

SUSAN GRODY RUBEN, Esq.  
Labor Arbitrator  
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#1095

IN ARBITRATION PROCEEDINGS PURSUANT TO THE  
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

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DCSEA-OFFICE OF  
GENERAL COUNSEL

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES  
ASSOCIATION, Local 11, AFSCME

and

OHIO BUREAU OF  
WORKERS COMPENSATION

Grievance # 34-25-20100922-0152-01-07

Grievant: Michael Ely

ARBITRATOR'S  
OPINION AND AWARD

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME ("the Union") and OHIO BUREAU OF WORKERS COMPENSATION ("the State") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. The Parties agreed to submit the case to the Arbitrator on stipulated facts, written exhibits, and written briefs submitted October 28, 2011.

**APPEARANCES:**

**On behalf of the Union:**

**JENNIE LEWIS, OCSEA Staff Representative, 390 Worthington Rd.,  
Westerville, Ohio 43082.**

**On behalf of the State:**

**RUTH A. REHAK, MLHR, Labor Relations Officer, Ohio Bureau of Workers  
Compensation, 30 West Spring St., L28, Columbus, Ohio 43215.**

**THE GRIEVANCE**

**Grievant was returned to former position and was not allowed to work from home as he was prior to exempt position. Grievant is not a new hire or transferred employee. Other DSH employees are allowed to work from home.**

**STIPULATED ISSUES**

- 1. Is the grievance substantively arbitrable?**
- 2. If the grievance is substantively arbitrable, is it procedurally arbitrable?**
- 3. If the grievance is both substantively and procedurally arbitrable, does the Grievant being headquartered at OCOSH rather than at his residence violate the Agreement? If so, what shall the remedy be?**

**PARTIES' POSITIONS ON SUBSTANTIVE ARBITRABILITY**

**State Position**

**The issue contained within the grievance does not meet the definition of a grievance in Article 25.01: “any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement.” The Union tacitly acknowledged the inapplicability of the Agreement when it argued at Step 3 the Ohio Revised Code had been violated. The Union has no**

right to grieve any provision contained within the ORC; it is outside the four corners of the Agreement.

The grievance form alleges violation of Article 2 – Non-Discrimination and Article 18.06 – Layoffs-Previously Held Classifications. Neither of these Articles is applicable.

Article 2 applies to discrimination on the basis of protected class status. It references the Americans With Disabilities Act, Equal Employment Opportunity, and Affirmative Action. The Union did not even mention discrimination at Step 3. Instead, it asserted the Grievant was treated differently from employees who are in a temporary working level (“TWL”) position. The Grievant was not in a TWL position and Article 2 does not pertain to TWLs.

Article 18 pertains to layoffs. The Grievant was not laid off. Article 18.06 refers to bumping rights to previously-held classifications. Again, the Grievant was not laid off. The Union failed to offer any explanation in Step 3 regarding how Article 18 is relevant to the instant grievance.

The Grievant’s rights to a previously-held classification are derived from the ORC, not the Agreement. As there is no contractual violation, and the provisions of the ORC cannot be grieved, the grievance lacks substantive arbitrability.

### Union Position

Pursuant to Article 44.03, the Agreement cannot void a statute. The State agrees there are ORC sections that are relevant to the issue in this matter. ORC Section 4121.121(B)(2) is inextricably linked to the issue. The State cited that section in its letter to the Grievant informing him he was being placed back into a classified position. The Agreement does not address movement of an employee from an unclassified position to a classified position as in this instance. As did the State, the Grievant is relying on ORC

Section 4121.121(B)(2) to demonstrate the State did not return him to the same status and benefits he had when he was previously in a classified position. The Arbitrator has jurisdiction over this substantive issue.

#### **ARBITRATOR'S OPINION**

For an arbitrator to have jurisdiction over a grievance, the issue contained in the grievance must meet the Parties' negotiated definition of a grievance. That definition appears in Article 25.01, which defines a grievance as:

**any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement.**

While the instant grievance form alleges violation of Article 2 and Article 18.06, on their face, neither of these sections applies. Article 2 – Non-Discrimination prohibits discrimination on the basis of:

**race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status.**

The Grievant is not alleging discrimination on the basis of any of these protected classes. Article 18.06 addresses a laid-off employee's bumping rights to a previously-held classification. The Grievant was not laid off.

What the Grievant is alleging in essence is violation of ORC Section 4121.121(B)(2). That section is not incorporated by reference in the Parties' Agreement. As it is not in the Agreement, the Arbitrator does not have jurisdiction to determine whether it was violated.

While the Union is correct Article 44.03 does not void ORC Section 4121.121(B)(2), that is not the same question as whether the Arbitrator has jurisdiction over an ORC provision. Moreover, the State's reliance on ORC Section 4121.121(B)(2) for placing the

Grievant back in a classified position likewise does not bestow jurisdiction on the Arbitrator to determine whether that ORC section was complied with. The Arbitrator has jurisdiction only over grievances as the Parties have agreed to define grievances. Accordingly, the instant grievance is not substantively arbitrable.

**AWARD**

For the reasons set out above, the grievance is not substantively arbitrable and therefore is denied.

DATED: December 14, 2011

*Susan Grody Ruben*  
Susan Grody Ruben, Esq.  
Arbitrator