

ARBITRATION DECISION NO.:

344

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation

DATE OF ARBITRATION:

May 1, 1991

DATE OF DECISION:

May 10, 1991

GRIEVANT:

Misty Tadem

OCB GRIEVANCE NO.:

31-13-(91-02-25)-0014-01-09

ARBITRATOR:

Anna Smith

FOR THE UNION:

FOR THE EMPLOYER:

KEY WORDS:

Arbitrability
Employee's Duty to Know
Contractual Rights
Timeliness
Probationary Status

ARTICLES:

Article 25-Grievance Procedure
§25.02-Grievance Steps
§25.03-Arbitration Procedures

FACTS:

The grievant was hired by the Department of Transportation on October 22, 1990. Due to prior state service, her probationary period should have ended on December 22, 1990. She was maintained on probationary status and removed on February 14, 1991 as a probationary employee.

UNION'S POSITION:

The grievance is timely and, therefore, arbitrable. The grievant, while improperly retained on probationary status, was not harmed until she was removed. Thus her removal, not the arguable end of her probationary period, was the trigger for the article 25 time limits. Secondly, the grievant was not informed by the employer of her contractual right to a shortened probationary period due to prior state service. For that reason, the

grievant had no knowledge of a contract violation until her removal.

EMPLOYER'S POSITION:

The grievance is not timely filed and not arbitrable. The thrust of this grievance is the grievant's improper retention in probationary status. The appropriate time for filing the grievance is, therefore, when she believed her probationary period ended on December 22, 1990, not her removal on February 14, 1991. Additionally, the employer is under no duty to inform employees of their contractual rights generally, or that the grievant may be entitled to a shortened probationary period (which the employer does not agree the grievant is entitled to).

ARBITRATOR'S OPINION:

The arbitrator agreed with the employer's arguments. The triggering event for grieving improper retention on probationary status is when the grievant believes the probationary period to be over. The harm is the employer's failure to grant full contractual rights, which occurs when an employee is not taken off probation. That the harm was manifested in this case by her removal is irrelevant.

The employer argued that it has no duty to inform employees of their contractual rights. The contract places no such duty on the employer. Additionally, the employer cannot be obligated to inform an employee of a right, a shortened probation period, that it does not believe the employee has obtained. The grievant had sufficient time to learn of her contractual rights as she had eight (8) months total seniority.

AWARD:

The grievance was found to be untimely and, as such, not arbitrable.

TEXT OF THE OPINION:

**In the Matter of Arbitration
Between

O.C.S.E.A. LOCAL 11,
A.F.S.C.M.E., AFL-CIO

and

STATE OF OHIO,
DEPARTMENT OF TRANSPORTATION**

OPINION

Anna D. Smith, Arbitrator

Case 31-13-(02-25-91)-14-01-09
Misty Tademy, Grievant
Arbitrability

The following is the Arbitrator's reasoning in the award rendered May 1, 1991 at Columbus, Ohio in the cited case:

The Grievant's removal is arbitrable only if she was not on probationary status on February 15. Whether she was on probationary status is arbitrable only if the issue was timely raised under §25.02 of the Collective Bargaining Agreement:

"All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event."

The event giving rise to the grievance occurred when Ms. Tadem continued to be carried as probationary after sixty days of ODOT employment. Having been hired on October 22, December 22 is when her 30-day clock started ticking. She had until January 21, 1991 to grieve her probationary status. The issue, however, was not raised until after she was removed on February 14, 1991.

The Union raises two arguments with some merit. The first is that the Grievant was not harmed until after she was removed. The Arbitrator disagrees. If the Grievant was inappropriately kept on probationary status, she was harmed by not receiving full protection and rights of seniority status.

The second claim is that the Grievant was not oriented by her employer and was therefore unaware of her rights under the collective bargaining agreement. The Arbitrator searched the Contract for language requiring the Employer to train employees on Contractual rights. While language on training does exist (in §3.07, 3.08 and 37.02), no such requirement was found, and the Arbitrator is prohibited by §25.03 from creating one. The Union goes on to state that the Employer did not inform the Grievant that she was entitled to a shortened probation because of her prior service. However, the Employer does not here appear to accept the Union's view of the Grievant's qualification for the shortened probation. One cannot expect the Employer to tell an employee she is entitled to something the Employer believes she is not entitled to. Had the Employer acted in bad faith to keep the Grievant in the dark--perhaps by concealing the provision for a truncated probationary period--a different result would have obtained. However, the Grievant knew she was in trouble on January 15 when she wrote the statement of Joint Exhibit 12, six days prior to the lapse of her grievance window. She also had eight months of service with the State, adequate time to learn the benefits of consulting her Union steward. She also had adequate time to discover the issue of her probationary status and raise it in a timely fashion. The Arbitrator has no reason here to hold the Employer accountable for the Grievant's lapse.

For the foregoing reasons, this issue was held to be untimely raised and therefore not arbitrable.

Anna D. Smith, Ph.D.
Arbitrator

Date: May 10, 1991