

State of Ohio Civil Service Employees Association Arbitration Preceding

In the matter of the Arbitration Between:

The State of Ohio, Department of Rehabilitation and Correction

-And-

Ohio Civil Service Employees Association, Local 11, AFSCME

Re: James Adkins

Grievance: James Adkins

Grievance Nos.: 27-19-(2010-06-24)-0151-01-06

27-19-(2009-08-31)-0199-01-06

Arbitrator's Opinion and Award

Arbitrator: David M. Pincus

Date: November 20, 2012

Appearances

For The Employer

Philip Elms
Nicole Boysel
Antwan Booker
David Lundberg
Jessie Keys
Venita S. White

Captain
Lieutenant
Legal Intern
LRO II
Second Chair
Advocate

For the Union

James Adkins
James A Ross
Terry Brentlinger
Thomas Cochrane

Grievant
Chapter Representative
Second Chair
Associate General Counsel

Introduction

This is a proceeding under Article 25, Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panels of the Agreement between the State of 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 April 15, 2009- February 29, 2012 (Joint Exhibit 1).

At the 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 hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. The parties submitted briefs in accordance with guidelines established at the hearing.

Issue¹

Did the Employer violate Article 11 when it failed to issue keys to non-custodial employees on August 26, 2009 and June 23, 2010?

Case History

The Ohio Reformatory for Women (ORW) houses approximately 2300 female inmates with varied levels of security ratings. Most inmates, however, are classified as minimum security.

The dispute involves certain procedures imposed by the Employer on several Yard Days. This day is an annual all day recreational event for the inmate population's enjoyment.

The initial yard Day dispute took place on or about August 28, 2008 (Union Exhibit 2). The Employer refused to provide certain employees with their keys. This particular grievance was settled by having the dispute discussed in the labor management committee. Once discussed by the parties, the matter still remained unresolved.

Subsequent Yard Days resulted in similar disputes. On August 26, 2009, the Employer refused to issue keys to certain employees. The Union grieved (Joint Exhibit 2) this matter and it was advanced to the arbitration step. The matter was never heard because of an intervening event. Another Yard Day was held on June 23, 2010. Again, the Employer withheld keys.

The 2009 and 2010 grievances (Joint Exhibit 2 and Joint Exhibit 3) were eventually consolidated. The following statements reflect the contents of both grievances:

¹ The parties were unable to stipulate to an issue. As such, based on a complete review of the record the Arbitrator formulated the issue to be reviewed.

On 8/26/08 Bargaining Unit members were denied their keys due to the fact it was Yard Day for the inmates. This only tells the bargaining unit members of this facility that management does not trust them. Staff must pull their keys to lock the bathroom when they have to use the facilities because you can't lock it without a key. Staff must also pull their keys to be able to pull the fire alarms if a fire would break out because again, this has a keyed lock on it and cannot be pulled without a key.

XXX

(Joint Exhibit 2)

The most recent grievance contained the following relevant particulars:

XXX

On 6/23/10 yard day was held for inmates. This is ran as a C.I.M. within the institutions. Certain bargaining unit employees were denied their keys when they came to work. This is placing their safety and maybe even their lives in danger due to the fact that there were over 2000 inmates out in the yard and no form of egress for these staff to be able to separate themselves from any situation that might arise.

XXX

(Joint Exhibit 3)

The grievance was not settled during subsequent stages of the grievance procedure. Neither party raised procedural or substantive arbitrability issues. As such, the grievance is properly before the arbitrator.

Merits of the Case

The Union's Position

The Union argues that the Employer violated Article 11 by arbitrarily violating Article 5. As articulated in Article 5, the Employer does have the right "to...determine the type of equipment used..."

Here, the dispute deals with the assignment of the keys to non-security employees during several Yard Days.

Article 11 anticipates the Union bringing grievances dealing with alleged unsafe practices. The denial of keys on a CIM day clearly raise safety issues requiring reasonable relationship between the denial and the Employer's objective.

Adkins provided testimony in support of the Union's position. Several examples were provided which identified ways employees' health and safety was threatened because of the circumstances surrounding Yard Day, and the Employer's unwillingness to assign keys to non-custodial personnel.

The Employer's rebuttal was totally flawed. It failed to provide any rational basis for the decision. Captain Elms sole justification for the practice was to ensure assigned duties would be completed properly.

The Employer's Position

The Employer argues there was no contractual violation of Article 11. Limiting the use of institutional keys was well within the Employer's management rights and did not abridge the contract.

Not assigning the keys in the dispute did not create a security risk or a safety hazard. The situation did not differ from other situation where employees are inside the prison without keys. Even if keys were provided, security would not have been enhanced. Adkin's keys would not access anything in the yard. He would have to be in an area which provided for access.

The Union's security fears were invalid. Extra security was provided during Yard Day as supported by rosters (Union Exhibit 4) produced at the hearing. Staff at the yard without keys would have had access to other areas if a disturbance had arisen. Keys required by Adkins to open mechanical rooms were not in close proximity to Adkin's grilling location. Finally, issuing the keys in question would not enhance security. Yard Days require heightened security measures which were in place on the days in question.

The Union also failed to comply with Article 112 requirements. It did not report the safety and health issue to “an Agency/Facility safety designee for evaluation.” Section 11.03 contains this requirement.

Arbitrator’s Opinion and Award

From the evidence and testimony introduced at the hearing, a complete review of the record including pertinent contract provisions, it is the Arbitrator’s opinion that the contract was violated. Neither the procedural nor substantive arguments were supported by the Employer.

The Article 11 arguments were unpersuasive. The Employer raised the Section 11.03 defect but was unable to rebut Adkin’s testimony. He stated the Union brought its concerns to the safety designee without any resolution. Thus, the Union complied with the required reporting process. Once this process was completed, the Union properly filed a grievance contesting the Employer’s actions.

The procedural defect claim seems suspect for another reason. The Employer never raised procedural arbitrability nor substantive arbitrability claims. Such matters should have been raised if the Union failed to comply with section 11.03. The procedural aspect should have been raised prior to the arbitration hearing, while any substantive arbitrability issue could have been raised at anytime.

Article 5 contains a listing of traditional management rights. In fact, it articulates certain matters related to the present dispute:

XXX

5. Make any and all rules and regulations
6. Determine the work assignments of its employees.
8. Determine the type of equipment used and the sequence of work processes.

XXX

Normally, the rights are absolute, but when challenged, it is well-established the Employer’s actions must be supported by a reasonable business justification. Here, the Employer failed to support its

administrative action when it barred all non-custodial personnel from having their keys. As such, Section 11.3 was also voided since the Employer was unable to rebut the Union's safety and health arguments.

This conclusion is based on a number of related critical considerations. Yard Day takes place once a year. The Employer implemented a Critical Incident Management (CIM) plan because it viewed this day as a heightened security risk. Such a designation seems reasonable since the inmates are no longer confined but are engaged in a number of activities. To confine their counterpart non-security personnel without their keys is a safety and health risk under these circumstances.

Adkins provided specific examples regarding potential risks. Staff must avoid getting trapped if an incident takes place. With their keys, employees can isolate themselves and others in buildings or rooms until the incident subsides. Similarly, restroom access is limited by this administrative decision. All but three restrooms allow access without keys. As such, access can only be achieved via escort or by finding an unlocked restroom.

The major justification provided by the Employer is also flawed. Employer witnesses stressed it was imperative to limit the movement of personnel so they complete their tasks. Unfortunately, the Employer was unable to provide any prior experience in support of this justification. Prior discipline was not introduced to evidence any on-going problem or issue.

Yard Days are used throughout the system. Yet, this facility solely has this key policy even though there are many similarly situated institutions. Adkins, who is a statewide Union official, provided this testimony which went unanswered.

Prior to the event, the bargaining unit was notified that the decision regarding the key policy will take place on a case by case basis. Yet, it appears no non-custodial employee was granted access to their keys. Perhaps, a true analysis would have led to some deviation from the norm producing some semblance of justification. Otherwise, the Arbitrator concludes the notification serves as a mere pretext.

Award

The grievances are upheld. The Employer is ordered to cease and desist from applying the same key policy next Yard Day, or another Yard Day as long as it continues to use the same justifications. Obviously, if circumstances or justifications change, and can be supported, the Employer may under Article 5 implement a reasonable key policy.

November 11, 2012
15054 Hemlock Point Road
Chagrin Falls, Ohio 44022

Dr. David M. Pincus
Arbitrator