

ARBITRATION DECISION NO.:

252 A

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Commerce

DATE OF ARBITRATION:

April 17, 1990

Rehearing Award:

November 16, 1990

DATE OF DECISION:

April 30, 1990

Back Pay Award:

January 22, 1991

GRIEVANT:

Pam Jones

OCB GRIEVANCE NO.:

07-00-(89-12-27)-0059-01-09

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Carol Bowshier

FOR THE EMPLOYER:

Rachel Livengood

KEY WORDS:

Removal

Job Abandonment

Mitigation

Management Duty to
Investigate

ARTICLES:

Article 24-Discipline

§24.01-Standard

ADDENDUM:

FACTS:

The Union requested the arbitrator to reopen the hearing because the grievant was being treated unfairly. The grievant had been offered and accepted another position which management had created in response to the arbitrator's original award, however the duties assigned were lower level duties than those the grievant had been performing. The grievant had also been offered a comparable job in the Fire Marshall's office which she rejected because of travel problems.

The Union raised the issue that it had not been allowed at the meeting where the comparable job which the grievant had accepted, had been offered. Secondly, the Union raised the issue that the grievant had not received full back pay.

ARBITRATOR'S OPINION:

Although management should have let the Union take part in the meeting when the new job was offered to the grievant, nonetheless that action by management, by itself, is not a technical violation of the contract.

AWARD:

The arbitrator relinquishes jurisdiction over the grievance award except for the issue of back pay. If the grievant has not been made whole the parties are to brief the issue to the arbitrator within 30 days of the receipt of the second award.

NOTE: See Corresponding Cases 252 and 252 B

TEXT OF THE OPINION:

**In the Matter of the
Arbitration Between**

**OCSEA, Local 11
AFSCME, AFL-CIO
Union**

and

**State of Ohio
Department of Commerce
Employer.**

Grievance No.:
07-00-(12-27-89)-0059-01-09

Grievant:
(Jones, P.)

Hearing Date:
April 17, 1990

Award Date:
April 30, 1990

Rehearing Award:
November 16, 1990

Back Pay Award:
January 22, 1991

On April 17, 1990 at the end of the hearing of Grievance Number 07-00-(12-27-89)-0059-01-09, the

Arbitrator found no just cause for discipline of the Grievant. The Arbitrator made excruciatingly clear that the Grievant was to be reinstated. Rather than make a final order that day, the Arbitrator acceded to the suggestions of the OCB representative with the acquiescence of the Union representative and agreed to wait for a negotiated settlement that would contribute to labor peace and the saving of face by various parties. The representatives of the Department of Commerce were well aware that the Grievant was to be reinstated. Yet, the Employer was unable to reach an agreed settlement, and the Arbitrator was forced to write a formal award to protect the rights of the Grievant. To protect the integrity of the award, the Arbitrator retained jurisdiction over the fulfillment of the award.

Even with the award, the matter was not peacefully or reasonably settled. The Employer did not reinstate the Grievant until May 21, 1990 nor pay her her back pay until June 1, 1990.

Meanwhile, a dispute arose over the nature of the position to which the Grievant was reinstated. Numerous conferences, letters, and calls occurred. On November 16, 1990, the Arbitrator reluctantly relinquished jurisdiction over the issue of the nature of the position. The Arbitrator was reluctant because the spirit of the award, and the contract were unfulfilled in her estimation. However, practical limits exist to an Arbitrator's powers when faced with a system of artificially divided agencies and antiquated rules and regulations, complicated by a divided labor relations power within the Employer.

In the decision of November 16, 1990, the Arbitrator retained jurisdiction over the "back pay" award.

On November 29, 1990, the Employer wrote to the Arbitrator claiming that the reinstatement date of May 21, 1990 and the pay date of June 1, 1990 were "as soon as operationally feasible."

Moreover, the Employer claimed that no back pay issues existed because the Grievant had cashed her check and that back pay issues had not been properly raised.

The Union's response raised two specific issues with regard to the back pay award:

- 1) ADC monies received by the Grievant were deducted from the back pay award.
- 2) The Union asked for interest on the back pay from the date of the award (4/30/90) until actual payment (6/1/90).

Discussion

The fact that Grievant cashed her back pay award in no way defeats any claims as to the correct amount. The Grievant had been wrongfully terminated on December 15, 1989 and had been without a salary. To suggest that she forego cashing the check to keep issues alive borders on the ludicrous. Moreover, the Arbitrator still had jurisdiction at that point. Secondly, the Union very clearly and specifically raised the back pay issues in its letter of September 11, 1990. The issues raised by the Union are properly before the Arbitrator. (See *In re Printing Industry of Washington, D.C. Inc, Union Employers Division and International Typographical Union, Columbia Typographic Union No. 110, 40 LA 727 (1963)*).

Issue #1. The Deduction of ADC Monies

The Arbitrator holds that the deduction of ADC monies was incorrect, unjust, and are to be repaid to the Grievant.

ADC is not comparable to Unemployment Compensation. The Employer, in essence, provides (in part) Unemployment Compensation; however, no employer contribution is involved in ADC. ADC is not compensation but a minimal public benefit due to the Grievant as a taxpayer. See *In re Boise Cascade Corporation and United Paper Workers International Union Local 1226, 90 LA 748 (1988)*. See also *Dickey-Grabler Co. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 217 LAAB-2ARB452*.

Issue #2. Interest on Award

On April 17, 1990, the Employer was on notice that the Grievant, was to be returned to work. At the

hearing, the Arbitrator specifically indicated her concern that medical benefits be obtained as quickly as possible so the Grievant could resume counseling. The Arbitrator concludes that the need for a written award on April 30, 1990 stemmed almost entirely from the intransigence and bad faith of the Employer (DOC). From other hearings and awards, the Arbitrator knows that emergency checks can be cut by DAS. The Arbitrator finds incredible and unpersuasive that no back pay could be made available to the Grievant until June 2, 1990. Therefore, the Arbitrator awards interest on the back pay award (including the restored ADC deduction) from April 30, 1990 until June 1, 1990. This amount is to be paid within two weeks of the date of this award or interest will run on the award itself until paid. The rate of interest is to be the prime rate on April 30, 1990 and is to be compounded daily. (See *In Re Farmer Brothers Company and Food Processors, Packers, Warehousemen and Clerical Employees, Local 547, International Brotherhood of Teamsters*, 66 LA 354 (1976); see also *City of Cincinnati and Fraternal Order of Police, Queen City Lodge No. 69 LAA "88-2Arb § 5999* (1988).

Upon the payment of the sums directed in this award, the Arbitrator relinquishes jurisdiction of the Grievance.

Date: January 25, 1991

Rhonda R. Rivera
Arbitrator