

ARBITRATION DECISION NO.:

490

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Millcreek Psychiatric Center

DATE OF ARBITRATION:

February 19, 1993

DATE OF DECISION:

February 23, 1993

GRIEVANT:

George J. Moore

OCB GRIEVANCE NO.:

None

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

Penny Lewis
Patrick Mayer

FOR THE EMPLOYER:

Teri Decker
Robert Thornton

KEY WORDS:

Removal
Notice
Registered Mail
Arbitrability (Timeliness)

ARTICLES:

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

FACTS:

The grievant was removed from Millcreek Psychiatric Center for Children, an institution operated by the Ohio Department of Mental Health, for allegedly abusing a patient. The merits of this grievance were not reached because the Arbitrator ruled that the grievance was not timely filed.

UNION'S POSITION:

Union witnesses, the Union advocate and the Chapter President, testified that the grievance had been properly prepared, addressed, stamped and mailed. The Union Advocate testified that she met with the grievant and the Chapter President on several occasions to discuss and prepare the grievance, that she repeatedly called OCB to inquire whether the grievance had been received and that the grievance and a worksheet had been received by OCSEA on September 23, 1991. The Chapter President testified that he mailed the grievance in a timely fashion and that he was forced to use regular mail because the union office ran out of registered mail slips. The Chapter President indicated that he mailed the grievance to both OCB and OCSEA's central offices.

EMPLOYER'S POSITION:

The State maintained that it never received a grievance on behalf of this grievant at Step 3; therefore, the issue of the grievant's removal was not properly before the Arbitrator. The Union failed to prove that the grievance was timely mailed. On cross-examination, the Chapter President was unable to give the specific details of the mailing. He could not recall from what location he mailed the envelope, the address to which he sent the envelope, the date he mailed the envelope or the type of envelope he used. The witness stated that he did not recall meeting with the Union Advocate to discuss and prepare the grievance.

ARBITRATOR'S OPINION:

Due to the number of inconsistencies and omissions in the testimony of the Union's witnesses, the Arbitrator rendered a bench decision in favor of the State. The Arbitrator stated that the Union failed to meet even the minimum proof required to show that the Union put the grievance in an envelope, properly addressed and stamped, and placed into in a U.S. Mail Box. The Arbitrator stated that the Chapter President's testimony was insufficient to meet the minimum criteria; therefore, the Arbitrator concluded that the Union failed to prove that the grievance had ever been filed.

AWARD:

Pursuant to Article 25.03, the issue was not properly before the Arbitrator.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

**OCSEA, Local 11
AFSCME, AFL-CIO**
Union

and

**Ohio Department of Mental
Health, Office of Collective
Bargaining**
Employer.

Grievance No.: None

Grievant (alleged):

George J. Moore

Hearing Date:

February 19, 1993

Award Date:

February 19, 1993

(Bench)

Arbitrator:

R. Rivera

For the Employer:

Teri Decker

Robert Thornton

For the Union:

Penny Lewis

Patrick Mayer

Present at the Hearing in addition to the Grievant and Advocates were John Quigley, LRO-ODMH (witness), Donna H. Brown, ODMH (observer), Roosevelt Thornton, OCSEA-President, Chapter (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. Witnesses were sequestered. All witnesses were sworn.

Issue

Was the alleged Grievance properly before the Arbitrator?

Relevant Contract Sections

25.02 - Grievance Steps

Step 1 - Immediate Supervisor

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. 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. If being on approved paid leave prevents a grievant from having knowledge of an occurrence, then the time lines shall be extended by the number of days the employee was on such leave except that in no case will the extension exceed sixty (60) days after the event. The immediate supervisor shall render an oral response to the grievance within three (3) working days after the grievance is presented. If the oral grievance is not resolved at Step One, the immediate supervisor shall prepare and sign a written statement acknowledging discussion of the grievance, and provide a copy to the Union and the grievant.

Step 2 - Intermediate Administrator

In the event the grievance is not resolved at Step One, a legible copy of the grievance form shall be presented in writing by the Union to the intermediate administrator or his/her designee within five (5) days of the receipt of the answer or the date such answer was due, whichever is earlier. The written grievance shall

contain a statement of the grievant's complaint, the section(s) of the Agreement allegedly violated, if applicable, the date of the alleged violation and the relief sought. The form shall be signed and dated by the grievant. Within seven (7) days after the grievance is presented at Step Two, the intermediate administrator shall discuss the grievance with the Union and the grievant. The intermediate administrator shall render a written answer to the grievance within eight (8) days after such a discussion is held and provide a copy of such answer and return a legible copy of the grievance form to the grievant and a copy to one representative designated by the Union.

Step 3 - Agency Head or Designee

If the grievance is still unresolved, a legible copy of the grievance form shall be presented by the Union to the Agency Head or designee in writing within ten (10) days after receipt of the Step Two response or after the date such response was due, whichever is earlier. Within fifteen (15) days after the receipt of the written grievance, the parties shall meet in an attempt to resolve the grievance unless the parties mutually agree otherwise. In the Ohio Department of Transportation Step 3 meetings will normally be held at the worksite of the grievant. If the meeting is held at the district headquarters the chief steward, will be permitted to represent.

The Agency Head or designee shall process grievances in the following manner:

A. Disciplinary grievances (suspension and removal)

The Step 3 grievance response shall be prepared by the Agency Head or designee and reviewed by the Office of Collective Bargaining. The response will be issued by the Agency Head or designee within thirty-five (35) days of the meeting. The response shall be forwarded to the grievant and a copy to one representative designated by the Local Chapter Officer. Additionally, a copy of the answer will be forwarded to the Union's Central Office. This response shall be accompanied by a legible copy of the grievance form.

If the grievance is not resolved at Step 3, the Union may appeal the grievance to arbitration by providing written notice and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given whichever is earlier.

B. All other grievances

The Agency Head or designee shall give his/her written response and return a legible copy of the grievance form within fifteen (15) days following the meeting. The Agency shall forward the response to the grievant and a copy to one representative designated by the Local Chapter Officer.

Step 4 - Office of Collective Bargaining Review

If the grievance is not settled at Step Three, pursuant to Step 3B, the Union may appeal the grievance in writing to the Director of The Office of Collective Bargaining by sending written notice, and a legible copy of the grievance form to the Employer, within ten (10) days after the receipt of the Step Three answer, or after such answer was due, whichever is earlier.

The Director of the Office of Collective Bargaining or his/her designee shall issue a full response to the Union and the grievant within twenty-one (21) days of the appeal. The response will include a description of the events giving rise to the grievance and the rationale upon which the decision was rendered. The Director of the Office of Collective Bargaining may reverse, modify or uphold the answer at the previous step or request a meeting to discuss resolution of the grievance.

A request to discuss the resolution of the grievance shall not extend the thirty (30) days in which the Union has to appeal to arbitration as set forth in Step Five.

Step 5 - Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given, in Step Four.

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 Union and/or Employer may make requests for specific documents, books, papers or witnesses reasonably available from the other party and relevant to the grievance under consideration. Such requests will not be unreasonably denied.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Such requests shall be made no later than three work days prior to the start of the arbitration hearing, except under unusual circumstances where the Union or the Employer has been unaware of the need for subpoena of such witnesses or documents, in which case the request shall be made as soon as practicable. 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 agree otherwise.

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.

Joint Exhibits

1. Contract 1989-1991

Union Exhibits

1. OCSEA Grievance worksheet
2. Leasing Associates v. Slaughter & Son, Inc., 450 F.2d 174
3. Grievance Award #G87-2931

Discussion

The parties agreed that the first issue before the Arbitrator was the question of arbitrability, pursuant to Contract Article 25.03. Both parties agreed that the preliminary issue was whether a grievance had been properly filed pursuant to Contract Article 25.02. In the opening statement, the Employer maintained that no grievance had ever been received with regard to the removal of Mr. Moore and, therefore, the issue was not properly before the Arbitrator. In the opening statement, the Union maintained that the Grievance had been properly prepared, put in an envelope, addressed properly, stamped properly, and mailed properly. The person who was alleged to have carried out this task was the Chapter President Roosevelt Thornton.

After the opening statements, the Union presented its case. The first witness was OCSEA staff advocate Penny Lewis (questioned by second chair Patrick Mayer) who testified to meeting with Mr. Moore and Mr. Thornton on numerous occasions to prepare the Grievance. She testified that in their last meeting, she had prepared a synopsis for the President and the alleged Grievant to use in the preparation of the Grievance itself. She also testified that she was subsequently told by the President that the Grievance had been properly mailed. She testified that when no Third Step was scheduled, that she had repeatedly inquired of John Quigley who had told her that no one in central office or OCB had any record of the Grievance. Union Exhibit #1 was introduced into evidence. Ms. Lewis testified that the worksheet with a grievance form attached had been received at OCSEA headquarters on September 23, 1991.

The Union then called Mr. Roosevelt Thornton, the President of the Chapter. During direct examination, Mr. Thornton indicated that he recognized Union Exhibit #1, that he had signed it, and that the Vice-President of the Union had filled it out. He claimed that he had mailed the Grievance also. He said that he had mailed it in "the regular mail" but not registered mail because there were no more registered mail slips in the Union office." He said that he mailed the Grievance in a "Union envelope" marked Watermark Drive. On cross examination, Mr. Thornton was asked exactly where he had mailed the Grievance, he replied "I suppose at the first box I found." He could not be more specific in response to further questions. He was asked to what address he had mailed it; he said "he had put it in a packet to OCB and Watermark Drive." He was asked what date he had mailed the Grievance; he replied that he could not remember but it was after Moore was discharged. He was asked if he had mailed the Grievance after his meetings with Moore and Penny Lewis. He replied he could not remember the meetings with Moore and Lewis. He was asked if he had filled out the Grievance from the synopsis prepared by Lewis. He said the vice president had filled out most of the form, but he could not remember any "synopsis." He was asked what kind of envelope he used. He said first that it was a long white envelope with an OCSEA mark on it somewhere. Then he was shown numerous envelopes used to send other grievances, and he could not pick out which type of envelope he had used. Upon further questioning, he said he now did not remember which envelope he used. He said he could not recall if the chapter had return address envelopes. He was asked to explain that on Joint Exhibit #1 the worksheet indicated that the Step 3 had not occurred. He said he could not explain it. On redirect, Mr. Thornton was asked where the addresses were to use to send in grievances. He said they were on a board in the Union office. He was asked how many grievances he had filed in the past. His answer was rambling and inconclusive.

After Mr. Thornton left the room, the Arbitrator asked the Union if they had any further witnesses with regard to the issue of arbitrability. They indicated that they rested. The Arbitrator at that point rendered a bench decision for the Employer. The Arbitrator said that at the minimum the Union had to show that the Grievance was put in an envelope, properly addressed, properly stamped, and properly placed in a U.S. Mail Box. The Arbitrator found that none of these minimum criteria were shown by Mr. Thornton's testimony. He could not remember the envelope, the correct address, nor where he allegedly mailed the Grievance. He never mentioned postage at all. The Arbitrator found that insufficient proof existed that any grievance with regard to Mr. Moore had ever been filed and, therefore, the Grievance failed to meet the contractual standards under 25.02.

Award

Pursuant to Contract Section 25.03, the Arbitrator finds that in the matter of the alleged Grievance of George J. Moore no matter existed that was properly before the Arbitrator.

Rhonda R. Rivera
Arbitrator

February 23, 1993
Date