#1129

Ohio Civil Service Employees Association, AFSCME Local No. 11, AFL-CIO, and State of Ohio, Public Utilities Commission of Ohio and Department of Commerce

Grievance Numbers: 07-00-201217-0019-01-14 and 26-00-20130327-02-01-07

Opinion and Award
Arbitrator Sarah R. Cole

Federico Reyes is an Ohio Department of Commerce (ODOC) employee. Kelly Hedglin is employed by the Public Utilities Commission (PUCO). Both are members of the Ohio Civil Service Employees Association (OCSEA), which maintains a collective bargaining agreement (CBA) with the State of Ohio.

Mr. Reyes, who has worked for ODOC for ten years, married Michael Rose in 2005 in Toronto, Ontario, a place where same-sex marriage is legally permitted. When Mr. Rose's mother died in November 2012, Mr. Reyes applied for bereavement leave under CBA section 30.03. ODOC denied his request, contending that section 30.03 provides bereavement leave only for the parents of an employee's ***spouse***, not for the parents of an employee's significant other. After Mr. Reyes used three days of vacation leave, he filed a grievance under section 30.03 claiming that he should have been entitled to use three days of bereavement leave to attend the funeral and other associated events, rather than being forced to use vacation leave.

Ms. Hedglin, who has worked at the PUCO for twenty-four years, entered into a civil union with Bonnie Bish in 2003 in Vermont, which permits same-sex civil unions. When Ms. Bish's mother died in March 2012, Ms. Hedglin requested bereavement leave. PUCO rejected her request contending that Ms. Bish was Ms. Hedglin's "significant other," and that leave was not available for the parent of an employee's significant other. Ms. Hedglin grieved the denial, claiming that pursuant to section 30.03 she was entitled to use bereavement leave, not other discretionary leave, to attend the funeral and other associated activities.

Issue: Did the State's denials of the bereavement leave request of Mr. Reyes and Ms. Hedglin violate Articles 2 or 30 of the collective bargaining agreement (CBA)?

Relevant Contract Provisions:

Section 30.03 – Bereavement Leave

Three consecutive days of bereavement leave with pay at regular rate will be granted to an employee upon the death of a member of his/her immediate family interpreted for the purposes of this Article to include: spouse or significant other ("significant other" as used in this Agreement is defined to mean one who stands in place of a spouse and who resides with the employee), child, step-child, grandchild, parent, step-parent, grandparent, great-grandparent, brother, sister, step-sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, or legal guardian or other person who stands in the place of a parent. Bereavement leave will be granted in the case of stillbirth conditioned upon the tendering of a death certificate.

The Employer may grant vacation, sick leave, or personal leave to extend the bereavement leave. The leave and the extension may be subject to verification. Part-time employees shall receive bereavement leave with pay for the hours that they are normally scheduled to work.

Article 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 . . . sexual orientation . . . .

Union Position

The Union contends that this case turns on the arbitrator's interpretation of Sections 2.01 and 30.03 of the CBA. According to the Union, the State must use federal law to determine its obligations under Section 2.01. The Union's interpretation of federal law requires the State to treat the Grievants' marriage and civil union, respectively, as it would marriages between opposite gender couples. The Supreme Court's recent decision in *United States v. Windsor*, 570 U.S. ____, 133 S.Ct. 2675 (2013), according to the Union, mandates this result. The Union also contends that an Ohio federal district court decision in *Obergefell v. Wymyslo*, 1:13-cv-501 (S.D. Ohio Dec. 13, 2013), in which the court ordered the State of Ohio to recognize a valid out-of-

state marriage between a same-sex couple on a death certificate, further confirms the view that the State should treat same-sex marriages and civil unions the same as opposite sex marriages. To do otherwise, argues the Union, would be a violation of the Agreement's non-discrimination provision.

In addition, the Union claims that Section 30.03, the CBA's bereavement leave provision, requires that bereavement leave be granted to any employee whose partner's parent dies. The Union argues that because the Agreement uses the terms "spouse" and "significant other" interchangeably in one part of the provision means that the provision should be read to provide bereavement leave when *either* a spouse or a significant other's parent dies. The Union argues that this interpretation is bolstered by the definition of significant other in the provision and the listing of types of parents following that definition. Defining significant other as "one who stands in place of a spouse and who resides with the employee" followed by a list of different types of parents means that parents of significant others should be included in list of those whose death creates bereavement leave entitlements.

Employer Position

The State of Ohio contends that a question of substantive arbitrability exists in this case that the arbitrator must decide before reaching the merits of the dispute. The State notes that the CBA confers arbitrability questions on the arbitrator. According to the State, the Union's contention that "in-law" in the CBA includes same-sex partners' in-laws is not arbitrable. If the arbitrator finds that the issue is arbitrable, the State contends that neither federal nor state laws require the State to recognize an out-of-state marriage or civil union for purposes of determining entitlement to bereavement leave. The State emphasizes that Ohio does not recognize same-sex marriages or civil unions. As a result, the State asserts that a claim that a domestic partner is the

same as a spouse or that a parent of a domestic partner is the same as an "in-law" is inconsistent with Ohio law. Thus, the State's decision not to grant bereavement leave to the Grievants did not violate Article 2 of the CBA.

Nor did the State violate Article 30.03, defining when an employee is entitled to bereavement leave. According to the State, a same-sex partner is not a spouse because Ohio does not recognize same-sex marriages or civil unions. The use of the term "in-law" in the bereavement leave provision applies only to those persons who are relatives by marriage. Since, in Ohio, marriage is defined only as between a man and a woman, in-law cannot include the parent of an employee's same sex partner, because that partner is not a spouse. In addition, nothing in federal or state law requires Ohio to acknowledge marriages or civil unions from other states or countries.

The only remaining argument, contends the State, is that a same-sex partner fits within the definition of "significant other" in the bereavement leave provision. The State argues that past arbitral decisions and the plain language of the provision make it clear that the provision does not include the parents of a significant other. If the parties wanted to include significant others' parents in the category of "immediate family", they could have done so. Their failure to do so means that the parties did not intend to confer bereavement leave this broadly. Thus, Grievants were not entitled to bereavement leave when their same-sex partners' parents passed away.

Opinion

I. Arbitrability

The State first argues that a question of substantive arbitrability exists in this case that the arbitrator must decide before she may reach the merits of the case. According to the State, the

Union's contention that "in-law" in the CBA includes same-sex partners' in-laws is not arbitrable. The State suggests that the Union's argument for an expanded interpretation of this language renders the dispute inarbitrable. As the State notes, parties may arbitrate "any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement." In these cases, the Union argues for a different interpretation of the contract language than does the Employer. This kind of disagreement is clearly arbitrable. The Union's contention that the State is discriminating against its members on the basis of sexual orientation is also arbitrable because Article 2 requires that the CBA be interpreted in a manner "not inconsistent" with federal or state laws. Thus, I find that this dispute is arbitrable.

II. Does Federal Law Require the State to Provide Bereavement Leave to an Employee whose Same-Sex Spouse's Parent Dies?

Article 30.03 states, in pertinent part, that:

> bereavement leave with pay . . .will be granted to an employee upon the death of a member of his/her immediate family interpreted for the purposes of this Article to include: spouse or significant other ("significant other" as used in this Agreement is defined to mean one who stands in place of a spouse and who resides with the employee) . . ., mother-in-law, father-in-law

Under this provision, if a same-sex partner is a "spouse," an employee would be entitled to bereavement leave upon the death of the same-sex partner's mother or father-in-law. The Union contends that federal law requires the State of Ohio to treat same-sex partners as spouses following the Supreme Court's decision in *United States v. Windsor* and an Ohio federal district court's decision in *Obergefell v. Wymyslo*, 1:13-cv-501 (S.D. Ohio Dec. 13, 2013). The Union argues that it is appropriate for the arbitrator to use federal law to interpret the terms of the contract because, in Article 2.01, the parties agreed that, "[n]either 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 . . . sexual orientation."

The State contends that a same-sex partner is not a "spouse" under Ohio law and, therefore, that Grievants are not entitled to bereavement leave to grieve the death of their same-sex partners' parents because those parents are not in-laws. The State contends that the arbitrator may not look beyond the law of Ohio because the CBA was entered into in Ohio, and the Grievants work for the state of Ohio. The State also argues that the arbitrator should not take notice of a recent federal court decision interpreting Ohio law because "[t]hat case has no bearing on the interpretation of the parties' previously negotiated language in this CBA." (Employer Brief at 7).

This is a case of first impression. A previous arbitration involving the bereavement leave provision addressed the interpretation of the term "significant other" to assess whether an employee was entitled to bereavement leave when a domestic partner's significant other's parent died.[1] Arbitration Between Health Care and Social Service Union, SEIU District 1199 and the State of Ohio, 14-00-930714-0070-02-11 (Arbitrator Bowers) (John Park Grievance). The Park grievance is irrelevant because it did not involve same-sex partners and the question whether such partners, when married in a state that recognizes such marriages, are spouses for purposes of Section 30.03.

---

[1] The Union cites in support of its argument a different, but also not relevant, decision, OCSEA/AFSCME Local 11, AFL-CIO and State of Ohio, Office of Collective Bargaining, no. 34-26-(99-02-19)-0012-01-09 (2001) (Marshelle Steele, grievant) (Harry Graham, arb.) (Union Ex. 1). The case has no impact on the outcome here because the grievant in that case was married to her spouse when the aunt of the spouse, who had raised the spouse, died. The question in that case was whether an employee is entitled to bereavement leave when the person who stood in the place of a parent to her spouse died. Here, the question is whether the Grievants' same-sex partners are spouses under federal law.

In the present cases, the parties' agreement states that "[n]either 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 . . . sexual orientation." The language of this agreement *requires* the arbitrator to determine whether the application of the bereavement leave provision discriminates against the Grievants in a way that violates federal or state law.

While it is clear that Ohio law does not require recognition of same-sex partners as spouses, current federal law does require the State to treat same-sex partners as spouses for purposes of determining bereavement leave. In *United States v. Windsor*, 570 U.S. ____, 133 S.Ct. 2675 (2013), the Supreme Court struck down section 3 of the federal Defense of Marriage Act (DOMA). Section 3 of DOMA provides that, for purposes of all federal statutes, regulations and directives, "the word 'marriage' means only a legal union between one man and one woman." In *Windsor*, the parties had married in Ontario Canada. New York recognized their Ontario marriage as valid. When one of the same-sex spouses died, the federal government refused to recognize their marriage and denied the marital exemption from the federal estate tax to Windsor. As a result, Windsor paid $363,053 in estate taxes. She sued to obtain a refund of this payment. According to the Court, States are responsible for regulating marriage. *Windsor,* 133 S.Ct. at 2689. The federal DOMA departed "from this history and tradition of reliance on state law to define marriage." Id. at 2692. Thus, it was DOMA's deviation from the usual tradition of recognizing and accepting state definitions of marriage that was problematic when it was used to "deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriage." Id. at 2693. Thus, following *Windsor,* the federal government must recognize legally performed marriages between same-sex couples.

Here, though, there are two separate States involved, the State in which the marriage occurred, and the State in which the couple now resides. What *Windsor* did not expressly address was the question whether, in such situations, the views of the former State (which permitted the marriage) or the latter (the State in which the couple now resides) should control. That is the question to which Section 2 of DOMA, which permits states not to recognize other states' marriages between same-sex couples, is directed.[2] The Supreme Court's decision did not address Section 2, leaving open the question of whether "federal law" following *Windsor* permits or precludes states from recognizing or rejecting same-sex marriages performed elsewhere.

The Union argues that federal court decisions since *Windsor* have answered that question by determining that the same non-discrimination principles that prevent the federal government from ignoring the marrying-State's decision to allow same sex unions also precludes other States from doing so. The Union points, for example, to a recent case from the Southern District of Ohio that required the State of Ohio to recognize a valid out-of-state marriage between same-sex couples on the death certificate of one member of the couple means federal law requires recognition of same-sex marriages in Ohio. See *Obergefell v. Wymyslo*, 1:13-cv-501 (S.D. Ohio Dec. 13, 2013). The federal district court in *Obergefell* extended to DOMA Section 2 the Supreme Court's analysis striking down Section 3 of DOMA as unconstitutional because it violates the equal protection and due process clauses of the Constitution. The *Obergefell* court stated that,

> By treating lawful same-sex marriages differently than it treats lawful opposite sex marriages (*e.g.*, marriages of first cousins and marriages of minors), the Ohio laws barring recognition of out-of-state same-sex marriages, enacted in 2004, violate equal protection principles.

---

[2] The 1996 Defense of Marriage Act Section 2 states, "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

Although the *Obergefell* court stated that its ruling was limited to the question of whether the same-sex spouse's name would appear on a death certificate, the holding is clearly much broader. If Ohio's law violates the constitutional principles of due process and equal protection when it bars recognition of out-of-state same sex marriages, it is invalid when applied to treat a same-sex partner as a significant other rather than a spouse. To avoid a constitutional violation, the State must treat the same-sex partner as a spouse when the parties demonstrate that they have a valid out-of-state marriage.

Obergefell does not stand alone. Since *Windsor* was decided, every federal district court considering the impact of *Windsor* on state defense of marriage acts have issued opinions supporting the rights of same-sex partners to have their valid out-of-state marriages recognized for rights and benefits purposes. See *Bostic v. Rainey,* 2:13-cv-395-AWA-LRC (E.D. Va. Feb. 13, 2013); *Bourke v. Beshear*, 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *Bishop v. United States*, 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014); *Kitchen v. Herbert*, 2:13-CV-217, 2013 WL 6726688 (D. Utah Dec. 20, 2013). Thus, current federal law requires the State of Ohio to recognize out-of-state marriages or civil unions.

The State contends that *Obergefell* does not apply to resolve these disputes because "it has no bearing on the interpretation of the parties' previously negotiated language in this CBA." That would be true if the parties had not explicitly agreed to act in a manner that is consistent with federal anti-discrimination law. But the parties did so. And, at least at the present time, federal law requires the State to recognize valid out-of-state marriages. As a result, the Grievants' partners must be considered "spouses"[3] for purposes of applying the CBA's

[3] That Hedglin and Bish were originally united in a civil union rather than a marriage is irrelevant. Vermont now treats parties to a civil union as spouses in a civil marriage. See 15 Vt. Stat. Ann. Tit. 15 sec. 1204 (a)-(b) (2009). Moreover, according to the statute, "[a]party to a civil union shall be included in any definition or use of the terms

bereavement leave provisions. If they are spouses, then the spouses' parents are grievants' in-laws. Because Section 30.03 of the Agreement provides bereavement leave to employees upon the deaths of their spouses' parents (i.e. a mother in-law or father in-law), the State should have granted bereavement leave to these employees.

Because federal law requires the State to treat Grievants' same-sex partners as spouses for purposes of determining bereavement leave, no further analysis of the bereavement leave provision is necessary.

Award

The grievances are granted.

March 3, 2014

____Sarah R. Cole_____

Sarah Rudolph Cole, Arbitrator

"spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote the spousal relationship, as those terms are used throughout the law."