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REVIEWED BY
Closed 9/20/01
SEP 20 2001
GRIEVANCE COORDINATOR

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In the Matter of Arbitration
Between
OCSEA/AFSCME Local 11
and
The State of Ohio,
Department of Commerce
****

Case Number: 07-00-(98-12-21)-0109-01-14
~~07-00-12-21-0109-01-14~~

Before: Harry Graham

APPEARANCES: For OCSEA/AFSCME Local 11:

Robert W. Steele, Jr.
Staff Representative
OCSEA/AFSCME Local 11
390 Worthington Rd.
Westerville, OH. 43082-8331

For Ohio Department of Commerce:

John P. Downs
Labor Relations Administrator
Ohio Department of Commerce
77 South High St., 23rd Floor
Columbus, OH. 43226-0544

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham in Columbus, OH. on August 1, 2001. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on August 23, 2001 and the record in this proceeding was closed.

ISSUE: At the hearing the parties agreed upon the issues in dispute between them. Those issues are:

Is the grievance properly before the Arbitrator? If so, did the Employer violate the Memorandum of Understanding of May 12, 1998 regarding the work performance of Oscar Morgan? If so, what shall the remedy be?

BACKGROUND: There is a great deal of agreement upon the events that prompt this proceeding. The Grievant, Oscar Morgan, has 23 years of service with the Ohio Department of Commerce. At one time he was classified as a Financial Institution Examiner 4 (FIE) in the hierarchy of positions maintained by the State. He held that classification for 13 years. The State became dissatisfied with a number of aspects of Mr. Morgan's work. It proposed to demote him to a Financial Institution Examiner 2. In due course a Memorandum of Understanding (MOU) was reached between the Department of Commerce, Division of Financial Institutions, OCSEA/AFSCME Local 11 and the Grievant. It provided that he be demoted to an FIE 2 and established a performance action plan for the Grievant. It continued to establish a schedule for review of his performance and the consequences of his failure to satisfy the Employer that his performance was adequate. The MOU also provided that:

> OCSEA and Morgan agree to waive any and all rights they may currently or subsequently possess to obtain any reparation, restitution, or redress as a result of the events which formed the basis for this action, including the right to have the issues resolved through arbitration, or through administrative appeal, or through the institution of legal action.

It continued to provide that:

> All parties to this Agreement hereby acknowledge and agree that this Agreement is in no way precedent setting. This Agreement shall not be introduced, referred to, or in any other way utilized in any subsequent arbitration, litigation or administrative hearing except as may be necessary to enforce its provisions and terms.

In December, 1998 Curtis Stitt of the Department sent the Grievant a letter indicting the Grievant had not satisfactorily completed his performance action plan. It also indicated that the Grievant would remain an FIE 2. A grievance protesting that decision was filed. It was not resolved in the procedure of the parties. As indicated in the agreed-upon issue, the parties disagree over whether or not the grievance is properly before the Arbitrator.

POSITION OF THE UNION: The Union contends the grievance is arbitrable. In support of that view it points to the phraseology cited above. Specifically, the proviso that the Agreement shall "not be introduced, referred to, or in any other way utilized in any subsequent arbitration...except as may be necessary to enforce its provisions and terms." That is precisely the thrust of the substance of Mr. Morgan's grievance. He alleges that for various reasons, harassment, intimidation and unfair practices against him, he has been unable to successfully complete the probation period and be promoted to an FIE 3 per the terms of the MOU. As the Employer has not properly applied the terms of the MOU in the Union's view, it may advance Mr. Morgan's grievance to

arbitration the Union contends.

During Mr. Morgan's probationary period as an FIE 2 his work product was criticized by his supervisors, Sam McKee and Kevin Allard. That was not to occur in the Union's view. Rather, he was to be assisted to improve his performance with a view to successfully completing the probationary period. That he was not assisted shows the Employer did not comply with the MOU in the opinion of the Union. At arbitration both were highly critical of Mr. Morgan's work product. Nor, during the probationary period did they inform him he was in jeopardy of failing. In fact, Mr. Morgan's final probationary performance review shows him meeting expectations in four of the seven criteria itemized in the performance review. That review was completed by Samuel McKee, IV, the Field Supervisor. As it is positive, Mr. Morgan should be promoted to the position of FIE 3 as specified in the MOU. He should also receive appropriate back pay the Union contends.

POSITION OF THE EMPLOYER: The Employer points to Article 22 of the Agreement dealing with performance evaluations and asserts the Union is seeking to expand its reach. At Section 22.03 the Agreement sets forth appeal procedures relating to performance evaluations. Arbitration is not part of the appeal process. Hence, the Arbitrator may not reach Mr. Morgan's appeal in the State's opinion.

Further, the text of the MOU itself indicates the Grievant waived his rights to appeal to arbitration. As indicated above, the MOU provides that it will not be "introduced, referred to, or in any other way utilized in any subsequent arbitration...except as may be necessary to enforce its provisions and terms." Mr. Morgan signed a separate paragraph, specific to him. He agreed to waive "resort to administrative appeal or...institution of legal action." Based upon the text of the MOU the merits of Mr. Morgan's grievance may not be reached the State asserts.

By the terms of the MOU the Grievant accepted a demotion to an FIE2 from an FIE4. There is no automatic progression to a higher classification, either in the MOU or the Agreement at Article 6. Article 6 deals with what may be termed normal, regular probationary periods. Mr. Morgan's situation does not fall into that category. He and the Union agreed to the condition outlined in the MOU. Hence, he may not appeal to arbitration the Employer contends.

Should it be determined that the grievance is arbitrable, the fact is that during the probationary period specified in the MOU his work was unacceptable. Joint Exhibit 3 represents the assessment of supervisors of the various assignments given to Mr. Morgan from May 12, 1998 to Nov. 12, 1998. With some exceptions, eg. memo of Oct. 8, 1998 from Tom Stephens

to Sam McKee, they reflect poor performance by Mr. Morgan. Taken in their totality, Mr. McKee concluded that Mr. Morgan's work was unsatisfactory. He found errors in writing and grammar. He came to conclude the Grievant copied the work of others. In the final analysis, Mr. Morgan did not successfully complete the terms of his probation as agreed-upon in the MOU. Hence, if the grievance is reached on its merits, it must be denied the State insists.

DISCUSSION: The terms of the MOU do not prohibit recourse to arbitration under certain circumstances. There is an exception to the prohibition against utilization of the MOU in arbitration. That is "as may be necessary to enforce its provisions and terms." That is precisely what the Union is seeking to do in this proceeding. According to it, the Employer is not in compliance with the terms of the MOU as it applied them to Mr. Morgan. Further, Mr. Morgan's waiver of rights is specific to "administrative appeal or through the institution of legal action." He did not waive any right to move to arbitration. It must be concluded that this dispute is reachable on its merits.

The MOU provides that if Mr. Morgan did not satisfactorily complete the FIE 2 action plan developed for him, he was to remain in that classification. During the term of the action plan Mr. Morgan's work was monitored closely by

Samuel McKee IV, Field Supervisor and other supervisory personnel of the Division of Financial Institutions. With few exceptions their comments on Mr. Morgan's performance were very negative. On April 23, 1998 Paul Albin, a Field Supervisor, wrote Mr. McKee that Mr. Morgan's comment for XYZ Savings Bank of Cincinnati (Names of financial institutions were redacted in materials presented at arbitration. The terminology XYZ is a creation of the Arbitrator) had to be rewritten as it was not presentable. Nor did it explain various abbreviations used by Mr. Morgan. On July 15, 1998 Mr. McKee wrote a memo for the file itemizing Mr. Morgan's shortcomings in his work at ABC Savings Bank. (ABC is again terminology of the Arbitrator). He concluded Mr. Morgan's work should have been "much better." He determined that "It appears that he did not check his work carefully." He also found that "the types of errors in this comment and his workpapers are unacceptable for an examiner with 25 years of experience." On July 6, 1998 Douglas B. Trenaman sent a memo to Sam McKee detailing Mr. Morgan's performance. He found that "I was not able to use the capital comment provided by Mr. Morgan." He also noted that "Mr. Morgan also completed the Capital Adequacy Analysis section of ELVIS for the workpapers. This section was reviewed by Sam McKee and the review disclosed many errors." On August 3, 1998 Eric Kuo

sent Kevin Allard, the Chief Examiner, a report on Mr. Morgan's work at the 123 financial institution. (Another fictitious notation of the Arbitrator). He noted various errors of commission and omission. On August 11, 1998 Craig Kaiser found Mr. Morgan' work performance to be "totally unacceptable and inadequate." Another employee was forced to redo all his work. Other memos in Joint Exhibit 3 are in the same vein and do not require citation. The overall conclusion is that the Grievant performed unsatisfactorily.

Included in Joint Exhibit 3 is a memo (undated) from Mr. Morgan to Kevin Allard. Included is this sentence "Although the comment was **delay** I did finish it prior to the field review." Included as well is this sentence "Therefore I gave it ot the Federal EIC...." Finally, the memo is signed, "Oscar L. Morga" (Emphasis supplied) These errors in a short memo lend credence to the comments of the various other memos in Joint Exhibit 3 indicating Mr. Morgan had a propensity not to check his work.

Mr. Morgan was rated "meets expectations" on four of the seven criteria itemized on the Interim Performance Review. That is a barely satisfactory rating. In performance evaluation disputes opinions of supervisors are due weight when it is not shown they were prejudiced towards the Grievant. In this situations the record reflects comments

from several supervisors and co-workers (Jt. Ex. 3) concerning Mr. Morgan's unsatisfactory performance. It cannot be concluded that there was malice towards the Grievant in the evaluations of such a diverse group of commentators. While the total of "meets expectations" was barely above the "below expectations" on the performance evaluation, the memo's detailing Mr. Morgan's performance leave no doubt that serious deficiencies were noted regularly. Based upon the record, it cannot be doubted that the Grievant did not satisfy the terms of the May 12, 1998 Memorandum of Understanding relating to the necessary improvement of his job performance. Consequently, the Employer did not violate that MOU when it declined to advance him to an FIE 3.

AWARD: The grievance is denied.

Signed and dated this 10th day of September, 2001 at Solon, OH.

Harry Graham
Arbitrator