#1185
Rec'd 3/25/20

IN THE MATTER OF THE ARBITRATION BETWEEN

OCSEA/AFSCME
Local 11, AFL-CIO

Grievance No: DVS-2018-01538-04

Jason Jones, Grievant

AND

STATE OF OHIO

Department of Veteran Services

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ARBITRATOR: Meeta A. Bass
AWARD DATE: March 25, 2020

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APPEARANCES FOR THE PARTIES

Advocate for the Union:
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PROCEDURAL HISTORY

The Department of Veterans Home is hereinafter referred to as "Employer" or "Agency." The Ohio Civil Service Employees Association/ AFCSME is hereinafter referred to as "Union." Jason Jones is hereinafter referred to as "Grievant."

The Union submitted Grievance No. DVS-2018-01538-04 to the Employer by electronic submission on May 2, 2018, pursuant to Article 25 of the parties' 2018-2021 Collective Bargaining Agreement. Following unsuccessful attempts at resolving the grievance, the Union requested that the grievance be advanced to arbitration. Pursuant to the CBA between the Employer and the Union, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on Wednesday, February 12, 2020, at the Ohio Veterans Home located at 3416 Columbus Avenue, Sandusky, Ohio 44870.

The parties stipulated to the issue as follows:

> Did the Employer violate Article 2 of the Collective Bargaining Agreement when it denied/revoked an ADA accommodation for the Grievant, if so, what shall the remedy be?

During the hearing, both parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The following individuals testified at the hearing:

Union:
Jason Jones, Grievant
Amy Wray, Chapter President
Michael Duco, Director of Field Services and Assistant General Counsel

Employer:
Robert Breeckner, ACM Manager for Central Office - Veteran's Affair
Donna Green, Labor Relations Officer

Witnesses other than the representatives were sequestered.

Joint Stipulation of Facts
The parties stipulated that the fact-finding report was issued on April 20, 2018.

Joint Exhibits
1. 2018-2021 - Contract between the State of Ohio and OCSEA/AFSCME Local 11.
2. 1994-1997 - Contract between the State of Ohio and OCSEA/AFSCME Local 11.
3. 1997 - 2000 - Contract between the State of Ohio and OCSEA/AFSCME Local 11.
4. Grievance Trail
5. Classification Specification
6. ADA Requests and Notice of Disposition
7. ADA Revocation and Mandatory Overtime Report
8. ADA Executive Order and Agency ADA Policy

Union Exhibit
1. FMLA Certification Approval

The parties agreed to post-hearing submissions on Friday, February 28, 2020, at which time the record was closed.

APPLICABLE PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND POLICY RULES.

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, 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 President.

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

STATEMENT OF FACTS

The Employer hired the Grievant on September 24, 2001 as a Licensed Practical Nurse. The Grievant has a documented medical condition. In June of 2017, Grievant submitted a request to the Employer for an accommodation that would exempt the Grievant from working more than eight (8) hours per day. On July 7, 2017, the Employer granted temporary or provisional approval of the requested accommodation. The Grievant continued to work voluntary overtime. At the time the accommodation was granted, the Employer did not discuss the accommodation with the Union but the local President did have knowledge of the accommodation.

The ACM Manager travelled from the Central Office located in Columbus, Ohio to the Veterans Home located in Sandusky, Ohio to meet with the Agency employees regarding their accommodations on May 1, 2018. On this same date, the Manager met with individuals to discuss their accommodations, and later gave notice to the Grievant, as well as other staff who had accommodations, of its decision to remove the ADA Accommodation as a result of "undue hardship" on the Agency's operation effective May 13, 2018. The Employer represented that working mandatory overtime was an essential function of the LPN position as listed in the LPN series job classification.

It is not disputed that the Employer was staffing through voluntary overtime, but mandated overtime was still occurring and significantly increased after the accommodation was revoked. The Employer has had several employees leave their employment due to issues related to overtime. On May 2, 2018, the Grievant filed this grievance alleging a violation of Article 2 of the 2018-2021 Collective Bargaining Agreement and as a remedy, requested that the Employer honor the prior accommodation. The Grievant later filed for FMLA, and the Employer approved the same on October 23, 2018.

The grievance was not resolved within the procedure established by the parties' CBA and was properly advanced to arbitration.

POSITION OF THE PARTIES
POSITION OF THE UNION

The Union contends that the Employer discriminated against the Grievant based on his disability in violation of Article 2.01 Paragraph 1. The Union argues that the Employer engaged in a mass revocation of ADA accommodations granting 8 hour restrictions the very first day after CBA went into effect in a discriminatory manner. According to the Union's point of view, the cited arbitral precedents do not apply to the facts and circumstances in this grievance. The Union also argues that these awards are limited to the Article 2.01, Paragraph 2. The Union maintains that Article 2.01 Paragraph 1 addresses discriminatory conduct of the Employer directed toward the listed protected class of disability "in a way inconsistent with the laws of the United States or the State of Ohio as opposed to the granting of accommodations.

The Union also contends that the Employer failed to show a legitimate non-discriminatory reason for its action. The Union asserts that the CBA went into effective May 12th, and the next day, May 13th, the accommodation was revoked. From the Union's perspective, there were proposals in bargaining related to work areas that would impact staffing at the Agency. The timing of these revocations, the Union argues, is beyond coincidental, and opines that the Employer's mass revocation is retaliatory. The Union argues that the evidence establishes a prima facia case of discrimination directed toward disabled employees. The Union argues that the Grievant is disabled, that he performed his duties, and that the circumstances suggest that he was subjected to negative job actions based on his disability. The Union maintains that the Employer violated Article 2.01 Paragraph 1.

Further, the Union contends that the Grievant has a legitimate medical condition which the Employer subsequently approved for FMLA. The Union maintains that the Employer improperly revoked the accommodation.

Moreover, the Union contends that the Arbitrator prevented the Union from establishing "a possible link from bargaining and the Employers mass revocation of eight (8) hour minimum working restrictions the day after the CBA became effective." The Union argues that the Arbitrator improperly sustained an objection to the admission of evidence related to Appendix N. It is the position of the Union that said evidence would possibly demonstrate retaliation by the Employer.

Lastly, it is the position the Union that the grievance should be sustained, a finding that the Employer discriminated against the Grievant based on his

disability be made, reinstatement of the ADA accommodation, and for such other remedy that the Arbitrator deems appropriate.

POSITION OF THE EMPLOYER

The Employer contends that a reasonable accommodation claim under Section 2.01 is not cognizable under the arbitration procedure of the parties' CBA. The Employer cites arbitral precedent within its industry to support its position which holds that the parties did not bargain for the incorporation of the ADA of 1990 and ORC Chapter 4112 into the CBA, and therefore reasonable accommodation claims are not cognizable under the CBA.

Further, the Employer contends that the temporary accommodation was properly revoked. The Employer asserts that the job classification of the Grievant indicates that mandatory overtime is required. The ACM Manager explained that "mandatory overtime was an essential function of his position." The evidence established that the Agency lost several employees due to the Agency's mandated overtime levels. In the Employer's view by spreading the mandatory overtime to more employees the Agency will deter employees from quitting due to being excessively mandated through the workweek. The Employer maintains that the accommodations had caused an undue hardship on the Agency.

Moreover, the Employer contends that the Union did not timely grieve any action by management when the accommodation was granted. The Employer granted the accommodation on June 7, 2017 and the Grievant filed his grievance on May 2, 2018. The Employer argues that Article 25.02 set forth the timelines for the filing of the grievance, within twenty (20) days of the event giving rise to the grievance or the Union becoming aware of the event. The Employer argues that the Grievant waited two-hundred sixty-seven (267) days past the date of the event. It is the position of the Employer that the grievance is untimely.

Lastly, the Employer contends the grievance should be denied in its entirety.

DISCUSSION

The general rule in contract interpretation cases is that the Union bears the burden of proof by a preponderance of the evidence to show a violation of the parties' CBA. The parties have stipulated to the issue as whether the Employer violated Article 2 of the Collective Bargaining Agreement when it denied/revoked an ADA accommodation for the Grievant, and if so, what shall the remedy be? This question has several subparts involving arbitrability, arbitral precedent, discrimination, and contract interpretation.

The Employer argues that the grievance is not procedurally arbitrable because it was untimely filed as related to Article 2.01 Paragraph 2. A look at the history of the Article sheds light on the intention of the parties in establishing such a provision. Article 2.03 Affirmative Action of the 1994-1997 CBA states that "Prior to establishing reasonable accommodation which adversely affects rights established under this Agreement, the Employer will discuss the matter with the Chapter President or other designated union representatives." This provision was subsequently modified in the 1997-2000 CBA, and relocated to Article 2.01 Non-Discrimination. The provision reads "Prior to establishing reasonable accommodations which adversely affects rights established under this Agreement, the Employer will discuss the matter with a Union representative designated by the Executive Director. This was the language in effect at the time the provisional accommodations were granted.

The evidence established that the Employer did not discuss the Grievant's accommodation with a Union representative designated by the Executive Director. The Union did not grieve the incident at the time of this occurrence on June 7, 2017 but argues the lack of discussion during the revocation process. The Union's attempt to apply the language to a revocation of an accommodation is misguided. The Director of Field Services,

who was called as a Union witness, testified that during prior negotiations, the Union successfully bargained that these accommodation discussions took place at a higher level. It was with the Union's intention to protect the bargaining rights of the members as a whole, such as seniority, pick-a-post, and so forth, that might be impacted by an accommodation afforded to an individual member. He stated that the Grievant would be less likely to grieve the grant of an accommodation which was in his interest but adversely affected the membership as a whole. Due to this self-interest consideration and joint liability concerns, the bargaining teams agreed on discussions at the higher level at the time of the establishment.

The language of the CBA clearly states establishment, and not revocation. Article 25.02 of the CBA sets forth the timelines for the filing of the grievance, within twenty days of the event giving rise to the grievance or the Union becoming aware of the event. The time started running as of June 7, 2017. The grievance as it relates to this issue is therefore untimely.

The Employer also argues that the subject matter of the grievance is not arbitrable. The Employer submitted two prior arbitration decisions by Arbitrator Murphy and Arbitrator Pincus, both of whom consider whether Article 2:01 of the parties' CBA incorporated the American Disabilities Act. Both arbitrators determine that the ADA claim is not cognizable under the arbitration procedure of the contract. Arbitrator Murphy wrote that the language of the CBA did not expressly incorporate the ADA into the parties' CBA. He wrote that "Article 2.01 is not a jurisdictional grant of power in this contract to an arbitrator over a docket of claim based upon the American Disabilities Act of 1990." Arbitrator Murphy also recognized that the arbitrator's authority is limited and defined by the CBA. The contract language in Article 25 reads "The arbitrator shall have no power to add to, subtract from, or modify any terms of the Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by

the expressed language of this Agreement." This language remains unchanged in the current CBA. The undersigned Arbitrator agrees with the prior awards' conclusions. Grievance arbitration is not the proper venue for an alleged ADA violation under these parties' collective bargaining agreement where the ADA has not been incorporated into the parties' CBA.

The Union stops short of conceding the aforementioned arbitrability conclusions under Article 2.01 Paragraph 2 but opines that the grievance is still arbitrable under a discrimination claim arising from Article 2.01 which reads that: "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, or veteran status." The crux of the Union's evidence of discrimination stems from the revocation of an accommodation for overtime work for several other employees on the same date. The Unions argues that this establishes a prima facie case of discrimination. The Employer, however, argues that its actions were not discriminatory under either of the statutes.

The ACM Manager was tasked to assess the accommodations on the Agency as a whole. As such, he testified that he considered the function of the Agency, the duties of the employees, and the impact of the accommodation on the other staff. The LPN classification series indicates that overtime may be required as a condition of employment. The LPN classification specifically has a subsection for unusual working conditions which states that "work nights & weekends with rotating days off; may be required to work mandatory overtime." The evidence further established that the Employer has had difficulty retaining employees due to overtime issues in the workplace, and the hiring/retention continues to affect the Employer since the accommodations were revoked. The Arbitrator finds that ACM Manager's explanation that he drove from central office, met with the

employees to discuss their claims, and issued letters on the same date does not establish evidence of discrimination. To require the Grievant to perform the terms and conditions of his employment does not constitute a discriminatory act given these facts. The Arbitrator is not persuaded that the actions, although occurring on the same date, establish that the Employer discriminated against the Grievant when the Employer revoked the temporary accommodation.

The Union attempted to introduce Appendix N to show evidence of discrimination over the strenuous objection of the Employer's advocate. The Grievance does not cite Appendix N and the Union admits that Appendix N was not cited during the grievance trail. There was no assertion that the Employer received notice of any reference to Appendix N to prepare a defense to the same. The Arbitrator denied the admission of Appendix N and questions thereon from consideration at the arbitration. The Arbitrator explained that due process runs to both the Union and the Employer as to notice and the opportunity to defend. The Arbitrator, however, did allow the Union to frame all his questions in accordance with Article 2.01 claim. The Union's examination of the other witnesses focused primarily on the revocation of an accommodation of the Grievant whose condition was later approved for FMLA certification rather than any discriminatory acts of the Employer. The Arbitrator concludes that the art of advocacy sometimes includes creative arguments and strategy to achieve the desired result, but the real issue in this case was Article 2.01 Paragraph 2.

Foremost, the Arbitrator states that it is inappropriate to substitute her judgment for that of the Employer in determining whether or not to grant an accommodation. The Arbitrator is an interpreter of the CBA and is constrained to act only in those areas for which authority has been granted. Therefore, after carefully reviewing the submissions, evaluating the testimony, and considering the arguments of the parties, the Arbitrator finds

that the grievance is not procedurally and substantively arbitrable as related to Article 2.01 Paragraph 2. The Arbitrator further finds that the Union has failed to meet its burden of proof as a violation of Article 2.01 Paragraph 1. The Employer did not violate Article 2 of the CBA when it denied/revoked an ADA accommodation for the Grievant.

AWARD

Having heard, read and carefully reviewed the evidence and the submissions in this case and in light of the above Discussion, Grievance No. DVS-2018-01538-04 is denied.

Dated: March 25, 2020

/s/ Meeta A. Bass, Arbitrator
Dublin, Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Opinion and Award was served upon the following persons via electronic service this 25th day of March 2020:

Advocate for the Union:
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/s/ Meeta A. Bass, Arbitrator
Dublin, Ohio