

ARBITRATION DECISION NO:

#126

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Mental Retardation and Developmental Disabilities

DATE OF ARBITRATION:

March 9, 1988

DATE OF DECISION:

May 18, 1988

GRIEVANT:

McKinley Tarrance

OCB GRIEVANCE NO.:

G87-1478

ARBITRATOR:

Thomas P. Michael

FOR THE UNION:

John Porter, Assoc. General Counsel
Steven Lieber, Staff Rep.

FOR THE EMPLOYER:

Marlaina Eblin
Tim Wagner, OCB
Rodney Sampson, OCB

KEY WORDS:

Arbitrability
Timeliness

ARTICLES:

Article 25 – Grievance Procedure
§25.07 – Advance Step Filing
Article 43 -

FACTS:

This matter was submitted to the Arbitrator solely on the issue of arbitrability of the grievance. The Grievant was removed from his position as a hospital aide at the Ohio Department of Mental Retardation and Developmental disabilities effective February 24, 1987, by an order of removal dated February 12, 1987. The Grievant signed an acknowledgment of receipt of the order of

removal on February 23, 1987. The Grievance, which is the subject of this case, was signed by Grievant on March 17, 1987, postmarked March 24, 1987, and received by the employer on March 27, 1987.

UNION'S POSITION:

The Union admits that the grievance was not filed within the fourteen (14) day contractual time period. Nonetheless, the Union contends that the grievance is arbitrable since the employee has suffered no irreparable harm by the late filing of the Grievance. It is also the Union's contention that both the employee and the Union have regularly waived contractual deadlines and that such waivers should be construed as a waiver of the filing deadline in this matter.

The Union contends that the removal order itself did not place the Grievant on adequate notice of his grievance appeal deadlines. Finally, the Union maintains that the Arbitrator should find the grievance arbitrable since to hold otherwise would serve as economic capital punishment against the Grievant without affording him review of the substantive merits of his case.

MANAGEMENT'S POSITION:

The employer claimed that it would suffer irreparable harm if the grievance was determined to be arbitrable since the employer is exposed to a possible back pay award should the Grievant prevail on the merits. The employer also argued that the Contract itself served as notice to the Grievant of the grievance appeal deadline and it was the responsibility of the Union, not the employer, to inform and advise the Grievant regarding his grievance appeal rights.

ARBITRATOR'S DECISION:

The Grievance was not filed within the filing deadline imposed by section 25.07 of the Contract and was therefore denied. The parties agreed contractually that any employee with a grievance involving a suspension or discharge must institute the grievance within fourteen (14) days of notification of such disciplinary action. Unless there are some extraordinary circumstances such as a disability by the Grievant, the contract language concerning timeliness must be followed.

* * *

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF MENTAL RETARDATION
AND DEVELOPMENTAL DISABILITIES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL NO. 11, AFSCME AFL-CIO

McKINLEY TARRANCE, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR

COLUMBUS, OHIO

Grievance No. G87-1478, McKinley Tarrance

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Department of Mental Retardation and Developmental Disabilities, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter "Union").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was conducted at the Office of Collective Bargaining on March 9, 1988. This matter has been submitted to the Arbitrator on the arguments and exhibits offered at the hearing. The parties granted permission for publication of this Opinion and Award.

The Grievant, McKinley Tarrance, was not present for the hearing of this matter. At the request of the Union, the record was left open until the close of business on March 10, 1988, to enable the Union to ascertain the reason for Mr. Tarrance's absence. Mr. Porter informed the arbitrator on March 10, 1988, that he had spoken with Mr. Tarrance and that Mr. Tarrance offered no explanation on his absence. Therefore, the Union has made no request for reopening the record and this matter is ripe for decision.

APPEARANCES:

For the Employer:

Marlaina Eblin
Tim Wagner
Rodney Sampson
Office of Collective Bargaining

For the Union:

John Porter
Associate General Counsel
Steven Lieber, Staff Rep.
OCSEA/AFSCME Local 11
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ISSUE

The parties are in disagreement on the issue before the Arbitrator. The union posits the issue thusly:

Is this grievance arbitrable under the Contract?

The Employer couches the issue in the following terms:

Was the grievance timely filed under §25.07 of the Contract and therefore arbitrable?

Since the sole objection raised by the Employer at this preliminary stage of this arbitration is late-filing of the written grievance, this Arbitrator adopts the Employer's enunciation of the issue for purposes of this Opinion and Award.

PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS

Section 4117.08(C), Ohio Revised Code.

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

* * *

(2) Direct, supervise, evaluate, or hire employees:

[]

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:

* * *

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(8) Effectively manage the work force. . .

CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employee reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(A) numbers 1-9.

ARTICLE 25 - GRIEVANCE PROCEDURE

§25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

Those employees in their initial probationary period as of the effective date of this Agreement shall retain their current rights of review by the State Personnel Board of Review for the duration of their initial probationary period.

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day

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shall be the next day which is not a Saturday , Sunday or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. If a verbal reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal reprimand.

§25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties have agreed otherwise.

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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 not specifically required by the expressed language of this Agreement.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

§25.05 - Time Limits

Grievances may be withdrawn at any step of the grievance procedure. Grievances not appealed within designated time limits will be treated as withdrawn grievances.

The time limits at any step may be extended by mutual agreement of the parties involved at that particular step.

The Employer's failure to respond within the time limits shall automatically advance the grievance to the next step.

§25.07 - Advance Grievance Step Filing

Certain issues which by their nature cannot be settled at a preliminary step of the grievance procedure or which would become moot due to the length of time necessary to exhaust the grievance steps may by mutual agreement be filed at the appropriate advance step where the action giving rise to the grievance was initiated. An employee with a grievance involving a suspension or a discharge may initiate the grievance at Step Three of the grievance procedure within fourteen (14) days of notification of such action.

ARTICLE 43 - DURATION

§ 43.01 - First Agreement

The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. 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 for ORC Chapter 4117, this Agreement ****6****

shall take precedence and supersede all conflicting State laws.

§43.05 - Duration of Agreement

This Agreement shall continue in force and effect for three (3) years from its effective date of July 1, 1986, and shall constitute the entire agreement between the parties. All rights and duties of both parties are specifically expressed in this Agreement. This Agreement concludes the collective bargaining for its term, subject

only to a desire by both parties to agree mutually to amend or supplement it at any time.

BACKGROUND

- This matter has been submitted to the Arbitrator solely on the issue of arbitrability of the grievance. McKinley Tarrance, the Grievant, was removed from his position as a Hospital Aide at Broadview Developmental Center effective February 24, 1987, by an Order of Removal dated February 12, 1987. (Joint Exhibit 1-1). Mr. Tarrance signed an acknowledgment of receipt of the Order of Removal on February 23, 1987. (Joint Exhibit 1-2). The grievance which is the subject of this case was signed by Grievant on March 17, 1987 (Joint Exhibit 1-3), postmarked March 24, 1987, (Joint Exhibit 1-4), and received by the Employer on March 27, 1987 (Joint Exhibit 1-3).

POSITION OF THE UNION

The Union admits that the grievance was not filed within the fourteen (14) day contractual time period. Nonetheless it contends that the grievance is arbitrable since the Employer has suffered no irreparable harm by the late-filing of the grievance. The Union further argues that both the Employer and the Union

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have regularly waived contractual deadlines and that such waiver should be construed as a waiver of the filing deadline in this matter.

Additionally, the Union contends that the removal order itself does not place the Grievant on adequate notice of his grievance appeal deadline. In support of that argument, the Union cites as an example the pre-contractual disciplinary form (Joint Exhibit 2) used by the Employer, which notifies an employee of his appeal deadline. The Union also cites to the Arbitrator several post-contractual removal orders issued by other state agencies (Joint Exhibits 3, 4 and 5), which orders specifically set forth the contractual fourteen-day appeal period.

Finally, the Union posits that the Arbitrator should find this grievance arbitrable since to hold otherwise would serve as economic capital punishment against the Grievant without affording him review of the substantive merits of his case.

POSITION OF THE EMPLOYER

- The Employer alleges that the sole issue before the Arbitrator is whether or not the admitted failure of the Grievant to adhere to the contractual deadline for filing a grievance acts as a bar to arbitrability of this grievance. There can be no extension of that deadline where, as here, no extension was requested by Grievant or the Union.

The Employer claims that it would suffer irreparable harm if this grievance is determined to be arbitrable due to the **8**

Employer's exposure to a possible back pay award should the Grievant prevail on the merits.

The Employer also argues that the Contract itself serves as notice to the Grievant of the grievance appeal deadline and it is the responsibility of the Union, not the Employer, to inform and advise the Grievant regarding his grievance appeal rights.

OPINION

The parties have agreed contractually that any employee with a grievance involving a suspension or a discharge must initiate the grievance within fourteen (14) days of notification of such disciplinary action (§25.07). As one arbitrator aptly noted:

Time limits have their detractors and defenders. On the one hand they may bar meritorious grievances and cause unresolved disputes to fester; on the other, they encourage prompt action and eliminate the problems associated with "stale" complaints. The wisdom of such limits is for the parties to determine, not the arbitrator ...

(General Telephone Co. of the South, 14 LAIS 1105, Arbitrator Nolan).

Nonetheless, there are clearly numerous circumstances under which arbitrators have held that it would be unreasonable to require strict compliance with the time limits specified by the agreement. The most obvious example is when the parties have agreed, either orally or in writing, to an extension of the filing date (See, for example, Memphis Regional Medical Center, 14 LAIS 2056, Arbitrator Vause). The parties have expressly recognized this exception by the terms of their contract

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(§25.05). However, the Union has made no claim that the Employer ever was requested to extend the filing deadline for this particular grievance.

Other examples of extraordinary circumstances held to excuse an untimely filing include continuing violations, prior laxness of the parties in enforcement of time limits, the employer's negotiation of the merits at pre-arbitral stages without making objection to timeliness, failure of the grievant to discover the objectionable action until a later date, and notice by the union to the employer of a reasonable basis for delaying the grievance filing. (Elkouri, How Arbitration Works, 3d ed., pp. 149-153).

As an example, if it had been demonstrated to this Arbitrator that Grievant was under some disability which prevented his filing of the grievance in a timely manner, this neutral would likely find the contractual filing time limit inapplicable. However, the Union has advanced no personal reason whatever to excuse Mr. Tarrance from filing in a timely manner.

Nor is the Arbitrator persuaded by the Union's argument regarding alleged inadequate notice. The Grievant, as well as all Union members, are on constructive notice of the terms of the Contract; the Contract recognizes that the Union acted as bargaining representative for each such employee in negotiating the terms of that Contract (§1.01). This Arbitrator is unwilling to apply a rule which effectively would open each late-filed grievance to an exposition of whether or not the Grievant in

fact had actual notice of his filing deadline.

Thus, it is concluded that no facts have been alleged or proven which would place this late-filed grievance in any of the

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categories recognized as an exception to contractual filing deadlines.

AWARD

The grievance was not filed within the filing deadline imposed by §25.07 of the Contract. Therefore the grievance is denied.

Thomas P. Michael, Arbitrator

Rendered this Eighteenth day
of May, 1988, at Columbus,
Franklin County, Ohio

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CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was mailed by U.S. Mail Service, postage prepaid, to Eugene Brundige, Executive Director, Ohio Department of Administrative Services, 65 East State Street, Columbus, Ohio 43215; with copies of the foregoing Opinion being mailed by U.S. Mail Service, postage prepaid, this 18th day of May, 1988, upon:

John Porter
Associate General Counsel
OCSEA/AFSCME Local 11
995 Goodale Boulevard
Columbus, Ohio 43212

Marlaina Eblin
Office of Collective Bargaining
65 East State Street
Columbus, Ohio 43215

Thomas P. Michael

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