All advocates - FYI

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May 4, 1989

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Ohio Dept. of Administrative Services
Office of Collective Bargaining
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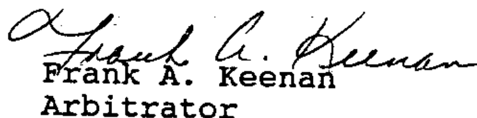
Re: State of Ohio Hazardous Waste Facilities Board and O.C.S.E.A. Local 11, A.F.S.C.M.E., AFL-CIO (Lepp Suspension; GR 87-2931)

Gentlemen:

You will find enclosed the Ruling with respect to the Union's pending motions.

Very truly yours,



Frank A. Keenan
Arbitrator

Enclosure

In the Matter of Arbitration Between

STATE OF OHIO HAZARDOUS WASTE
FACILITIES BOARD

and

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11
A.F.S.C.M.E., AFL-CIO

GR 87-2931
(Michael Lepp)

Appearances:

For the Board:
Egdillio J. Morales

For the Union:
Daniel Scott Smith

# RULING ON MOTION TO REOPEN THE RECORD AND SUBMIT ADDITIONAL EVIDENCE ON ARBITRABILITY

Before:

Frank A. Keenan
Panel Arbitrator

By letter dated March 27, 1989, the Union sought to reopen the Record[1/] and submit additional evidence on the issue of arbitrability of Grievant Lepp's suspension, on the grounds that the additional evidence would consist of:

> "1. Instances where the Office of Collective Bargaining has stated that a demand for arbitration was not in the file and the Union has produced documentation to prove a demand was received by OCB. Some of these instances have occurred only after the last hearing date for this grievance [i.e., February 17, 1989]. . . . This evidence is either newly discovered or in the nature of rebuttal evidence."

By letter dated April 4, 1989, the State resists reopening the record for the introduction of such evidence on the grounds that the evidence sought to be adduced ". . . is irrelevant; it is a new argument; and, it is not in the nature of rebuttal evidence. Whether or not the parties have had previous disputes over the proper filing of an arbitration request is not material to the present case. The Employer is willing to stipulate that this has occurred. However, this does not diminish the Union's burden to establish that in the instant case a demand for arbitration was properly filed.

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[1/] The Record to date consists of the transcribed proceedings of the Hearings held on February 17 and March 29, 1989.

Furthermore, the Union's contention that 'some of these instances have occurred only after the last hearing date for this grievance' supports the position that at least some of the alleged evidence was available before the hearing and thus it is not newly discovered. Also, events occurring after the hearing cannot be relevant to the issue to be decided. They have absolutely nothing to do with the arbitrability of G87-2931."

In addition the Union would submit evidence consisting of:

> "2. Intent testimony to show that Arbitration is considered the 5th Step of the grievance procedure and subject to Section 25.01 (D) of the Agreement. . . . This evidence is either newly discovered or in the nature of rebuttal evidence."

The State resists this proposed evidence on the grounds that "arguments on intent of 25.01 (D) are also new arguments not previously raised. Since it concerns intent, it cannot possibly be newly discovered. In addition, since the State did not put forth intent testimony on 25.01 (D), it cannot be rebuttal testimony.

The Union should only be permitted to provide rebuttal testimony which addressed the testimony of our own rebuttal witness. The State contends that the Union had this opportunity when Mr. Wyngaard testified subsequent to the State's rebuttal witness and no further testimony should be admitted."

In addition, the Union would submit evidence consisting of:

> "3. Evidence concerning OCB's practice of refusing to accept hand-delivered grievance appeals . . . This evidence is either newly discovered or in the nature of rebuttal evidence."

The State resists this proposed evidence asserting that "this is a new argument; it is not relevant; an alleged 'practice' cannot be newly discovered; and it is not rebuttal evidence."

In addition, the Union would submit evidence consisting of:

> "4. Additional testimony by Bruce A. Wyngaard concerning the events that trigger demands to arbitrate . . . This evidence is either newly discovered or in the nature of rebuttal evidence."

The State resists this proposed evidence on the grounds that "all of the same points [made above] apply to additional testimony from Mr. Wyngaard. It is not relevant and certainly not newly discovered. Mr. Wyngaard and the Union had every opportunity to present relevant testimony at the original hearing."

By way of elaboration, the State argues that it "believes that the Union is attempting to expand its case-in-chief through the introduction of new evidence." The State additionally contends that at page 147 of the [February 17,

1989] transcript, the Union's advocate "specifically narrowed the scope of any further evidence to be presented on arbitrability stating that '. . . the parties will be permitted to put on intent testimony concerning the 25.03 issue and to a limited extent reopen the issue to introduce documents that are readily available concerning the arbitrability issue which were mentioned as lacking in the employer's closing.' A review of page 110 of the [February 17, 1989] transcript demonstrates that the State specifically mentioned in its closing the other batch logs which the Union claims were sent to OCB but which the State never received. However, the State contends that even these documents should not now be admitted as the Union should have been prepared to present such documents originally."

Finally, in its letter of April 4, 1989, the State asserts that "as stated in the objection raised [in the March 29, 1989 transcript] to Mr. King's testimony, the Union is trying to expand the issue under consideration to include whether or not the parties should present arguments on the merits of the case on the same day that procedural arbitrability is addressed. The State presented argument and evidence on this question for the sole benefit of assisting the Arbitrator to make a ruling in this case. The bifurcation question itself was never presented as an issue to be decided by the Arbitrator. Therefore, the State's position is that since our motion was withdrawn, the parties should now proceed to schedule a hearing

on the merits of the discipline unless of course you decide prior to scheduling the hearing that the case is not arbitrable."

Following the State's statement of position in opposition to the Union's Motion, dated April 4, 1989, the Union responded by letter dated April 10, 1989, as follows:

"1. The Employer's position in opposition to our motion is not consistent with its earlier conduct. The Employer objects to our motion because the Union had its opportunity to present evidence and closed the record. Concerning the bifurcation issue, however, the Employer made a motion to admit additional evidence after it had had similar opportunity and agreed to close the record. The record was not merely closed, a decision was rendered. The Employer made its motion only after it received an unfavorable decision. The fact that the Employer later withdrew its motion does not change the matter. It did not withdraw because it believed the motion was wrongfully made. The Employer, it seems, wants to hold the Union to a standard to which it does not adhere itself.

The Union appreciates the desire to have the speedy resolution of grievances. It does not encourage the extension of arbitration processes. It has not and will not abuse motions such as the one that is made in this case. In this case, however, it believes that such a motion is necessary.

For a variety of reasons, the pace of the hearing was rushed. The pace of the hearing, and the several acrimonious debacles that disrupted the hearing caused several points to not be addressed.

Also, the State's rebuttal evidence challenging the Union's appeal practice was unexpected and not revealed prior to hearing. Consequently, the Union was not fully prepared to respond at hearing.

Lastly, in part, the Arbitrator's bench discussion of the arbitrability issue raised questions as to the sufficiency of the evidence. The Arbitrator specifically raised questions as to Step 5's relationship to the lower steps of the procedure and the applicability of Section 25.01(D).

As a consequence of the above, the Union believes that absent a decision to reopen the records, the Arbitrator will make a decision that is not based on a full and complete record. For all the above reasons, the Union believes its motion is proper and respectfully requests that the same be granted."

Discussion:

A review of the transcripts of the Record to date, and the parties' respective positions, in support of and/or opposition to, the Union's Motion To Reopen the Record, disclosed four (4) dominant issues to be determined at this stage of the proceedings vis-a-vis the above-styled grievance, to wit:

Issues #1 and 2:

1) Is the bifurcation issue properly before the Arbitrator for disposition? And, if so, what is the meaning of paragraph three of Section 25.03--Arbitration Procedures?

Issue #3:

Is the Union's Motion To Reopen the Record for the submission of certain proposed evidence well grounded and hence to be granted?

Issue #4:

Notwithstanding the outcome of issue #3, may the Union now properly submit certain alleged batch logs, and may the State now respond by way of testimony, or otherwise, to said evidence, should said batch logs be allowed to now enter the record?

Ruling and Rationale:

A review of the Record to date and the parties' respective positions in my judgment readily reveals that the bifurcation issue is squarely before the Arbitrator for disposition. In a nutshell, the State's position is that paragraph three of Section 25.03 does not contemplate that a hearing on the merits of a grievance will take place on the same day as evidence as to "arbitrability" is received, and that rather, arbitrability evidence must first be received, and a decision made as to arbitrability within whatever reasonable time frame that might

require, and that after a decision to the effect that a grievance is arbitrable has been made, then and only then will merit evidence, on a subsequent hearing date, be received.

Whether this position comported with the Contract was decided against the State in a "bench decision" at the Hearing held February 17, 1989. Following this bench decision adverse to its position the State moved to reopen the record on the point, asserting that "intent testimony" would reveal, as State Advocate Morales put it, that "the intention [of paragraph three of Section 25.03] was that the parties would proceed not on the same day and that the intent witness will show that, and so we'd like to reopen the case to put in an intent witness. Because the Union doesn't have one [i.e., an 'intent witness'] here, certainly we're more than willing to ask for a continuance to comply with the notions of fairness." Accordingly, a continuance was granted until March 29, 1989, for the purpose of receiving intent evidence vis-a-vis paragraph three of Section 25.03. However, in the interim the State withdrew its Motion to Reopen the Record, stating as follows at the March 29th hearing:

> "Mr. Arbitrator, management would like to go on record as objecting to this proceeding.
>
> This proceeding was originally scheduled because management had filed a motion to reopen the arbitrability case to enter intent testimony on 25.03.

Management has since determined that there are no intent notes on the subject, that the language was not discussed when it was originally negotiated,[2] and consequently management has withdrawn its motion.

Management, therefore, contends that the Arbitrator is exceeding his authority in reopening the case.

Given that it was a Management motion and that we control it, we believe once it has been withdrawn, there is no basis for this proceeding and no further evidence on arbitrability should be admitted.

We might point your attention to the issue which you were to decide originally, and that was the arbitrability of the 10-day suspension, and not the question of bifurcation raised by the Union.

Therefore, we object to continuing this proceeding."

Reiterating my prior ruling, I find that in the circumstances present here, the State cannot be said to have a proprietary interest in its Motion to Reopen the Record in order to introduce intent testimony. Thus this Motion of the State was initially allowed because of a blatant ambiguity within paragraph three Section 25.03, namely, the parties' use of the phrase "then proceed to <u>determine</u> the merits of the dispute." In context it must seriously be doubted that the

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[2] These assertions are of course "representations" of fact and not testimony or evidence.

parties literally required the Arbitrator to "determine" the merits of the dispute. In context it appeared that the parties intended to require the Arbitrator to <u>hear</u> the merits of the dispute and at a subsequent time, if found to be arbitrable, "determine" the merits, or lack thereof, of the dispute. In these circumstances when the State offered to clarify this blatant ambiguity, with intent evidence, for the first time <u>after</u> a bench decision was made without the benefit of any intent evidence, fairness dictated that the State be allowed to do so and in order to do so the Record had to be reopened. Hence the State's motion to do so was granted. As the State at the time of its Motion recognized, "fairness" also dictated that the Union also be afforded the opportunity to introduce intent testimony. The short of the matter is that this "fairness" consideration is not now defeated simply because the State elects to not introduce said intent testimony and seeks to withdraw its motion. Indeed, in failing to introduce intent testimony or other evidence, the inescapable inference is that the State is not in possession of evidence to support its construction of paragraph three of Section 25.03 of the Contract. Furthermore, the Union, accepting the Ruling on the State's Motion to Reopen,stood willing to clarify the ambiguity noted above with its own intent witness, Thomas J. King. In sum, King's sworn and uncontradicted testimony at the March 29th hearing corroborates that as the parties discussed at the bargaining table, paragraph three of Section 25.03 is intended to provide that if the Arbitrator selected to hear a

grievance on a date certain, concerning which a question of its arbitrability is raised by a party, the Arbitrator will first hear the evidence and arguments as to arbitrability and if possible, rule on arbitrability before proceeding to hear the merits of the dispute. However, where in the Arbitrator's judgment, a determination cannot be reasonably made there and then concerning the arbitrability of the grievance, then the parties shall nonetheless proceed to present their evidence on the merits that same day, and if it is ultimately determined by the Arbitrator that the grievance is not arbitrable, then of course no determination on the merits will be made.

The Ruling then on issues #1 and 2 is that the bifurcation issue is properly before the Arbitrator and the meaning of paragraph three of Section 25.03 is as more fully described above.

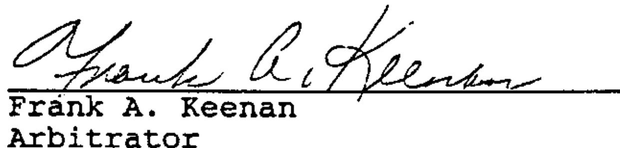
With respect to issue #3, except as expressly provided herein with respect to Union request no. 2 (intent testimony on 25.03 (D)), I find that the State's objections, and the bases therefore, to a reopening of the Record for the purposes urged by the Union, are well founded. Accordingly, the Union's Motion with respect to its requests numbered 1, 3, and 4 are denied. With respect to request number 2, intent testimony vis-a-vis 25.01 (D), suffice it to say that the Arbitrator's comments at pages 126 and 127 of the transcript for February 17, 1989, were intended merely to flag an area where the parties should brief the Arbitrator and no determinations concerning the meaning of the parties' contract terms was intended. Moreover, unlike the

situation concerning paragraph three, Section 25.03, there is no blatant ambiguity here. Hence, absent a subsequent determination following careful study to the effect that indeed the parties' contract is ambiguous in the matter, the Union's request to reopen the Record for receipt of intent testimony is presently denied, subject to reconsideration should the circumstances outlined above come to pass.

With respect to issue #4, it appears that the alleged batch logs in question were inadvertently not brought to the initial hearing for introduction and fairness dictates that they now be received. It seems to me that this matter can best be accomplished by stipulation of the parties, in which case the State can introduce its evidence on the matter, if any, as well.

Finally, in light of the above, and because the parties have requested an opportunity to brief the matter of the arbitrability of the Lepp suspension grievance, briefs are set due fourteen (14) days from the date of this Ruling, or such further time as one or another of the parties, for good cause shown, requests of the undersigned and as approved by the undersigned.

Dated: May 4, 1989



Frank A. Keenan
Arbitrator