

IN THE MATTER OF THE ARBITRATION BETWEEN
GRIEVANCE NO.: 30-04-20101115-0064-01-14

#1097

The Ohio Civil Service Employees
Association, AFSCME Local 11

GRIEVANT: John Anthony, Chapter 2595

AND

State of Ohio

Department of Taxation

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JAN - 3 2012
DCSEA OFFICE OF
GENERAL COUNSEL

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: January 3, 2012

APPEARANCES FOR THE PARTIES

EMPLOYER

Gregory Siegfried, HR Counsel, First Chair

Ashley Hughes, Second Chair

UNION:

Barbara Folman, Ohio Civil Services Employees
Association, AFSCME Local 11, First Chair

John Anthony, Chapter President and Grievant

PROCEDURAL HISTORY

The Ohio Department of Taxation is hereinafter referred to as "Employer". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". John Anthony is the Grievant.

The Union submitted Grievance No. 30-04-20101115-0064-01-14 to Employer in writing on November 15, 2010 pursuant to Article 25 of the parties' Collective Bargaining Agreement. Following unsuccessful attempts at resolving the grievance, the parties referred the grievance to arbitration in accordance with Article 25, Section 25.03 of the 2009-2012 Collective Bargaining Agreement.

Pursuant to the Collective Bargaining Agreement between the Union and Employer, the parties designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on October 4, 2011 in Columbus, Ohio. During the course of the hearing, the Arbitrator afforded the parties full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing. The Employer advocate submitted his closing statement on November 14, 2011; the Union advocate submitted her closing statement on November 18, 2011. The hearing record closed on November 18, 2011.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator. The parties further stipulated to the issue as follows: Whether the Employer violated Article 3 of the Contract between the State of Ohio, Department of Taxation and the Ohio Civil Services Employee Association, AFSCME Local 11, AFL-CIO (April 15, 2009 – February 29, 2012)? If so, what shall the remedy be?

PERTINENT PROVISIONS OF THE 2009-2012 AGREEMENT

ARTICLE THREE - UNION RIGHTS

Article 3.01 – Access

It is agreed that the Agencies covered by this Agreement shall grant reasonable access to stewards, professional Union representatives and chapter officers, defined to include President and Vice President for the purpose of administering this agreement. The Employer may provide a representative to accompany a non-employee Union representative where security or treatment considerations do not allow non-employee access.

The Union shall furnish, in writing, the names of the Union representative, and their respective jurisdictional areas as soon as they are designated. Any changes shall be forwarded to the Employer by the Union as soon as changes are made.

Article 3.04 – Meeting Space

The Union may request use of State property to hold meetings. Where feasible, the Employer will provide such space. Such meetings will not interrupt State work and will not involve employees who are working. Such requests will not be reasonably denied.

Article 44 – Miscellaneous

Article 44.02- Operations of Rules and Law

To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to State employees in areas where this Agreement is silent, such benefits shall be determined by those statutes, regulations, rules or directives.

BACKGROUND

The facts in this case are largely undisputed and are hereinafter summarized. However, where, relevant evidence regarding pertinent facts are disputed, the evidence is summarized.

Peajai Keyse is a former employee of the Department. She retired on June 30, 2010. On that date Ms. Keyse transmitted an email to a massive number of employees' state email accounts from her Department email account. The attachment to the email contained heart-felt thanks but also made disparaging remarks about, and character attacks against, coworkers who she references only by first name, and expressed criticisms of the administration. The transmission of the email with attachment was a misuse of the email system of the Department. Ms. Keyse left the building shortly thereafter, and she was officially retired at the close of business.

The attachment disrupted the normal operations of the Department; the attachment became a focal point of discussion amongst the employees of the Department including the Tax Commissioner, Deputy Tax Commissioner, and Executive Administrator of the Human Resources Division. Two employees approached Human Resources regarding the email. One employee, Lewis Walker, was extremely annoyed and angry about the content of the email. Mr. Walker announced his intentions to confront Ms. Keyse at the open invitation retirement party held at an offsite restaurant, and requested personal leave. The Administrator advised Mr. Walker not to go to the retirement party. Mr. Walker requested and was granted personal leave. Mr. Walker went to the party and demanded to speak to Ms. Keyse; she refused to speak to him. The restaurant staff asked Mr. Walker to leave the premises and he did.

Grievant requested to use the Agency's main employee cafeteria at the facility for the purpose of holding an OCSEA Chapter 2595 meeting on November 9, 2010. The northland facility is a secure facility, and Union generally holds its meetings in the main cafeteria. Employer and Union previously entered into an agreement that allowed meetings to be held on-site. Members of the general public are not permitted in the non-public portions of this facility except with an employee escort. Employer requested Grievant to provide the names of meeting participants who were not employed by the Department in an active pay status. Ms. Keyse was on the list of participants; Ms. Keyse serves as Treasurer and Executive Board member of the Union chapter. The Constitution of the Union allows nonemployee retired members to continue membership with the exception that a retired member cannot seek the office of president and vice president, and cannot vote on the ratification of the collective bargaining agreement. Mr. Walker learned of Ms. Keyse's requested presence at the facility, and again objected to her presence at the facility.

Grievant was notified in an email dated November 8, 2010 that "due to the Department's concerns with Ms. Keyse's presence on Taxation property affecting current employees to whom she sent an email dated June 30, 2010, the Department is denying her access to the non-public areas of the Department's Northland facility to include the Northland cafeteria." The Union rescheduled the location of the November 9, 2010 chapter to an offsite location, Roosters Restaurant.

The Union filed its grievance on November 15, 2010 alleging a violation of Articles 3.01, 3.04 and 44.02 of the Collective Bargaining Agreement. The parties did not resolve the grievance within the procedure established by the collective bargaining agreement, and properly advanced the grievance to arbitration.

POSITION OF EMPLOYER

Employer contends that Union has failed to meet its burden to establish a violation of Article Three (3) of the Collective Bargaining Agreement. The facts giving rise to the grievance, the June 30, 2010 email of an attachment to Departmental employees, a report that Mr. Walker appeared at Ms. Keyse's retirement party to confront her about the disparaging remarks about him in the attachment, and the objections of employees to Ms. Keyse's presence at the facility, justify the decision of Employer to deny Ms. Keyse access to a non-public area of the facility to attend a union meeting. It is the position of Employer that the decision was reasonable under the facts and circumstances of this case.

Employer contends that there was no denial of the union to use its Northland cafeteria, a non-public area, under Article 3.04 to hold its meeting. Employer only denied Ms. Keyse access to the facility.

Employer contends that the substantive remedy cannot be awarded by the Arbitrator. Employer argues that the remedy sought, to direct the Employer to cease and desist in denying any member or officer of Chapter 2595 from meeting at the worksite, and to grant any request for meeting space to any Union representatives, officers, members or official guests, is beyond the arbitral authority of the Arbitrator. Employer further argues that the Arbitrator does not have the authority to award travel costs at the current contract rate incurred by members who attended the meeting at the offsite location if a violation is found.

Employer requests that Grievance No. 30-04-20101115-0064-01-14 be denied in its entirety, finding that Employer did not violate Article 3 under

the facts and circumstances of this specific case by denying on November 8, 2010 access to Ms. Keyse to the facility on November 9, 2010.

POSITION OF UNION

Union contends that Department and Union Chapter have a long-standing history of animosity and strife. The Employer has disingenuous motives and acts out of their own need to retaliate for the disruption caused by Ms. Keyse in the workplace. The reason for the denial as stated in the November 8, 2010 email is a mere pretext to deny Union meetings at the facility. The denial of access of the union officer is unreasonable.

Union contends that holding membership meetings at the workplace is a long-standing practice by many chapters due to the convenience it provides members who want to attend. Chapter meetings are an important opportunity for the Union to share information with its membership. The Employer's decision to ban Ms. Keyse from the facility interferes with the union's ability to conduct its business in a manner that best serves the members. Ms. Keyse serves as the chapter Treasurer and Executive Board member, and serves on various chapter committees. Her attendance is required at quarterly meetings in order to make reports to the membership and be available to answer questions regarding the financial matters of the chapter. Therefore, denying Ms. Keyse access to the facility is tantamount to banning the chapter from conducting chapter meetings in the Northland cafeteria.

Union contends that the concerns of the Employer stemming from the presence of Ms. Keyse at the facility are exaggerated based on one person's complaints. The animosity of Mr. Walker directed to Ms. Keyse can be handled through the Union, and with reinforcement of the work rules by

Employer. Instead of addressing the animosity of Mr. Walker, Employer is using it as a pretext to keep the Union from using the facility for its meetings.

Union requests that Grievance No. 30-04-20101115-0064-01-14 be sustained, and a cease and desist decision be issued to the Department.

DECISION

This grievance is a result from a denial of the request to have a non-employee Union officer and executive board member to attend a union meeting schedule in the cafeteria of a secured facility. The Union has the burden to prove that Employer violated the Agreement by denying Ms. Keyse access to the cafeteria of a secured facility. Article 3.01 states in pertinent part:

It is agreed that the Agencies covered by this Agreement shall grant reasonable access to stewards, professional Union representatives and chapter officers, defined to include President and Vice President for the purpose of administering this agreement. The Employer may provide a representative to accompany a non-employee Union representative where security or treatment considerations do not allow non-employee access...

Further Article 3.04 states:

The Union may request use of State property to hold meetings. Where feasible, the Employer will provide such space. Such meetings will not interrupt State work and will not involve employees who are working. Such requests will not be reasonably denied.

It is well-settled that the Agreement must be construed as a whole and that provisions must be interpreted harmoniously. The first sentence of

Article 3.01 requires Employer to grant reasonable access to chapter officers for the purpose of administering this agreement. The second sentence of Article 3.01 permits Employer to provide a representative to accompany a non-employee representative. The parties therefore contemplated in the negotiations of the Agreement that a nonemployee officer would have need to access the facility for union business.

Ms. Keyse is a retired employee who serves as the Chapter Treasurer and Executive Board member. As a union official she stands in a fiduciary position with respect to the Union and its members. She occupies a position of trust within the union. As the treasurer, Ms. Keyse is responsible to manage the finances of the local chapter. Her expenditures require authorization consistent with the bylaws such as a motion passed at a local meeting. Said motion practice typically allows for a question and answer session between members and the treasurer. Her lack of attendance would frustrate a significant purpose of the union meeting, its financial operations.

Having negotiated the specific right for officers to have access to the facility, said access cannot be unreasonably denied. Employer argues that the decision to deny Ms. Keyse access to the facility was reasonable on the following grounds:

1. The June 30, 2010 email of an attachment to Departmental employees,
2. The fact of receiving a report that Mr. Walker appeared at Ms. Keyse's retirement party to confront her about the disparaging remarks about him in the attachment, and
3. The objections of employees to Ms. Keyse's presence at the facility.

Ms. Keyse issued the June 30, 2010 email of an attachment to Departmental employees while an employee of the Department within hours of her retirement. While the Arbitrator agrees that her actions constituted a misuse of the computer system, and but for her retirement, Ms. Keyse would

have been disciplined, Ms. Keyse did retire. Her retirement renders disciplinary measures moot, and that should have been recognized as such by Employer. Although the email caused significant disruption in the workplace, it does not warrant a denial of access to a union officer to attend a union meeting.

The second ground is that Mr. Walker appeared at Ms. Keyse's retirement party to confront her about the disparaging remarks about himself in the attachment. Mr. Walker testified that he initially did not open the email but deleted the same. A coworker later told him that he should read the same; "his name was all over it". Mr. Walker read it, and was "highly upset". He testified that he was "pissed". The email portrayed him in a negative light as a professional and portrayed him as a person who is "not fully vested in doing his job." It is his opinion that Ms. Keyse attacked him personally and professionally. He then learned the location of the retirement party. Next, he talked to his manager about the email, and his manager directed him to Human Resources. Mr. Walker then spoke to Mr. Corrigan in Human Resources. Mr. Walker expressed his feelings about the email and his intentions to confront Ms. Keyse at her retirement party; he was advised not to go to the retirement party. Mr. Walker secured leave and went to the retirement party. Upon arriving at the retirement party he was approached by several people, but not Ms. Keyse. A few choice words were spoken, and the sister of Ms. Keyse informed Mr. Walker that Ms. Keyse was not talking about him. He was asked to leave, and he left. Later he received a call from work to see "if he had done anything physical to anybody". Mr. Walker responded no. Upon cross examination Mr. Walker stated that his intentions were to obtain "an explanation for her cowardly ways". If he had intended to cause a physical altercation, he would have done so.

Mr. Walker later informed security that if Ms. Keyse came into the building, there would be a problem. He testified there would be a physical confrontation if she came to the facility. He clarified his response to say that it would not be to anyone's benefit if she came to the facility. He would call "his buddies at the Sheriff's Department to have her removed from the building". Mr. Walker stated that he is just as angry as he was when the incident first occurred. It is noted from his tone and posture in the witness stand that he is irritated by the incident. But more importantly, Mr. Walker stated on cross examination that he would not cause a problem if she is on the premise.

The Arbitrator finds that Mr. Walker is justifiably upset about remarks made about him in the email. However, Mr. Walker testified that he had no intentions to cause physical harm to Ms. Keyse at the retirement party or at the work place if she attends the meetings. He simply wanted "an explanation of her cowardly ways". Furthermore, Mr. Walker is an employee of the Department, and his conduct, if necessary, can be corrected through the disciplinary process. He cannot make threats of violence in the workplace. This ground does not warrant a denial of access to a union officer to attend a union meeting.

The third stated ground was the objections of employees to Ms. Keyse's presence at the facility. Mr. Walker was the only employee that testified to an objection to Ms. Keyse being allowed accessed to the premises for union meeting. The Employer advocate stated in his closing argument that Ms. Keyse is *persona non grata* to the Ohio Department of Taxation. There are probably other persons who resent the actions of Ms. Keyse. It is unreasonable to deny access of a union officer because she is unliked by her peers. As Arbitrator Dworkin noted in Grievance No. G 87-2401 "intra-union strife which, to put bluntly, was none of his or Management's business". Ms.

Keyse may be considered an unwelcome person at the facility due to the email transmittal, but this ground does not warrant a denial of access to union officer.

In sum, the Union has met its burden to prove that Employer violated Article 3.01 of the Collective Bargaining Agreement when, in this instance, it unreasonably denied Ms. Keyse, a union officer, access to the facility to attend the union meeting. Said decision by Employer is unreasonable. The Arbitrator therefore sustains Grievance no. 30-04-20101115-0064-01-14.

The Arbitrator agrees with Management that she does not have the authority to modify, delete, or change the language of the Collective Bargaining Agreement. Therefore, she cannot issue an award that provides for blanket access to the facility for union representatives and meeting space. The contract speaks in terms of reasonableness for officers and reasonableness and feasibility for meeting space. The remedy stated in the grievance included a request for reimbursement of the travel cost at the current contract rate to Chapter 2595 members, Officers, Representatives and Guests that attended the Chapter meeting of November 9, 2010 at the offsite location. At arbitration, the Union advocate modified the remedy to request only a cease and desist decision as the remedy. In fashioning the appropriate remedy an Arbitrator must craft an award that speaks to the proven contractual violation. An award of damages would be punitive in nature, and inappropriate in these damages.

AWARD

After a full review and consideration of all documents and arguments presented, as well as the testimony of witnesses, and the post hearing briefs of the parties in support of their positions, Grievance No. 30-04-20101115-0064-01-14 is sustained. The three aforementioned grounds, the email attachment transmittal, the attendance at the retirement party, and the objections to her presence at the facility due to the email transmittal are not reasonable grounds for Employer to deny access of the union Treasurer and Executive Board Member, Peajai Keyse, from the union meetings hosted at the Northland Facility cafeteria. Employer is directed to rescind the Denial of Access of Ms. Keyse dated November 8, 2010.

January 3, 2012

 /s/ Meeta Bass Lyons
Meeta Bass Lyons, Arbitrator
Steubenville, Ohio