VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 27-22-20040225-0892-01-03
and	*	
	*	
OHIO DEPARTMENT OF	*	Randolph R. Foston, Grievant
REHABILITATION	*	Settlement Agreement
AND CORRECTION	*	

APPEARANCES

For the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO:

Lynn Belcher, Staff Representative
Anissia Goodwin, Staff Representative
Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO

For the Ohio Department of Rehabilitation and Correction:

Beth A. Lewis, Asst. Chief, Bureau of Labor Relations
Ohio Department of Rehabilitation and Correction

Joe Trejo, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:20 a.m. on September 28, 2005, at the offices of the Ohio Civil Service Employees Association in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties presented three issues which are set fourth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation and Correction (the "Department") were Teri Decker, Chief of Bureau of Labor Relations; Michael Duco, Manager of Labor Relations and Contract Compliance, Ohio Office of Collective Bargaining; Larry Blake, Labor Relations Officer, Franklin Pre-Release Center; and Andrew Shuman, Labor Relations Specialist, Ohio Office of Collective Bargaining. Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO (the "Union") were Donald M. Sargent, former Staff Representative; John Porter, Associate General Counsel; Herman Whitter, Assistant General Counsel and Director of Dispute Resolution; and the Grievant, C.O. II Randolph R. Foston. Also in attendance was Chapter President Kevin Birchfield. A number of documents were entered into evidence: Joint Exhibits 1-4, Department Exhibits 1-11 and Union Exhibits 1-9. The oral hearing was concluded at 2:25 p.m. on September 28, 2005. Written closing statements were timely filed and exchanged by the Arbitrator on October 31, 2005, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. BACKGROUND

The Grievant in this case is a correction officer employed by the Ohio Department of Correction and Rehabilitation in 1994. On May 27, 2003, he was removed from his position at Franklin Pre-Release Center ("FPRC"). This action was protested by the parties' grievance 27-

08-20030531-0686-01-03. On December 5, five days before the arbitration of that grievance, the parties entered into a settlement agreement, the terms of which in pertinent part are:

> WHEREAS, the (FPRC) denies any liability in connection with the alleged claim;
>
> WHEREAS, all parties hereto wish to reach a full and final settlement of all matters and causes of action arising out of the claim set forth above;
>
> Now therefore, all parties hereto, in consideration of their mutual covenants and agreements to be performed, as hereafter set forth, agree as follows:
>
> 1. The Agency agreed to reinstate and transfer the employee to Pickaway Correctional Institution.
> 2. The Employee will have no break in state seniority.
> 3. The time between the removal and the reinstatement will be coded as administrative leave without pay.
> 4. The Employee will receive no backpay.
>
> OCSEA agrees to waive any and all rights it may currently or subsequently possess to obtain any reparation, restitution or redress for its members as a result of the events which formed the basis of the aforementioned grievance, including the right to have the grievance resolved through arbitration, or through resort to administrative appeal or through the institution of legal action.
>
> OCSEA agrees to withdraw the aforementioned grievance and to waive its right to pursue any and all claims that may arise as a result of the implementation of the terms of the Agreement.
>
> ***
>
> All parties to this Agreement hereby acknowledge and agree that this Agreement is in no way precedent setting. This Agreement shall not be introduced, referred to, or in any other way utilized in any subsequent arbitration, litigation, or administrative hearing except as may be necessary to enforce its provisions and terms.
>
> Employee agrees:
> To waive any and all rights they may currently or subsequently possess to receive any reparation, restitution or redress for the events which formed the basis of the aforementioned grievance, including the right to resort to administrative appeal or through the institution of legal action. Employee specifically agrees to withdraw the following actions which are currently pending: (Joint Ex. 3)

The Grievant was accordingly reinstated to Pickaway Correctional Institutuion on December 26, 2003.

While his grievance was pending, the Grievant filed an unemployment claim. On June 19, 2003, a determination was issued ruling that the removal was not for just cause. This determination was appealed by FPRC (July 9), and affirmed (July 25). FPRC filed its appeal to the redetermination on August 13. A month later jurisdiction was transferred to the Unemployment Compensation Review Commission ("UCRC"). Hearings were conducted on November 20 and December 22. The purpose of the continuance was to take the Grievant's testimony, but he did not appear. However, when the hearing officer inquired as to the status of the Grievant's discharge grievance, the Department submitted the Settlement Agreement. In

January the hearing officer reversed the redetermination of August 13 finding the Grievant "was on a disciplinary layoff for misconduct in connection with his work from May 27, 2003, until January 6, 2004. (Joint Ex. 4) It also put the parties on notice that they had until February 2, 2004, to file a request for review, warning that "if this decision becomes final because no timely request for review is filed an overpayment of benefits already received will exist and an order for repayment will be issued by the Director of the Ohio Department of Job and Family Services" ("ODJFS"). (Joint Ex. 4) This decision was mailed to the Grievant and employer appellant on January 12, 2004. A month later (February 14) ODJFS came after the Grievant for overpayment of benefits in the amount of $9,932.00. The Grievant appealed this determination of benefits on February 19, but the redetermination of overpaid benefits issued on March 9 affirmed the February 19 determination. (Union Ex. 3) The Grievant appealed this redetermination on March 18. (Union Ex. 7) A telephonic hearing on the order for repayment of the overpaid benefits was held on May 4, 2004. During this hearing a discussion ensued as to whether the Grievant had appealed the January 12 determination that he was ineligible for benefits since a final determination of ineligibility is a precondition for determination of amounts overpaid. The discussion concluded with the Grievant's attorney requesting a copy of the January 12 decision and explaining to the Grievant that there were two issues, the matter of eligibility for benefits and the amount of overpayment. On May 14, the Grievant's "Appeal of Director's Redetermination" was faxed to the UCRC. (Union Ex. 4) The letter is undated, but the Grievant testified he had sent it by mail earlier in the year. In this letter, the Grievant disputes that he was on disciplinary lay-off while receiving benefits, asserts that his employer's references to the grievance settlement were improper, claims that the settlement terms did not include back pay, not because of discipline but because he had received unemployment benefits, and asks that the determination "that I received overpayment of unemployment benefits" be overturned. (Union Ex. 4) A telephonic hearing on the Grievant's May 14, 2004, request for review was held on June 18 with decision following on June 23. The UCRC found that the Grievant did not receive the hearing

officer's decision of January 12 and held that his May 14 request for review was therefore timely. (Union Ex. 5) No later evidence from the trail of the Grievant's unemployment case was submitted in the instant arbitration except the Grievant's testimony that he has received additional demands for repayment.

Meanwhile, the instant grievance (27-22-20040225-0892-01-03) had been filed on February 25 alleging the Department was in violation of the Settlement Agreement entered into on December 5 and seeking compensation for "the amount of dollars the 'State of Ohio Unemployment Review Commission' is attempting to retrieve from this employee or the Department of Rehabilitation and Corrections pay the reimbursement directly, the State cease and desist from violating terms of the settlement agreement and make the employee whole." (Joint Ex. 2) This grievance was thereafter processed to arbitration where three stipulated issues were presented:

1. *Is the grievance substantively arbitrable?*
2. *Was the grievance filed in a timely manner?*
3. *Did Ohio Department of Correction and Rehabilitation violate the terms of the Settlement Agreement of Grievance #27-08-20030531-0686-01-03? If so, what should the remedy be?*

III. ARGUMENTS OF THE PARTIES

Argument of the Department

The Department argues in the first place that the grievance is not substantively arbitrable because the contractual definition of "grievance" does not include an alleged violation of a settlement agreement. The grievance as stated on the form references articles that do not apply. Also cited is Ohio Revised Code Chapter 4117 which is relevant but is for the State Employment Relations Board ("SERB"). In fact, it is the Union's normal practice to file unfair labor practice charges when it seeks enforcement of a settlement agreement. A second reason the grievance is not substantively arbitrable is that the Arbitrator has no jurisdiction over the UCRC decisions. In order to grant the remedy requested by the Union (reimbursement of money ODJFS is trying to collect from the Grievant) one must find the UCRC made a faulty decision because of some

action of the Department. The Arbitrator has no such authority as she is limited to disputes involving the Collective Bargaining Agreement. Only the UCRC has the authority to review its decision and it has already done so.

The Department's second argument is that the grievance is not procedurally arbitrable because it was untimely filed. The Grievant was first informed of the hearing officer's decision granting the employer's appeal on or about January 15, 2004, but his grievance was not filed until February 25, 2004, about 42 days after he first learned the Settlement Agreement had been used in the unemployment hearing. The evidence, says the Department, does not substantiate his claim that he only learned of it when he got ODJFS's demand for repayment on or about February 14, 2004. Since he did not attend the second day of hearing when the Department tendered the Settlement Agreement, he had to have learned of its use through the hearing officer's decision. Without this, neither he nor the Union could have been aware of a potential violation. Yet the Grievant now claims he did not get it until after the May 6 telephonic hearing. And yet during that hearing he admitted he had already gotten it. The only time he could have done so was when it was mailed in January. The Grievant's "Appeal of Director's Redetermination" is even better evidence, for in it he refers to the Department's references to the Settlement Agreement in the redetermination hearing, which he could only have known about had he read the January 12 decision. Yet on cross-examination he admitted this was both his appeal of the notice of overpayment of benefits and what he faxed to the UCRC in May. The Department surmises that the Grievant was unconcerned about the hearing officer's decision in January until he got the overpayment notice and that he was forced to claim he did not get the hearing officer's decision because this was the only way he could preserve his appeal rights.

Turning to the merits, the Department argues that even if the Arbitrator finds the grievance to be arbitrable, it must be denied. The terms of the Settlement Agreement include no provision for dropping the appeal of the Grievant's unemployment claim. Employer witnesses testified and their notes support that there was no discussion of unemployment benefits. The

only witness so alleging was the Grievant and his testimony is self serving. Even the staff representative who represented him testified that the Department has generally been unconcerned but would not say what the Department of Administrative Services would do. He simply presumed that this would be like these other cases and that the Department would not pursue its appeal. The Department, on the other hand, offered evidence that the general practice is to include specific language when unemployment compensation is an issue.

The Department further contends that its introduction of the Settlement Agreement to the UCRC hearing officer was not a violation of that agreement. The sole purpose was to clarify the issue before the hearing officer, whether "discharge for misconduct" or "disciplinary layoff for misconduct." Whether back pay was agreed to was also relevant inasmuch as only a claimant who has been without pay can perfect a claim. Employer representatives at the hearing did not characterize the Settlement Agreement in any way. Even the Union admits that settlement agreements may be introduced in some circumstances and did so itself in the instant arbitration when it offered an Ohio Veterans Home settlement agreement. But even if its introduction is found to be a violation, it is de minimis because it had no bearing on the hearing officer's decision that the Grievant committed misconduct under the UCRC standards.

Finally, the Department submits that the grievance should be denied because the Grievant has suffered no harm. He has not yet repaid the requested money to ODFJS and if he does not do so within three years, it will be cancelled as uncollectible. And if the Grievant receives money as requested in the grievance, he will receive a windfall, having received benefits twice and being still able to resist repaying ODJFS.

For all these reasons the Department asks that the grievance be denied in its entirety.

Argument of the Union

The Union argues first that the grievance is procedurally sound. UCRC found that the Grievant did not receive the decision mailed January 12 and there is nothing in the record to refute this finding. Traditionally the parties have accepted a certified return receipt as proof of

service. Since there is none in the file, the Arbitrator should rely on the Grievant's testimony that he was unaware of the adverse decision until he got the February 14 demand for repayment which notified him of his harm. Even if the Grievant did receive it in January, the decision does not clearly indicate there was a change in the terms of the settlement which the Grievant thought had ended the entire affair. The Union points out that the grievance was filed within ten days of receiving ODJFS's demand for repayment by which time he was aware of the Settlement Agreement's use in the UCRC hearing. The grievance statement does imply the hearing officer's decision was in his hands by then, but there is no clear evidence of when he got it. The Union further points out that the Department raised no procedural objection to the grievance until arbitration. Additionally, the Department claims that the Grievant has not been harmed because he has not yet had to repay any money. By this reasoning, the grievance is premature, not tardy.

The Union further submits that the grievance is substantively arbitrable. Citing *Bryant v. Witkosky et al.* (Ohio App. 11 Dist 2002) 2002 Ohio 1477, 171 LRRM 2234, and comparing SERB to the NLRB, the Union asserts that settlement agreements are enforceable through collective bargaining agreements, not just through SERB. In practice and noting *Soletto* in particular, Ohio and OCSEA have submitted settlements and awards to arbitration for clarification. Union witnesses also testified that the grievance procedure is the preferred mechanism when a pattern is not evident. The practice of using the grievance machinery has been effective because to date there have been no arbitrations of settlement agreements involving unemployment. To the extent that the Department argues unemployment compensation disputes are not for the arbitrator, the Union points out that FPRC's actions changed the terms and conditions of the Settlement Agreement because the Grievant agreed to no back pay with the understanding that he had these benefits. FPRC also sought a disciplinary lay-off in contradiction of the Settlement Agreement's provision removing the discipline from the Grievant's record. These are actions which should be reviewed rather than simply dismissed because of lack of jurisdiction. As for the Department's no-harm/no-foul argument, the Union

points out that the sum of money is substantial and that this argument ignores legal costs and the effect on the Grievant's credit record.

Turning to the merits, the Union argues that presentation of the Settlement Agreement in the unemployment benefit hearing violated the Settlement Agreement. The language of the Settlement Agreement specifically prohibits its use in "any subsequent arbitration, litigation, or administrative hearing." Additionally, when FPRC presented it, it misrepresented or permitted it to be misconceived as converting the discharge to a disciplinary layoff. The parties to the Settlement Agreement did not intend to convert the discharge to a suspension but FPRC failed to inform the hearing officer that the Grievant had no discipline on his record.

The Union continues that in negotiating the Settlement Agreement, the Department led the Union to believe that it had no desire to pursue retrieval of these funds. The staff representative handling the discharge grievance testified the Department's chief of labor relations told him she did not care about fund retrieval and in the staff representative's extensive experience the Department would agree not to fight the employee's claim but would not memorialize this agreement because it could not bind the Department of Administrative Services. Although the chief of labor relations denied having such a conversation in this case, but the veteran staff representative believed this case would be like all the others. The Grievant, himself, relied on a conversation with FPRC's Labor Relations Officer Blake after the first day of hearing. Believing the matter was settled, he did not attend the second day of hearing. The Union suggests that it was neither the Department's or the Office of Collective Bargaining's intent to pursue the unemployment money, but hostility towards the Grievant at FPRC, motivated that subordinate unit of the Department to go after it. Yet the Department could have stepped in to stop it when the grievance was filed.

The Union draws the Arbitrator's attention to the parties' twenty year history saying that this shows the parties' intent to completely resolve the grievance through the Settlement Agreement. It further notes there was no evidence the Union was ever informed of OCB's

training instructions to include unemployment claim language in settlement agreements. Finally, it alleges that the $9,932 at issue will be a windfall for the Department if the Arbitrator does not grant the grievance.

As to remedy, the Union asks that the grievance be sustained and that the Grievant either be paid the amounts owed to ODJFS or that the Department make the payment directly.

IV. OPINION OF THE ARBITRATOR

Substantive Arbitrability

The first issue to be addressed is whether the grievance is substantively arbitrable. Article 25.03 limits the Arbitrator's authority "only [to] disputes involving the interpretation, application or alleged violation of a provision of the Agreement." Article 25.01 similarly defines a grievance as "any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement." The Department argues that since these sections do not include the term "settlement agreement," the complaint is not a "grievance" and so is beyond the Arbitrator's jurisdiction. This argument overlooks the fact that grievance settlement agreements are products of Article 25 and thus creations of the Collective Bargaining Agreement. Article 25 in at least three places implies disposal of grievances by settlement agreements and even directly refers to them:

> 25.01 - Process
> F. It is the goal of the practice to resolve grievances at the earliest possible time and at the lowest level of the grievance process.
> H. Settlement agreements that require payment...
>
> 25.02 - Grievance Steps
> Step Three (3) - Agency Head or Designee
> ...unless otherwise agreed to in the settlement...
> Step Four (4) - Mediation/Office of Collective Bargaining
> ...mutually agreeable resolution of the dispute...

The Agreement thus contemplates arbitral interpretation and enforcement of grievance settlement agreements. The Department is correct, however, that the Arbitrator has no jurisdiction over UCRC decisions and so she will answer the grievance without reviewing their propriety.

Procedural Arbitrability

The second issue is whether the grievance was timely filed. The Collective Bargaining Agreement contains specific time units for filing grievances:

> Step One (1) - Immediate Supervisor
> ...All grievances must be presented no later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event.

Only one exception is provided for, being on approved paid leave. Specific time limits such as these will ordinarily be strictly construed. In this case there are a number of ambiguities. For one, what constitutes the grievable event, the UCRC decision issued on January 12 or ODJFS's demand for payment on February 14? For another, whether the Grievant received the decision in January or some time later. Moreover, not until arbitration was the procedural objection raised. This is significant for at least two reasons. One is the parties' stated intent in Article 25.01 at paragraph F to resolve grievances "at the earliest possible time and the lowest level of the grievance procedure." Raising time limit infractions as they occur facilitates early resolution. The other is that doing so would better permit preservation of evidence on the timeliness issue. The Department unquestionably knew at least by the third step that, while the demand for payment was cited on the grievance, the hearing officer's decision was relevant. Yet it raised no procedural objection until arbitration. It is therefore deemed to have waived this contract requirement. The grievance is timely. In so ruling, it bears pointing out that there is considerable arbitral opinion that failure to raise a timeliness objection prior to arbitration generally constitutes a waiver, although there are some exceptions.[1]

Merits

Turning next to the substantive question of whether the Department violated the terms of the Settlement Agreement, the Department did violate its agreement not to use the Settlement Agreement in any administrative hearing when it gave it to the unemployment compensation

[1] Elkouri & Elkouri, 6th ed., pp. 217-227.

hearing officer, but it was a harmless error. This is because the Settlement Agreement was used solely in the framing of the issue and did not affect in any way the substance of the hearing officer's decision. In other words, it was used only to establish whether the Grievant was off work and without wages during the claim period, not why he was off work. Had the hearing officer not been given the Settlement Agreement, the Grievant still would have been found guilty (by administrative standards) of misconduct and he still would have received the demand for overpayment. The real issue here is not whether the Settlement Agreement should have been used as it was, but whether the Department's FPRC should have been in that forum at all after the Settlement Agreement was signed. This question turns on whether there was an agreement that the Department (or FPRC) would not pursue its appeal of the unemployment case.

Without a doubt the Settlement Agreement itself makes no reference to the unemployment claim. Furthermore, it expresses the parties' desire to reach "a full and final settlement of all [emphasis added] matters and causes of action arising out of the claim set forth above" which references the grievance alleging violation of Article 24 of the Collective Bargaining Agreement. This, as well as other language of the Settlement Agreement, effectively draws a line between what is contained on the Settlement Agreement document and what is not. The presumption, then, is that since the unemployment appeal is not mentioned, there was no agreement one way or the other.

The Union makes what amounts to a past practice argument, stating in effect that it was so well understood that, while the Department could not stop the Department of Administrative Services, it would not, itself, go after the benefits. Therefore, it reasons, it was not necessary to negotiate specific language in each and every settlement agreement. If this were the case, then how explain the unemployment benefit language that has, in fact, been incorporated into other settlement agreements?

The Union also contends that the Grievant relied on his conversation with FPRC's labor relations officer to the effect that there was a quid pro quo of unemployment benefits for no

backpay. Yet this conversation took place in a parking lot after an unemployment hearing, outside the grievance mediation and settlement discussions. It never came up within the grievance procedure and it certainly never made it into the written agreement. Moreover, even by the Grievant's own testimony, the labor relations officer couched it in terms of probabilities: "He [the labor relations officer] said, 'I doubt they will come after you for anything else.'" Therefore, not only is there insufficient proof of a binding past practice, but there is also no evidence of a meeting of the minds with respect to this particular settlement agreement that the Department would stand aside. The Grievant simply assumed he had an assurance from the labor relations officer (when, in fact, it was only a probability) and never followed through on it.

V. AWARD

1. The grievance is substantively arbitrable.

2. The grievance was filed in a timely manner.

3. The Ohio Department of Rehabilitation and Correction did not violate the terms of the Settlement Agreement of Grievance #27-08-20030531-0686-01-03.

Grievance No. 27-22-20040225-0892-01-03 is denied.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
January 5, 2006

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