

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. 14-18-20050920-050-01-13

and *

Lorraine Stephens, Grievant

OHIO DEPARTMENT OF HEALTH *

Health and Safety

*

APPEARANCES

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

Barbary Follmann, Staff Representative
Ohio Civil Service Employees Association, Local 11 AFSCME

For the Ohio Department of Health:

Chris R. Keppler, Labor Relations Officer
Ohio Department of Health

Buffy Andrews
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:10 a.m. on November 28, 2006, at the offices of 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 stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth 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 to argue their respective positions. Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME (the "Union") were Health Physicists David Lipp and Lorraine Stephens. Also in attendance was Steward Mary Clifton. Testifying for the Ohio Department of Health (the "Employer") were Medical Licensing and Inspection Supervisor Mark Light and Michael F. Rea of the Ohio Bureau of Workers Compensation. A number of documents were entered into evidence: Joint Exhibits 1-2, Union Exhibits 2, 4 and 5, and Employer Exhibits 1-4. The oral hearing was concluded at 11:50 a.m. on November 28. Written closing statements were timely filed and exchanged by the Arbitrator on December 8, 2006, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Grievant is a Health Physicist 3 in the Ohio Department of Health's Bureau of Radiation Protection. The purpose of her classification series is to

evaluate the production, use, release, disposal &/or presence of radioactive material in the environment & ionizing radiation from any device or equipment that emits or is capable of producing radiation to safeguard public & environment from overexposure or to conduct investigations/inspections & research into nuclear power utility management & performance to ensure safe operations at nuclear facilities. (Union Ex. 1)

The Grievant testified that she spends approximately 60 percent of her time in the office and 40 percent in the field performing routine radiological inspections. In the course of these duties she

and her fellows do not expect exposure to bloodborne¹ pathogens. However, she and the other health physicists are also assigned on a rotating basis to respond to incidents including those at landfills. Their objective on the so-called “trash runs” to landfills is to locate, identify and isolate the radioactive material triggering the run. A summary of Bureau records reports there were a total of 388 incident responses including 100 at landfills in the four years preceding this arbitration. The Grievant testified that she is on the response list every eight or nine weeks and that in 2005 she had to go out twice. Her only responsibility at the dump is to scan the radioactive material with a portable hand-held device in order to learn how long it has to be isolated. She is not required to handle any refuse but, she said, the ground at a landfill can be treacherous. She has fallen into the muck and had to be hosed off. She knows of or has heard of three or four others in the past 8½ years who have twisted an ankle, cut a hand, injured a knee or lost a boot when falling into the trash. Avoiding contact with infectious material is nearly impossible, she said, as the trash contains animal carcasses, diapers and human waste, cans, glass and various sharp objects. In the last few years the Bureau has given health physicists protective gear such as plastic overalls and jackets, gloves, hard hats, goggles and steel-toed boots, but, she said, the rain gear is easily ripped and the leather gloves cannot be worn when inspecting.

Health Physicist 3 David Lipp concurred with much of what the Grievant testified to, noting that since the Bureau is not a radioactive materials licensee, its employees are not to touch the radioactive material or contaminated objects. This is for the landfill employees. However, he said, there is the potential for accidental exposure. Those who work on landfills need to know where to stand and how to walk. Mr. Lipp wrote Bureau procedure ERS-EM-110, Incident Response for Minor Event Occurring in the Public Domain, effective November 18, 2005, on which employees received formal training beginning in January 2006. Prior to this, new health

¹“Pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV) and human immunodeficiency virus (HIV).” (Union Ex. 5)

physicists were trained on the job by lead-worker health physicists and then certified by a supervisor following an observation. The newly procedure provides in part the following:

2. PRECAUTIONS AND LIMITATIONS

- 2.1 The incident sites generally associated with these types of events involve many chemical and industrial safety situations that, in most cases, present a greater hazard to Bureau employees than the radioactive material. Some events, by their very nature, involve biological hazards. Bureau staff should always maintain an awareness of these non-radiological hazards when responding to any event.
- 2.2 The Bureau of Radiation Protection is not a radioactive materials licensee and maintains no facility for the storage of radioactive material other than exempt quantity sealed reference sources. Absolutely no radioactive material, samples, devices, objects, contaminated tools or survey instruments, interesting antique collectables [sic], rocks, waste, etc. shall be brought back to the 35/246 office complex without the prior expressed permission of the Bureau Chief and prior notification to the Bureau's Radiation Safety Officer.
- 2.3 Personal protective equipment based on the specific hazards, site requirements, potential or existing conditions, task to be performed, work location, or environment as well as guidance in procedure TS-RS-500 shall be worn when responding to any radiological incident to prevent injury and contamination.
- 2.4 Radiological instrumentation shall be protected from contamination and surveyed at the end of each response to verify that the instrument, detector, cable and knobs were not inadvertently contaminated during the response.
- 2.5 All injuries should be reported to the On-Call Supervisor as soon as possible. Injuries involving immediate medical attention shall take precedence to the incident response.
- 2.6 Bureau staff should ensure personnel involved in recovery of the radioactive material are surveyed to verify no one became contaminated during the response. Report all personnel contamination to the On-Call Supervisor who shall notify the Bureau's Radiation Safety Officer for guidance on decontamination and potential skin dose calculations.
- 2.7 Bureau staff shall not handle radioactive material or contaminated objects or waste. The Bureau's responsibility is to assist the facility or company in resolving the event. If the event escalates or becomes such more hazardous than originally anticipated, stop work immediately, bring the area into as safe a configuration as possible, and contact the On-Call Supervisor for direction.

4. Incident Response

- 4.6 Response Plan for the Remediation of the Radioactive Material
The Bureau response to these types of incidents is to advise and assist the facility representative or individual. Staff shall not handle radioactive material, operate machinery, dig though [sic] piles of material, or otherwise manipulate any materials at the site. The assistance should be limited to performing surveys to locate the radioactive material.
(Employer Ex. 2, emphasis in the original)

Supervisor of Medical Licensing and Inspection Mark Light testified that there have been no calls in the past nine years from any field employee concerned about his or her own safety because of radiation or exposure to medical waste. He has heard that an employee was afraid to file a report but does not think it true. He takes safety seriously and has suspended activities because of it.

Michael Rea, Program Administrator of the Ohio Public Employee Risk Reduction Program ("PERRP") testified his agency has adopted the OSHA standards. PERRP does not use the term "high risk" but it has determined that employees who pick up and haul refuse to landfills are not reasonably at risk of exposure. Their supervisors are, however, because they are expected to handle the material. The same applies in recycling centers where supervisors, but not employees on the conveyor, assume the removal and disposal of needles. The deciding factor, he said, was actual contact. In 2005 his agency received an anonymous complaint stating that the Ohio Department of Health had failed to prepare an "Occupational Exposure Determination" for Bureau employees working at landfills. The Bureau responded on November 29, 2005, with ERS-EM-110 and a list of personal protective equipment which satisfied PERRP. Since the complaint was anonymous, however, there was no opportunity for the complainant to dispute the information provided by the Bureau.

Meanwhile, Health Physicist 3 Loraine Stephens had filed Grievance 14-18-050920-050-01-13 dated September 12, 2005, seeking pre-exposure vaccinations and protective gear under Article 11 for health physicists performing onsite inspections. This grievance was denied at Step 1 and subsequently fully processed to arbitration where it presently resides free of procedural defect on the stipulated issue of *"Did the Employer violate Article 11.05 by denying Health Physicists in the Bureau of Radiation Protection pre-exposure hepatitis B vaccination? If so, what is the remedy?"*

III. PERTINENT PROVISIONS OF THE CONTRACT

11.05 - Communicable Diseases

The Employer recognizes that some employees who work with individuals infected with hepatitis B virus may be at increased risk of acquiring hepatitis B infection. In accordance with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) guidelines, hepatitis B vaccinations shall be made available to all employees who have high risk occupational exposure to the virus. Low risk employees will have vaccinations made available post exposure, within the timelines required under federal regulations, i.e., if exposed to blood or other potentially infectious materials. Post exposure evaluation and follow-up consultations will be made available for all employees who experience an exposure incident. "Occupational exposure" shall have the same meaning in this Agreement as is contained in the OSHA guidelines. Hepatitis B vaccinations shall be offered within ten (10) working days of initial assignment to employees who have occupational exposure to blood or other potentially infectious materials. Employees who decline the initial vaccination may, at a later date, request and obtain the vaccination from the Employer. All hepatitis B vaccinations and related medical procedures pertaining to its administration are to be made available at no cost to the employee.

IV. ARGUMENTS OF THE PARTIES

Argument of the Union

The Union points out that the parties disagree only whether the health physicists' occupational exposure is "high risk." What the Union seeks is to err on the side of safety and protection, which is what it believes the OSHA regulations call for, noting in particular 1910.1030(d)(1) which calls for observance of universal precautions to prevent contact with potentially infectious materials and consideration of all body fluids potentially infectious where different body fluid types cannot be differentiated.

The Union asserts that the people who actually do the work know best what the conditions are. Landfills comprise a quarter of their incident responses. Here they must walk on top of and come into contact with medical waste materials including contaminated sharps. This is not an occasional exception but a normal part of their work. The fact that there have been no reported incidents is because there have been no injuries and the fact that employees tend to minimize injury-free accidents, especially when they are not trained on the dangers.

The Arbitrator should view with suspicion the claims of the Bureau that it is a safety conscious agency. It took a grievance for the Bureau to supply boots and protective clothing. It has not conducted any training on bloodborne pathogens and so some employees may not even be aware of the danger. It continues to ignore OSHA's requirement for an exposure control plan and its policy on incident responses in the public domain (ERS-EM-110) came out of an anonymous complaint to PERRP. Even then there were irregularities in its dissemination. PERRP's investigation of this complaint should be given no weight for two reasons. For one, it relied only on information from the party alleged to have violated the rules. For another, one of its functions is to advocate for the employer.

The Union suggests the Arbitrator reason by analogy, substituting "Health Physicists" for "supervisor" into OSHA's interpretation that where "supervisors have reasonably anticipated exposure to blood and thus occupational exposure within the meaning of 29 CFR 1910.1030(b)" they "must be vaccinated within 10 working days of placement into a position that requires responding to areas where contaminated sharps are found." (Union Ex. 4)

Finally, the Department of Health, of all places, should make pre-exposure vaccinations available to those health physicists who request it.

Argument of the Employer

The Employer submits that the Arbitrator should be bound by the Collective Bargaining Agreement and, by reference, the applicable OSHA guidelines, specifically 1910.1030(b). She should also give significant weight to the expert testimony of the PERRP program administrator on the meaning of "reasonably anticipated contact" and to the supervisor's testimony about the grievance class members' duties.

The Employer contends that the record shows that health physicists are not at high risk of occupational exposure to blood or other potentially infectious material. Therefore the post-exposure provision applies. The OSHA bloodborne pathogen rule was primarily focused on health care workers and then interpreted for other industries and settings where workers vary

with respect to their physical relationship to potentially contaminated material, both in terms of what they do and the nature of the environment. The Employer cites a number of examples, urging that the refuse industry is particularly applicable here because, like health physicists, refuse collectors and recycling center sorters are exposed to the same type of refuse as health physicists and are not expected to handle objects which may be contaminated whereas their supervisors, who are expected to handle these objects, are deemed to have occupational exposure. Bureau rules 2.7 and 4.6 further reduce the likelihood of direct contact because they specifically direct staff not to handle or manipulate materials at a site. Thus, based on the work, training and protective equipment provided, PERRP concluded that health physicists do not have reasonably anticipated contact with the materials that put employees at risk. Moreover, the potential for exposure is infrequent inasmuch as there have been 25 landfill incidents a year in the last four years and health physicists are on-call only one week in eight or nine.

The Employer summarizes that the risks inherent in responding to alarms at landfills are effectively abated by its clear and specific response procedures, the safety equipment provided, and employee common sense. It took note of the employees' concerns raised on the grievance and responded with formalization of safety practices into a written procedure and training on that procedure. If employees do their part, they are at low risk of exposure to hepatitis B, a view concurred in by PERRP in response to an anonymous complaint. Their only risk is if they fall into a trash bag containing medical waste and that waste punctures both the bag and the employee's protective equipment. This risk is heightened if the employee acts irresponsibly in contravention of policy and training. If they use common sense and direct landfill employees to handle the refuse, they insure their personal safety and that of the general public.

V. OPINION OF THE ARBITRATOR

The sixth sentence of Article 11.05's hepatitis B paragraph makes it clear that the vaccine is to be offered to employees who have "occupational exposure" to the virus. This sentence makes no distinction between high and low risk exposure, yet much of the parties' dispute

centered on what degree of exposure the subject employees have. The fact of the matter is that the terms “high risk” and “low risk” as used in Article 11.05 in the second and third sentences of this paragraph distinguish “employees,” not likelihood of “occupational exposure.” Employees with high risk are those having “occupational exposure” and are to be offered the vaccine within ten days of their initial assignment, i.e., pre-exposure, because occupational exposure places them at high risk of infection. Low risk employees are those without occupational exposure. They qualify for the vaccination after an exposure event. It is therefore not necessary for the Arbitrator to calculate the degree of risk. She need only determine if the class members have “occupational exposure.” If they do, they qualify for the protective vaccine pre-exposure.

The Contract incorporates by specific reference the OSHA definition of “occupational exposure.” This definition is set forth in the OSHA standards at 1910.1030(b)

Occupational Exposure means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee’s duties.

The PERRP program administrator, whose agency responds to complaints and performs employer program assessments, reviewed the Bureau’s written policy during the pendency of the grievance in response to an anonymous complaint. He testified he was able to consider the duties of the health physicists and understood they do run across medical sharps. But he also said he was pleased to see that management had addressed that these employees are not to handle waste. Based on their duties he concluded that they are not required to have pre-exposure vaccination.

This witness’s opinion has to be given weight. While it is true that he affirmed on cross-examination that he was an “advocate for employers,” on direct his full statement was that his agency is an “advocate for employers to meet safety standards.” The function of PERRP is thus aligned with employee interests, not opposed to them. It is also true that the complaining party did not have an opportunity to respond to the Employer’s claims by virtue of its anonymity, but the Union did elicit on cross-examination of the program administrator two points unhelpful to its case. One of these was that he did understand that health physicists run into hypodermic

needles in their work. Then, asked if the working environment differences between the conveyor line of the recycling center and the open landfills health physicists work in made the Wellman recycling center determination less relevant here, he agreed it was a factor, but would not say that it made that case less relevant. Finally, on redirect he affirmed his opinion that, based on their duties, these employees are not reasonably expected to have contact with blood or other potentially infectious materials. It is true that the Bureau policy assisting him in making this determination had not even been signed yet and that employees had yet to be trained on the written policy, but those defects were cured before the case came to arbitration.

Against the expert witness's testimony is the Grievant's experience and hearsay testimony about others' experiences at the landfills. The incident related by the Grievant was an accident for which the right to post-exposure evaluation and vaccination was created. Standing by itself in the face of current policy and training, this incident does not evidence "reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties." Health Physicists therefore are not found to have "occupational exposure," and are therefore not entitled to hepatitis B vaccine pre-exposure.

VI. AWARD

The Employer did not violate Article 11.05 by denying Health Physicists in the Bureau of Radiation Protection pre-exposure hepatitis B vaccination. The grievance is denied in its entirety.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
April 22, 2007

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