

**ARBITRATION DECISION NO.:**

353

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Transportation

**DATE OF ARBITRATION:**

**DATE OF DECISION:**

June 7, 1991

**GRIEVANT:**

Robert J. Thomas

**OCB GRIEVANCE NO.:**

Number Unknown

**ARBITRATOR:**

Jonathan Dworkin

**FOR THE UNION:**

John Fisher

Harold Bumgardner

**FOR THE EMPLOYER:**

G. Dewayne Slack

Meril J. Price

**KEY WORDS:**

Removal

Timeliness

Arbitrability

**ARTICLES:**

Article 25-Grievance

Procedure

§25.01-Process

§25.02-Grievance Steps

§25.05-Time Limits

§25.07-Advance

Grievance Step Filing

**FACTS:**

Grievant was a 20-1/2 year employee of the Ohio Department of Transportation and was removed for his fourth preventable accident in a State vehicle. On September 8, 1989 at approximately 11:00 a.m., he was operating a mower on State Route 79. He allegedly drove carelessly and collided with a dump truck parked on the berm. The truck's rear-view mirror was destroyed in the collision.

**EMPLOYER'S POSITION:**

The grievant was removed for just cause. The grievance was not filed within 14 days after notification of the discipline, therefore the grievance is not arbitrable.

**UNION'S POSITION:**

The union argued that because the steward was working overtime on snow removal that this was a mitigating factor for filing late. The union also argued that management was aware that the grievance would be filed because of discussions between the steward and labor relations officer.

**ARBITRATOR'S OPINION:**

The dispute surrounded the initiation of the grievance at Step Three of the grievance procedure within fourteen days of notification of such action. The grievance was postmarked January 2, 1990. Calculating the fourteen days for commencement according to Section 25.01 (C) of the Agreement, the last day for submission was Thursday, December 28, 1989. There was no question in the Arbitrator's mind but that the grievance was five days late. Therefore an untimely grievance is a nullity unless time limits are waived or voluntarily extended by the employer. However, there was no mutual extension in writing, nor is there a justifiable inference of waiver on the employer's part.

The Arbitrator summarily dismissed the grievance on purely technical grounds. The employer's request to deny the grievance was granted.

**AWARD:**

The grievance is dismissed.

**TEXT OF THE OPINION:**

**OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING  
SUMMARY ARBITRATION OPINION AND AWARD**

In The Matter of Arbitration Between:

**THE STATE OF OHIO**  
Department of Transportation  
District 5 Maintenance Facility

-and-

**OHIO CIVIL SERVICE EMPLOYEES  
ASSOCIATION, OCSEA/AFSCME**  
Local Union 11, State Unit 6

**Unnumbered Grievance of  
Robert J. Thomas**

**Decision Issued:**  
June 7, 1991

**REPRESENTING THE EMPLOYER:**

G. Dewayne Slack, Labor Relations Advocate  
Meril T. Price, Labor Relations Advocate

**REPRESENTING THE UNION:**

John Fisher, OCSEA Staff Representative  
Harold Bumgardner, OCSEA Staff Representative

**DECISION**

This dispute, which stems from the discharge of a 20-1/2-year employee, presents a threshold question of arbitrability. The State challenges the grievance for untimeliness, contending it was initiated outside the mandatory fourteen-day limitation period and, therefore, is void.

The material facts are undisputed. Grievant was removed for his fourth "preventable" accident in a State vehicle. On September 8, 1989 at approximately 11:00 in the morning, he was operating a mower on State Route 79. He allegedly drove carelessly and collided with a dump truck parked on the berm. The truck's rear-view mirror was destroyed in the collision.

The dismissal notice was drafted by the Department on December 13, 1989. It stated in relevant part:

"This letter is to inform you that you are hereby terminated from your employment as a Highway Worker 2, with the Ohio Department of Transportation effective at the close of business December 14, 1989.

After reviewing the recommendation of the impartial administrator and others, it has been determined that just cause exists for this action."

The notice was hand-delivered to Grievant and his Union Representative the following day, Thursday, December 14, 1989.

The grievance was commenced at Step 3, pursuant to the following language in Article 25, §25.07 of the Agreement:

**§25.07 - Advance Grievance Step Filing**

\* \* \* 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. [Emphasis added.]

Article 25, §25.01, Subsection C of the Agreement describes how the fourteen days are to be measured. They are to consist of calendar days, not workdays, and counted as follows:

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

Section 25.01, Subsection C specifies that grievance appeals are timely if postmarked within the requisite time frames. This grievance was postmarked January 2, 1990. Calculating the fourteen days for commencement according to §25.01 C, the last day for submission was Thursday, December 28, 1989. There is no question but that the grievance was five days late.

An untimely Step 3 grievance is a nullity unless time limits are waived or voluntarily extended by the Employer. These findings are required by the clear language of Article 25, §25.05:

**§25.05 - Time Limits**

Grievances may be withdrawn at any step of the grievance procedure. Grievances not appealed within the 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. Such extension(s) shall be in writing. [Emphasis added]

There was no mutual extension in writing, nor is there a justifiable inference of waiver on the Employer's part. To the contrary, the Agency regarded the grievance as void ab initio and refused to process it. That is why the case is unnumbered.

One other contractual provision is pertinent to this controversy -- Article 25, §25.03 which defines and restricts arbitral authority. It states in part:

“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.”

This Arbitrator, like many others, is most reluctant to summarily dismiss grievances on purely technical grounds. At the same time, he recognizes his limitations. He does not have power to dispense justice and fairness if to do so would violate the Agreement. In the case at issue, there is no alternative; the Employer's request to dismiss must be granted.

### **AWARD**

The grievance is dismissed.

Decision Issued at Lorain County, Ohio June 7, 1991.

Jonathan Dworkin, Arbitrator