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OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio Department of Natural Resources
-AND-
OCSEA/AFSCME Local 11

Appearing for DNR
John Duffey, Assistant Chief–Reach
Bradley A. Nielsen, Labor Relations Officer 3
Joseph Trejo, Labor Relations Specialist
Abbie Workman, Labor Relations Officer 1

Appearing for OCSEA
Treva J. Knasel, ODNR Chapter 2515 President & Chief Steward
Sharon V. Ralph, OCSEA, Staff Representative
Clark Scheerens, Witness, OCSEA Chief Steward Retired
Thomas Tomastik, Witness, Vice President and Steward

CASE-SPECIFIC DATA
Grievance No.
25-11-20060706-0004-01-13
Hearings Held
August 3, 2007

Case Decided
January 7, 2008

Subject
Timeliness of Grievance (Procedural Arbitrability); Grievance as Prima Facie Case

Award
Grievance Sustained (Grievance is Arbitrable)

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

Table of Contents

I. The Facts

The parties to this issues dispute are the Ohio Department of Natural Resources, Division of Real Estate and land Management ("Employer" or "Agency") and Ohio Civil Service Employees Association ("OCSEA" or "Union"), representing all bargaining-unit employees of the Employer.

On April 24, 2006, the Agency posted a position for an Environmental Specialist 1 ("ES-1") position. Subsequently, the Agency withdrew that posting and issued letters to potential applicants that the position would not be filled. The potential applicants received the letters on or about May 26, 2006[1]. Then the Agency reissued an AA-2 position.

On July 6, 2006, the Union filed Grievance No. 25-11-20060706-0004-01-13 ("Grievance") challenging the Agency's decision to cancel the ES-1 position, post the AA-2 position instead, and ultimately fill that position on June 26, 2006. The Grievance specifically claimed that the job description in AA-2 was essentially the same as that in ES-1, which was bargaining-unit work. Moreover, according to the Grievance, both the ES-1 and AA-2 positions were in the same division and section and reported to the same supervisor. Consequently, from the Union's perspective, assigning an exempt employee (a non-bargaining-unit member) to that position on June 26, 2006 violated Article 1.05 and 17.05.

II. The Issue

Whether the Grievance is fatally tardy, and whether the Grievance establishes a prima- facie case under Article 25.03.

III. Relevant Contractual and Regulatory Provisions

Article 1.05

The Employer recognizes the integrity of the bargaining unit and will not take action for the purpose of eroding the bargaining units.

Article 17.035

Posted vacancies shall not be withdrawn to circumvent the Agreement.

Article 17.05

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[1] Joint Exhibit 2. The Grievance claims potential applicants received the letters on May 30, 2006.

Although the Grievance cites Article 17.05, the Parties' Post-hearing Briefs mention no specific provisions. Therefore, none is listed here.

Article 25.02

A grievance involving a . . . non-selection . . . shall be initiated at Step Three (3) of the grievance procedure within fourteen (14) days of notification of such action.

Article 25.03

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration.

IV. Summaries of the Parties' Arguments

A. Summary of the Agency's Arguments

1. The Agency did not violate Article 1.05 by eroding bargaining-unit work. Article 1.05 addresses two subjects: supervisors doing bargaining-unit work and erosion of bargaining-unit work. Because the Grievance is silent about supervisors performing bargaining-unit work, it presumptively alleges that the Agency eroded bargaining-unit work. However, the Agency did not, and, indeed, could not have eroded bargaining unit work because bargaining-unit work is nonexistent in ESS. In fact, ESS has never employed bargaining-unit employees. In any event, an erroneous posting of bargaining-unit work, as in the instant case does not somehow create a bargaining-unit position and cannot "erode" bargaining-unit work. An erroneous posting of bargaining-unit work hardly establishes ***intent*** to erode bargaining-unit work, especially where, as here, bargaining-unit work does not exist and has never existed. Under those conditions, the Agency cannot erode bargaining-unit work.
2. The Agency did not violate Article 17.05. First, Article 17.05 is inapplicable to selection of exempt candidates for exempt positions. Instead that Article addresses standards for selecting bargaining-unit members for bargaining-unit work. The Agency never filled the ES-1 position, which precludes any prima facie case of non-selection.
3. The Grievance also fails to satisfy the standards of Article 25.03, which provides in relevant part: Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration."
4. The Grievance fails to state a prima facie violation. Article 25.03 implicitly requires that the Union establish a prima facie case of a contractual violation. An allegation of erosion does not constitute a prima facie case of erosion and, thus, does not allege a contractual violation under Article 25.03. Nor does a non-selection Grievance about an exempt position allege a contractual violation because bargaining-unit members and the Union lack standing to grieve selections involving exempt positions.
5. The Grievance is fatally tardy under Article 25.02. For Grievances involving layoffs, non-selection, or discipline, Article 25.02 requires a Step-3 initiation within fourteen days of notification of the alleged contractual violation. Joint exhibit No. 2 establishes that on May 26, 2006 the Agency notified applicants for the original ES-1 position of the cancellation thereof. Therefore, the Grievance should have been filed no later than June 6, 2006, fourteen days from May 26, 2006. Instead, the Union filed the Grievance on July 6, 2006, well outside of the procedural window of the Contract, thereby rendering the Grievance fatally tardy.

B. Summary of the Union's Arguments

1. By first raising the issue of procedural arbitrability at the arbitral hearing, the Agency constructively waived its right to challenge the timeliness of the Grievance. The Agency knew or should have known of the alleged timeliness violation months before the arbitral hearing. Arbitrator Smith held that issues of procedural Arbitrability should be raised earlier in the grievance procedure to facilitate early resolution and to preserve evidence.
2. The Grievance is not untimely. Article 25.02 requires grievances such as the one in this dispute to be filed within ten days of the causal action. In the instant case, the event that started the procedural "clock" under Article 25.03 and which triggered the Grievance occurred on June 26, 2006 when the Agency awarded the position to an exempt employee and not when the position was originally posted or withdrawn. Thus, the Grievance was filed within the ten-day limit.
3. The Union is grieving the transfer of bargaining-unit duties to an exempt employee and not the posting process itself. The contractual violation occurred at the point that the exempt employee assumed the position in question.
4. The Agency's argument regarding the Union's prima facie case addresses the merits and assumes facts not in evidence, facts which are to be decided during a fully blown arbitral hearing.
5. The argument that by not mentioning supervisory performance of bargaining-unit work, the Grievance fails to assert a contractual violation under Article 1.05 misses the mark for several reasons. First, Article 1.05 contains no such requirement to state a contractual violation. Second, the Grievance does not rest on Article 1.05 alone but alleges a violation of Article 17.05, "and any other relevant articles." So even if the Arbitrator ruled in the Agency's favor on these two Articles, there are other issues of merit to be decided in a fully blown arbitral hearing on the merits. Third, Arbitrator Murphy has broadly held that the Agency's duty under Article 1.05 not to erode the bargaining unit extends beyond simply avoiding supervisory performance of bargaining-unit work. Instead, Arbitrator Murphy read the last sentence of Article 1.05 to prohibit even non-supervisory performance. Finally, the Grievance addresses "what kind of bargaining-unit work is performed at ESS." Furthermore, the Union rejects the contentions that bargaining-unit work is nonexistent at ESS and that ESS has no history of employing a bargaining-unit employee.

V. Discussion and Analysis

A. Evidentiary Considerations

Because the Agency alleges that the Grievance contains fatal procedural flaws, the Agency has the burden of proof or persuasion regarding that allegation. To establish those allegations, the Agency must adduce preponderant evidence in the arbitral record as a whole, showing that more likely than not the Grievance is fatally flawed either because of untimeliness or because of failure to comply with a contractual duty to present a prima facie case of the allegations within the Grievance. Also, because the Agency has the burden of persuasion, doubts about the existence of any alleged misconduct shall be resolved against the Agency. If the Agency fails adequately to establish it procedural allegations in the first instance, it cannot prevail, irrespective of the strength or weakness of the Union's defenses. Similarly, the Union has the burden of

persuasion (preponderant evidence) regarding its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

B. Procedural Arbitrability–Timeliness of the Grievance

The issue here is whether the Grievance is fatally flawed due to untimeliness. Pursuant to Article 25.02, the Agency contends that the Union should have submitted the Grievance no later than June 26, 2006, fourteen days after the Agency notified applicants that it would withdraw the ES-1 posting. Essentially two rationales drive this argument. First, the Agency suggests that the time limits in Article 25.02 govern the filing of the Grievance. The June 26 notification that the Agency would withdraw the ES-1 posting triggered the procedural "clock" under Article 25.02, giving the Union fourteen days from June 26 to grieve the withdrawal of the ES-1. The Agency does not specifically address the legitimacy of raising procedural Arbitrability for the first time in arbitration.

The Union offers two contentions in response. First, the Agency implicitly or constructively waived its right to raise an issue of procedural Arbitrability by raising that issue for the first time at the arbitral hearing. Second, the Grievance is subject to the ten-day procedural window under Article 25.02. Third, the Grievance was in fact timely because the triggering event was the June 26 filling of the AA-2 position with an exempt employee and not the announced withdrawal of the ES-1 posting.

For the following reasons, the Union prevails on the issue of procedural Arbitrability. First, the Arbitrator agrees with the Union and with Arbitrator Smith that the Agency effectively waived its right to raise the issue of procedural arbitrability by waiting until the arbitral hearing to assert that issue. Furthermore, the Arbitrator agrees with Arbitrator Smith's rationale— that such delay in raising procedural objections obviate possible settlements earlier in the negotiated grievance procedure and risk losing relevant, probative evidence. In addition, disposing of grievances where parties first assert their procedural objections at arbitral hearings ignores the continuity of the special collective-bargaining relationship and need for peace therein. The waiver defense recognizes and respects these characteristics and places a premium on addressing and resolving the

merits of disputes in collective-bargaining relationships if at all possible and without unduly trammeling proponents' rights.[12] Each Party has a standing obligation to scrutinize the substantive and procedural dimensions of a grievance while processing it through the negotiated grievance procedure and to raise relevant procedural and/or substantive objections *before* going to arbitration.[13] For the foregoing reasons, the Arbitrator holds that the Agency in this dispute constructively or implicitly waived its procedural arbitrability objection by waiting until the arbitral hearing to raise it. This is especially true where, as here, nothing in the arbitral record suggests that with due diligence the Agency could not have raised this procedural objection earlier in the negotiated grievance procedure.

C. Role/Impact of the Prima-facie Standard

Here the issue is whether Article 25.03 imposes an implicit duty on the Union to establish a prima facie case as a *precondition* to arbitrating the merits of a dispute.[14] The Agency cites the following language as the basis for its prima-facie argument: "Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration."[15] According to the Agency, the Grievance must contain facts (not mere allegations) sufficient to establish that the Agency somehow eroded bargaining-unit work by mistakenly posting an ES-1 position, withdrawing it, posting an AA-2 position, and filling it. Furthermore, the Agency contends that the Union cannot establish such requisite erosion because there are neither bargaining-unit employees nor bargaining-unit positions in ESS. Finally, the Agency maintains that

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[12] The Arbitrator recognizes that although the affirmative defense of waiver is a widely-held view in the arbitral community, it is hardly universal. Other arbitrators embrace several different responses to the issue of procedural arbitrability. Each of these approaches, like the waiver defense, has functional shortcomings. For example, one view rejects the waiver defense essentially because procedural arbitrability is a *jurisdictional* issue. Therefore, it is argued, a proponent of a procedural arbitrability objection may raise it *anytime* during the grievance procedure, including the arbitral hearing. Subscribers to this school of thought also stress that to embrace the affirmative defense of waiver in the face of explicit contractual time limits is to ignore those time limits and effectively to rewrite those contractual, procedural provisions. This view, however, ignores the concerns of arbitrators who embrace the doctrine of waiver.

Still other arbitrators adhere to defenses of *due diligence* and *harmful error*, both of which *also* tend to *circumvent* the sometimes harsh effects of contractual time limits. The due diligence defense gives the opponent to the procedural arbitrability objection a second "bite of the procedural apple," while the harmful error rule completely shifts the burden of persuasion from the opponent to the proponent of the procedural arbitrability issue.

[13] However, *see* the due-diligence defense discussed in the previous footnote.

[14] Since Article 25.03 makes no mention of a prima facie case, any duty relating thereto must be read into that Article, and, thus, would be implicit rather than explicit.

[15] Joint Exhibit 1, at 91.

Article 17.05 is inapplicable to selections of exempt candidates. In short, the Agency insists that Article 17.05 together with the employee and job demographics of ESS preclude the Union from satisfying the implicit requirement under Article 25.03 of establishing a prima facie case of a contractual violation of erosion under Article 17.05.

Also, the Agency argues that a non-selection grievance regarding an exempt position is not an objection involving an interpretation or application of the Contract because the Union lacks standing to challenge that genre of managerial decisions. This is tantamount to an objection on the basis of substantive arbitrability.[6] The Agency in effect contends that filling exempt vacancies is not a subject that the Parties *agreed to arbitrate*.[7]

The Union counters with several contentions. First, the Union argues that the Agency's prima- facie argument assumes facts not in evidence and that it must be litigated in a fully-blown arbitration. Second, the Union contends that neither Article 1.05 nor 17.05 contains a prima- facie requirement. Third, the Union insists that even if the Arbitrator found such a requirement in either of those provisions, the Grievance contains the "catch all" phrase "and any other relevant articles," which includes other relevant contractual provisions and issues of merit for arbitral attention. Fourth, the Union contends that the last sentence in Article 1.05 covers erosion of bargaining-unit work whether of not the erosive force involves supervisory performance of that work.

The following reasons persuade the Arbitrator that the Union prevails on the Agency's prima- facie objection. First, much of the Agency's prima-facie argument turns on its own *interpretation* of Articles 1.05, 17.05, and 25.03, none of which contains a ***single*** provision that either explicitly adopts or rejects the Agency's readings thereof. For example, Article 1.05 nowhere requires that as a precondition for arbitration

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[6] However, the Arbitrator does not take this objection as one of substantive arbitrability, lest he would lack jurisdiction to entertain it without the Parties' expressed mutual consent and agreement.

[7] Also one may view the Agency's claim as a demurrer or motion to dismiss for failure to state a claim. That is, the Grievance, in this case, allegedly fails to state a claim covered by the Contract. A successful demurrer, like a successful objection of procedural arbitrability, results in the dismissal of the grievance in question.

a grievance filed thereunder must specifically allege supervisory performance of bargaining-unit work. Similarly, Article 17.05 contains no discernible standard that grievances raised under that section must contain specific allegations to qualify for arbitration review. Finally, while Article 25.03 requires a contractual nexus for a grievance to receive arbitral review, that Article has no perceptible requirement that the nexus requirement entails a prima facie case. Ultimately, then, the Agency's arguments regarding the foregoing Articles rest on little more than its interpretation of those Articles, interpretations on which reasonable mind may differ. Consequently, those interpretations simply reinforce the need for arbitral review of the issues in this dispute.

Another problem that plagues the Agency's position is that much, if not all, of the Agency's prima- facie argument rests on several assertions that have hardly been established as facts in this dispute; Assertions that, as the Union contends, are better left to the evidentiary crucible of arbitration. An example of these assertions is, "bargaining-unit work does not exist in the ESS."[8] Perhaps, or perhaps not, but such an assertion is hardly self-evident, and, therefore, cannot constitute a basis for a prima- facie argument against the Grievance in this dispute. Relevant evidence in the arbitral record establishes only that the Agency: Posted an ES-1 position, withdrew that position, replaced it with another position, and later assigned that position to an exempt employee. The Union alleges that the position should have gone to a bargaining-unit employee because the job duties in the ES-1 posting are not substantially different from those in the AA-2 posting.[9] Although these allegations are not "proof," they raise sufficient questions about the propriety of the Agency's decisions to warrant arbitral review, regardless of their prima-facie content.[10] This holding is particularly apt given the special relational and institutional needs in collective-bargaining relationships to address the merits of disputes. Such needs create a heavy presumption in favor of arbitration. Indeed, as the United States

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[8] Agency's Post-hearing Brief, at 3.

[9] Grievance No. 25-11-20060706-0004-01-13.

[10] Generally, a prima facie case contains *sufficient evidence* that, unless rebutted, will at least raise a presumption of the existence of the disputed fact(s).

Supreme Court has declared, "The processing of even ***frivolous*** claims may have therapeutic values. . . ."[11] The Court later declared that doubts under a broadly worded arbitration clause such as that in the Parties' Contract should be clearly resolved in favor of arbitration. A final reason for rejecting the Agency's prima-facie argument is that the prima- facie standard is marginal at best in labor arbitration essentially because of its indelible legal formalistic pedigree.

VI. The Award

For all of the foregoing reasons, the Arbitrator holds that the grievance is fully arbitral and, barring a contrary mutual agreement by the Parties or a decision by the Union to withdraw the Grievance, it is ripe for arbitral review.

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[11] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 568 (1960) (emphasis added).