#1194

IN THE MATTER OF ARBITRATION

BETWEEN

SEIU/DISTRICT 1199

AND

OHIO DEPARTMENT OF MENTAL HEALTH

Before: Robert G. Stein, Arbitrator

Grievant(s): Gayle Stinson, et al
Case # 23-17-20030825-0016-02-11
Arbitrability

Advocate(s) for the UNION:

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INTRODUCTION

This matter came on for a hearing before the Arbitrator pursuant to the terms of the Collective Bargaining Agreement (herein "Agreement") between the State of Ohio/Department of Mental Health (herein "Department" or "Employer") and the SEIU District 1199 (hereinafter "Association", "Scope" or "Union"). The parties initially disagreed regarding the substantive arbitrability of the grievance, and the matter was bifurcated in order to allow a preliminary decision prior to addressing the merits. This decision by the Arbitrator is limited strictly to the matter of arbitrability and is not intended to deal with the merits of the actual grievance.

The parties mutually agreed to forego a hearing and to submit briefs to the Arbitrator. The hearing was closed October 15, 2004 after receipt of both briefs. A decision in this matter is due forty-five (45) days following the day the hearing was closed.

Both parties agreed to the arbitration of this matter pursuant to Article 7.

ISSUE

Is the grievance arbitrable?

RELEVANT CONTRACT LANGUAGE
(As cited by the parties, listed for reference see Agreement for language)

BACKGROUND

The issue in this case concerns the Employer's revision of its Smoke Free-Environment Policy, 05.07 (hereinafter "SFEP"). The revised policy is a complete ban on smoking on the premises of all of the Department's campuses. The non-smoking policy that existed prior to the change permitted smoking in certain designated areas such as personal automobiles. After a period of study and discussion the proposed policy was announced by the Department on August 7, 2003, and implemented on or about September 2, 2003.

Employees at the Toledo campus of the Employer filed the instant grievance. The Employer contends the Union, at any of the Department's campuses, including Toledo, never requested any meetings and never invoked its right to engage in impact bargaining regarding the implementation of SFEP. At Step 3 and in mediation, the Employer notified it Union it would present the threshold argument that the grievance was not substantively arbitrable.

SUMMARY OF EMPLOYER'S POSITION

The Employer flatly rejects the Union's assertion that the grievance is arbitrable. It contends that the Agreement *"per se does not address the resolution of concerns or conflicts between the parties over the effects of these policies on the wages, hours, and terms and conditions of employment..."* The Employer also argues that the Union sat on its rights too long and failed to request impact bargaining over the implementation of SFEP in a timely manner. The Employer's arguments are contained in its brief as follows:

Article 5 of the Contract (Management Rights) imbues Management with "...all the inherent rights and authority to manage and operate its facilities and programs..." ".....Except to the extent modified by this Agreement...". Among these inherent rights is the right to establish, promulgate, and enforce policies and procedures provided the same are reasonably related to the operations of the workplace, do not discriminate against employe(s) in the exercise of their contractual rights, do not discriminate against any employee or group of employees on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, union affiliation and activity, handicap or sexual orientation. Pursuant to the Ohio Administrative Code, Section 4117.08 (Note 4)(jtx. C) whenever Management exercises this right pursuant to Contract Article 5 thereby effectuating a policy or procedure the Union has a right to request that Management bargain the effects of the proposed change on any *"reasonably foreseeable wages, hours or terms and conditions of employment.... .....**if** the union makes a timely request to bargain."* (bold and underlined for emphasis). With respect to the concept of timeliness note 4 further states:

> *"Where an employer announces its intent to implement a unilateral policy change, the reasonableness of the time it leaves the union to request bargaining will be determined on a case-by-case basis; if the union states it does not wish to bargain or does not request bargaining in a reasonable time, the union has waived or slept too long on its rights, respectively."*

The OAC clearly puts the onus on the union to be the moving party if impact (or effects) bargaining over policy implementation is to be requested. Any union request to impact bargain must be made within a reasonable time depending on the circumstances of any given case. In the instant case the Arbitrator should note that the Union has not asked Management to impact bargain over the implementation of SFEP to this date (10/08/04). The OAC anticipates the possibility of impact bargaining, post policy implementation, as follows (4117.08 – Note 4):

> *".....terms and conditions of employment affected by these decisions must be bargained as soon as possible and, whenever reasonably practical, before the announced implementation date...."*

Ergo any Union assertion that improper or untimely notice by Management of the implementation of SFEP prevented it from making a timely request to impact bargain its effects becomes absurd. The two incontrovertible facts that support this argument are the filing and processing of the instant grievance completely through the grievance procedure, and the plain fact that the policy was implemented effective Sept. 2, 2003. It would be ludicrous to argue that the Union never received notice of the implementation of the Smoke-Free Environment Policy in the face of these realities. It follows, then, that the union has

abrogated its right to request impact bargaining, albeit post-policy implementation, in that it has "*slept too long on its rights...*" having not yet requested to impact bargain – pre or post policy implementation.

There is ample evidence that the Union knew or should have known that Management intended to implement policy 05.07 effective Sept. 2, 2003 well in advance of that date.

Joint Ex. D:

This document is an email dated 10/22/02, over ten months prior to the effective date of SFEP (smoke-free environment policy). Though this email was not addressed to any Union officials or members, it is offered to establish the fact that Management was making preparations to educate staff as well as patients on smoking cessation programs and to form a crew of smoking cessation facilitators well before Sept 1, 2003. Doug Smith, the author of this email, is the Chief Medical Officer for corporate, and he is identified as the "owner" on the SFEP document.

Joint Ex. G:

This exhibit is the minutes of the Wellness Committee meeting that occurred on 3/7/03. This document is evidence that the decision to make SFEP effective Sept. 1, 2003 was made and publicized no later than 3/7/03...six months in advance. It also establishes that two 1199 bargaining unit members at Toledo were named as facilitators for SFEP: Kim Watson and Terri Johnson are both RNs, and Ms. Johnson is also an 1199 union delegate. An "Action" memo shows that the Wellness Committee was instructed to "continue to publicize the nonsmoking plan for the hospital."

Joint Ex. E:

This email from Patricia Murphy (Doug Smith's secretary) to Douglas Smith (subj: no smoking on grounds), dated 8/20/03, indicates that "people" have been reading the policy. There is no doubt that the policy referred to is SFEP, and the fact that "people" have been reading the policy and formulating questions about it can only lead to a conclusion that the SFEP had been promulgated at some point prior to 8/20/03.

SUMMARY:

The Contract (Article 5) provides Management the right and responsibility to develop and implement policies to the extent that these policies are consistent with other contractual limitations, are not unlawful, and do not pose a grave danger to employees life and/or health. The Contract per se does not address the resolution of concerns or conflicts between the parties over the effects of these policies on the wages, hours, and terms and conditions of employment. In cases where the Contract is silent regarding a matter the parties are guided by the relevant sections of the Ohio Revised Code and/or the Ohio Administrative Code (collectively – the code). The instant case is one of those cases. Nowhere within the four corners of the Contract do the parties mention terms and conditions of employment, how they might be affected by policy implementation or change, or what recourse is available to a grievant or class of grievants who seek relief from the effects of the change(s). Therefore the parties must turn to the code.

In summary, the evidence presented from the code proves that the union must be the moving party with respect to bargaining over policy changes if the union believes that the changes affect the terms and conditions of employment for its members. A Union request for impact bargaining can be made within a reasonable time after becoming aware of the particulars of policy changes, and the request can be made before or after the effective date of the policy changes. In fact the Union was, or should have been, well aware that Management intended to affect SFEP on Sept. 2, 2003 at least six months, and most likely a year in advance of that date. Two 1199 members, including an 1199 Delegate, were members of the team of facilitator/coordinators charged with publicizing SFEP. Joint Ex. 3 proves that SFEP had been promulgated prior to 8/20/03 because "people" had already read it and were questioning various aspects of it. Further, on 8/25/03 the Union filed and processed a grievance on the policy changes and was in full awareness that the policy was to go into effect on Sept. 1, 2003. Yet in the light of irrefutable evidence that the union was put

on notice of the SFEP Management has never received any request to bargain pursuant to OAC 4117.08(Note 4), let alone a timely request. The Union has "slept too long on its rights" and has no other recourse through the grievance procedure at this point in time.

Management respectfully asks the Arbitrator to deny this grievance in its entirety on the grounds of substantive arbitrability based on the evidence and arguments offered in this brief.

REMEDY

Should the Arbitrator determine that the Union still retains rights to request impact bargaining pursuant to OAC 4117.08(Note 4) the State respectfully requests that the scope of any remedy be limited to an order that the parties engage in bargaining over the impact of SFEP. Until such bargaining yields a negotiated agreement or reaches impasse the matter is not ripe fruit for arbitral review through the grievance procedure. Further, in the event of such a decision the State would respectfully ask that the Arbitrator not order the suspension of SFEP during negotiations as the State has argued that the code provides for impact bargaining after implementation of a policy where such bargaining before implementation is not *"reasonably practical". (OAC Section 4117.08 (Note 4).*

SUMMARY OF UNION'S POSITION

The union contends the grievance is arbitrable due to the fact that a violation of the new SFEP could result in discipline that is specifically addressed in the Agreement. The Union also asserts that the SFEP is related to conditions of employment for the class of members affected and should not have been implemented without first being bargained. The Union's arguments are contained in its closing statement and are as follows:

This grievance does not lack substantive arbitability. The policy is arbitrary and capricious and the limitations on tobacco use are not consistent across the ODMH agency.

There is clear language included within our CBA addressing the issue of progressive discipline "for just cause"; and for management to add mid-term a matter of discipline and then argue that there are no grounds to grieve the issue related to substantive arbitability is clearly unreasonable. It is clear that this policy is related to conditions of employment for the class of members affected, and as such should not have been implemented without first being bargained with the Union, and entered into the CBA.

Appendix D of SEIU/District 1199s' current CBA speaks to "Drug Free Workplace Policy" and was formally negotiated with clear language entered into the contract to address that policy. Failure to bargain with the Union over tobacco usage clearly demonstrates that management is misusing its' management rights by restricting employees individual freedoms.

Drug and alcohol use is a dangerous thing and cannot be tolerated by any agency that provides public service, yet this urgent need was appropriately addressed via formal negotiations. What was the real urgency with tobacco use that it required mid-term implementation of policy that includes discipline for violations thereof?

Tobacco is a legal and highly taxed substance. The State of Ohio used funds from the tobacco law suit settlements to balance its' budget in 2003. Upon the backs of smokers, Ohio moved to serve its' budgetary needs; now those same smokers cannot enjoy one of their personal freedoms by having a cigarette, a cigar or a rub of snuff in their own personal vehicle on their own personal time if it is on State property (NCBHO parking lot).

NCBHO Policy 05.07 clearly identifies the category of offense if an employee violates the Policy. Under Education and Notification, Section 3 the Policy states; "Work associates who violate this smoke free environment policy will be subject to progressive corrective action for Neglect of Duty." ODMH offenses for violation of Neglect of Duty can result in discipline ranging from a verbal reprimand to a removal action.

The discipline for this violation is described in Policy 05.07 as "progressive". Progressive discipline is included in the SEIU/District 1199 Contract in article 8. This does give Contract language to the offense, and clearly links the current violation of policy issue to current CBA language.

There are few things on this planet that are more addictive than nicotine, the key agent in tobacco that causes addiction. It is often the position of non-smokers that people who smoke are simply uncooperative and self-centered when they will not comply with society's current trend to just throw down the tobacco product that they use and further act as if the "habit" has been forgotten forever. How wonderful it would be if it were really this easy.

Policy 05.07 does state under "Education and Notification" that, "Those patients and work associates who seek specific treatment for smoking cessation will be supported in this effort." There has not to this date been any concrete plan moved into place to help associates who are trying to make it through an 8.5 hours shift without using tobacco in the form of nicotine patches, gum, or lozenges. These items are quite costly and the expense should not be borne by the employee. The need by some employees for nicotine aides arises as a result of the employer's restrictions and limitation on tobacco use. This restriction of an otherwise legal freedom is clearly a term and condition of employment and as such should have been negotiated with the Union prior to implementation of policy.

I ask that you find this grievance to have no procedural concerns that would prohibit the members involved from having the merit of their grievance presented.

Based upon the above, the Union urges the Arbitrator to sustain the Grievance.

DISCUSSION

The following discussion and award is strictly limited to a determination of arbitrability of the grievance in accordance with the mutual request of the parties.

The presumption of arbitrability is so strong that the U.S. Supreme Court has resolved that "doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Navigation Co.* 363 U.S. 574, 80 S.Ct. 1347 (1960). An arbitrator interprets a specific contract and its provisions within the framework of the collective bargaining philosophy. *School Board of Broward County (Fla.) and Broward Teachers' Union*, 82 LA 1096 (Raffaele, 1984). It is widely accepted by arbitrators that the disputed portions of language should be read in light of the entire agreement. Therefore, it is not unreasonable to first evaluate a disputed portion of language within the context of the general article in which it appears and is related, and if necessary within the context of other relevant provisions of the Collective Bargaining Agreement if applicable (U.S. W. Communications 114 LA 752, 753-54 (Monat, 2000).

The current Agreement is effective from 2003 through 2006. The grievance (Joint Ex. H) generally references all provisions of the Agreement with the introductory words, *"Included but not limited to..."* It also cites in particular Articles 5 and 8 of the Agreement. Article 5 provides a detailed list of management rights and Article 8 addresses the

issue of discipline. As with many provisions of a Collective Bargaining Agreement, these provisions are closely linked. If employees do not comply with managerial directives, they are subject to discipline under a just cause standard.

The Employer has broad discretion to create polices and procedures to management its facilities and programs. However, it is widely accepted among arbitrators that policies, procedures, and rules promulgated by employers have an implied limitation of reasonableness (Schien Body and Equipment Co., 69 LA 930 (Roberts 1977 and Hill & Sinicropi, Management Rights, A Legal and Arbitral Analysis, 71 (BNA Books, 1986)). Moreover, the existence of a just cause standard in Article 8 of the Agreement subjects policies, rules, and procedures to arbitral review. Whether policies are reasonable will be evaluated in connection with the issuance of discipline under a just cause standard as provided for in the grievance procedure (Article 7).

The evidence demonstrates the Union was aware of the Employer's desire to institute or re-institute a more comprehensive smoking ban at all of its facilities for several months. However, months in advance of any policy it is not reasonable to presume any employer will take a particular course of action until such time as it is taken. Policies often get delayed, modified, or even scraped immediately prior to implementation. Moreover, after implementation some policies prove to have unintended

consequences or lead to unforeseen problems and have to be altered or rescinded.

Based upon the above, I do not agree with the Employer's that the Agreement is silent in this matter. And, it is not uncommon for arbitrators to base their authority to rule on such matters on general contract language such as the management rights' clause or provisions that call for a just cause review of discipline. Arbitral case law is replete with examples of arbitral review of new or revised policies regarding smoking in the workplace. However, it is important for the parties to attempt to resolve any disputes short of an arbitrator's intervention. Therefore, prior to any arbitral review of changed policy on smoking, the parties need to be engaged in bargaining regarding SFEP.

AWARD

Based on a careful consideration of all of the evidence and arguments, it is the decision of the Arbitrator in the instant case that the Association's grievance concerned with the new smoke free policy, SFEP, is arbitrable and that an order to arbitrate is justified. The matter is within the Arbitrator's jurisdiction and may be properly addressed on the merits.

However, the parties need to attempt to resolve their differences prior to any intervention by a neutral third party. It is ordered that during the period of sixty calendar-days from the date of this award, the parties engage in mid-term bargaining over the policy. If mid-term bargaining does not produce a satisfactory resolution by January 31, 2005, a hearing on the merits of this case shall be scheduled in the month of February 2005. During this time the SFEP shall remain in effect.

Respectfully submitted to the parties this 29th day of November, 2004.

Robert G. Stein, Arbitrator