early Retirement Incentive Plans.*

The State's Position on the substantative arbitrability issue:

The collective bargaining agreement is silent on the question of early retirement incentive plans. In addition the state argues that the Collective Bargaining Act (ORC 4117.10) specifically prohibits negotiation of provisions regarding retirement. The state calls the arbitrator's attention to section 7.07 E of the Collective Bargaining Agreement where it states: *"Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration."*

The state cites an arbitration decision issued by Arbitrator Robert Brookins in 2000 dealing with substantive arbitrability. It is the view of the state that this decision is controlling in this matter.

Union Position on Substantive Arbitrability:

The Union argues that Article 1 of the Collective Bargaining Agreement incorporates the Ohio Revised Code requirement for an *Early Retirement Incentive Program, (ERIP)* when it states: "*Upon ratification, the provisions of this*

Agreement shall automatically modify or supersede: (1) conflicting rules, regulations and interpretive letters of the Department of Administrative Services pertaining to wages, hours and conditions of employment; and (2) conflicting rules, regulations, practices, policies and agreements of or within departments/agencies pertaining to terms and conditions of employment; and (3) conflicting sections of the Ohio Revised Code except those incorporated in Chapter 4117 or referred to therein."

The Union also believes an additional section of Article 1 buttresses their argument where it states: *"Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement, will be determined by the Ohio Revised Code."*

Discussion of the Merits of the case:

Each party presented their respective views of the merits of the case regarding the requirement to offer an early retirement incentive plan and the proper timing for offering such a plan.

A discussion of these arguments will be postponed until a ruling has been made on the threshold issue of arbitratility.

Discussion of the Threshold Issue:

Sub-issues:

"Is the Brookins decision 'controlling?"

"Does this arbitrator have authority to decide the threshold issue?"

"Is the grievance arbitrable?"

One must assume when the state argues that the Brookins case is "controlling" that they are advancing a theory of "*res judicata" or "collateral estoppel."*

Elkouri and Elkouri in How Arbitration Works contains a helpful discussion of the role of *res judicata, stare decisis, and collateral estoppel.* It states:

> "Where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration but it may be controlled by the prior award. The destiny of a party's thus may be governed by a prior award that either precludes the claim under *res judicata* concepts or controls the decision on the claim by stare decisis concepts. In some instances arbitrators likewise have made the prior award the governing factor by application of a third judicial concept, *collateral estoppel,* which stands somewhere between the concepts of res judicata and *stare decisis (collateral estoppel* also overlaps somewhat with *res judicata* and, in a sense, with the authoritative precedent area of *stare decisis*). However, regardless of whether the arbitrator speaks in terms of *res judicata, collateral estoppel, or stare decisis*, ordinarily the prior award by some procedure will have been the governing factor in the disposition of the present claim." [1]

Arbitrator Samuel J. Nicholas Jr. summarizes the feelings of many arbitrators when he writes:

> "It is often written that an arbitrator is not bound by the prior decision of another arbitrator, either by following precedent (under the legal doctrine of *stare decisis*) or in ruling on the same issue between the same parties (under the doctrine of *res judicata*). It is written just about as often, however, that arbitrators strive to encourage stability in the relationship between the parties and consistency and finality in the adjustment of their disputes by accepting and adopting an earlier decision, particularly in *res judicata* circumstances, unless the earlier decision was clearly erroneous"[2].

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[1] How Arbitration Works, Elkouri & Elkouri, Voltz, Martin M., Goggin, Edward P., Fifth Edition, Bureau of National Affairs, Inc. Washington D.C. at page 609.

[2] In re DEFENSE DEPOT MEMPHIS (Tenn.) and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2501, 98 LA 1024, March 19, 1992.

This arbitrator agrees with arbitrator Nicholas and the majority of those writing, that previous arbitration decisions which meet the tests of *res judicata,* must be given great deference unless a previous decision is clearly erroneous.

Let us turn to the question of whether the instant case fits the tests of *res judicata.*

Arbitrator Thomas Hewitt, in the York Casket Company case,[3] listed four tests to determine if *res judicata* is a consideration. The four tests are:

1. Same issue
2. Same set of facts
3. Same contract language
4. Same parties.

While both matters arguable relate to subjects not specifically named in the Collective Bargaining Agreement, the instant case does not meet all four tests.

While it is the opinion of this Arbitrator that *res judicata* does not apply, the decision by Arbitrator Brookins and his reasoning is helpful and instructive.

"Does this arbitrator have authority to decide the threshold issue?"

The question of who decides whether a matter is arbitrable has been debated since the 1960's and the issuance of the cases in the Steelworkers *Trilogy.*

In the 2000 Health Services case Arbitrator Brookins speaks eloquently to this question when he cites the Enterprise Wheel case: "*[T]he meaning of the arbitration clause itself, is for the judge unless the parties clearly state to*

contrary." [4] Arbitrator Brookings goes on to state: "This pronouncement is the touchstone for distinguishing arbitral from judicial jurisdiction regarding procedural issues in grievance arbitration. Absent specific and clear consent from the parties, grievance arbitrators must steer clear of issues of substantive arbitrability." [5]

The parties in this matter have granted me authority to decide the "substantive arbitrability" question by proceeding to present their cases on both the threshold issue and the merits of their respective positions.

The union argues throughout their brief that the arbitrator has the authority to decide the entire issue.

Management states on page two of their post hearing brief "*...the Employer respectfully requests that you deny the grievance based on a lack of substantive arbitrability."*

Based upon these facts I conclude that the parties have asked me to decide the threshold issue and thus, I do have the authority to make that decision.

"Is the grievance arbitrable?"

The position of the parties is clear. The Union has a strong belief that the revised code language governing Early Retirement Incentive Programs is not

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[3] In re YORK CASKET COMPANY (Lynn, Ind.) and the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 90 AND LOCAL LODGE 2532, 116 LA 421, FMCS case No. 00/13135, July 17, 2001, Arbitrator Thomas Hewitt.
[4] Steelworkers v. Enterprise Wheel & Car Corp., 80 S, Ct. 1358 (1960)
[5] Opinion and Award in the matter of Arbitration between the Ohio Department of Health Services & SEIU/ District 1199, November 10, 2000, Robert Brookins, J.D., Ph.D.

being followed and they are attempting to use their right to binding arbitration to resolve the issue.

The State believes since the collective bargaining agreement is silent on the matter of ERIP's then there can be no arbitration. Further the state does not believe they could have negotiated on the subject of ERIP's due to the apparent prohibition in ORC 4117.10.

Arbitrator Calvin Sharpe succinctly states the basic proposition of determining if a grievance is arbitrable:

"A grievance lacks substantive arbitrability, if the parties have not agreed to arbitrate it. Thus, a claim of non-arbitrability such as the Employer's requires an examination of the arbitration clause. Specifically, how do the parties define "grievances" that are subject to arbitration?" [6]

The grievance procedure in this matter is found in Article 7 of the Collective Bargaining Agreement. The definition of a grievance is found in section 7.02 "*Grievance as used in this Agreement refers to an alleged article(s) or section(s) of the Agreement.*"

The Union cites Article 1 as the specific reference to allow them to argue the misapplication of the appropriate Ohio Revised Code provision. The relevant sections of Article 1 state: : "*Upon ratification, the provisions of this Agreement shall automatically modify or supersede: (1) conflicting rules, regulations and interpretive letters of the Department of Administrative Services pertaining to wages, hours and conditions of employment; and (2) conflicting rules,*

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[6] In re LORAIN CO. [Ohio] SHERIFF'S OFFICE and LORAIN COUNTY DEPUTIES/SHERIFF'S ASSOCIATION 99 LA 91, July 14, 1992.

regulations, practices, policies and agreements of or within departments/agencies pertaining to terms and conditions of employment; and (3) conflicting sections of the Ohio Revised Code except those incorporated in Chapter 4117 or referred to therein."

Later on in Article 1 we find this language: *"Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement, will be determined by the Ohio Revised Code."*

The first provision from Article 1 relates to the Collective Bargaining Agreement modifying or superseding any provisions of laws, rules, regulations, etc. At hearing all parties acknowledged that there is no mention of Early Retirement Incentive Programs in the Collective Bargaining Agreement. If the Agreement does not mention ERIP's then there can be no question of superseding or modifying any such program.

The second cited section of Article 1 refers to a continuation of "*fringe benefits and other rights...*" The record provides no guidance on whether an Early Retirement Incentive Program is a "fringe benefit or other right." Even if such a definition could be established, no evidence was offered that the ERIP established in statute has been altered or repealed.

A different question would be presented if the State had attempted to repeal the ERIP statute. That appears not to be the case in the instant grievance.

The State's argument that they could not have bargained about an Early Retirement Incentive Plan is not persuasive. The language of ORC 4117.10 states:

"Laws pertaining to civil rights, affirmative action, unemployment compensation, workers' compensation, ***the retirement of public employees,*** *(emphasis added) residency requirements, the minimum educational requirements contained in the Revised Code pertaining to public education including the requirement of a certificate by the fiscal officer of a school district pursuant to section 5705.41 of the Revised Code, and the minimum standards promulgated by the state board of education pursuant to division (d) of section 3301.07 of the Revised Code prevail over conflicting provisions of agreements between employee organizations and public employers.*

This language would seem to indicate that if the state had bargained a provision regarding an *Early Retirement Incentive Plan*, then the statutory language would prevail.

Since the Collective Bargaining agreement does not contain any provision regarding an ERIP then the question at hand is whether the Collective Bargaining Agreement provides a vehicle for enforcing what the union believes to be the proper application of the existing statute.

In the Fairweather text, Practice and Procedure in Labor Arbitration, one commentator remarks: *"the prevailing view among arbitrators appears to be that a grievance claim will be considered within their jurisdiction if based upon an alleged violation of the agreement and involving an issue not completely foreign to the traditional scope of labor agreements and arbitration..."* [7]

Arbitrator Jerry Fulmer applied this concept in a similar Ohio public sector case. The Benjamin Logan Board of Education and the Education Association had a collective bargaining agreement which listed two types of grievances: A Contract grievance was one that alleged a violation of the agreement and could

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[7] Fairweather, *Practice and Procedure in Labor Arbitration*(2nd Ed., BNA, 1983) p. 131

be arbitrated under that agreement. The second type was referred to as a "policy grievance." These complaints were about Board policies and procedures and could not be arbitrated under the contract.

Arbitrator Fulmer decided the issue of substantive arbitrability in the following manner: "*It is the allegations of the grievance itself which govern. The grievance cites three* ***specific (emphasis added)*** *articles of the agreement and 'other related articles.' No particular Board policies or administrative rules are cited."* [8]

In the case at issue there are no specific articles cited. Instead the Union attempts to use the "protection" language of Article 1 of the collective bargaining agreement to gain access to the arbitration provision of the agreement in order to have a vehicle to enforce the language of the statute.

This arbitrator makes no judgment about the proper interpretation of Ohio Revised Code 145.297 because the collective bargaining agreement simply does not provide a method for review or enforcement of such provisions.

DECISION AND AWARD:

After a full review and consideration of all documents and arguments presented, as well as the testimony of witnesses, and the post hearing briefs of the parties,

I FIND THE GRIEVANCE IS NOT ARBITRABLE.

Respectfully submitted this 8th day of September, 2004 at London, Ohio.

N. Eugene Brundige
N. Eugene Brundige,
Arbitrator

This opinion and award is being sent to Mary Ann Hupp, Advocate and Organizer for SEIU/District 1199 and Krista Weida, Advocate for the Office of Collective Bargaining, State of Ohio this 8th day of September, 2004 by E-mail and by regular U.S. Mail.

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[8] In re BENJAMIN LOGAN BOARD OF EDUCATION (Logan County, Ohio) and BENJAMIN LOGAN EDUCATION ASSOCIATION, 105 LA 1168, December 11, 1995. AAA Case No. 52-390-00113-95.