ARBITRATION DECISION NO.:
252 B

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Commerce

DATE OF ARBITRATION:
April 17, 1990

Rehearing Award:
November 16, 1990

Stay of Award (Partial):
February 11, 1991

Interest Hearing:
March 8, 1991

DATE OF DECISION:
April 30, 1990

Back Pay Award:
January 22, 1991

Final Award:
May 6, 1991

GRIEVANT:
Pam Jones

OCB GRIEVANCE NO.:
07-00-(89-12-27)-0059-01-09

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Linda Fiely

FOR THE EMPLOYER:
Rachel Livengood

KEY WORDS:
Interest Awarded on
Back Pay
Employer Bad Faith
Remedy

ARTICLES:
Article 24-Discipline
§24.01-Standard

FACTS:
The grievant was removed on December 15, 1989. She was reinstated by the arbitrator on April 17, 1990 and the employer was notified to reinstate the employee on that date. The employer was granted a delay to reach an amicable settlement, however the employer was unwilling to settle with the employee. The grievant was reinstated on May 20, 1990 and received back pay on June 1, 1990. The Union requested that interest be paid for the period until payment was received by the grievant.

UNION'S POSITION:
The arbitrator has the authority to award interest on back pay as part of a make whole remedy. There is no language in the contract which specifically limits the arbitrator in this regard. Further, the arbitrator may award interest from the date of discharge if the employer acted in bad faith or with intent to injure the grievant. Interest from the date of award is justified if the employer acted to delay implementing an arbitrator's decision, as was the case here.

There are several alternative interest rates which can be used in determining the interest rate applicable in such cases. Examples of such rates are, the rate the grievant would have had to pay to borrow the money, an "adjusted prime rate" as used by the NLRB, or the legal rate set by state statute.

EMPLOYER'S POSITION:
The arbitrator has no authority to award interest on back pay as part of a make whole remedy. An award of interest would amount to punitive damages which are not a proper arbitral award. Additionally, it is not provided for in the contract and, therefore, any such award falls outside the scope of the arbitrator's power.

ARBITRATOR'S OPINION:
Absent specific limiting language, the arbitrator has the authority to award interest on back pay awards. Doing so is neither outside the scope of the arbitrator's power nor equivalent to an award of punitive damages. While not a common practice, it is within an arbitrator's restorative powers. This power extends to prejudgment awards when the employer has acted with intent to injure an employee. If the employer's action was unlawful, egregious or in bad faith, then interest on back pay may be awarded from the date of discharge. On the other hand if the employer was reasonable in imposing discipline but dilatory or acting in bad faith in compensating an employee after the award then post-judgment interest may be awarded. In this case, the employer engaged in delaying tactics by not paying the grievant's back pay for over a month after the award had been made.

The interest rate applied in such cases is not well settled. Arbitrators have been found to use several different rates. The standards found to have been used are; 1) the rate the grievant would have had to pay to borrow the money; 2) an adjusted prime rate used by the NLRB; 3) the legal rate set by state statue; or 4) the federal civil suit rate set according to the 52-week T-Bill rate. The "adjusted prime rate" used by the NLRB tied to the private sector money market was found to be appropriate in this case. It will serve to discourage breaches of the labor agreement and fully compensate aggrieved employees.

AWARD:
The grievant is to be awarded interest on back pay from the date of award until the date paid at the "adjusted prime rate" in effect on the original award date.

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
Stay of Award (Partial):
February 11, 1991
Interest Hearing:
March 8, 1991
Final Award:
May 6, 1991

For the Employer:
Rachel Livengood

For the Union:
Linda Fiely

I. FACTUAL BACKGROUND

The Grievant was discharged on 12/15/89. At the conclusion of the initial arbitration hearing on 4/17/90, the arbitrator put the employer on notice that the Grievant was to be reinstated. The Arbitrator found the investigation of the Employer to have been virtually nonexistent and was prepared on 4/17/90 to issue a bench opinion. The Employer specifically requested a delay to effectuate a face saving settlement. When such a settlement was not forthcoming, the Arbitrator had to award reinstatement and back pay in a written opinion on April 30, 1990. After that opinion, the Employer did not reinstate the Grievant until 5/20/90, and the Grievant did not receive her back pay until 6/1/90.

The Union then asked for interest on the back pay from the date of the award (4/30/90) until actual

payment (6/1/90). The Arbitrator ordered interest on the back pay award from April 30, 1990 until June 1, 1990, at the prime lending rate in effect on April 30, 1990 and compounded daily. In addition, the Arbitrator found that the need for a written award on 4/30/90 stemmed almost entirely from the intransigence and bad faith of the employer.

On 2/11/91, the Arbitrator stayed the award pending further briefing by the parties. The matter has now been fully briefed.

II. AUTHORITY TO AWARD INTEREST ON BACK PAY

The Employer argues that an award of interest on the back pay award is equivalent to an award of punitive damages against the Employer. The Employer also claims such an award is outside the scope of the Arbitrator's authority as the labor agreement has no provision for punitive damages and prohibits the imposition of an obligation not specifically required by the express language of the contract. The Union asserts that absent specific limiting language in the contract, the Arbitrator has the authority to fashion a remedy limited only to the extent that the Arbitrator must not substitute her own rule of damages for that adopted by the parties.

Although historically not a common practice, the awarding of interest is part of the "make whole" remedy for a wrongfully discharged employee, and in the absence of language in a collective bargaining agreement to the contrary, the authority to make such an award is within the traditional inherent restorative powers of the Arbitrator. Falstaff Brewing Corp. v. Local 153, 103 LRRM 2008, 2017,.(D. N.J. 1978); see Allied Chemical Corp. v. Oil, Chemical Workers Union, Local 3-568, 47 LA 686, 690 (Hilpert 1966); see generally, Hill & Sinicropi, Remedies in Arbitration, 197-200 (2d ed. 1991). Contrary to the Employer's position, an award of interest for the period after the award has been issued, is not punitive, but restorative. "[T]he object of an arbitral remedy is to make an employee whole and merely getting the money one should have had a year or two (or in this case, three) later does not make one whole. In arbitration as in lawsuits, interest should be the normal means of compensating for delayed payment." Niemanal Industries Inc. v. United Paperworkers Int'l. Union Local 919, 94 LA 669, 673 (Nolan 1990).

By submitting the grievance to arbitration, the parties empower the Arbitrator to determine the proper remedy for a violation of the Agreement. Falstaff Brewing Corp., 103 LRRM at 2017. While an arbitrator's remedial authority is not limitless, it is both within the scope of arbitral authority, and indeed the arbitrator's obligation to make whole a grievant for a contract breach. Synergy Gas Co. v. Int'l. Brotherhood of Teamsters, Local 282, 91 LA 77, 91 (Simons 1987). Accordingly, the Arbitrator finds that an award of interest on a back pay award is within the scope of her arbitral authority.

III. STANDARDS FOR AN AWARD OF INTEREST

Having determined that the Arbitrator does have the authority to award interest on a back pay award, under what circumstances is such an award warranted?

Recent cases involving interest awards generally fall into two major categories. First, when employers engage in dilatory tactics or act in an arbitrary fashion so that a logical conclusion could be drawn that the employer was deliberately trying to injure the grievant, arbitrators will order the inclusion of interest as part of the damages. The burden is on the grievant to prove that such conduct or delay took place.

Cases in the first category often result in an interest award running from the date of discharge, i.e., "prejudgment interest." The NLRB had a practice of not awarding interest on back pay-awards, but it now invariably awards simple interest on back pay awards for unlawful discharge. Isis Plumbing Co., 138 NLRB 97, 51 LRRM 1122, 1124 (1962) rev'd on other grounds, NLRB v. Isis Plumbing Co., 322 f.2d 913, 54 LRRM 2235 (9th Cir. 1963). See also National Railroad Passenger Corp., 95 LA 617, 631 (1990).

Second, regardless of the issue of bad faith or egregious conduct, arbitrators will award interest for periods after the award, i.e., "postjudgment interest," particularly where a delay has occurred between receipt of the award and payment to the grievant.

The following cases illustrate the tendency of arbitrators to deny interest on back pay awards unless the

employer's conduct is egregious.

In National Railroad Passenger Corp., 95 LA 612 (1990), the discharge of a sleeping-car attendant who had on-duty, consensual sexual relations with a passenger was reduced to a 90-day suspension, and he was awarded simple interest of 11% on his back pay for the remainder of his off-work period. The Public Law Board found that he was deprived of the use of monies he would otherwise have had at his disposal had he not been improperly discharged, his name was sullied by his employer's conduct, and the employer's investigation was flawed by numerous egregious procedural violations.

In Central Business Systems, 95 LA 472, 479 (Allen, Jr. 1990), the arbitrator refused an award of interest because "this is not a case wherein the company's position was frivolous and 'delay' was the company's prime intent."

In Builders Plumbing Supply, 95 LA 351 (Briggs 1990), the arbitrator refused to award interest because he was not convinced from the record in the case that the company maliciously and intentionally violated the labor agreement. "It is more likely that through the unavoidable lens of self-interest the company simply interpreted the labor agreement incorrectly." The Union had argued that interest should be awarded due to the blatant nature of the company's violation.

In City of Bridgeport, 94 LA 975 (Stewart 1990), the arbitrator stated "The arbitration process is not a punitive proceeding. It is restorative. Therefore, the Union's request for double the pay differential and interest on the back pay is denied." Id. at 978.

In Kings County Truck Lines, 94 LA 875 (Prayzich 1990), the arbitrator found insufficient evidence of arbitrary and bad faith conduct to justify the inclusion of interest on the back pay award, "particularly in the absence of contractual language providing for same."

In Stone Container Corp., 91 LA 1186 (Ross 1988), the arbitrator was willing to award interest in the absence of bad faith, especially in light of the fact that the company, when it discovered its error, apologized for the action taken against the grievant and immediately offered recompensation.

However, when employers engage in dilatory tactics, the awarding of interest for the period after the award has issued has been held to be a proper remedy. See generally Hill & Sinicropi, Remedies in Arbitration, 198-99 (2d ed. 1991) citing, Markle Manufacturing Co., 73 LA 1292 (Williams 1980) and Farmer Brothers, 66 LA 354 (Jones, Jr. 1976).

In Synergy Gas Corp., 91 LA 77 (Simons 1987), upheld Synergy Gas Co. v. Sasso, 129 LRRM 2041 (2d Cir. 1988), the arbitrator found that only by granting interest would the grievant be made whole in light of a six year delay by the employer. However, in Niemand Industries, 94 LA 669 (Nolan 1990), the grievant was denied an award of interest after a three year delay for two reasons. First, the union failed to ask for interest on the award until the back pay proceeding and second, the union failed to prove that the company engaged in dilatory tactics.

Thus, although interest on back pay is not customary in arbitration awards, see Elkouri and Elkouri, How Arbitration Works, 406-407 (4th ed. 1990), an award of postjudgment interest is clearly part of the make-whole remedy contemplated by the underlying principle that arbitration should result in a just, speedy, and inexpensive determination of every action. Delay in receipt of an award leads inevitably to hardship to the grievant, a windfall to the employer, and the rewarding of bureaucratic inefficiency.

While the employer's conduct in this case did not descend to the level of egregious conduct necessary to support an award of prejudgment interest, the record indicates that the employer's intransigence caused the initial delay in receipt of the award. Despite repeated proddings from the union, bureaucratic inefficiency along with "the unavoidable lens of self-interest" resulted in the delay in payment and financial hardship to the grievant.

Accordingly, an award of "postjudgment" interest from the date of the award (4/30/90) until actual payment (6/1/90) is warranted and appropriate.

IV. APPROPRIATE RATE OF INTEREST

No clear rule exists as to the appropriate rate of interest or compounding period. Some arbitrators have declared the rate to be that which the grievants themselves would have to pay in order to borrow the money. Farmer Brothers, 66 LA 354, 356 (Jones 1976). The NLRB switched from a rate of six percent (6%) and now

uses the "adjusted prime rate" which is a sliding interest scale charged or paid by the IRS in underpayment or overpayment of Federal taxes. Florida Steel Corp., 96 LRRM 1070 (1977). The "legal rate" is also used in some cases. General Electric Co., 39 LA 897, 906 (Hilpert 1962). The current legal rate in Ohio is ten percent (10%) per annum. R.C. §1343.03. The statutorily prescribed rate for postjudgment interest for civil judgments in federal court is the rate paid on fifty-two (52) week U.S. T-Bills computed daily and compounded annually. The employer has asked for interest at the standard savings rate by which the arbitrator assumes a standard passbook savings rate which is currently at about 4.16%. The union has asked for the prime lending rate in effect on April 30, 1990 compounded daily from April 30, 1990 until June 1, 1990.

The Arbitrator finds persuasive the reasoning of the NLRB in Florida Steel Corp., 96 LRRM at 1072. A rate of interest more accurately keyed to the private sector money market would have the effect of (1) encouraging timely compliance with arbitral awards, (2) discouraging breaches of the labor agreement, and (3) more fully compensating aggrieved employees for their economic losses.

Accordingly, the rate of interest shall be the "adjusted prime rate" in effect on April 30, 1990 compounded daily.

The Arbitrator relinquishes all jurisdiction in this matter.

Date: May 6, 1991

RHONDA R. RIVERA
Arbitrator