

#1011

ARBITRATION DECISION

October 19, 2008

In the Matter of:

State of Ohio, Ohio Veterans Home)	
Sandusky)	
)	Case No.33-00-(2007-12-20)-0173-01-04
and)	Class Action – Union Representation
)	
Ohio Civil Service Employees Association,)	
AFSCME Local 11)	

APPEARANCES

For the State:

Ryan Sarni, Labor Counselor, OCB
Joe Trejo, Assistant Manager of Labor Relations, OCB
Donna Green, Labor Relations Officer, OVH

For the Union:

Robert Robinson, Advocate
Deborah Bailey, Staff Representative
Holly Canino, Grievant
George Yancey, Witness
Vanessa Brown, Chapter President
Joann Grisson, Witness
Lori Meinzer, Witness

RECEIVED / REVIEWED

Arbitrator:

Nels E. Nelson

OCT 20 2008

OCSEA-OFFICE OF
GENERAL COUNSEL

BACKGROUND

The grievance before the Arbitrator was filed on December 20, 2007, by Vanessa Brown, the Chapter President and chief steward, and Holly Canino. The grievance form states that the grievance is a "class action" grievance and indicates that it involves "all" of the classifications. The statement of the facts is as follows:

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

The remedy requested is:

If an employee feels they need a union steward, one should be provided. Investigations do result in discipline, even if they are not the subject of the interview.

The grievance was triggered by two events on December 19, 2007. The first one occurred when Lori Meinzer was called to the labor relations office by Joe Trejo, the Assistant Manager of Labor Relations at the Office of Collective Bargaining, and Donna Green, the Labor Relations Officer at the Ohio Veterans Home at Sandusky, to give a statement in an investigation relating to allegations against John Cook, a supervisor. Meinzer arrived at the office with Brown, as her union representative. She was told, however, that she was not the target of the investigation and was not entitled to union representation. Green then ordered Brown to return to work and Meinzer wrote a statement related to the allegations against Cook.

The other incident involved Canino. She was also called to the labor relations office to give a statement relating to Cook. Canino requested union representation but, like Meinzer, was told she was not the target of the investigation and, therefore, was not entitled to representation. She completed a statement as directed.

Following the meeting, Canino called the union office in Columbus. She complained that she felt that she had been improperly denied union representation and that the same thing had happened to other employees at OVH in the past. Canino testified that she was advised to write a class action grievance protesting the denial of union representation.

At the arbitration hearing, the union offered testimony regarding other occurrences where it felt employees were denied union representation in violation of the collective bargaining agreement. Several of the incidents involved an investigation of allegations that employees were accepting gifts from residents. These events and the others raised by the union occurred in late 2006 and in early 2007.

The grievance was heard at step three on January 15, 2008. When it was not resolved, the chapter waived mediation and the case was appealed to arbitration. The hearing was held on July 14, 2008. Written closing statements were received on September 5, 2008.

ISSUE

The issue as agreed to by the parties is:

Did management violate the contract Article 24.04?

RELEVANT CONTRACT PROVISIONS

Article 24 - Discipline

* * *

24.04 - Investigatory Interview

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to

believe that the interview may be used to support disciplinary action against him/her.

When employees have a right to and have requested a steward, stewards shall have the right to be informed of the purpose of the interview and to receive a copy of any document the Employer gives to an employee to keep, during an investigatory meeting. Employees who are interviewed or testify during an investigation have no right to a private attorney, Ohio Revised Code (ORC) 9.84, notwithstanding.

* * *

Article 25 - Grievance Procedure

25.01 - Process

* * *

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the names(s) or groups(s) of the grievant(s). The Union shall define the members of a group grievance by the Step Three (3) grievance meeting, unless the Union provides evidence that specific and relevant information has been denied which prevents them from defining the group.

* * *

25.02 - Grievance Steps

* * *

Step One (1) - Immediate Supervisor

* * *

All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event.

* * *

PROCEDURAL ISSUES

State Position - The state argues that the grievance is not properly before the Arbitrator and should be dismissed. First, it points out that Article 25, Section 25.01(B), requires the union to define the members of a group grievance by the step three meeting. The state notes that the instant grievance was filed as a class action but the group was not defined by the January 15, 2008, step three meeting. It observes that Trejo testified that a class action grievance normally contains the names of the aggrieved employees and the dates of any actions referenced but neither was identified in the instant case until the arbitration hearing. The state complains that as a result, it was prejudiced in responding to the grievance and in preparing its case for arbitration.

The state rejects the union's claim that the class was all OCSEA members. It contends that "Section 25.01 would lose all meaning if, by default, all OCSEA members were considered to be part of a class action, regardless of whether they actually suffered an injury." (State Written Closing Statement, page 3) The state claims that the purpose of Section 25.01(B) is to allow both sides to understand the facts, dates, and parties involved in a grievance.

Second, the state charges that many of the events brought up at the arbitration hearing are untimely. It reports that Section 25.02 states:

All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty days (30) days after the event.

The state asserts that three quarters of the acts complained of occurred during an investigation that took place in 2006 and early 2007 while the grievance was not filed until December 20, 2007.

Third, the state maintains that the grievance should be dismissed because “the remedy is outside the scope of the contract and is thus not awardable.” (State Written Closing Statement, page 4) It indicates that section 25.03 states;

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.

The state complains that while Section 24.04 does not give members a right to union representation at non-investigatory interviews, the remedy requested on the grievance form is that “if an employee feels they need a steward, one should be provided.” It adds that Robert Robinson, the union’s staff representative, sent an email to the state offering to settle the case for an agreement that “the union has the right to accompany the person if they ask for representation at any interview.”

Union Position - The union rejects the state’s procedural arguments. It claims that the grievance was based on what management did to Canino on December 19, 2007. The union adds that “it was written to cover the grievant and all OCSEA members that had/had been forced to suffer ordeals similar to what she had suffered.” (Union Written Closing Statement, page 7) It asserts that there were no surprises because “management was fully aware that this grievance addressed her concerns and the concerns of members treated in a like manner.” (Union Written Closing Statement, page 8)

MERITS

Union Position - The union argues that the state violated Section 24.04 of the collective bargaining agreement. It claims that the state acted “with malice and deliberate intent” in violating the contract. The union indicates that the state’s “purpose was to

confuse and deny employees their rights to union representation with the inherent threat of discipline hanging over their heads.” (Union Written Closing Statement, page 1)

The union contends that the state’s action came close to “union busting.” It asserts that the state treated union officials in such a manner that the subliminal message was clear. It charges that the message to employees was “if the union can’t protect themselves, how can they help us?” (Ibid.)

The union accuses the state of taking Canino through a “nightmare.” It states that on December 19, 2007, she was called into an investigation where her repeated requests for union representation were denied. The union complains that the grievant was not told the reason for the investigation and was told she could have a union representative only if she was the object of the investigation.

The union maintains that Kathy Bowman was also denied union representation. It points out that she was told that she was not entitled to representation because she was only giving a statement. The union indicates that she was subsequently given a ten-day suspension for not being truthful. It stresses that the discipline was grieved and was overturned in arbitration.

The union cites an occasion when Canino represented Bowman in a meeting with management. It charges that “Ray Mussio [from the Office of Collective Bargaining] and Joe Trejo took this opportunity to badger, insult and humiliate [Canino] in front of Ms. Bowman, the employee she was representing.” (Union Written Closing Statement, page 2) It claims that the incident reduced Canino to tears and that she cried for approximately one hour as a result of the “attack.” The union asserts that the “attack” on Canino “is

indicative of the concerns held by all employees when called into a meeting with them.”

(Union Written Closing Statement, page 3)

The union charges that the state’s action has affected its ability to represent employees. It reports that approximately five of 20 stewards are active in representing almost 500 employees. The union claims that stewards have “seen union officials, specifically, Vanessa Brown, the Chapter’s Chief Steward (a union officer with more than twenty years of service) escorted off grounds for no valid reason” and are “afraid to represent anyone.” (Ibid.)

The union questions the state’s rationale for refusing to reveal the nature of an investigation, denying employees union representation, and preventing union representatives from being an active part of the process. It claims that the state refuses to tell employees or their union representatives the nature of the dispute in order “to confuse and manipulate [them] into saying something that management could twist and use against them.” (Union Written Closing Statement, page 4) The union charges that the state’s refusal to allow employees to have union representation sometimes results in an “all out assault” on them. It adds that forbidding stewards to speak means that they cannot ask for clarification, stop harassment, or assist employees in any way, leaving employees “bewildered and the union unsure rendering the union ineffective.” (Union Written Closing Statement, page 5)

The union maintains that until 18 to 24 months ago there were no problems with union representation at OVH. It points out that Brown testified that until that time, OVH followed Section 24.04 and Weingarten. The union states:

Management and the union worked well and had a seamless process which was evidenced by the fact that management would immediately notify the union of

investigations. The employees did not have to ask for union representation because they knew one would be there. The union would be aware of the investigation; they were allowed to talk to the employee before the investigation and clarify issues raised during the investigation. (Union Written Closing Statement, page 5)

It notes that Joann Grisson testified that the prior to Trejo's arrival, union representatives would be waiting before she arrived at a meeting; that they were told the purpose of the meeting; that she would have an opportunity to talk to her union representative prior to the meeting; and that she was treated with respect.

The union argues that Brown was also subject to harassment and threats. It states that when Brown was called in for an investigation, Carolyn Smith, who was allowed in as her representative, was forbidden to speak and was not told the nature of the investigation. The union complains that following the meeting, Brown was sent home on administrative leave but then called a few hours later and told to come in the next day.

The union contends that on December 19, 2007, Brown was denied the right to represent Meinzer. It charges that when she tried to exert her rights as a union steward, Trejo told Green to order her to return to work. The union asserts that this was a blatant violation of Section 24.04, and created "utter chaos" for employees and made labor relations "very contentious."

The union acknowledges that the unfair labor practice it filed on December 6, 2006, was dismissed. It maintains, however, that it was dismissed only because it provided no proof that employees had requested union representation. The union stresses that in the instant case, there was testimony from the grievant and others that they requested and were denied union representation.

The union agrees with the state that the elements defining when an employee is entitled to union representation are set out in State Employment Relations Board v. State of Ohio, Department of Rehabilitation and Correction, Ross Correctional Institution, Case No. 98-ULP-03-0122. It indicates that the elements are:

- (1) That the interview was investigatory;
- (2) that the employee requested the presence of a union representative and the request was denied;
- (3) that the employee reasonably believed that the interview might result in discipline; and
- (4) that after the employer's denial of representation, the employer compelled the employee to continue the interview.

The union claims that these requirements were met in the instant case.

The union rejects the state's claim that Grisson was provided union representation. It recognizes that the state provided two documents showing that she was afforded representation. The union notes, however, that she testified that she had been called to the office "about four times" and that she was not always allowed union representation. It claims that the process led to her removal but asserts that "like the others removed during those investigations, she was reinstated." (Union Written Closing Statement, page 9)

The union contends that it is only asking for the rights guaranteed by Section 24.04. It states that it never asked to be included in all meetings. It stresses that it "only wants the unfair interrogations and intimidating tactics to stop." (Union Written Closing Statement, page 10)

The union argues that Weingarten goes against the state's claim that the union steward's role is only to observe. It states:

The Supreme Court clearly acknowledges a representative's right to assist and counsel worker during the interview. The Supreme Court further states that the union **MUST** be informed of the nature of the interview; the representative **MUST** be allowed to speak privately with the employee before the interview;

and during the questioning the representative can interrupt to clarify a question or to object to confusing or intimidating tactics. (Union Written Closing Statement, pages 10-11)

The union concludes that the grievance should be upheld. It asks the Arbitrator to provide clarity regarding an employee's right to union representation; to direct the state to stop its intimidating and threatening tactics; and to direct the state to post his decision throughout the facility.

State Position - The state argues that the union's claim that it violated Section 24.04 and Weingarten by denying union representation to Canino and Meinzer on December 19, 2007, is without merit. It points out that Section 24.04 guarantees employees the right to have a union steward "only at investigatory interviews where the employee has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her." (State Written Closing Statement, page 6) The state maintains that in both cases, the employees were told that they were only there to give a statement regarding what they saw and that they could not receive discipline as a result of the investigation.

The state cites State of Ohio and Ohio Civil Service Employees Association, AFSCME Local 11, June 1, 1998, in support of its position. It reports that in that case Arbitrator John Murphy adopted the four-part test from the decision of the State Employment Relations Board in In re City of Cleveland, SERB 97-011, to determine if there was a violation of section 24.04. The state observes that SERB indicated that the four elements necessary to prove a violation of Weingarten rights are:

(1) that the interview was investigatory; (2) that the employee requested the presence of a union representative and the request was denied; (3) that the employee reasonably believed that the interview might result in discipline;

and (4) that after the employer's denial of representation, the employer compelled the employee to continue with the interview.

The state argues that in the instant case the first element was not satisfied. It points out that Trejo, Green, and the grievant testified that the purpose of the meeting was to elicit information regarding the conduct of Cook and that the conduct of Canino and Meinzer was not the subject of the interview. The state claims that the union knew this "because it was the union that requested the investigation in the first place." (State Written Closing Statement, page 7)

The state contends that the third element was not satisfied. It claims that there could be no reasonable belief that the interview might result in discipline because the union requested the investigation of Cook and because the grievant and Meinzer were told that they were not the subject of the investigation. The state adds that "there was no accusation that either of them had done anything incorrectly." (State Written Closing Statement, page 8)

The state rejects the union's claim that Bowman received discipline as the result of a non-investigatory interview on November 17, 2006. It maintains that she gave a statement at a meeting regarding the conduct of others but then told an entirely different story at an arbitration hearing. The state claims that as a result, "a new investigation was opened into whether she was untruthful in her witness statement or in her testimony." (State Written Closing Statement, page 8) It indicates that at that investigation she was afforded union representation because the interview was about her conduct. The state adds that in any event, any complaint regarding Bowman's case is untimely because it occurred in 2006.

The state rejects the union's argument that it violated employees' Weingarten rights in meetings in November of 2006 and May of 2007 related to allegations that employees were accepting gifts from OVH residents. It contends that the meetings were not investigatory and employees did not request union representation. The state acknowledges that an the unfair labor practice charge was filed by the union but reports that the State Employment Relations Board found that employees' rights were not violated and dismissed the charge.

The state accuses Robertson of changing his story regarding union representation at these meetings. It points out that the unfair labor practice charge does not claim that employees requested union representation but at the arbitration hearing Robinson claimed that they did request representation. The state insists that "this is an inaccurate description of the events and the union supplied no evidence supporting their assertion." (State Written Closing Statement, page 9)

The state concludes that it did not violate Section 24.04 of the contract or the Cleveland standard when it denied Canino and Meinzer's requests for union representation. It asks the Arbitrator to deny the grievance in its entirety.

ANALYSIS

Procedural Issues - The first issue for the Arbitrator is the state's argument that the grievance is procedurally defective and should be dismissed. The Arbitrator agrees with the state that the grievance was not properly filed. It was filed as a class action grievance on behalf of all of the employees at OVH. The dispute, however, appears to be limited to Canino and Meinzer, who were called to the labor relations office to meet with management on December 19, 2007, and, according to the union, denied union

representation in violation of Article 24, Section 24.04. The other instances cited by the union occurred in late 2006 and early 2007 and were clearly beyond the ten-day limit for filing a grievance as set forth in Article 25, Section 25.02.

The Arbitrator, however, does not believe that the grievance should be dismissed. First, he rejects the state's claim that the union violated Article 25, Section 25.01(B), by failing to list members of the class by the step three meeting and that its failure to do so requires the dismissal of the grievance. The record indicates that the state understood that the union believed that Canino and Meinzer were improperly denied union representation and Robinson's email to Ryan Sarni, the state's advocate, which identified the union's potential witnesses and revealed the nature of their testimony, made it clear to the state that it intended to present testimony regarding earlier incidents relating to union representation. The conclusion that the earlier instances cannot be considered does not justify the dismissal of the grievance as it relates to Canino and Meinzer.

Second, the Arbitrator must also reject the state's contention that the grievance is not arbitrable because the remedy requested by the union is "outside the scope of the contract." In most arbitration cases there are two questions -- whether the employer violated the contract and, if so, the appropriate remedy for the breach of the agreement. The fact that the union may have requested an improper remedy does not mean that the Arbitrator cannot consider whether there was a contract violation and, if necessary, devise a proper remedy.

Based upon the above discussion, the Arbitrator is left with a grievance claiming that the state violated Article 24, Section 24.04, by denying Canino and Meinzer union representation when they met with Trejo and Green on December 19, 2007.

Merits - The union argues that the state violated Section 24.04 of the contract.

This section indicates that an employee is entitled to union representation where the state is conducting an investigatory interview, i.e., one that focuses on the employee being interviewed; where it is reasonable for the employee to believe that the interview could lead to discipline; and where the employee requests representation.

The contractual provision is consistent with the standard adopted by the State Employment Relations Board. In In re Davenport, SERB 95-023 (12-29-95), the board indicated that it was adopting the standard of NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), and in In City of Cleveland, SERB 97-011 (6-30-97), the board explained that a denial of the right to union representation is shown when four elements are established.

A violation requires:

(1) that the interview was investigatory; (2) that the employee requested the presence of a union representative and the request was denied; (3) that the employee reasonably believed that the interview might result in discipline; and (4) that after the employer's denial of representation, the employer compelled the employee to continue the interview.

In the instant case, the record reveals that Canino and Meinzer were not entitled to union representation under Section 24.04. First, their meetings with management were not investigatory interviews. They met with management representatives as a result of a union complaint regarding the conduct of a supervisor. He was the object of the investigation, not Canino or Meinzer

Second, Canino and Meinzer had no reason to believe that they could be subject to discipline. As indicated above, the investigation focused on a supervisor who was accused of striking a bargaining unit employee. Canino and Meinzer were simply asked to write statements regarding what they saw or heard.

The Arbitrator must reject the union's claim that an employee is entitled to union representation at a meeting with management where the employee feels uncomfortable or feels that he/she needs representation. This position is inconsistent with the standard adopted by SERB and the NLRB which requires employees to reasonably believe that they could be subject to discipline before they are entitled to union representation. Page 235 of the sixth edition of Elkouri and Elkouri's How Arbitration Works explains that "the 'reasonableness' of an employee's belief that discipline might result will be determined 'by objective standards under all the circumstances of the case.'"¹ A "feeling" of discomfort or of a need for representation does not meet this standard

The testimony of the union's witnesses went beyond the question of an employee's right to union representation in a meeting with management. A number of witnesses complained about their treatment at meetings with management. They also claimed that the stewards were sometimes not told the purpose of a meeting and were ordered not to speak, reducing them to mere observers.

The Arbitrator appreciates the importance of these issues and is familiar with the rulings of the National Labor Relations Board relating to many of these issues. However, the issue in the instant case is not the rights of union stewards at investigatory interviews or the conduct of the management representatives at the meetings but simply the right of an employee to union representation at a meeting with management.

Based on the above analysis, the Arbitrator must deny the grievance.

¹ Elkouri and Elkouri cite NLRB v. J. Weingarten, Inc., 420 U.S. at 257, n.5.

AWARD

The grievance is denied.

Nels E. Nelson

Nels E. Nelson
Arbitrator

October 19, 2008
Russell Township
Geauga County, Ohio