

#1801

IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/DRC

Before: Robert G. Stein

**Case # 27-16-20031020-3778-01-03
Temporary CO/Contractors Powerhouse**

Advocate(s) for the UNION:

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Advocate(s) for the EMPLOYER:

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INTRODUCTION

A hearing on the above referenced matter was held on November 10, 2004 in Marion, Ohio. The Employer raised the issue that the grievance is procedurally defective. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. In lieu of making oral closings, the parties submitted written closings.

ISSUE

According to the original grievance and what was processed prior to arbitration, the issue is as follows:

Did management violate the Collective Bargaining Agreement when it did not create a temporary Correctional Officer position to escort, protect and guide outside contractors at the Powerhouse? If yes, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

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

BACKGROUND

The grievance in this matter concerns the use of outside contractors by the Ohio Department of Corrections (hereinafter "Employer") from December 28, 2003 until March 2, 2004 at its Marion Correctional Institution ("MCI") location. The contractors' work was performed at the Powerhouse, which is located outside of the perimeter fence of MCI. The Ohio Civil Service Association (herein "Union") asserts that the Employer's failure to create a temporary Correctional Officer's position to accompany the outside contractors violates Articles 2.02, 13.07, and the MCI Pick-A-Post Agreement. This was the Union's position throughout the grievance process; however, during the arbitration hearing the Union withdrew its contention that the Employer violated Article 13.07. At the hearing the Union also added the claim that the Employer violated Article 1.05.

The Employer concedes that it has had a past practice at MCI of using Correctional Officers to accompany contractors inside the institution's perimeter fence, but argues that there has been no such practice that applies to contractors strictly working outside of the

perimeter fence. The parties also introduced the following stipulation into evidence:

"Management stipulates that it is a practice to post temp bids for contractors when the job duties are inside the perimeter. Once a temporary officer is assigned to a work crew the officer stays with the crew inside & outside the perimeter."

The Employer also objects to the introduction of a new alleged violation of Article 1.05. The Union disagrees with the Employer's position and states that MCI should always create a temporary posting for Corrections Officers for all contracting situations regardless of whether the work is being performed inside or outside of the perimeter of MCI. It filed the instant grievance based upon this position.

SUMMARY OF UNION'S POSITION

The Union rejects the Employer's argument that the grievance is not arbitrable based upon procedural defects in drafting. It contends it did not know all the facts impacting this matter until the grievance process was well underway.

The Union argues the parties have had a consistent past practice of posting temporary Pick-A-Post ("PAP") positions for outside contractors. In the instant matter, the Employer assigned the duties of tool control at the Power House to an exempt employee. The Union asserts this improper assignment demonstrates there is a need for such work to be performed

by bargaining unit employees under Article 1.05. As will be stated below, the Employer rejects any reference to Article 1.05 on the grounds it is a new issue that was never part of the grievance process prior to arbitration. The Union also claims that the location of the work outside of the perimeter fence does not justify the Employer's actions in this matter.

The Union also points out that the MCI PAP Agreement allows for the creation of temporary posts to be bid on by Corrections Officers. The work of escort and tool control is the work of Correction Officers when outside contractors are on MCI grounds, either inside or outside the perimeter fence, argues the Union.

Based upon the above, the Union urges the Arbitrator to grant the grievance.

SUMMARY OF EMPLOYER'S POSITION

The Employer forwards the threshold argument that the grievance is procedurally deficient. The Employer asserts that the Union failed to identify the members of this class action grievance by the 3rd step of the grievance procedure as called for in Article 25.02. The Employer further asserts the grievance never identified the dates of the alleged violations, as also required by Article 25. Based upon these defects, the Employer asserts the grievance should be denied. The Employer also objects to the

introduction at the hearing of a new allegation of a violation of Article 1.05.

On the merits, the Employer argues it was within its rights to decide not to create a temporary posting for the work done by outside contractors from December 28, 2003 to March 2, 2004. The Employer rejects the notion that it discriminated against any employee in the exercise of its rights. Moreover, the Employer asserts that the instant matter is not about a violation of the existing PAP Agreement, but is related to the creation of a new temporary post, which it contends is an exclusive right of management.

Based upon the above, it urges the Arbitrator to deny the grievance.

DISCUSSION

Arbitrability

I find the grievance was flawed as the Employer asserts. The facts demonstrate that in this group grievance and the Union did not identify employees allegedly affected by the 3rd step of the grievance procedure. Furthermore, the grievance was devoid of dates of the alleged violation, another important piece of information that would help address this concern. Moreover, the record demonstrates that nowhere in the

grievance or in the grievance processing record was there an allegation of a violation of Article 1.05.

Raising new issues for the first time in an arbitration hearing is generally frowned upon by arbitrators. Injecting new evidence or raising new issues at a hearing tends to place a party who does so in a bad faith position. The very purpose of a grievance procedure is to provide a mechanism through which the parties may air all aspects of a disagreement at progressively higher levels in their organizational hierarchies so as to enhance the possibility of reaching a mutually acceptable settlement short of arbitration. Thus, withholding information that would contribute to such a settlement frustrates the very purpose of the grievance procedure. *Equal Employment Opportunity Comm'n*, 78 Lab. Arb. 165 (Bennett 1982).

In spite of the procedural errors of omission, I find the parties had a sufficient understanding as to the nature of the Union's complaint as it relates to the Union's assertion that a temporary Correction Officer's position should have been posted during the work of outside contractors at the Power House from December 28, 2003 to March 2, 2004. Although the grievance could have been filed with more attention to detail, it is not sufficiently flawed to cause it to be dismissed. Unlike a failure to timely file or process a grievance under the parties' Collective Bargaining Agreement, the parties on the basis of a "dismissal" do not definitively deal with the issue of poor drafting. In the Agreement, it is well understood that the parties have taken the extra step of agreeing upon a penalty for an untimely filed or processed grievance, and many arbitrators, including the undersigned have enforced this clear provision

contained in Article 25. However, the same cannot be said for a poorly drafted grievance.

Poor drafting of a grievance will likely impact the Union's ability to argue its point in full, and can also place self-created limits upon a remedy. It is only the particular claim(s) specifically detailed in a properly submitted grievance that may progress through the various grievance steps, and it is only the submitted claim(s) that, after impasse at the final grievance step, may be appealed to arbitration. Accordingly, the essence of the principle proscribing the adding of a new issue at the arbitral level is that an arbitrator has no authority to address such an issue in view of the fact that the claim has not been presented and discussed at the preceding grievance levels. In other words, the application of the grievance procedure to the issue(s) set forth in a grievance is a pre-condition to arbitral authority. *City of Grand Rapids (Mich.) and Local 1061, MI Council 25, American Federation of State, County, and Mun. Employees, AFL-CIO*, 88 Lab. Arb. 947 (Roumell 1987).

However, it must be remembered that 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). Accordingly, the grievance will be considered on its merits, as originally identified in the grievance and in the grievance steps that preceded

arbitration. The issue of supervisors doing bargaining work, while potentially significant due to the existence of Article 1.05, will not be addressed due to the fact it was never discussed in the lower steps of the grievance procedure.

Merits

"Unless a decision is arbitrary or capricious, arbitrators rarely interfere with an employer's decision regarding the work duties and placement of an employee." *ITT Automotive and Int'l Ass'n of Machinist and Aerospace Workers, Region 129 of District Lodge 57, Local Lodge 956*, 105 LA 11 (Shanker 1995). Personnel decisions are recognized as one of an employer's inherent managerial rights. Absent an express restriction in a collective bargaining agreement, management does have the authority to make and enforce reasonable rules and policies to ensure the safety of its employees. *Glen-Grey Corp. and United Steelworkers of America, Local 8192*, 80 LA 921 (Gates 1983).

A careful review of MCI policy 310-Sec 36 and its policy on escorting outside contractors supports the Employer's position regarding its right to not post a temporary position to escort an outside contractor whose work never required it to enter the perimeter of MCI. For purposes of clarity, this differs from the parties' stipulation that a practice exists to use temporary Correction Officers for outside contractors who work both in and outside of MCI's perimeter fence (See signed stipulation).

The Employer's policy repeatedly refers to "entering the institution or the inside perimeter fences." MCI's policy on the escorting of outside contractors has the following stated purpose:

"To set forth policy and procedures for safe and secure operations in and around the Institution. To monitor and provide accountability of tools/equipment in use by outside contractors. To aide in the prevention of contraband into the facility."

In the instant matter, an outside contractor worked solely in the Power House, which is outside of the perimeter fence. In addition, testimony of Union witnesses demonstrated that no inmates were assigned to the Power House or even in the area of the Power House during the time in question. These facts greatly diminish the need for a temporary Correction Officer to be assigned during this period in question. Moreover, the facts buttress the Employer's decision that safety and security brought about by the presence of a Corrections Officer was not needed in this particular situation. Inmate contact with the outside contractors was not contemplated and the facts made it very unlikely. While tool control was still necessary, the safety and security dimensions that accompany such matters, one of the main tasks of Correction Officers, were not significant issues.

I also find tool inventory and accountability are found in other job descriptions other than that of a Correction Officer's job description. For example, the job of Stationary Engineer 2, who may be assigned to the Power Plant, carries a tool inventory and monitoring expectation.

A careful review of the PAP Agreement does not support the Union's contention that the Employer had to create a temporary position under the circumstances of the instant grievance. In fact, the PAP Agreement specifically states, "Management reserves the right to establish temporary posts for operational need." It is reasonable to conclude that if the parties permitted the Employer to reserve to itself the right to create a temporary post, they also have reserved the right not to create a temporary post. Of course, it is expected that the Employer will exercise this right within the confines of the Agreement, any binding past practices, and said right will not be arbitrarily implemented.

While one of the most firmly established principles in labor relations is that management has a right to direct its work force, the Union has a reciprocal right or duty to challenge managerial action perceived to have been ill-founded, arbitrary, or capricious. *Minnesota Mining and Mfg. Co. and Local 5-517, Oil, Chem. and Atomic Workers Int'l Union*, 112 Lab. Arb. 1055 (1999). When a grievance involves a challenge to a managerial action, the standard of review is whether the challenged action was arbitrary, capricious, or taken in bad faith. *Kankakee (Ill.) School District No.111 and Service Employees Int'l Union, Local 73*, 117 Lab. Arb. 1209 (2002). The burden of proof, therefore, is on the grievant to demonstrate that the Employer's challenged action(s) demonstrated a violation of the Employer's duty or the grievant's rights under the

Agreement (including any binding past practices or understandings reached by the parties).

The Employer determined it did not need Correction Officers during the period of December 28, 2003 and March 2, 2004 for work done by outside contractors strictly outside of MCI's perimeter/with no inmates assigned to the Power House. I find this decision was consistent with the parties' practices, the PAP Agreement, and the Agreement.

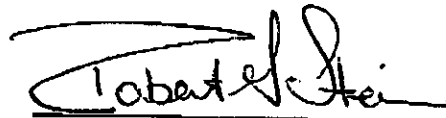
AWARD

The grievance is denied.

I find that the Employer acted in accord with the Agreement, the PAP Agreement, and past practice when it decided not to post a temporary position for Corrections Officer for work performed by outside contractors from December 28, 2003 to March 2, 2004. This ruling is premised upon two specific conditions: the work was completely performed outside of the perimeters of MCI (i.e. the outside contractors never had to enter the perimeter fence), and it was performed during a period when there were no inmates present in the area of said contractors.

This ruling shall not be construed to apply to the propriety of the assignment of tool inventory in this matter, but only to the issue of a need to create a temporary Correction Officer's position under the conditions specified above.

Respectfully submitted to the parties this 19th day of January, 2005.


Robert G. Stein, Arbitrator