Decision # 835

In The Matter of the Arbitration

OPINION AND AWARD
Case No. 14-23-(00-08-28)-0029-01-13

-between-

Ohio Civil Service Employees Association/AFSCME, Local 11

-and-

The State of Ohio, Ohio Department of Health

ARBITRATOR: John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE UNION:

Lynn Kemp
Staff Representative
Ohio Civil Service Employees Association
390 Worthington Road, Suite A
Westerville, Ohio 43082-8331

Mark Linder
2nd Chair
Associate General Counsel

Also present:

Donald Conley
Union Operations Director

Donald Miles
Grievant

William Hayward
Union Chapter President and Steward

FOR THE DEPARTMENT:

Richard G. Corbin
Staff Advocate
Office of Collective Bargaining
State of Ohio
100 E. Broad Street
Columbus, Ohio 43215

Chris Keppler
2nd Chair
Office of Collective Bargaining

John F. Kinkela
Labor Counsel
Office of Collective Bargaining

Also present:

Icilda Stevens-Dickerson
Former Department of Health Supervisor

Debra Payne
E.E.O. Officer, Department of Health

Marsha Felber
Manager, Department of Health

Matt Beal
Ohio Department of Agriculture

BAKCGROUND:

The Grievant is one of three licensed lead risk assessors employed by the State of Ohio. He is a Sanitarian Program Specialist 1 for the Ohio Department of Health, and has held this position since June 1980. The Grievant reports to the Department's District Office located in the Ocasek Building in Akron, Ohio.

About 80% of the Grievant's job duties occur at locations within a 16 county area away from the Ocasek Building. Upon a referral or complaint by a medical person, the Grievant is assigned to investigate the presence of lead paint primarily in residences of children. This field investigation work is normally conducted from Monday through Thursday, and he is required to report to the Ocasek Building on Friday to complete administrative duties, including reports based upon his investigations.

In May 1997, Mr. Miles' fiancée began to have adverse health reactions to chemical residues or substances that the Grievant was picking up from his workplace at the Ocasek Building. The Grievant spoke to his supervisor and the supervisor agreed to an arrangement to permit the Grievant to perform his administrative at Hiram College Library rather than at the Ocasek Building. This ended in January of 1999 when his then supervisors required him to report to the Ocasek Building on Fridays to perform his administrative duties.

A year later, in January 2000, the Grievant began to have adverse health reactions to what he claimed was pesticide exposure.

The building manager had been spraying the public bathroom areas and snack bar with a pesticide, Dursban.

Sometime later the Grievant orally requested an accommodation from the EEO Chief for the Department of Health, and he provided a letter from his physician documenting his health problem as sensitivity to pesticides. The physician's opinion was that his illness was caused by his occupation of his office at the Ocasek Building and not his exposure to investigating any home or business for lead. After an investigation including consulting with the business managers and department liaison to the Ocasek Building, the EEO Chief denied the Grievant's request on July 28, 2000.

On August 7, 2000, the Grievant filed a grievance that requested among other things that the Grievant be permitted to work at an alternative work site. Thereafter, the department made arrangements for the Department of Agriculture to perform air quality tests and swipe tests in the department's office and other areas in the Ocasek Building. The tests determined there was no residue of Dursban. After the examination of the Ocasek Building had been completed in the period November-December 2000, the grievance was denied at the various steps.

ISSUES:

The parties stipulated the following issue:

> Did management violate Article 2.01 of the Collective Bargaining Agreement? If so, what shall the remedy be?

During the hearing, the Union presented testimony by a Union representative of the bargaining team of the background and intent of the contractual language that appears in Article 2.01 as it

pertains the Americans With Disabilities Act. This testimony by the initial witness for the Union was relevant because the grievance was presented by both parties in arbitration as a claim predicated upon the American with Disabilities Act. It was the Union's theory and the purpose of the testimony by this initial witness to assert that Article 2.01 of the collective bargaining contract "incorporates federal violations of laws including the 'Americans With Disabilities Act of 1990'." (Union post-hearing brief at 9). Indeed, the Union characterized the grievance in this case as a request "in conjunction with the ADA, that he (the Grievant) be permitted to work at an alternative work site at the Employer's choosing on Fridays as a result of his sensitivity to pesticide which makes him severely ill." (Id. at 9).

The parties agreed to brief the general issue stated above on the merits and also brief the issue of whether the arbitrator under this collective bargaining contract has the authority not only to interpret, but also to apply and grant a remedy based upon the Americans With Disabilities Act of 1990. The staff advocates for the Union and the state were joined by Associate General Counsel of the Union and Labor Counsel for the Office of Collective Bargaining in presenting written arguments with authorities on both the issue of the matter on the merits as well as the issue of the authority of the arbitrator.

The issue concerning the authority of the arbitrator is stated as follows:

> Does Article 2.01 of the contract incorporate by reference the Americans With Disabilities Act of 1990

such that a claim based upon this Act is cognizable under the arbitration procedure of the collective bargaining contract?

OPINION ON ARBITRABLE AUTHORITY UNDER THE CONTRACT:

A.) A Preface

The question is whether the claim is cognizable under the arbitration procedure of the contract; not whether the claim was cognizable under the grievance procedure of the contract. The parties did stipulate that, "The Grievance is properly before the arbitrator." That stipulation, however, does not resolve the issue. The contract defines a grievance as

> [A]ny difference, complaint or dispute between the employer and the union or any employee regarding the application, meaning, or interpretation of this Agreement. . . . (Article 25.01 (A).

As any grievance properly before an arbitrator, the grievance is then subject to interpretation of the contract provisions as they bear on the grievance. In this case, this includes the interpretation of provisions bearing on the power of the arbitrator and Article 2.01--the provision stated in the issue recited above.

The following is an analysis of the issue that concludes that the ADA claim is not cognizable under the arbitration procedure of the contract. First, while Article 2.01 appears to have been in contracts between the parties for several years,[1/]

[1/] A Union witness, Donald Conley, testified that he had led negotiations on Article 2 since 1994 and had participated on the negotiation of Article 2 in 1991.

none of the arbitral awards cited by the parties in this case were based on claims emanating solely from statutory law external to the contract. Indeed, in awards by Arbitrators Pincus and Rivera, both arbitrators refused the invitation to either consider a claim based upon external law or formulate a remedy based upon external law.

Secondly, the reluctance of arbitrators and this arbitrator to entertain claims or requests for remedies based on external law, is not founded upon broad policy concerns. Rather, this reluctance is based upon the contractual admonition to arbitrators in this contract not to add to the terms of the contract, and not to impose an obligation "not specifically required by the expressed language of this Agreement." (Article 25.03).

Lastly, that contractual admonition requires more express language of incorporation of statutes including the ADA than appears in Article 2.01. This is not to reduce Article 2.01 to mere surplusage. It is certainly a contractual basis for the interpretation of other provisions in the contract in light of the host of state or federal statutes referred to in Article 2.01. It could also be a basis for a choice between two reasonable interpretations of other clauses--found to be ambiguous. One interpretation may be contrary to one of those myriad of laws; another, consistent with same. Article 2.01 is not interpreted to be a jurisdictional grant of power in this

contract to an arbitrator over a docket of claims based upon the Americans With Disabilities Act of 1990.

B.) Other Arbitral Awards

The Union cited two awards by Arbitrator Pincus as resolving issues involving the Fair Labor Standards Act. In neither of these opinions, however, did Arbitrator Pincus grant a claim based upon the Act. Indeed, in one of the decisions, Arbitrator Pincus refused an invitation to do so. In the first decision, Case No. G-86-0249., the stipulated issue shows that the grievance was based upon a claim under Article 13.12 of the contract--the Stand-By Pay provision.

> The stipulated issue in this grievance: did Columbus Developmental Center violate Article 13.12 of the collective bargaining agreement?

The FSLA became implicated in this case not as a basis of a claim for a requested remedy, but as a guideline for the arbitrator to interpret Article 13.12. Arbitrator Pincus applied the Department of Labor Interpretation Bulletin at 29 CFR part 785, and determined that the employer's interpretation of the Article was consistent with the FSLA. This is not a case where Arbitrator Pincus added the FSLA to the contract as a basis or an obligation or limitation to one of the parties.

The second Pincus decision is more illuminating. In this decision, Case No. G-86-0497., the issue concerned whether the employer had violated Article 13.07 of the contract--the Overtime provision. The Union based its claim upon FSLA and argued that

if there were a conflict between the contract language in Article 13.07 and the FSLA, then FSLA controls.

Arbitrator Pincus had this to say about the Union's invitation:

> The arbitrator is sensitive to the union's Fair Labor Standards Act arguments, but the cases introduced in support of its incorporation hypothesis are not universally supported by all arbitrators. (Id. at 15).

Arbitrator Pincus had acknowledged that he had used portions of the Fair Labor Standards Act to interpret specific language contained in the Agreement in his prior decision in Case No. G-86-0249. He went further, however, to note that in this case the Union wanted him to apply concepts in the FSLA that had never been negotiated nor anticipated by the parties.

> Under these circumstances, it would be inappropriate to fashion a potential remedy under the guidelines of the Fair Labor Standards Act. (Id. at 15).

The Union also cited an opinion by this arbitrator in Case No. 27-21-(00-11-09)-2105-01-03. This decision was cited as one where "this arbitrator recently arbitrated over a Family Medical Leave Act issue." (Union post-hearing brief at 24). Once again, the external law in this case was implicated of by interpretation by a rule by the Employer against abuse of sick leave.

In this case, the Grievant was discharged for several reasons including violation of the Employer's Rule 3h absenteeism--misuse of sick leave. The factual specification in the removal letter with respect to Rule 3h was the fraudulent use of FMLA hours to cover an absence.

An FMLA issue was not decided in this case. What was decided was whether the evidence showed fraud by the Grievant in obtaining the FMLA leave. Again, this is not a case where the external law was used as a basis for a claim raised in a grievance or for a requested remedy arising out of a claim in a grievance.

In the case in this arbitration, the Grievant states a claim in the grievance, which is based upon the Americans With Disabilities Act of 1990. The arbitrator is asked to interpret this Act, find the Employer violated the Act, and then find that the arbitrator has the authority under the contract to enforce the Act within the agreement between the parties. The arbitral decisions provided by the Union do not support such authority.

C.) Contractual Admonitions to Arbitrators

This arbitral reluctance to expand the contract to include a docket of statutorily based claims is not, and should not be, based upon arbitral pronouncements about desirability of arbitral forums as compared to judicial forums for the hearing of statutory rights. The job of the arbitrator is to read the contract of the parties and not pronounce what he or she believes is desirable for the parties.

This contract has more than the expected admonition to the arbitrator to limit his or her analysis to the terms of the agreement. The contract states:

> The arbitrator shall have no power to add to, subtract from or modify any terms of this Agreement, nor shall he/she impose on either party a limitation or

> obligation not specifically required by the expressed language of this Agreement. (Emphasis added).

The last portion of this admonition states that arbitrators must find duties by the parties in "the expressed language of this Agreement" and those duties must be "specifically required." It is this admonition that requires the arbitrator to examine Article 2.01 to find a specific requirement on the Employer to comply with the American with Disabilities Act of 1990 and that specific requirement must be found in expressed language. Neither of these requirements is met in the words of Article 2.01.

This particular statute is, however, the only statute that is specifically referred to in Article 2.01. The second paragraph of this article states:

> The Employer may also undertake reasonable accommodation to fulfill or ensure compliance with the Americans With Disabilities Act of 1990 (ADA). . . . 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 Executive Director.

This paragraph does not state an incorporation by reference of duties upon the Employer under the ADA. First, the paragraph's subject is the making of reasonable accommodations and the process by which these accommodations may come about. Second, the verb that expresses an expectation on the part of the Employer is not an obligatory verb. The verb "may" is an auxiliary verb modifying the main verb "undertake." This auxiliary verb means "has the power to" or "has the privilege to"

(Webster's Third New International Dictionary at p. 1396 (1981 G. & C. Merriam Co.)). Therefore, this provision recites a privilege on the part of the Employer to make reasonable accommodations so long as discussion with the Union occurs. This provision does not impose upon the Employer the duty to comply with the ADA.

AWARD:

For the reasons stated above, there is no necessity to examine the merits of the claim under the Americans With Disabilities Act of 1990. The grievance is denied. The claim is not cognizable under the arbitration provisions of the contract between the parties.

Date: June 23, 2003

John J. Murphy