Ohio Civil Service Employees Association, AFSCME Local No. 11, AFL-CIO, and State of Ohio, Office of the Attorney General

Grievance Number: 13-51

Opinion and Award
Arbitrator Sarah R. Cole

Appearances

For the Union

Patricia Howell, OCSEA Staff Representative
James Ross, Grievant
Amber VanDine, Vice President Chapter 2580

For the Employer

Kathleen Madden, Director of Human Resources
Matthew Karam, Assistant Attorney General
James Rosenthal, Assistant Attorney General

Witnesses for the Union: James Ross
Deena Gray

Witness for the Employer: Kathleen Madden

#10

Background

James Ross, the grievant, began working at the Ohio Attorney General's office on June 25, 2007, as a classified bargaining unit employee. On February 28, 2010, Ross was promoted to the unclassified position of Administrative Staff from the bargaining unit position of Clerk 2. On April 17, 2013, the Ohio Attorney General (Employer) alleges that Ross sent an e-mail to his supervisor which contained threatening remarks. As a result, the Employer placed Ross on administrative leave, effective April 18, 2013. Following an investigation, the Attorney General's office determined that Ross violated the Attorney General Code of Conduct. Kathleen Madden, Director of Human Resources, met with Ross on May 14, 2013 and presented him with a letter. The letter stated that the Attorney General intended to revoke his unclassified position

and that, due to his misconduct, he forfeited his fall back rights to his classified position. The letter further stated that the Employer would not terminate Ross if he agreed to several conditions including: (1) serving a 15 day suspension from May 13 – 31, 2013; (2) accepting a demotion to the position of Clerk 2; (3) serving a 180 probationary period as a Clerk 2 starting June 3, 2013; and (4) executing a last chance agreement that would be effective for a two-year period. The Employer gave Ross until the end of business on the 14th to accept or reject the offer.

Following this meeting, Ross retained an attorney, Diane Einstein. At Einstein's request, the Employer granted Ross additional time to consider the terms initially conveyed to him on May 14, 2013. Ross asked that the probationary period language be removed. The Employer agreed. On May 16, 2013, Ross's attorney agreed that Ross would serve the suspension, accept the demotion and sign the last chance agreement (LCA). Madden sent Ross's attorney the LCA and Ross's attorney forwarded the LCA to Ross. Ross did not sign the LCA.

Ross returned to work on June 3, 2013, in the classified Clerk 2 position. The Employer deducted union dues from his paycheck. When Madden realized that Ross had not signed the LCA, she sent an e-mail to Ross's attorney, copying Ross, attaching the LCA and requesting that Ross sign the LCA. Ross refused to sign the LCA, however, because he was concerned that the word "misconduct" as used in the LCA was not properly defined. Despite clarifications regarding the language, Ross continued to refuse to sign the LCA. Madden gave him the weekend and all day July 1, 2013 to sign the agreement. When Ross failed to sign the LCA by the end of business on July 1, 2013, the Employer removed him from his employment.

The Union filed a grievance on Ross's behalf on July 3, 2013, claiming that his removal was improper. The Employer countered that Ross's removal was not grievable because Ross

was not a bargaining unit member when he agreed to sign the LCA, be demoted to the Clerk 2 position, and serve a 15 day suspension.

While the grievance was pending, Ross appealed his removal to the State Personnel Board of Review (SPBR). The SPBR has jurisdiction over classified exempt civil service employees. The Employer filed a motion to dismiss for lack of jurisdiction on the ground that when the Employer removed Ross, he was an unclassified employee. SPBR agreed with the Employer, issuing an order dismissing Ross's appeal.

Following exhaustion of the grievance process, this matter came to hearing in front of Arbitrator Sarah R. Cole on February 6, 2014.

Issue

Is Ross's grievance arbitrable when Ross failed to execute the Employer's proposed last chance agreement, which was a condition of his continued employment, but permitted Ross to return to work as a classified employee, at the classified position's pay rate, deducted union dues from his paycheck and, following his removal, paid out his leave balances at the classified rate?

Union Position

The Union contends that at the time Ross was terminated on July 1, 2013, he was a classified employee, working in the Clerk 2 position. To support this argument, the Union emphasizes that Ross's paycheck designated Ross as a bargaining unit employee and the Employer deducted Ross's union dues from his paycheck.

The Union contends that returning Ross to his bargaining unit position prior to the execution of the LCA establishes that signing the LCA was not a condition of his return to the bargaining unit and that any delay in obtaining Ross's signature on the LCA was the fault of the Employer, not Ross. Thus, the Employer waived its right to condition returning Ross to employment on Ross's willingness to sign the LCA.

Employer Position

The Employer contends that Ross's removal for violation of the Attorney General's Code of Conduct was held in abeyance only if Ross signed the LCA, in addition to fulfilling other aspects of the May 14, 2013 offer. According to the Employer, Ross's failure to fulfill a material term he agreed on May 16, 2013, justified the Employer's decision to retract the suspension of his removal and terminate him as an unclassified employee. In other words, failure to fulfill the terms that conditioned his return to classified service meant that Ross would never become a classified employee. Ross's refusal to sign the agreement on July 1, 2013, a condition of his becoming a classified employee, justified his termination. His status at the time of the termination was as an unclassified employee.

The Employer argues that Ross's paycheck, which showed that Ross was a classified employee whose union dues were deducted from his paycheck, is simply evidence that the Employer was keeping its end of the bargain. The Employer could have kept Ross on suspension until he signed the LCA but the Employer wanted to return Ross to work as soon as it could and expected Ross would act in good faith and sign the LCA. The Employer states that a decision that this case is arbitrable would undermine the parties' ability to negotiate future deals permitting a public employee to keep his job when his actions justify his removal.

The Employer also contends that the arbitrator does not have jurisdiction over this case because the State Personnel Board of Review has exclusive jurisdiction to determine if Ross was removed as a classified or unclassified employee.

Opinion

In this case, the Employer, as part of a disciplinary action, demoted James Ross to a classified position from an unclassified position. As a condition of remaining employed by the Employer, Ross agreed to sign a last chance agreement. The Employer provided him this Agreement on May 14, 2013 and told him that he had until the next day to sign the agreement and agree to other terms. Ross hired an attorney and requested additional time to consider the terms. After discussion about the probationary period term, on May 16, 2013, Ross's attorney requested that the Employer send a copy of the last chance agreement to the attorney. On June 3, 2013, the Employer sent the agreement to Ross's attorney. (Employer Ex. 9) On June 26, 2013, the Employer, through Kathleen Madden, sent an e-mail to Ross's attorney, copying Ross. This e-mail stated that Ross needed to sign the last chance agreement by June 27, 2013. On June 26, approximately forty-five minutes after receiving Madden's e-mail, Ross responded via e-mail to Madden and his attorney stating, "Ms. Madden, my attorney seems to not have taken the expected actions, so I am replying directly to you. Ms. Einstein forwarded the Last Chance agreement to me on June 3. I replied back to her that the definition of misconduct was missing . . . ." The parties exchanged additional e-mails regarding the definition of misconduct but Ross remained unsatisfied and refused to sign the agreement. As a result, the Employer removed Ross on July 1, 2013. At the arbitration hearing, Ross testified that he realized that he was a member of the union two days before his July 1 termination because he observed that union dues had been deducted from his paycheck. When he was terminated, he was paid his leave balances at the pay rate he received as a Clerk 2, a classified position. In addition, since his return to work on June 3, 2013, he was paid at his Clerk 2 rate.

The Employer's demand that Ross sign a last chance agreement and accept demotion to a classified position in order to avoid removal was a condition of his reinstatement. The question in this case is whether the Employer waived performance of the condition by permitting Ross to work in the classified Clerk 2 position from June 3 until June 25 before insisting again that he actually sign the last chance agreement, paid him at the Clerk 2 rate, deducted union dues from his paycheck and, when he was finally removed, paid out his leave balances at the Clerk 2 rate.

To understand this case, one must understand the distinction between a duty and a condition. A party makes a promise either by verbally making that promise or by conduct that expresses that intention. The purpose of a promise is to create a duty in the promisor. The purpose of constituting some fact as a condition is the postponement or discharge of a duty. Failure to fulfill a promise is a breach of an agreement and creates in the other party a right to damages. The non-occurrence of a condition, by contrast, prevents the existence of a duty in the other party.

Here, the Employer told Ross that if he signed the last chance agreement, it would reinstate him. Ross promised to sign the last chance agreement. The Employer's obligation to reinstate Ross was conditioned on Ross signing the LCA and Ross had a duty to sign the last chance agreement. But, the non-occurrence of a condition prevents the existence of a duty in the other party. Had Ross failed to sign the last chance agreement and the Employer refused to reinstate him, Ross could not sue the Employer for breaching the agreement. The Employer's duty to reinstate was conditional, the condition, i.e. the signing of the last chance agreement, would not have occurred, thus the Employer's duty to reinstate would not be due and there would be no breach by the Employer.

The ***only right*** that the failure to sign the last chance agreement gives to the Employer ***as a condition*** is the right not to perform its conditional duty (i.e., to reinstate). Once the Employer reinstated Ross, however, it became apparent that the Employer did not intend to rely on the condition ***as a condition***. The Employer can make no further use of the condition, as it has already performed the duty that was conditional.

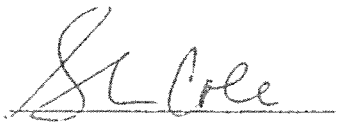
By reinstating Ross, the Employer waived its right to demand the occurrence of the condition before tendering its performance. Ross was reinstated to a classified position on June 3, 2013, became a member of the union and began paying union dues. As of the date of Ross's reinstatement, then, Ross is a member of the union.

Because Ross was a member of the union at the time of his removal, I find that his claim is arbitrable. Because Ross is a classified employee, the State Personnel Board of Review does not have exclusive jurisdiction over this claim.

Award

The grievance is arbitrable.

March 14, 2014



Sarah Rudolph Cole, Arbitrator