

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 30-04-20080718-0046-01-09

The Ohio Civil Service Employees

Association, AFSCME Local 11

GRIEVANT: Ruby J. Toran

AND

The State of Ohio

Department of Taxation

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: December 21, 2009

APPEARANCES FOR THE PARTIES

Management:

Gregory Siegfried, Labor Relations Officer
Management Advocate

Ashley Hughes, Office of Collective Bargaining

UNION:

Jerry Buty, Ohio Civil Services Employees Association,
AFSCME Local 11, Union Advocate

Grievant: Ruby J. Toran

PROCEDURAL HISTORY

The Ohio Department of Taxation is hereinafter referred to as "Management". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Ruby J. Toran is the Grievant.

Grievance No. 30-04-20080718-0046-01-09 was submitted by the Union to Management in writing on July 15, 2008 pursuant to Article 25 of the parties' Collective Bargaining Agreement. Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2006-2009 Collective Bargaining Agreement.

Pursuant to the Collective Bargaining Agreement between the Union and Management, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on November 4, 2009 at OCSEA. Management challenged the substantive arbitrability of the grievance. The parties initially disagreed as to the written grievance. Two grievance forms were submitted as part of the grievance trail. One form alleged only a violation of Article 2 Non Discrimination of the Agreement; the other form alleged a violation of Article 2 and Article 44 Work Rules of the Agreement. The parties agreed that the grievance form alleging violations of Articles 2 and 44 would be controlling. The issue of whether the grievance is arbitrable was taken under advisement. The Arbitrator received evidence on the issue of arbitrability, and if the objection is overruled, said evidence shall be considered for the merits of the grievance. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing. The hearing and record were closed on November 4, 2009.

The parties stipulated to the issues as follows: Is the case properly before the Arbitrator? If so, did Management violate Article 44.04 of the Collective Bargaining Agreement? If so, what shall the remedy be?

PERTINENT PROVISIONS OF THE 2006-2009 AGREEMENT

ARTICLE 25 - GRIEVANCE PROCEDURE

25.01 - Process

A. A grievance is defined 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 grievance procedure shall be the exclusive method of resolving grievances. No employee who has rights to final and binding arbitration of grievances, including disciplinary actions, may file any appeal with the State Personnel Board of Review (SPBR) nor may such Board receive any such appeal.

25.03 - Arbitration Procedures

The parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator. Questions of arbitrability shall be decided by the arbitrator ... Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute. ...The decision and award of the arbitrator shall be final and binding on the parties. ...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 this Agreement.

ARTICLE 44-MISCELLANEOUS

44.04 - Work Rules

After the effective date of this Agreement, Agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them.

Policy No: ODT-HR-006, Conflict of Interest & Outside Activity

Outside Activity

All employees of ODT are reminded that, prior to engaging in any outside activity(paid or unpaid), they are strongly advised to notify and gain approval of such outside activity from the Executive Administrator of the Human Resources Division or his/her designee. This notification and subsequent approval will also prevent potential discipline.

For the purposes of this policy, activity is defined as paid employment of all types, including certain volunteer/unpaid activities. Employees must contact ODT before engaging in any activity that that involves accounting or tax related issues. When in doubt, it is better to notify ODT before engaging in an activity that presents a potential conflict of interest.

The following are specific types of employment or activities that are not permitted:

- 1) Engaging in any outside employment or business activity that is inconsistent with the employee's time, resource and duties within ODT, or in any degree affects or interferes with the performance of such duties while employed by ODT;
- 2) Engaging in the preparation and/or completion, outside of the scope of official duties, of any tax returns involving municipal, county, state or federal tax laws for or on the behalf of any taxpayer (other than members of the employee's immediate family). Certain volunteer activities, such as VITA, may be permitted with prior approval from ODT; or
- 3) Maintaining, consulting, advising or auditing the books and records of any taxpayer outside the scope of official employment, which may subsequently be used as the basis for the determination of any municipal, county, state or federal tax liability.

Notification/Approval Process for Outside Activity

Any employee in a potential conflict of interest situation or engaging in an outside activity, as described above, is hereby instructed to contact their immediate supervisor as soon as possible. The employee should provide a complete description of the facts and circumstances of the matter so that ODT officials may conduct an investigation of the situation. The

employee's immediate supervisor will forward the information through proper chain of command channels to the Human Resources Division along with his/her recommendation for approval or denial based upon the facts presented...

If an employee is notified that the activity is not appropriate and the employee has already engaged in the activity, the Tax Commissioner may invoke disciplinary measures against the employee. Should the employee refuse to cease the activity, practice, or outside employment, the employee may ultimately be terminated.

BACKGROUND

Set forth in this background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision. The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

Grievant applied for a position of Tax Commissioner Agent 4 (TCA) on or about July 7, 2008. During the course of the application process, Grievant approached the Human Resources representative about her qualification for the TCA position that included volunteer work as the financial manager for her church. The representative questioned Grievant regarding potential conflicts of interest and requested Grievant to provide a complete description of the facts, duties, and circumstances of the financial manager position so that Human Resources could make a determination of any conflicts. Grievant informed the representative that her church duties were approved several years ago. No such approval was found in the personnel file of the Grievant. Grievant had no recollection of the date when the documentation was provided to Human Resources. Grievant recalled that the documentation was submitted sometime in the 80's. Grievant had no recollection of the name of the person to whom she submitted the

documentation in the 80's. Grievant did not recall receiving any written determination of approval for the volunteer work in the 80's. Grievant did not keep a copy of the letter or documentation that she submitted in the 80's. The nature of the volunteer work has changed over the years. There was no evidence of any supplemental submissions for approval over the years as her duties changed. Grievant then submitted the requested documentation.

As the church financial manager, Grievant is responsible for the following duties:

1. Process account payables in reference to utility bills, donations and all other various open accounts,
2. Process account receivables in reference to donations to the church,
3. Reconcile and audit accounts on a weekly, monthly, quarterly and annually to insure accuracies for verification purposes,
4. Prepare all bank deposit statements,
5. Enter all financial information into quick books,
6. Prepare budgets, balance sheets and income statements and
7. Act as a liaison to the outside certified public accountant of the church.

A cease and desist order was issued as to those activities which created a conflict or potential conflict with her employment. Specifically, Grievant was not permitted to perform the bookkeeping responsibilities. Management determined that these responsibilities would be in conflict with the activity prohibitions of the Conflict of Interest Policy that provides in pertinent part...: the following are specific types of employment or activities are not permitted... (3) Maintaining, consulting, advising or auditing the

books and records of any taxpayer outside the scope of official employment..."

The Union filed its grievance on July 15, 2008 alleging a violation of Article 44.04 Work Rules and Article 2 Non-Discrimination of the Collective Bargaining Agreement. The Union subsequently withdrew its claim of violation of Article 2. The grievance was not resolved within the grievance procedure established by the Collective Bargaining Agreement, and was properly advanced to arbitration.

POSITION OF UNION

Union contends that the grievance is arbitrable under Article 44.04 of the Collective Bargaining Agreement. The definitions of policy and work rules are interchangeable to the extent that said terms represent employment guidelines to govern employee's behavior and actions, and the violation thereof may result in discipline. Discipline is covered in Article 24 of the Agreement. The cease and desist order is tantamount to discipline because the order restrains Grievant from performing her volunteer church work as a financial manager in face of disciplinary action. The cease and desist order issued by Human Resources pursuant to Policy No. ODT-HR-006 - Conflict of Interest violates Article 44.04 Work Rules of the Collective Bargaining Agreement. Said violation may be grieved under the Agreement.

Union contends that the position of the Grievant, as a financial manager in her church does not conflict with her position as an Account Clerk 3 with the Department of Taxation. Union argues that her church is qualified under IRC section 501(c)(3) and is tax exempt. No conflicts exist due to the tax-exempt status of the Church. Article 25.01 permits the Union to challenge the application of the work rules - Article 44.04. Human Resources already approved her duties as a financial officer in her church twenty years ago,

and said approval should remain in full force and effect. The cease and desist order is unreasonable.

Union requests that Grievance No. #30-04-20080718-0046-01-09 be sustained, and Grievant be permitted to resume and perform all duties including bookkeeping as the church financial manager.

POSITION OF MANAGEMENT

Management contends that the Grievance is not substantively arbitrable. Management and Union have agreed to define a grievance as any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of the Agreement in Section 25.01 of the Collective Bargaining Agreement. Section 25.03 of said agreement enumerates the type of disputes that can be grieved. Those disputes are limited to matters of interpretation, application or alleged violation of the Collective Bargaining Agreement. ODT–HR- 006 Conflict of Interest Policy is a departmental policy and not an article or provision of the Collective Bargaining Agreement. Management has not agreed to submit disputes related to said policy to the Article 25 grievance or arbitration procedures. Management further opines that although the Arbitrator has authority to decide matters of arbitrability; the Arbitrator cannot add to, subtract from or modify the Agreement. The Arbitrator does not have authority to make a determination on the decision of Management finding conflicts or potential conflicts of the policy arising in an issue grievance.

Management contends that the Department of Taxation implemented ODT–HR-006 Conflict of Interest Policy to comply with the provisions of Ohio Revised Code Section 5703.07 which prohibits employees of the department of taxation from holding a position of trust, or profit or engage in any occupation, employment or business and which interferes with, or is

inconsistent with, her duties as an employee. Policy ODT-HR-006 Conflict of Interest specifically prohibits maintaining, consulting, advising or auditing the books and records of any taxpayer outside the scope of official employment. Grievant does not deny the bookkeeping aspects of duties as the church financial manager. Human Resources Division determined that the bookkeeping duties of the volunteer work as the church financial manager were in conflict with her duties as an employee of the Department of Taxation. Although the church is tax exempt, the church is still subject to audits and unrelated business income tax, pays employment taxes, and so forth. The policy is reasonable, and does not violate any provisions of the Collective Bargaining Agreement.

Management contends that this issue has already been submitted to arbitration. See, In the Matter of Arbitration Between the Ohio Civil Service Employees Association/AFSCME, Local 11 and State of Ohio, Ohio Department of Health, Grievance #14-23-(00-08-28)-0029-01-13. The decision is binding upon the parties.

Management requests that Grievance No. #30-04-20080718-0046-01-09 be denied.

DISCUSSION:

Article 25.03 of the Collective Bargaining Agreement provides in pertinent part ... "the parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator. Questions of arbitrability shall be decided by the arbitrator..." Article 25.03 further provides "only disputes involving the interpretation, application, or alleged violation of the provision of the Agreement shall be subject to arbitration."

It is well settled that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so

to submit. See, the Steelworkers Trilogy. The dispute in the instant case arises from the application and interpretation of Article 44.04.

Article 44.04 provides in pertinent part that "Agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them." The departmental policy, ODT-HR-006, Conflict of Interest & Outside Activities, formerly known as Directive 6, has been in existence since 1993. The Arbitrator concurs with Union that the departmental policy, is an institutional rule or directive covered under this Agreement. ODT-HR-006, Conflict of Interest & Outside Activities is subject to the mandates of Article 44.04. In accordance with Article 44.04, said departmental policy must not violate the Agreement, must be reasonable, and Union must be provided the opportunity to discuss the policy prior to implementation.

The agreed written grievance of July 1, 2008 provides notice of contractual violations of Article 2 and Article 44 of the Collective Bargaining Agreement, with the following factual statement:

I was instructed by Human Resources Division to discontinue my accounting job duties for my church due to conflict of interest. My job duties DO NOT include preparing and/or handling taxes, tax preparers or dealing with tax issues and therefore are not a conflict of interest.

The factual statement does not support a violation of the Agreement, that the policy itself is not reasonable, or that the Union was denied the opportunity to discuss said policy prior to implementation. The factual statement fails to state a claim for relief for violation of Article 44.04. Notwithstanding, the Arbitrator is cognizant that the Grievant is a lay person.

There was no evidence introduced at the hearing to support a violation of the Agreement or that the Union was denied opportunity to discuss the policy prior to its implementation. Although the evidence established

otherwise, Grievant only maintained that there was no conflict with her church volunteer work and duties of employment, and the work rule as applied was unreasonable. This type of argument is considered in connection with the issuance of discipline under a just cause standard.

However, the mandate of Article 44.04 is that the work rule itself is reasonable. The goals of Management in establishing a conflict of interest policy is to comply with statute, promote sound business principles, and further the public good. The policy, ODT-HR-006, Conflict of Interest & Outside Activities, is reasonable.

Grievant seeks a decision by the Arbitrator to review the business decision of Management denying her volunteer church work. The Arbitrator has no authority to make such determination pursuant to the terms of the Collective Bargaining Agreement. Article 25.03 states that 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 this Agreement. This is a restrictive and narrow arbitration clause. Unless the Agreement provides for a grievance procedure on the application of work rules outside the disciplinary process, the claim is not valid. There was no such evidence; therefore the Arbitrator finds that grievance is not arbitrable.

Union argues that Management waived the issue of substantive arbitrability by failing to raise the issue in the Step 3 response. The Step 3 response addressed only the alleged violation of Article 2 of the Agreement which was subsequently withdrawn prior to the arbitration. Management acted upon, and was in possession of, the written grievance form that listed only a violation of Article 2 of the Agreement. At the arbitration hearing Management argued that there was no pending contractual violation. Union, acted upon, and was in possession of, the written grievance form that listed a violation of Article 2 and Article 44. The parties eventually accepted the

grievance form in the possession of Union, and proceeded with arguments under Article 44. The parties had prior notice and discussions on the matter of arbitrability, and both parties appeared at the hearing and submitted written arguments to support its position. Management did not waive its challenge of arbitrability.

AWARD

After a full review and consideration of all documents and arguments presented, as well as the testimony of witnesses, and in light of the above Discussion, the grievance is not arbitrable.

December 21, 2009
Steubenville, Ohio

/s/ Meeta Bass Lyons
Arbitrator