

Voluntary Labor Arbitration Proceeding

In the matter of the Arbitration between:

The State of Ohio, Department of Taxation

-and-

Ohio Civil Service Employees Association, AFSCME, Local 11

Grievant: Susan McQuisten

Grievance No.: 30-04-20080718-0046-01-09

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GENERAL COUNSEL

Arbitrator's Opinion and Award

Arbitrator: David M. Pincus

Date: January 27, 2010

Arb.
Decision
1052

Appearances

For the Employer

Jamelin Wilson
Mindy Mathews
Ashley Hughes
Gregory Siegfried

Administrator
AA 2
Second Chair- OCB Labor Council
Advocate

For the Union

Susan McQuiston
Peajai Keyse
Jerry Bouty
Thomas Cochrane

Grievant
Steward
Staff Representative
Associate General Council

Introduction

This is a proceeding under Article 25- Grievance Procedure Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/ Mediation Panels of the Agreement between the State of Ohio, Ohio Department of Taxation, hereinafter referred to as the "Employer," and the Ohio Civil Service Employees Association, AFSCME,

Local 11, hereinafter referred to as the "Union," for the period March 1, 2006 through February 18, 2009 (Joint Exhibit 1).

The arbitration hearing was held on October 28, 2009 in Columbus, Ohio. The Employer raised a substantive arbitrability claim. Section 25.03 requires that questions of arbitrability be addressed prior to resolution of the merits. The Arbitrator heard arguments regarding the arbitrability issue, bifurcated the disputed matter because of the nature of the dispute, and requested briefs on whether the matter was properly before him. The parties complied with guidelines established at the hearing regarding their submissions.

Issue¹

Is a reasonable accommodation claim under Section 2.01 cognizable under the arbitration procedure of the collective bargaining Agreement?

Joint Stipulations

1. The Parties agree that a reasonable accommodation was negotiated as a remedy.

Pertinent Contract Provisions

Article 2- Non-Discrimination

2.01- Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation,

¹ The parties were unable to agree on a joint issue. As such, the issue was formulated by the Arbitrator based on the record.

or veteran status. Except for rules governing nepotism, neither party shall discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer may also undertake reasonable accommodation to fulfill or ensure compliance with the Americans with Disabilities Act of 1990 (ADA) and corresponding provisions of Chapter 4112 of the Ohio Revised Code. Prior to establishing reasonable accommodation which adversely affects rights established under this Agreement, the Employer will discuss the matter with a Union representative designated by the Executive Director.

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

XXX

(Joint Exhibit 1, Pg. 3)

Article 5- Management Rights

The Union agrees that all of the function, rights, powers, responsibilities, and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted, or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to:...

(6) Determine the work assignments of employees...

(8) Determine the type of equipment used and the sequence of work processes...

XXX

(Joint Exhibit 1, Pg.10)

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.

XXX

(Joint Exhibit 1, Pg. 86)

25.03- Arbitration Procedures

XXX

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.

XXX

(Joint Exhibit 1, Pg 91)

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.

XXX

(Joint Exhibit 1, Pg. 91)

Case History

On September 16, 2008, Susan McQuiston, the Grievant gave her supervisor, Patricia L. Brown, a letter from her doctor that maintained she should not be assigned to the OPEX 51 machines. She allegedly had anxiety issues regarding the operation of this equipment. Prior to the incident in dispute, Grievant had suggested a number of accommodations, but all were refused.

On the date in question, the Grievant, while undergoing training on the OPEX 51 machine, experienced an anxiety attack. She was allegedly terrified by the OPEX 51, which is an industrial extraction machine and its speed of operation.

On September 17, 2008, the formal grievance was filed, contesting the Employer's actions. The remedy sought contained the following particulars:

XXX

Make sure Ms Quiston is not required to use the machine OPEX 51 or other industrial extraction machines, make sure Ms McQuiston includes back pay with interest for any lost time due to illness from stress created by management requiring the employee to work out of her classification @ 1% interest per month.

(Joint Exhibit 2, Pg 3)

On July 16, 2009, the Ohio Civil Rights Commission filed a Letter of Determination regarding an alleged charge against the Employer for denying the Grievant a reasonable accommodation due to consideration of her disability. The Commission found insufficient information to establish discrimination or denied her a reasonable accommodation due to her alleged disability. (Employer Exhibit 2).

The Parties' Substantive Arbitrability Claims

The Employer's Position

The Employer opines the disputed matter lacks substantive arbitrability and should be dismissed and denied. In this instance, the Arbitrator lacks jurisdiction under the Agreement (Joint Exhibit 1) to hear the disputed matter.

Any waiver argument raised by the Union is without merit. Nothing in the Agreement (Joint Exhibit 1) requires the Employer to raise a substantive arbitrability claim during any particular stage of the grievance procedure up to and including the arbitration stage. Here, the Employer notified the Union about the substantive arbitrability objection prior to the arbitration hearing.

Arbitral support also diffuses the Union's waiver claim. It is axiomatic that substantive arbitrability objections can be raised at the outset of an arbitration hearing.

Reasonable accommodation claims are not cognizable under the Agreement (Joint Exhibit 1), and thus, this particular grievance is not properly before the Arbitrator.

Similarly, reasonable accommodations under the ADA of 1990 and corresponding provisions of ORC chapter 4112 are not incorporated in the Agreement (Joint Exhibit 1).

The Employer maintains that Arbitrator Murphy's prior award (Case No. 14-23-(00-08-28)-0029-01-13) has precedential value and should be adhered to. Arbitrator Murphy ruled on the same substantive arbitrability issue in favor of the State of Ohio. He interpreted Section 2.01 under the 1997-2000 Collective Bargaining Agreement, but the present contract language is identical. As such, the Employer advised that Arbitrator Murphy's award has precedential value and should be adhered to.

A reading of Section 2.01 supports the Employer's contract interpretation analysis. Here, the Grievant is alleging she is entitled to a reasonable accommodation and the accommodation she requires. She is not alleging an "antidifferentiation"

notion of discrimination which is articulated in paragraph 1. Paragraph 2 deals with "antissubordination" claims of reasonable accommodation, but that language is permissive stating, "The Employer may also undertake reasonable accommodation..." As such, reasonable accommodation grievances are outside the scope of an arbitrator's authority based on a substantive arbitrability bar.

The grievance is not arbitrable under Section 25.01. This section defines a grievance as a dispute, "Regarding the application, meaning or interpretation of this Agreement." A reasonable accommodation claim under the ADA of 1990 and corresponding provisions of Chapter 4112 of the Ohio Revised Code are not incorporated in the Agreement (Joint Exhibit 1) because such an accommodation is permissive.

The express and specific terms in paragraph 2 of Section 2.01 excluded mandatory reasonable accommodation. The word "may" connotes a permissive rather than a mandatory requirement. The reference in Paragraph 1 of Section 2.01 to more general disability discrimination claims does not dilute this interpretation.

The arbitral awards support the Employer's position in the issues. Not one arbitral award of the panel has found jurisdiction dealing with a reasonable accommodation claim. Also, no award of the panel has denied a substantive arbitrability objection on the basis of a claim solely based on external law. Other cases cited by the Union are inapplicable comparisons because they reference contract language materially different from Section 2.01.

The Union's Position

The Union states the grievance is arbitrable. This conclusion is based upon the language articulated in Section 2.01, contract language which clearly prohibits discrimination inconsistent with federal or state law. Section 2.01, moreover, identifies the types of discrimination and applicable federal and state statutes.

Paragraph 2 of section 2.01 further supports this analysis. It is premised on the assumption that the Employer must provide employees with reasonable accommodation to fulfill its statutory obligations. Paragraph 2 of Section 2.01 would be irrelevant if obligations contained in Paragraph 1 of section 2.01 were not required.

Paragraph 2 of section 2.01 does not articulate any permissible obligations. To do so would render the entire disability discrimination provision superfluous. An interpretation in the Employer's favor would also nullify the prohibition against disability

discrimination in paragraph 1 of Section 2.01. It would become optional via language expressed in paragraph 2 of Section 2.01.

Arbitral authority further supports the Union's interpretation of Section 2.01. Several awards rendered between 1992-1995 supported the premise that the contract language in question obligates the Employer not to discriminate based on disability. It further obligates the Employer to provide an employer with reasonable accommodation. Some of these awards, moreover, reviewed the reasonableness of accommodation requests.

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, a complete review of the record including a pertinent contract provisions and the parties' briefs, it is the opinion of this arbitrator that the grievance in question lacks standing because of the substantive arbitrability deficiencies. This finding is based on contract language negotiated by the parties which reflects their truest intent. An alternative finding exceeds the scope of the Arbitrator's authority as specified in Section 25.03. It would result in a modification of Section 2.01 unintended by the parties. The record clearly indicates that the parties did not bargain for incorporation of the ADA of 1990 and corresponding provisions of the ORC Chapter 4112 such that reasonable accommodation claims are cognizable under the Agreement (Joint Exhibit 1).

Paragraph 1 and paragraph 2 of Section 2.01 do not conflict but serve as separate vehicles for different causes of action. As such, the language in dispute is neither meaningless nor superfluous. Paragraph 1 of Section 2.01 deals with matters involving "antidifferentiation" causes of action with disabled employees as one of the protected

classes. This type of claim was never raised by the Union nor Grievant. If raised, and properly supported, this type of claim is not encumbered by substantive arbitrability limitations; they do not apply.

The Grievant's claim is clearly one of reasonable accommodation with solely falls within the confines of paragraph 2 of Section 2.02, which deals with "antissubordination" notions of discrimination. These notions regard preferential treatment on the basis of disability under the ADA of 1990 and related provisions of ORC Chapter 4112.

Paragraph 2 of Section 2.01, however, enjoys language, negotiated by the parties, which serves as a bar for any reasonable accommodation claims. By agreeing to the phrase "may undertake reasonable accommodation to fulfill or ensure compliance..." the Union has given the Employer certain unrestricted rights regarding these types of claims. The language is clearly permissive and if enacted precludes an arbitrator's analysis. Grievances of this sort lack substantive standing as evidenced by the parties' clear and unambiguous intent. The Union failed to introduce any bargaining history or other forms of parol evidence to rebut this interpretation. As such, this provision does not impose upon the Employer an obligation to comply with the Disabilities Act of 1990 and corresponding provisions of Chapter 4412 of the Ohio revised Code.

The arbitrator awards reviewed by the Union, and introduced in support of its claim, do not persuade an alternative outcome. None of these awards find jurisdiction over a reasonable accommodation claim. These awards, moreover, do not deny substantive arbitrability objections based on a claim that a grievance has standing based on statutory requirement outside the four corners of the collective bargaining agreement. Finally, some of the awards are totally inappropriate for comparison purposes since they

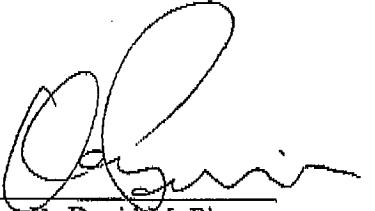
were authored prior to the inclusion of paragraph 2 of Section 2.01 in the 2006-2009 collective bargaining agreement.

Award

For the reasons stated above, the grievance is not arbitrable for it lacks substantive standing. A reasonable accommodation claim under Section 2.01 is not cognizable under the arbitration procedure of the collective bargaining agreement.

4/29/10

Chagrin Falls, Ohio



Dr David M. Pincus
Arbitrator