#949

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

Department of Rehabilitations and Corrections
-AND-
OCSEA/AFSCME Local 11

Appearing for DRC
Beth A. Lewis, Labor Relations Administrator I
Christopher Lambert. Labor Relations Officer 3
Ray Mussio, Labor Relations Specialists
Gregory L. Shader, Labor Relations Officer 2

Appearing for OCSEA
Merzelle Harris, Correction Officer
Shanell Thompson, Correction Officer
Frenjula Jackson, Psychiatric Attendant,
John Porter, Associate General Counsel
Karen Roman-Ells, Staff Representative/OCSEA
Michael Keltner, Correction Officer/Vice President 0250

CASE-SPECIFIC DATA

Grievance No. 2172
Grievance No. 27-02-20050921-01-03

Hearings Held
October 17, 2006

Briefs Submitted
November 7, 2006

Case Decided
December 22, 2006

Subject
Substantive Arbitrability of Reasonable Suspicion for Strip Searches

Award
Grievance Sustained

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Facts

The parties to this contractual dispute are the Allen Correctional Facility ("Agency"), a branch within the Ohio Department of Rehabilitation and Corrections ("DRC") and the Ohio Civil Service Employees Association, AFSCME (OCSEA) Local 11 ("Union"),[1] representing five African-American Grievants ("Grievants"). The Grievants are, and at all times relevant to this dispute were, Correction Officers ("COs").

In late 1989 and early 1990, DRC used inconsistent procedures allegedly to strip search and harass employees. Consequently, the Union challenged the constitutionality of the Agency's strip-search procedures by suing DRC in federal court. In January 1990, the Parties entered a Settlement Agreement containing several conditions intended to regulate future strip searches.[2]

The essence of the instant dispute is the Agency's decision to strip search five black female correction officers after receiving an anonymous tip that described some correction officers who allegedly intended to bring drugs into the Allen Correctional Facility in Lima Ohio. The Union challenged that strip search alleging, among other things, that the Grievants' descriptions did not sufficiently match those given in the tip. In support of this allegation, the Union claims that Labor Relations Officer Dean McCombs said the informants' description of the correction officers who would transport the drugs on to the Agency's premises was too vague to justify strip searching the Grievants. The Agency disagreed and the instant dispute ensued. The Parties could not resolve the dispute, and, consequently, selected the Undersigned to hear it.

On October 17, 2006, the Undersigned conducted an arbitral hearing at the Allen Correctional Facility. All parties relevant to the dispute were present. The Parties had a full and fair opportunity

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[1] Hereinafter referenced as the Parties.

[2] Joint Exhibit 3.

to make opening statements and to present admissible evidence and arguments supporting their positions. However, the Undersigned suspended the hearing shortly after the Parties' opening statements when the Agency claimed the Union had raised causal issues about the strip searches and their execution that lacked substantive arbitrability under the Collective-Bargaining Agreement. The Union admitted that causal issues lacked substantive arbitrability under the Contract but stoutly contended that the reasonableness of the strip searches and the underlying reasonable suspicion for them were fully arbitrable and properly before the Undersigned. Because substantive arbitrability is normally reserved for judicial resolution, the Undersigned requested, and the Parties granted him, jurisdiction to hear the issue of substantive arbitrability.

II. The Issue

The Parties cited different issues in their Post-hearing Briefs. The Union declared the issue to be, "The meaning of the language in Section 7(f) of the Settlement Agreement between OCSEA and the DRC. However, the Agency's Post-hearing brief phrased the issue as whether issues related to the "cause for search" of the four Grievants are substantively arbitrable?

Because the Parties could not agree on an issue, the Undersigned adopts the following issue in this dispute: Whether Section 7(f) of the Settlement Agreement excludes from the contractual grievance/arbitration procedures how the Agency strip searched the Grievants ("Reasonableness") and the reasonable suspicion for those searches.

III. Summaries of the Parties' Arguments

In this dispute, the Union and Agency each proffer two broad arguments that address the Settlement Agreement and the Contract. And both parties offered several specific supporting arguments for their broader positions.

A. Summary of Union's Arguments—Settlement Agreement

1. The Settlement Agreement controls the instant dispute.
2. "Cause for search" is limited to the informant's telephone call to the Agency, as distinguished from the information transferred during that telephone call. The Union challenges neither the telephone call itself nor the information conveyed therein. Instead, the challenge focuses on how the strip searches were conducted. Specifically, information from the informant's tip does not adequately describe the Grievants, thereby precluding any basis for reasonable suspicion to strip-search them.
3. Nothing in Section 7(f) waives the Union's right to challenge how the Agency conducts strip

searches based on information from the informant's tip. Specifically, the Union argues that "cause for search," under Section 7(f), does not include the Agency's decision to strip search employees based on information from the informant's tip. Barring that decisional process from grievance/arbitral review would, according to the Union, violate the interpretative canon that prohibits "harsh, absurd or nonsensical results."

4. Section 7(f) implicitly establishes intent to subject reasonable suspicion for strip searches to the grievance/arbitration procedures, insofar as that Section does not explicitly exclude reasonable suspicion for strip searches from the grievance/arbitration machinery.
5. Why would the Union subject drug tests to the reasonable-suspicion requirement in the Contract and yet omit such a requirement in the Settlement Agreement for strip searches, which are inherently more invasive?
6. The Settlement Agreement is equivalent to a "mini collective bargaining agreement" and is subject to ordinary principles of contractual interpretation.
7. When the Union wanted to exclude searches from "cause," it explicitly did so in Section 6 of the Settlement Agreement. Section 7(f) does not explicitly exclude "reasonable suspicion" from grievance/arbitration procedures.
8. The Union never waived the right to grieve/arbitrate whether "cause for search was reasonably applied to the employees."
9. The Arbitrator must fairly construe the ambiguous language of Section 7(f) so as not to unreasonably advantage either party or to create a forfeiture.

B. Summary of Agency's Arguments—Settlement Agreement

1. Section 7(f) waives the Union's right to grieve/arbitrate issues relating to reasonable suspicion by explicitly excluding "cause for search" from the contractual grievance/arbitration machinery.
2. "Cause for search" encompasses all issues and aspects of reasonable suspicion associated with strip searches. Consequently, issues of reasonable suspicion related to strip searches lack substantive arbitrability.
3. "Cause for search" includes information from an informant's tip as well as reasonable suspicion premised on that information. The reasonable suspicion is "based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the person to be searched is then in possession of a weapon, drugs or other contraband."[12]
4. Even though the Union waived its right to grieve/arbitrate "cause for search" under the Settlement Agreement, the Union still may litigate issues involving "cause for search" in federal court.
5. The Union had more than fifteen years to include procedural regulations for strip searches into the contract. It never included those procedures.
6. The "cause for search" is not limited to the telephone call itself but includes information transferred therein. The medium through which the Agency received the information is irrelevant to "cause for search."
7. "Cause for search" includes how the Agency applies an informant's information and thus that issue too is excluded from the grievance/arbitration procedures.

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[12] Agency's Post-hearing Brief, at 1.

8. Rights explicitly granted to employees under the Settlement Agreement are not explicitly granted to them under the Collective-bargaining Agreement, and such rights are enforceable only in federal court.
9. "Cause" is defined as "a basis for an action or decision; ground; reason."[4]
10. The Arbitrator lacks authority to enforce provisions of the Settlement Agreement. The Arbitrator's powers are limited by Section 25.03 of the Contract.

C. Summary of Union's Arguments—The Contract

1. The Settlement Agreement, which the Union argues permits grievance/arbitration of reasonable suspicion for strip searches, is incorporated into the Collective-bargaining Agreement.
2. Both Ohio law and the Agency's policies regarding strip searches are incorporated into the Collective-bargaining Agreement.
   a. Section 2933.32 of the Ohio Revised Code[5] explicitly addresses and limits the State's right to strip search employees, and Article 44.02 explicitly imports the limits in Section 2933.32 into the Contract.
   b. Because the Agency's strip-search policy[6] is a state statute that provides for employee benefits, Article 44.02 incorporates that policy into the Contract.
3. The Settlement Agreement was executed by the Parties in 1990 and addresses a violation of state employees' constitutional rights. Consequently, the Settlement Agreement constitutes federal law, which regulates and is automatically incorporated into the Contract. The Contract cannot violate federal law.
4. Article 44.02 of the Contract entitles employees to all benefits provided by federal law and the Settlement Agreement constitutes federal law.[7]

D. Summary of Agency's Arguments–The Contract

1. Employees have only those rights specifically enumerated in the Collective-bargaining Agreement.
2. Because the Collective-bargaining Agreement is silent regarding the Agency's right to strip search employees, the Parties' Settlement Agreement controls that issue.
3. Because the Contract explicitly limits the Arbitrator's jurisdiction to issues arising from the application or interpretation of the Contract, the Arbitrator lacks jurisdiction to interpret the Settlement Agreement and, hence, to address either the causality of the strip search or the reasonableness of its execution.[8]
4. Given the Contract's silence regarding strip searches, the Union lacks a contractual right to challenge the Agency's strip-search decisions. Specifically, the explicit provision in the Contract

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[4] The American Heritage Dictionary, Second College Edition at p. 249 (1985 Houghton Mifflin Company) (single quotes omitted)

[5] Union Exhibit 3.

[6] Joint Exhibit 4.

[7] Union Reply Brief, at 1, citing Union Exhibit 2.

[8] Employer Reply Brief, at 1.

addressing reasonable suspicion as a precondition for "drug tests" ("Reasonable-suspicion requirement") and the utter absence of any contractual provision regarding strip searches establishes that the Parties never intended to contractually limit the Agency's decision to strip search employees.

5. In further support of this argument is the interpretative canon "expressio unius est exclusio alterius (the expression of one thing is the exclusion of another)." That is, the specific inclusion of a reasonable-suspicion requirement for drug tests when contrasted with the stark absence of such a requirement for strip searches implies an intent to exclude that requirement.[9] The absence of any contractual limit on the Agency's authority to strip search employees deprives that issue of substantive arbitrability in the instant dispute. And since the Arbitrator's jurisdiction in this dispute is explicitly limited to "disputes arising from an interpretation, application or alleged violation of a provision of the . . . [Collective-bargaining Agreement]," he lacks jurisdiction to determine the scope of the Agency's authority to strip search employees.

IV. Relevant Contractual and Regulatory Provisions

Section 25.03
Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The Arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation specifically required by the expressed language of this Agreement." (Joint Exhibit 1, at).

Article 44.01
To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this agreement, except ORC Chapter 4117, this agreement shall take precedence and supercede all conflicting State laws.

Article 44.02 ("Operations of Rules and Law")
To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to State employees in areas where this Agreement is silent, such benefits shall be determined by those statutes, regulations or directives.

Section 2933.32(B)(2)
A body cavity search or strip search may be conducted if a law enforcement officer or employee of a law enforcement agency has probable cause to believe that the person is concealing evidence of the commission of a criminal offense, including fruits or tools of a crime, contraband . . . that could not otherwise be discovered. In determining probable cause for purposes of this section, a law enforcement officer or employee of a law enforcement agency shall consider the nature of the offense

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[9] Employer Post-hearing Reply Brief, at 2, citing Elkouri & Elkouri, How Arbitration Works, 467-468 (6th ed.) 2003.

with which the person to be searched is charged, the circumstances of the person's arrest, and, if known, the prior conviction record of the person.

DRC Document No. 310-SEC-35 ("Employee Search")

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V. Policy

Searches of employees shall comply with the Settlement Agreement entered into in Ohio Civil Service Employees Association v. Richard Selter, case no. C1-85-530.

F. An employee may be specifically singled out and requested to submit to a strip search if there is a reasonable suspicion that the employee is attempting to carry contraband into or off the grounds of an institution.

Section 7(f) of Settlement Agreement (Complaints)

[T]he *form* of the written statement and the *cause for search* may not be grieved or arbitrated under the Collective-bargaining Agreement between the State of Ohio and the Ohio Civil Service Employees Association, Local 11, American Federation of State, County and Municipal Employees. . . .[10]

V. Analysis and Discussion

A. Evidentiary Considerations

Because this is a contractual dispute, the Union has the burden of proof or persuasion and must adduce preponderant evidence in the arbitral record as a whole showing that issues involving reasonable suspicion as well as and how the Agency conducts strip searches are substantively arbitrable, i.e., fully subject to the contractual grievance/arbitration procedures. Similarly, the Agency shoulders the burden of proof or persuasion regarding any claims or affirmative defenses it raises and must establish those matters by preponderant evidence in the arbitral record as a whole.

B. Substantive Arbitrability of How Agency Conducts Strip Searches and Presence/ Absence of Reasonable Suspicion

For the reasons set forth below, the Arbitrator holds that Section 7(f) of the Settlement Agreement does not exclude from the contractual grievance/arbitration procedures how the Agency

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[10] Joint Exhibit 3, at 3.

strip searched the Grievants or the reasonable suspicion relating to those strip searches.

C. Nature of Reasonable Suspicion and the Strip-Search Decisional Process

Establishing the existence of reasonable suspicion to strip search employees entails at least two basic steps: (1) obtaining basic raw information, which claims that misconduct either has occurred or very well could occur in the future; (2) using judgement and experience to screen that information and to draw reasonable inferences therefrom.[11] In addition, to establish reasonable suspicion, one must demonstrate that a *reasonable person*, under the *same or similar circumstances* as the person(s) making the strip-search decisions, *could* conclude that the employees in question are either preparing to engage in misconduct or have already done so.

The instant dispute focuses on which, if any, of these steps or considerations fall within "cause for search," under Section 7(f) and, therefore, are barred from the contractual grievance/arbitration procedures. In short, what is the intended scope of "cause for search"?

D. Scope of "Cause for Search"

Neither Party offers a wholly persuasive interpretation of "cause for search." At one end of the continuum is the Union's parsimonious interpretation of "cause for search," which is limited to the informant's telephone call itself as distinguished from any information conveyed therein. At least in the instant dispute, the telephone call, standing alone—the mere ringing and answering of the telephone with no conversation or other information transferred—cannot logically be a "cause for search." Yet, by artificially distinguishing the telephone call from the information transferred during that call, the Union embraces this tenuous position.[12] As the Agency correctly argues, the medium

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[11] The informant's reliability is also a consideration in deciding whether there is reasonable suspicion to strip search an employee.

[12] As an abstract hypothetical, one could imagine a situation where the mere ring of a telephone was a signal that misconduct is afoot, but that is hardly the situation in this dispute.

(in this case a telephone) used to transfer information is irrelevant to the issue of "cause for search." It is the information transferred during the telephone call that likely triggered the search and, thus, was the "cause for search." At the other end of the continuum and painting with broad strokes, the Agency embraces a global interpretation that encompasses not only the other three phrases in Section 7(f),[13] but apparently any other information and analysis that impact a decision to strip search employees.

The breadth of the Agency's interpretation of "cause for search" conflicts with other pivotal considerations in an analysis of substantive arbitrability. A proper assessment of the scope of "cause for search" and what it was intended to encompass and, thus, remove from the contractual grievance/arbitration procedures involves examining the Settlement Agreement, the public policy favoring arbitration, and any applicable or relevant canons of contract interpretation ("Interpretative canon(s)." So analyzed, "cause for search," under Section 7(f), *does not* prohibit either grieving or arbitrating *how* the Agency conducts a strip search or the reasonable suspicion underlying that search.

Several reasons support this holding. First, a careful reading of Section 7(f) reveals that it explicitly removes only "cause for search" from the realm of arbitration and grievances. Neither Section 7(f) nor any other provision of the Settlement Agreement explicitly removes "cause for suspicion supporting the search," "cause for suspicion,""adequacy of the cause for suspicion," or "reasonable suspicion" from the realm of the grievance/arbitration procedures. One stretches credulity to suggest that all of the foregoing terms are synonymous with "cause for search" or that

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[13] The other three phrases are: "Cause for suspicion supporting the search," "Cause for suspicion," and "Adequacy of the cause for suspicion."

somehow "cause for search" was intended to comprehend all of those terms. Furthermore, this interpretation concurs with the interpretative canon, which states that a *change in terminology* reflects an intent to change meaning. "Cause for search" differs substantially from the other relevant phrases in Section 7(f), thereby strongly suggesting that "cause for search" was intended to differ from those phrases.

Second, unlike the other phrases, "cause for search" makes absolutely no reference to either "suspicion" or "reasonable." This omission suggests that "cause for search" was not intended to include those two terms.

Third, the fundamental, "but for" basis for a strip search is raw, unprocessed information from some source, in this case an informant. Therefore, in the most basic sense, that information can constitute a "cause for search." However, whether that information rises to the level of either "reasonable suspicion," "cause for suspicion supporting the search," or "cause for suspicion" are separate issues. "Cause for search" *is not necessarily synonymous* with those phrases.

Fourth, Section 7(b) affords employees targeted for strip searches the right to review much of the information that went into the decision to strip search them. Those targets may obtain specific , objective facts that motivated the search, the date and time that the information was received, the names of individuals that received that information (subject to certain provisos), the information itself, and the basis of the informant's knowledge.[14] Affording employees access to such information without the right to subject it to independent review affords them precious little protection from arbitrary, capricious, discriminatory, or unreasonable searches or decisions. Surely the Parties could not have reasonably intended such an outcome.

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[14] Joint Exhibit 3, at 3.

Fifth, the same sentence in Section 7(f) that exempts "cause for search" from contractual grievance/arbitration procedures, expressly excludes only "the *form* of the written statement," and not its *content*. This minimal exclusion in the same sentence suggests a corresponding intent to exempt only minor aspects of the decision-making process for strip searches from the contractual grievance/arbitration process. It is reasonable to conclude that the same intent applied to the written statement as to "cause for search." Therefore, one can reasonably read "cause for search" to include only the basic information actually conveyed in the tip or other informational source and not the analytical and decisional processes involving judgement, experience, inferences, etc.

Further corroborating this interpretation of "cause for search" is the strong national (judicial) policy supporting the grieving/arbitrating of labor disputes, especially those involving substantive arbitrability. That policy specifically states that doubts about substantive arbitrability should be resolved in favor of coverage, i.e., arbitrating the grievance in question. If in doubt, then arbitrate.[15] The intent not to arbitrate a given grievance or subject matter should be clear and unequivocal. Given the substantially amorphous and ill-defined definitional borders of "cause for search," one must strain to conclude that the Parties clearly and unequivocally intended to exclude from their contractual grievance/arbitration procedures how the Agency conducts strip searches or the reasonable suspicion of those searches.

E. Relationship Between the Contract and the Settlement Agreement

The issue here is whether the Settlement Agreement is incorporated into the Collective-Bargaining Agreement. For the reasons discussed below, the Arbitrator holds that the Settlement

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[15] *See,* e.g., United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960). Although Warrior & Gulf referenced the more traditional arbitration clause, Section 7(f) is in effect an "arbitration clause" or an amendment of one, a difference without a meaningful or outcome-determinative distinction.

Agreement was intended to be a part of the Collective-Bargaining Agreement. The Union contends that the Settlement Agreement constitutes federal law and as such is fully incorporated into the Collective-Bargaining Agreement. The Agency argues that Article 25.03 of the Contract deprives the Undersigned of authority to enforce the Settlement Agreement because that Article limits the Undersigned's authority to issues arising from an interpretation or application of the Collective-Bargaining Agreement. Thus, the Agency implicitly argues that the Settlement Agreement is not a part of the Collective-Bargaining Agreement.

The Undersigned holds that on its face the Settlement Agreement manifests an intent to be incorporated into the Collective-Bargaining Agreement. First, the discussion below precludes a discussion of the Union's argument suggesting that as federal law, the Settlement Agreement is automatically incorporated into the Collective-Bargaining Agreement. The Settlement Agreement is incorporated into the Contract not because it is federal law but because Section 7(f) of the Settlement Agreement manifests a clear intent to include that Agreement into the Contract. First, major points of contention in the instant dispute focus on how strip searches are conducted, whether they are supported by reasonable suspicion, and whether these subjects are substantively arbitrable, or whether they fall within the scope of "cause for search" and, thus, lack substantive arbitrability. Both parties agreed that the Undersigned should resolve the latter issue. Presumably, they understood that if the issue relating to strip searches were held to be arbitrable, that holding would directly implicate the contractual grievance and arbitrable procedures. This alone suggests that the Settlement Agreement very well may be linked to the Collective-Bargaining Agreement. Moreover, the language of Section 7(f) specifically references the contractual grievance/arbitration procedures in relation to "cause for search." If, the phrases other than "cause for search" were held to be

substantively arbitrable (as the Undersigned has held), the inescapable conclusion is that Section 7(f), if not the entire Settlement Agreement, is subject to the contractual grievance/arbitration procedures. "Cause for search" is the only phrase that Section 7(f) explicitly excluded from the contractual grievance/arbitration procedures. But why the concern about arbitrating "cause for search" if indeed the Settlement Agreement lies outside of the Contract? Clearly, the Parties thought the Settlement Agreement was somehow incorporated into the Contract and, therefore, sought to remove "cause for search" from the Contracts' arbitral realm. Otherwise, grieving or arbitrating "cause for search" should hardly have been a concern if indeed the Settlement Agreement was wholly independent of the Collective-Bargaining Agreement.

In summary, the reference to the contractual grievance/arbitration procedures in Section 7(f) of the Settlement Agreement implicitly recognizes that subjects in the Settlement Agreement may be substantively arbitrable. That recognition also reveals that the Settlement Agreement is not separate and apart from the Collective-Bargaining Agreement, but is either wholly or partially incorporated therein, at least for the purpose of subjecting its provisions to the contractual grievance/arbitration procedures.

Having held that the Settlement Agreement is incorporated into the Collective-Bargaining Agreement and that how strip searches are conducted as well as the existence of reasonable suspicion to conduct them are arbitrable, there is not need to address the remainder of the Parties' arguments as to whether the Collective-Bargaining Agreement contains any protections regarding the strip searching of employees. The Collective-Bargaining Agreement has all of the protections for strip searches that are contained in the Settlement Agreement.

VI. The Award

For all of the foregoing reasons, the Arbitrator holds that issues involving how strip searches are conducted and the element of reasonable suspicion supporting decisions to strip search employees are substantively arbitrable under the Collective-Bargaining Agreement, which is referenced under Section 7(f) of the Settlement Agreement.

Respectfully,

Robert Brookins

Robert Brookins, Professor of Law, Labor Arbitrator, J.D., Ph.D.