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IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/BWC

Before: Robert G. Stein

Grievant(s): Rickey L. Stoner
Case # 34-23-20040506-0027-01-09
Supervisor/Bargaining Unit Rights

Advocate(s) for the UNION:

Herman Whitter, Asst. General Counsel/Dir. Dispute Res.
Lori Collins, Staff Representative
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Advocate(s) for the EMPLOYER:

Mike Duco, Dir. Dispute Resolution
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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (herein "Agreement") between the State of Ohio, Bureau of Workers' Compensation (herein "Employer" or "Department") and the Ohio Civil Service Employees' Association (herein "Union"). The Agreement is effective from 2003 through 2006 (See Joint Exhibit 1 for exact dates) and includes the conduct that is the subject of this grievance.

A hearing on this matter was held on September 23, 2005. The parties mutually agreed to the hearing date and location and were given a full opportunity to present both oral testimony and documentation supporting their respective positions. The parties each subsequently submitted post-hearing briefs in lieu of making oral closing arguments. There was a delay in the sending of briefs and the arbitrator experienced technical difficulties in receiving and opening the Union's brief, which was on a PDF file that may have contained a virus. The file was eventually opened and was able to be read. The briefs were exchanged on January 11, 2006.

The parties have also agreed to the arbitration of this matter pursuant to Article 25 of the Agreement.

ISSUE

Whether the Employer violated Article 17 and/or 18 of the Collective Bargaining Agreement? If so, what should the remedy be?

RELEVANT CONTRACT LANGUAGE
(As cited by the parties)

BACKGROUND

This case centers upon the "fall back" rights of employee, Diana McHenry ("McHenry"), who was employed as a Training Officer for the Employer from June 27, 1993 until June 2, 2000 (Jt. Exh. 5). The position of Training Officer is a bargaining unit position. On June 4, 2000 McHenry applied for and was awarded an unclassified exempt position outside of the bargaining unit. The title of the position was Training Center Manager (Jt. Exh. 5). Employees holding unclassified positions work at the pleasure of the department administration, and such position may be revoked at any time. As a result of managerial restructuring, McHenry's position was eliminated (revoked) on April 27, 2004. The Collective Bargaining Agreement does not address fallback rights; however, they are addressed in ORC § 4121.121, which was enacted in September of 1997 (Jt. Exh. 3). The Employer allowed McHenry to return to her previously held bargaining

unit classification position of Training Officer, provided she was still certified for the position. Henry took advantage of the Employer's determination regarding her fall back rights, and she was placed into an open Training Officer position.

SUMMARY OF UNION'S POSITION

The Union contends that the Employer violated Articles 17 and 18 of the Collective Bargaining Agreement by placing McHenry directly into what it considers an "unavailable" Training Officer position. The Union contends that Articles 17 and 18 of the Collective Bargaining Agreement and the two-step process determined by Arbitrator Jonathan Dworkin in the April 21, 1991 decision involving Grievant, David Sloan, govern the facts in this case. While acknowledging that ORC § 4121.121(B)(2) grants employees limited fall back rights, it asserts the Employer should have first placed McHenry in a pool of applicants along with other qualified bargaining unit members per the Sloan decision (Jt. Exh. 6). The Union quotes Arbitrator Dworkin's ruling as follows:

> *"The Ohio Revised Code and Ohio Administrative Code are incorporated into the Agreement and allow laid-off supervisors to cross into the unit. The privileges of these employees who cross into the nit are the same as, and no greater than, those of any other laid-off represented employees."*

The Union argues that the Employer's position in this case renders Articles 17 and 18 of the Collective Bargaining Agreement moot.

Based upon the facts and arguments made at the hearing and reinforced in its brief, the Union urges the Arbitrator to grant the grievance. It requests that McHenry be removed from her position and be placed back into a pool of applicants if it intends to fill the training officer position pursuant to Articles 17 and 18 of the Collective Bargaining Agreement.

SUMMARY OF EMPLOYER'S POSITION

The Employer argues that it followed the dictates of ORC § 121.121(B)(2). It contends that in the case of McHenry, its hands were tied by the statute; the agency could not determine to fill the position of training officer due to the fact that McHenry had a statutory right to said position. The Employer contends that this interpretation gives effect to both the statute and the Collective Bargaining Agreement. The Employer asserts that Ohio did not abandon Civil Service regulations when it enacted the Public Employees Collective Bargaining Law. "Simply because a position is in the bargaining unit, does not render it "unavailable" argues the Employer.

The Employer contends that Article 18 of the Collective Bargaining Agreement, which was addressed in the Sloan decision rendered by Arbitrator Dworkin, does not apply in this situation in as much as there was no layoff that took place. The Employer also points out that if the

Collective Bargaining Agreement contained language to preclude non-bargaining unit employees from exercising fall back rights into the bargaining unit there would be no issue of contention in this case. The Employer asserts no such language exists in the Collective Bargaining Agreement or in any memorandum of understanding between the parties. Without contract language to rely upon, the rights contained in ORC § 4121.121 are controlling in this matter, argues the Employer.

Based upon the facts and arguments made at the hearing and reinforced in its brief, the Employer urges the Arbitrator to deny the grievance.

DISCUSSION

The essential underlying facts in the instant grievance are not in dispute, and the issue is a straightforward matter of contract interpretation and or the application of law as it relates to the Collective Bargaining Agreement:

> The rule primarily to be observed in the construction of written agreements is that the interpreter must, if possible, ascertain and give effect to the mutual intent of the parties. The collective bargaining agreement should be construed, not narrowly and technically, but broadly so as to accomplish its evident aims. In determining the intent of the parties, inquiry is made as to what the language meant to the parties when the agreement was written. It is this language that governs, not the meaning that can possibly be read into the language.

Calif. Area School Dist. and Serv. Employees Int'l Union, Local 585, AFL-CIO, 01-2 Lab. Arb. Awards (CCH) P 3882 (Talarico 2000). Article 25, Section 3 of the Agreement does limit the arbitrator's authority in addressing issues involving an alleged abuse of managerial discretion by including the following language:

> Only disputes involving the interpretation, application or alleged Violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of the Agreement.

Arbitrators recognize that management is generally free to "run the ship," as is needed, except as is otherwise expressly provided by a collective bargaining agreement provision expressly denying management's right to act unilaterally. *Arkansas Educ. Ass'n and Arkansas Staff Org.*, 111 LA 423 (Allen 1998). 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. *Minn. Mining and Mfg. Co. and Local 5-517, Oil, Chem. and Atomic Workers, Int'l Union*, 112 LA 1055 (1999).

> In reviewing an employer's exercise of discretion, it is not an arbitrator's function to substitute his independent judgment for that of an employer. Rather, an arbitrator is limited to determining whether an employer's decision is within the reasonable range of discretion, is not arbitrary or capricious, and was not motivated by anti-union animus or another improper reason.

Municipality of Anchorage. "While it is not an arbitrator's function to second-guess management's determination as to a Grievant's qualifications, he does have an obligation to make certain that a determination was reasonably fair and non-arbitrary." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 1, Local 1699,* 92 LA 1209 (2002).

> An action is described as arbitrary when it is without consideration and in disregard of facts and circumstances of a case and without a rational basis, justification, or excuse. The term "capricious" also defines a course of action that is whimsical, changeable, or inconstant.

City of Solon (Ohio) and Ohio Patrolman's Benevolent Ass'n, 114 LA 221 (Oberdank 2000).

Here, the evidence must be weighed with due consideration of the Union's burden of proof. The Union, as the grieving party in a non-disciplinary case, has the burden of proving by a preponderance of the evidence that the Employer has violated the Agreement. *City of Cincinnati,* 60 LA 682 (Bell 1977). The arbitrator here finds that the Union has failed to meet its burden of proving that the Employer has, in fact, acted either capriciously or in bad faith in exercising the management rights included in Article 5. The arbitrator believes, for the reasons explained below, that the Employer did not violate the Agreement.

The Employer properly applied the requirements of ORC § 4121.121 in the absence of contract language. Moreover, the Employer's actions

are consistent with the requirements ORC 4117.10(A) that subject the terms and conditions of employment not addressed in a collective bargaining agreement to the dictates of law. Although involving a different state union, the arbitration decision by Arbitrator Pincus in 1997 has applicability to this matter. It deals with the movement of State employees from an unclassified position back into the bargaining unit position, and it specifically involves a situation where the agreement was silent on the matter of supervisors moving back into positions they formerly held in the bargaining unit.

In his decision Arbitrator Pincus cites ORC 4117.10(A), which in pertinent part states:

> "...where no agreement exists or where the agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local ordnances pertaining to wages, hours, and terms and conditions of employment for pubic employees."

Arbitrator Pincus goes on to state, "The statute, moreover, allows statutory law to supplement a collective bargaining agreement where the agreement does not address the matter. Arbitrator Jonathan Dworkin, some six years earlier in a case involving OCSEA, also cited the same provision, and stated:

> "The Agreement is held to be silent on the right of displaced exempt employees to bump into the Bargaining Unit positions. Accordingly, Ohio Revised Code § 4117.10(A) incorporates Civil Service Law into the Contract and permits laid-off supervisors to cross into the Unit. Once they cross that line, their rights are defined by the Agreement. Their privileges are the same as, and no greater

> than those of any other laid-off represented employee. If their State seniority is sufficient, they may bump into a class series similar or related to the one they previously held."

The ruling by Arbitrator Dworkin involved bumping rights under Article 18 of the Collective Bargaining Agreement. The instant case does not involve a layoff or bumping of a bargaining unit employee by a former bargaining unit employee who is placed back into the bargaining unit. The Employer placed McHenry into a vacant position in the same classification she held prior to June 4, 2000 when she was promoted outside of the bargaining unit. Therefore, I find Article 18 of the Agreement has no jurisdiction in this dispute.

The Union argued that the Employer also violated Article 17 that addresses promotions, transfers, demotions, and relocations. However, a review of this article reveals, as was the case in the above referenced SEIU arbitration, that the language of Article 17 is silent on the movement of former bargaining unit employees from unclassified positions back into the bargaining unit. In the instant matter, McHenry was placed from an exempt position into a vacant position in her former classification. In the absence of specific contract language governing such a contingency state law, ORC § 4121.121 governs. It states in Section (B)(2):

> The administrator may appoint a person holding a certified position in the classified service to any state position in the unclassified service of the bureau of workers' compensation. A person so appointed shall retain the right to resume the position and status held by the person in the classified service

> immediately prior to the person's appointment in the unclassified service. If the position the person previously held has been filled or placed in the unclassified service, or is otherwise unavailable, the person shall be appointed to a position in the classified service within the bureau that the department of administrative services certifies is comparable in compensation to the position the person previously held [emphasis added].

In his well-reasoned decision involving OCSEA, Arbitrator Dworkin states:

> "In the private sector, contractual silence might be presumed to insure bargaining unit seniority against outside encroachment. In Ohio, the opposite conclusion is required; where a contract makes no reference to a subject, it incorporates preexisting law."

The issue of unclassified employees returning to the bargaining unit has been thoroughly addressed by two distinguished arbitrators. In the instant matter I find the Employer in obeying the law was required to place McHenry in a Trainer Position precluding the Employer, under the Agreement, from considering this position to be a vacancy. Specific contract language addressing this situation would conform to what exists in the private sector. However, until such time as such language is negotiated I concur with the findings of Arbitrators Dworkin and Pincus. Absent specific contractual language barring, limiting, or putting to rest the issue of fall back-rights, ORC § 4121.121 is controlling.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 19th day of January 2006.

Robert G. Stein, Arbitrator