

Voluntary Labor Arbitration Proceeding

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In The Matter of the Arbitration Between:

Ohio Department of Rehabilitation and Correction

-And-

Ohio Civil Service Employees Association , Local 11, AFSCME

Grievants: Sheri Oliver

James Adkins

Grievance No.: 27-19-20080915-0259-01-06

27-19-20090310-0047-01-06

27-19-20090303-0046-01-06

27-23-20090218-0006-01-03

27-31-20090319-0028-01-14

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Arbitrator's Opinion and Award

Arbitrator: David M. Pincus

Date: October 11, 2011

Appearances

For the Employer

Michael F. Duco

Alan Lazaroff

Aimee Szerbacki

Deputy Director- OCB  
Labor Relations- Administrator  
Advocate

For the Union

James Adkins

Sheri Oliver

Dave Justice

Donald Conley

Grievant  
Grievant  
Staff Representative  
Advocate

## Introduction

This is a proceeding under Sections 2.5.03 and 25.05 entitled Arbitration Procedures and Arbitration/ Mediation Panel between the State of Ohio, Ohio Department of Rehabilitation and Correction, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period of March 1, 2006 through February 28, 2009 (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted briefs in accordance with the guidelines established at the hearing.

## Issue

Are the grievances substantively arbitrable?

## Joint Stipulations

1. The Tobacco Free Workplace Policy (10-SAF-01) went into effect March 1, 2009
2. The grievances at issue have no procedural defects in regards to Article 25
3. In accordance with the settlement agreement entered into February 24, 2010 the parties met three separate times to bargain the impact of the Tobacco Free Workplace Policy (10-SAF-01).

These meeting dates are as follows:

- a. March 18, 2010
- b. March 30, 2010
- c. April 19, 2010

## Case History

The disputed matters have had a storied history. It began with the Employer's enactment on March 1, 2009 of a tobacco free workplace policy. This policy was then grieved and a hearing was held by this Arbitrator. Prior to the formal stage of the hearing the parties agreed to settle the disputed

matters by entering into a settlement agreement (Joint Exhibit 20). It contained the following relevant particulars:

XXX

Now therefore, all parties hereto, in consideration of their mutual covenants and agreements to be performed, as hereinafter set forth, agree as follows:

1. The decision to make a tobacco free workplace policy at D.R. & C. does not have to be bargained.
2. We agree to combine all tobacco free workplace grievances as of February 24, 2010 under this settlement agreement.
3. Parties agree to bargain the effects of the tobacco free workplace policy. Within 30 days the parties will have the first meeting and within 90 days the parties will complete bargaining.
4. Parties agree that each side can have six members present at the bargaining.
5. Parties may request Dr. Pincus to mediate during the committee's discussions.
6. Should either party determine they have reached impasse, they will make a declaration and the parties agree to go before Dr. David Pincus.

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 timely implementation of the terms of this 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.

XXX

The parties were unable to resolve the disputed matters. The substantive arbitrability issue will be dealt with initially. If it is resolved in the Union's favor, the merits will be reviewed and addressed.

#### The Merits of the Arbitrability Issue

##### The Employer's Position

The Employer argued that all the grievances lack substantive arbitrability. The grievances, for a number of reasons, do not fall within the Arbitrator's jurisdiction. As such, any review on the merits would violate Article 25 which describes the scope of an arbitrator's authority.

Two grievances (Joint Exhibit 2 A, C) were originally authored by attempting to apply the Collective Bargaining Agreement (Joint Exhibit 1). The Union tried to force a determination of whether the smoking policy was a mandatory or permissive subject of bargaining. ORC 4117, however, under ORC 4117.11 provides SERB with jurisdiction over the matters in dispute rather than an arbitrator. The Union should have filed an unfair labor practice charge under ORC 4117.11 (a)(5), and SERB would have determined whether the Employer's action or inaction constituted a violation. This course of action was never implemented by the Union.

The February 24, 2010 settlement agreement (Joint Exhibit 20) serves as an additional bar to these grievances via the arbitration process. The grievances, moreover, are no longer ripe for adjudication because certain remedies have been granted, through the settlement agreement (Joint Exhibit 20) and the bargaining process which ensued.

The Agreement (Joint Exhibit 1) would also be violated if the Arbitrator considered the remedy requested in a particular grievance (Joint Exhibit 2 (D)). This grievance desires that employees be allowed to smoke on institutional grounds until Ohio law prohibits smoking on the grounds of all state agencies. A remedy of this sort is outside the scope of the Arbitrator's authority since granting this remedy would impose a specific obligation not negotiated by the parties.

The binding settlement agreement (Joint Exhibit 20) thwarts any reasonableness allegation, and all remaining issues contained in newer grievances (Joint Exhibits 2(B), 2(D) and 2(E). The Union agreed to settle the disputed matters through impact bargaining.

#### The Union's Position

The Union seeks to have the reasonableness of the policy arbitrated as well as the unequal application of the policy in various locals within State service. The settlement agreement (Joint Exhibit 20) and the outcomes resulting from the bargaining process do not bar the Arbitrator from considering the merit of these and other related issues. It was never the Union's intent to have all related smoking

policy issues concluded and resolved by the terms and conditions mutually articulated in the settlement agreement (Joint Exhibit 20).

#### The Arbitrator's Substantive Arbitrability Opinion and Award

From the evidence and testimony adduced at the hearing, a complete and impartial review of the record including pertinent contract provisions and the parties' briefs, the Arbitrator finds that the grievances lack standing. They are not properly before the Arbitrator because of substantive arbitrability concerns.

It is axiomatic that prior grievance settlements or their terms and conditions will not be allowed as evidence by Arbitrators in de novo hearings. An exception exists, however, when matters in dispute directly deal with enforcing the provisions and terms of a mutually agreed to settlement. Here, the parties anticipated this potential enforcement outcome when they agreed to the following language:

XXX

This Agreement shall not be introduced,...except as may be necessary to enforce its provisions and terms

XXX

Here, the Employer has rightly imposed the following mutually agreed to term and condition contained in the settlement agreement (Joint Exhibit 20):

XXX

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 timely implementation of the terms of this Agreement.

XXX

The Union has never alleged the terms and conditions of the settlement (Joint Exhibit 20) were somehow violated by the Employer. It is, therefore, enforceable in its entirety.

All of the grievances, the two initial grievances heard in February of 2010, and those heard on March 9, 2011, cannot be heard on the merits because they lack substantive arbitrability. They all "arise as a result of the timely implementation of the terms of this Agreement." The Union, moreover, has

exhausted the remedies available because it agreed the tobacco free workplace policy did not have to be bargained, and it also agreed to resolve various other issues through the impact bargaining process.

Certain portions of the bargaining unit may dislike the tobacco free workplace policy. The Arbitrator is fully aware of the consequences these restrictions place on lifestyle alternatives. Yet, the settlement agreement (Joint Exhibit 20) was entered into without duress as the parties mutually agreed to particular terms and conditions with specifically incorporated rights and responsibilities. An alternative outcome would have the Arbitrator impose certain obligations unintended by the terms mutually agreed to by the parties and disallowed by the Collective Bargaining Agreement (Joint Exhibit 1).

Based on the analysis, the merits of the various issues cannot be reviewed by the Arbitrator.

Award

The grievances are denied because they lack substantive arbitrability.

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Chagrin Falls, Ohio

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Dr. David M. Pincus  
Arbitrator

