

ARBITRATION DECISION NO.:

191a

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Youngstown Developmental Center

DATE OF ARBITRATION:

October 27, 1989

DATE OF DECISION:

November 24, 1989

GRIEVANT:

Todd Lewis Revis

OCB GRIEVANCE NO.:

24-15-(88-09-14)-0019-01-04

ARBITRATOR:

Calvin William Sharpe

FOR THE UNION:

Staughton Lynd, Esq.

FOR THE EMPLOYER:

Tim Wagner

KEY WORDS:

Jurisdiction Of Arbitrator
Back Holiday Pay As A Remedy
Arbitrability

ARTICLES:

Article 25 - Grievance
Procedure
 §25.03-Arbitration
Procedures
Article 26 - Holidays
 §26.01-Observance
 §26.02-Work on
Holidays

§26.03-Eligibility
for Holiday Pay

§26.04-Employee's
Birthday

FACTS:

Grievant had previously been discharged and had then received an arbitrator's award reinstating him to his former position with "full back pay and benefits." The arbitrator had retained jurisdiction in the case to resolve any issue of back pay that the parties were unable to resolve.

The grievant was discharged for a second time as a result of an unspecified incident. The incident appears to be related to a dispute over changes in the grievant's scheduled days off made after his reinstatement.

EMPLOYER'S POSITION:

Employer claims that the arbitrator's jurisdiction in dealing with present grievance is narrow, and should not extend to the determination of the validity of the grievant's second removal.

Straight time and premium holiday pay should not be included in back pay deriving from grievant's previous arbitration award. Such back pay would be harmful to the long-term labor-management relationship, was never requested by grievant during either the grievance procedure or arbitration, and it would establish a "dangerous" precedent.

UNION'S POSITION:

Union demands the extension of the jurisdiction of the arbitrator for the first removal to the second removal. The contract, under Section 25.03, permits an arbitrator to hear an issue, even if the parties do not agree that the matter is properly before the arbitrator. Further, as a matter of equity, all questions of reinstatement and back pay should be resolved before a grievant is subject to new disciplinary action. Because the reinstatement issue was not properly settled, the union argues that the Grievant's second removal fell within the arbitrator's retained jurisdiction.

Union demands that straight time and holiday pay should be included as part of the back pay benefits awarded to the grievant in the previous arbitration award. These should be included since the grievant is entitled to back pay for of all contractually specified benefits. Straight time and premium holiday pay are contractually specified benefits.

ARBITRATOR'S OPINION:

Arbitrator concluded that the grievant's second discharge was an issue outside his jurisdiction, while the question regarding back pay was not. With regard to the arbitrator's jurisdiction over the second discharge, the scope of the arbitrator's jurisdiction was expanded beyond the scope of the contract by the previous award. However, in that award the arbitrator retained only a narrow jurisdiction, to resolve the issue of back pay.

Section 25.03 does not give the arbitrator jurisdiction over matters that are beyond the scope of arbitration. Further, while Sec. 25.03 does grant the arbitrator authority to decide questions of arbitrability, this power is constrained by another clause in the section:

"Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration."

With regard to the issue of back pay - this falls within the arbitrator's jurisdiction. "The purpose of back pay is to make an employee whole for losses that have been caused by the employer's breach of contract." Such losses include straight time and holiday pay as these are contractually

specified benefits.

Arbitrator finds extensive case history demonstrating the commonality of such back pay. Grievant's not raising the issue during prior grievance and arbitration is excused given that the issue had not been disputed before. The union does not foresee, and the arbitrator cannot foresee that such back pay would damage the parties' long-term relationship.

The arbitrator examined the employer's charge that grievant did not make sufficient effort to mitigate damages. "Breach of the duty to mitigate damages is an affirmative defense to the payment of back pay, and the employer has the burden of proving that the employee did not make a good faith effort to mitigate damages." Employer did not carry this burden, given employee's testimony with regards to his post-dismissal job search. Such a search "requires only a good faith effort and not success."

AWARD:

- i) Arbitrator's jurisdiction shall not extend to the post-award discharge of grievant.
- ii) Back pay award shall include straight time and premium holiday pay. The award shall be reduced only by the actual interim earnings made by the grievant between time of his discharge and reinstatement.
- iii) Arbitrator will retain jurisdiction for thirty days to resolve any issue regarding the computation of back pay.

TEXT OF THE OPINION:

STATE OF OHIO AND OCSEA-LOCAL 11/AFSCME AFL-CIO

In the Matter of the Arbitration

--between--

OCSEA/AFSCME

--and--

Youngstown Developmental Center

Reinstatement and Back Pay of:

Todd Lewis Revis

ARBITRATOR'S AWARD AND OPINION

For the Grievant

Staughton Lynd, Esq.

For the State

Tim Wagner

Director of Arbitration Services

November 24, 1989

**Calvin William Sharpe
Arbitrator**

On July 24, 1989, the Arbitrator ordered the re-instatement of Todd Lewis Revis (Grievant) "to his former position with full back pay and benefits from September 9, 1988 . . . to the date of his re-instatement." The Arbitrator also retained jurisdiction in the case to resolve any issue of back pay that the parties were unable to settle. At the request of the OCSEA/AFSCME (Association) and without objection from the State, the Arbitrator continued his jurisdiction over the remedial issue. Because the parties were unable to settle the back pay issue, the Arbitrator reconvened the parties to hear the outstanding remedial issues. The hearing was held in Columbus, Ohio on October 27, 1989.

I.

STATEMENT OF THE CASE

A. THE ISSUES

1. Is the Grievant entitled to straight time and premium holiday pay as a part of the back pay remedy?
2. Does the Arbitrator's retained jurisdiction extend to the removal of the Grievant following his re-instatement pursuant to the July 24, 1989 award?
3. Did the Grievant fail to attempt to mitigate damages?

B. RELEVANT PROVISIONS OF THE 1986-1989 AGREEMENT

25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

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.

The expenses and fees of the arbitrator shall be shared equally by the parties.

26.01 - Observance

The following holidays will be observed:

- New Year's Day - First Day in January;
- Martin Luther King, Jr.'s Birthday - Third Monday in January;
- President's Day - Third Monday in February;
- Memorial Day - Last Monday in May;
- Independence Day - Fourth day of July;

Labor Day - First Monday in September;
Columbus Day - Second Monday in October;
Veterans' Day - Eleventh day of November;
Thanksgiving Day - Fourth Thursday in November;
Christmas Day - Twenty-fifth day in December;
Any other day proclaimed by the Governor of the State of Ohio or the President of the United States.

When a holiday falls on a Sunday, the holiday is observed on the following Monday. When a holiday falls on a Saturday, the holiday is observed on the preceding Friday. For employees whose work assignment is to a seven (7) day operation, the holiday shall be celebrated on the day it actually falls. A holiday shall start at 12:01 A.M. or with the work shift that includes 12:01 A.M.

Upon request, an employee may observe a religious holiday provided that the time off is charged to vacation, compensatory time, personal leave or leave without pay.

An employee on an alternate work schedule is entitled to the same number of holidays and paid holiday hours as regularly scheduled employees.

26.02 - Work on Holidays

Employees required to work on a holiday will be compensated at their discretion either at the rate of one and one-half (1 1/2) times their regular rate of pay, or granted compensatory time at the rate of one and one-half (1 1/2) times, plus straight time pay for the holiday. The choice of compensatory time or wages will be made by the employee.

Holiday work beyond regularly scheduled work shall be distributed among employees by the provisions covered in Article 13. No employees' posted regular schedule or days off shall be changed to avoid holiday premium pay. The Agency reserves the right to determine the number of employees needed to work the holiday.

26.03 - Eligibility for Holiday Pay

An employee whose scheduled work day off falls on a holiday will receive holiday pay for that day.

An employee on vacation or sick leave during a holiday will not be charged vacation or sick leave for the holiday.

26.04 - Employee's Birthday

The employee shall be permitted to observe his/her birthday. Should the employee's birthday fall on a holiday or a day when the employee is normally in non-work status or if the employee is unable to take the birthday because of operational needs of the Employer or wishes to take another day, the employee shall be credited with a personal leave day.

C. BACKGROUND FACTS

On August 7, 1989, the Grievant was re-instated to his former position as directed by the Arbitrator's award of July 24, 1989. Shortly after the Grievant's reinstatement, a dispute arose regarding his days off under the re-instatement order. Before his discharge of September 9, 1988, the Grievant had worked on the third shift and been off on Mondays and Tuesdays. After his re-instatement, he was initially given Wednesdays and Thursdays off. Following his protest and after the State initially refused to give the Grievant Mondays and Tuesdays off, the State agreed to return to the Grievant's pre-removal days off schedule.

On September 5, 1989, the Grievant was involved in an incident that led to his second removal. The incident occurred on a Tuesday morning. At that time, Mr. Revis had not been returned to his pre-removal days off schedule and was, therefore, scheduled to work at the time of the incident. The Grievant alleges that he would not have been discharge, had his pre-removal days off schedule been in place.

The parties have been unable to agree about the inclusion of holiday pay in the backpay remedy. Of the approximately 70 removals by the State since the Agreement took effect, none has involved the inclusion of holiday pay as part of backpay.

II.

CONTENTIONS OF THE PARTIES

A. THE STATE'S POSITION

The State argues that it would be inconsistent with the parties' past practice and harmful to their long-term relationship, if straight time and premium holiday pay were included in back pay. The State also argues that the Grievant never requested holiday pay in the grievance, various steps of the grievance procedure, or at arbitration. Thus, the State continues, it would set a "dangerous" precedent to allow the Grievant, through outside counsel, to secure relief not contemplated by the parties in pre-existing cases.

The State also cites the agreement and the Arbitrator's award in support of its argument that the Arbitrator's jurisdiction in this proceeding is narrow. The State points out that the Grievant has filed a separate grievance regarding his second removal and that the Arbitrator has no jurisdiction under his retained jurisdiction over matters related to the validity of the second removal.

B. The ASSOCIATION'S POSITION

On the other hand, the Association argues that "benefits" under the Award should encompass any contractual benefits that the Grievant would have been entitled to had he not been discharged in violation of the contract. Since the contract specifies the payment of straight time and premium holiday pay, the Union argues that the Grievant was entitled to those benefits under the back pay award.

Regarding the Arbitrator's retention of jurisdiction, the Union argues that the contract permits the Arbitrator to hear issues that the parties cannot agree upon. This contractual authority, the Union continues, enables the Arbitrator to hear the second discharge, even though the parties do not agree that the matter is properly before the Arbitrator. The Association also argues that as a matter of equity, all questions of re-instatement and back pay should be settled before a Grievant, such as Mr. Revis, is subject to a new disciplinary action. Because the re-instatement issue was not properly settled, the Association argues that the Grievant's second removal fell within the Arbitrator's retained jurisdiction.

III.

DISCUSSION AND OPINION

This arbitration raises two issues related to the OCSEA/AFSCME and THE YOUNGSTOWN DEVELOPMENTAL CENTER decision of July 24, 1989. The first question concerns the authority of the Arbitrator to hear the merits of the post-award discharge of the Grievant, Todd Revis. The

second grows out of a dispute about whether certain benefits should be included in the computation of backpay under the award.

Arbitral Jurisdiction

In the award of July 24, 1989, the Arbitrator retained jurisdiction "for thirty days to resolve any issue of backpay that the parties are unable to settle". This procedure is a well-settled arbitral practice that recognizes the inadvisability of arbitral computation of backpay, where the parties have not presented relevant supporting data at the hearing and the issue may be mooted by an adverse award to the Grievant. See M. Hill and A. Sinicropi, Remedies In Arbitration, pp. 57-60 (BNA 1981). In the absence of this retention of jurisdiction the Arbitrator's jurisdiction would expire upon the issuance of the award under the doctrine of functus officio. See Expedient Services Inc., 68 LA 1082 (Dworkin 1977). Thus, the scope of the Arbitrator's jurisdiction is defined by the award itself. Some awards carve out a fairly broad area of retained jurisdiction, see e.g. Farmer Brothers Co., 64 LA 901 (Jones 1975) (retained jurisdiction "to dispose of any problems that may be encountered by the parties in the administration of this award"), while others narrowly define the Arbitrator's retained jurisdiction, see e.g. Bambergers, 59 LA 879 (Glushien 1972) (retained jurisdiction to rule upon the appropriate amount of backpay). In the instant case the Arbitrator retained a more narrow jurisdiction to resolve any issue of backpay. It would, therefore, be inappropriate to consider the Grievant's subsequent discharge, which can at best be characterized as an issue growing out of his alleged improper reinstatement.

The Grievant argues that the parties' disagreement about the Arbitrator's authority to hear the Grievant's post-award discharge does not preclude such a finding under the Agreement. Specifically, the Grievant argues that Section 25.03 of the Agreement is effectively a grant of arbitrarily defined jurisdiction, where the parties cannot agree. Moreover, the Grievant argues that the equities of this case require the Arbitrator to take jurisdiction, since the Grievant's second discharge occurred before the Arbitrator's award was fully implemented and would have been prevented, if the Arbitrator's award had been properly implemented.

The Arbitrator reads Section 25.03 as directing the parties to attempt to stipulate to the facts and issues in a submission to the Arbitrator. By implication the Arbitrator will find facts and determine the issues that are in dispute, where they cannot be agreed upon. That section does not give the Arbitrator jurisdiction over matters that are beyond the scope of arbitration. The Grievant also points out the Section 25.03 gives the Arbitrator the authority to decide questions of arbitrability--those matters that are within the scope of arbitration. Yet in making such a determination the Arbitrator is bound by the following scope of arbitration clause, found later in the section:

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration.

Thus, even though the parties have authorized the Arbitrator to interpret the arbitrability provision, that authority does not negate the limitations on arbitral jurisdiction found in Section 25.03. The Agreement does not permit the Arbitrator to expand his jurisdiction. Accordingly, the first sentence of section 25.03 must be interpreted as permitting the Arbitrator to articulate the issue raised by a grievance and resolve disputed factual issues in the absence of a party stipulation. Based on this reading of Section 25.03, it is clear that the Arbitrator cannot expand the jurisdiction narrowly retained in the July 24, 1989 award.^[1]

Backpay

Holiday Pay

The question of whether the Grievant is entitled to straight time and premium holiday pay is in a different jurisdictional posture from the Grievant's second discharge. Whether holiday pay should be included in the computation of backpay falls squarely within the Arbitrator's retained jurisdiction. Backpay jurisdiction also clearly includes the issue of whether the Grievant made sufficient efforts at mitigating damages.

The State argues that holiday pay should not be included in backpay on several grounds. First, it is not common for holiday pay to be part of a make-whole remedy. In the State's view the obligation to pay benefits under the award encompasses only sick leave, personal leave, and vacation pay. The State also argues that permitting the inclusion of holiday pay into backpay would open the flood gates to claims for lost overtime, call-back pay opportunities, interest, missed promotions, and attorney's fees. Second, the Grievant never requested holiday pay in the grievance form, in earlier steps of the grievance procedure or at arbitration. Third, such an inclusion would be inconsistent with the parties' past practice and harmful to their long-term relationship.

The purpose of backpay is to make an employee whole for losses that have been caused by the employer's breach of contract. Such losses include non-speculative wages and benefits, including holiday pay, that the Grievant would have received in the absence of the employer's breach. See M. Hill and A. Sinicropi, Remedies In Arbitration, *supra* pp. 65-70. See also e.g. Darby Printing Co., 49 LA 828 (King 1967), North Range Mining Co., 29 LA 724 (Howlett 1957), Alliance Manufacturing Co., 61 LA 100 (Gibson 1973), Dare Pafco, Inc., 73-2 ARB Par 8478 (High 1973), and The Logan-Long Co., 63-2 ARB Par 8722 (Warns 1962). The foregoing cases demonstrate, contrary to the State's assertion, that it is common for holiday pay to be part of a make whole remedy.

In the instant Award the Arbitrator ordered reinstatement of the Grievant "to his former position with full backpay and benefits from, September 9, 1988, the effective date of his removal from the YDC to the date of his reinstatement". Under Article 26 of the Agreement employees are entitled to paid holidays. Thus, the paid holiday is a contractually defined benefit that the Grievant would have received, had he not been discharged in breach of the Agreement. Under the Award of July 24, 1989, the State is obligated to pay the appropriate straight time and premium holiday benefit as a part of backpay.^[2]

A review of the Grievant's initial grievance filed on September 14, 1988, reveals that Rachelle Johnson, his union representative, requested "[t]hat Mr. Revis be reinstated to his position at the agency and the grievant be made whole for all losses incurred". Thus, the initial complaint filed on the Grievant's behalf contemplated a comprehensive make whole remedy. Furthermore, as indicated in Section I.A. of the Arbitrator's Decision And Award of July 24, 1989, the question of the remedy was an issue for the Arbitrator to decide. Nothing in the parties' submission to the Arbitrator suggested a limitation on the Arbitrator's traditional remedial power.

Finally, even though the State's claim that holiday pay has never been included in the parties' computation of backpay was not rebutted, the State admitted that the inclusion of backpay has never been disputed. The disputes regarding backpay have centered upon the number of days on which to compute backpay. The Grievant is not precluded from raising the issue of holiday pay in this case, particularly where the parties have never specifically addressed the issue.

The State's prediction of harm to the parties' relationship created by Grievant's outside counsel is undercut by the Association's position in this case. In her September 29, 1988, letter to Timothy

Wagner, Linda K. Fiely, Associate General Counsel of the Association asserted the Grievant's entitlement to holiday pay. The Association reiterated this position at the hearing. It appears to the Arbitrator that the State's concern about the effect of an expansive backpay award on the parties' relationship is not shared by the Association. Moreover, the Arbitrator perceives no such effect in this case, where neither party has reneged on a commitment made to the other.

Mitigation

The losses incurred by a grievant because of a wrongful discharge do not include interim earnings or willful losses incurred by the employee's failure to attempt to mitigate damages. Breach of the duty to mitigate damages is an affirmative defense to the payment of backpay, and the employer has the burden of proving that the employee did not make a good faith effort to mitigate damages. See Cleveland Pneumatic Co., 89 LA 1071 (Sharpe 1987).

The State argues that the Grievant did not make a sufficient effort to mitigate damages. The Arbitrator disagrees. The Grievant testified that he attempted to secure work through the Ohio Bureau of Employment Security (OBES) and that he entered a hat service business with Mr. Richardson after the OBES could recommend no job opportunities in Mahoning County. The hat service was a full-time job from October 10, 1988, until the Grievant's reinstatement. Mr. Richardson corroborated the Grievant's testimony and further testified that the business required eight hours of work per day, seven days per week. In addition, the evidence indicates that the business has not been profitable enough to pay income to Mr. Richardson and Mr. Revis during the relevant period.

These efforts at mitigation were reasonable, even though they involved self-employment. See American-International Aluminum Corp., 49 LA 729 (Howlett 1967). As noted by the Arbitrator in Cleveland Pneumatic Co., supra at 1075, the duty to mitigate does not hold the Grievant to the highest standard of diligence. It requires only a good faith effort and not success. Because the Grievant did attempt to mitigate damages and secured income of only \$411, his back pay should only be reduced by this amount.

IV. AWARD

Based on the foregoing, the Arbitrator's jurisdiction shall not extend to the post-award discharge of the Grievant. The backpay award shall include straight time and premium holiday pay. And the award shall be reduced only by the actual interim earnings made by the Grievant between the September 9, 1988, and the date of his reinstatement. The Arbitrator will retain jurisdiction for thirty days to resolve any issue regarding the computation of backpay.

CALVIN WILLIAM SHARPE
ARBITRATOR

11/24/89, DATE

[1] Similarly, the equity argument must be rejected. Even though the Arbitrator should bring his informed judgment to bear on a fair resolution of the grievance, the Court in United Steelworkers of

America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), makes it clear that arbitrators are confined to interpreting and applying the contract and do not sit "to dispense [their] own brand of industrial justice". Since the Agreement and the Award limit the Arbitrator's authority, it would be improper for the Arbitrator to assume jurisdiction over the second discharge of the Grievant. It should also be noted that the Grievant has an adequate remedy under the contractual grievance procedure.

[2] The State's concern about opening the flood gates to expanded claims for backpay including lost overtime, call-in pay opportunities, interest, missed promotions, and attorney's fees is not well-founded, since such claims are often defeated as speculative, not traditionally included in backpay awards, not warranted by egregious management conduct, or otherwise unjustified. See e.g. Alliance Mfg. Co., 61 LA 101 (Gibson 1973) and Cowlitz Redi-Mix, 85 LA 745 (Boedecker 1985).