

ARBITRATION DECISION NO.:

515

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Agriculture

DATE OF ARBITRATION:

September 24, 1993

DATE OF DECISION:

October 5, 1993

GRIEVANT:

James E. Trotter

OCB GRIEVANCE NO.:

31-06-(92-08-01)-0029-01-06

ARBITRATOR:

Nels E. Nelson

FOR THE UNION:

Robert Goheen, Advocate

John T. Porter, Second Chair

FOR THE EMPLOYER:

Edith Bargar, Advocate

Robert Thornton, Second Chair

KEY WORDS:

Timeliness

Arbitrability

Workers' Compensation

W.C. Waiting Period

Order of Leave

ARTICLES:

Article 25 - Grievance Procedure

§ 25.02 - Grievance Steps

§ 25.03 - Arbitration Procedures

§ 25.05 - Time Limits

FACTS:

The grievant was a Meat Inspector at the Ohio Department of Agriculture (ODA). He suffered a back injury in December of 1989, and reaggravated this injury in July 1990. The grievant requested to use vacation leave during the waiting period for Worker's Compensation benefits (June 4, 1990 to July 12, 1990), but was advised by his supervisors that he had to use his entire sick leave balance prior to using any other

types of leave. Relying upon this information, the grievant never filed a grievance.

One year later, while attending a Chapter meeting, the grievant discovered that he had been misinformed; nothing in the Ohio Revised or Administrative Codes requires employees to exhaust their sick leave balances prior to using other types of leave. The grievant learned that the order of leave rule was little more than an inconsistently enforced, agency-made policy. As a result, the grievant filed a grievance which was subsequently processed through each step of the grievance process without objection.

UNION'S POSITION:

The grievance was arbitrable; the State waived its right to object to the grievance on the basis of timeliness. The State processed this grievance through each step of the grievance process without objection and did not inform the Union of its intention to raise the arbitrability issue until less than 24 hours before the arbitration hearing. The Union was unfairly prejudiced by the State raising this threshold issue at the last moment and depriving the Union of an opportunity to fully prepare its case. The grievant filed his grievance immediately upon discovering that his rights under the Contract had been violated.

EMPLOYER'S POSITION:

The grievance was not arbitrable. Clearly, the grievant missed the filing deadline mandated in Article 25.05; therefore, the grievance was not arbitrable. The grievant was denied use of vacation leave on June 4, 1990; yet, his grievance was not filed until July 10, 1991. The State speculated that the fact that the grievance was filed almost exactly one year after the filing deadline made detecting the timeliness problem difficult.

Although the State admitted that it failed to identify the timeliness problem until one day before the arbitration hearing, the State maintained that it was not estopped from raising timeliness as a bar to arbitrability. The State cited to Elkouri and Elkouri and several arbitration decisions in support of its position. The State also emphasized that Article 25.05 requires any time extensions to be written and mutually accepted by both parties.

ARBITRATOR'S OPINION:

The grievant became or should have become aware of his grievance on or before June 1990. The grievant testified that he was unaware of his rights under the Contract until he attended a Chapter meeting in July 1991. However, an August 1993 letter written by the grievant indicated that the grievant had been informed by an ODA payroll accountant that other ODA employees had been permitted to use vacation instead of sick leave during the Workers Compensation waiting period long before he attended that Chapter meeting. Thus, the Arbitrator determined that the grievant failed to act in a timely fashion to protect his interests.

The Arbitrator agreed that the State did not waive its right to protest the timeliness of the grievant by not raising the issue prior to the arbitration hearing. The Arbitrator reasoned that: (1) the State did not intentionally withhold the issue for the purpose of surprising the Union at the hearing, and the State notified the Union promptly upon discovering the defect; and (2) it was well established (Elkouri and Elkouri's How Arbitration Works) that failure to raise an issue prior to the arbitration hearing does not result in forfeiture of the issue.

AWARD:

The grievance was not arbitrable and, therefore, denied.

TEXT OF THE OPINION:

ARBITRATION DECISION

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October 5, 1993

In the Matter of:

**Ohio Civil Service Employees
Association, AFSCME Local 11**

and

**State of Ohio, Department of
Agriculture**

Case No.:

04-00-(91-10-07)-0059-01-07

Grievant:

James E. Trotter

APPEARANCES

For the Union:

Robert Goheen, Advocate
John T. Porter, Second Chair
Kim Browne, Arbitration Clerk
T. Rex Pritchard, Witness
Carol Boushier, Employment and WC Specialist
Margaret Schmid, Assistant to Executive Director

For the State:

Edith Bargar, Advocate, OCB
Robert Thornton, Second Chair, OCB
Sam Waltz, Agency Representative, ODA
Barbara Valentine, Witness, ODA
Polly Misra, Observer, ODA

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, James Trotter, was a meat inspector in the Department of Agriculture. On December 8, 1989 he suffered a back injury at work and was off on workers' compensation until January 28, 1990. The grievant had further back problems and was off work again beginning June 4, 1990. While waiting to receive workers' compensation benefits for his second absence, the grievant requested to use his vacation but his request was denied. The grievant then opted to use his accumulated sick leave until July 12, 1990 when he began to receive workers' compensation. The grievant remained off work until he retired on January 1, 1992.

On July 10, 1991 the grievant filed a grievance. It charges that the grievant was told erroneously that he had to use all of his sick leave before he could receive workers' compensation benefits. The grievance requests that the grievant be paid for the sick leave that he lost due to the misinformation he received from the Department of Agriculture and Department of Administrative Services.

The grievance was processed according to the contractual grievance procedure. The step three hearing was held on August 22, 1991 and the grievance was denied on September 19, 1991. Subsequently, the case was appealed to arbitration.

The arbitration hearing was held on September 24, 1993. At that time the state argued that the grievance was untimely and, therefore, arbitration was barred. The union maintained that the grievance was arbitrable and that the Arbitrator should decide the case based upon its merits. After hearing the arguments regarding the timeliness issue, the Arbitrator granted the state's motion to dismiss the grievance as untimely. The positions of the parties and the rationale for the Arbitrator's ruling are presented below.

ISSUE

The issue as framed by the Arbitrator is as follows:

Is grievance no. 04-00-(91-10-07)-0059-01-07 (James Trotter, grievant) timely?

RELEVANT CONTRACT PROVISIONS

ARTICLE 25 - GRIEVANCE PROCEDURE

* * *

25.02 - Grievance Steps

* * *

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.

* * *

25.03 - Arbitration Procedures

* * *

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.

* * *

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.

STATE POSITION

The state argues that the grievance is untimely. It points out that Article 25.02, Grievance Steps, Step 1 states:

“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 state contends that the penalty for an untimely grievance is clear. It notes that Article 25.05 states:

“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 state further claims that the Arbitrator cannot hold that the grievance is arbitrable because he would be adding to, subtracting from, or modifying the agreement in violation of Article 25.03.

The state maintains that the arbitrability issue should be decided prior to considering the merits of the case. It notes that Article 25.03 states:

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

The state asserts that this means that where it is reasonably possible to do so, a determination on arbitrability must be made prior to hearing the merits of the case.

The state argues that the facts indicate that the grievance is untimely. It points out that the grievant requested to use vacation when he went off work on June 4, 1990 but was told that he had to use sick leave. The state notes that the grievant subsequently went on sick leave until he began receiving workers' compensation benefits on July 12, 1990. It stresses that the incident was over in July, 1990 but no grievance was filed for one year.

The state admits that the discrepancy between the date of the incident being grieved and the date of the grievance was not detected in processing the grievance. It observes that Barbara Valentine, a human resources administrator in the Department of Agriculture who is responsible for step three hearings, testified that she did not notice the variation in dates. The state speculates that the difference in dates was not apparent because the grievance was filed July 11, 1991 which was one day short of one year from the date the grievant began drawing workers' compensation benefits.

The state acknowledges that it did not raise the timeliness issue prior to the arbitration hearing but contends that it is not estopped from raising the issue in arbitration. It cites page 220 of the Fourth Edition of Elkouri and Elkouri's How Arbitration Works which states that "the right to contest arbitrability before the arbitrator is not waived merely by failing to raise the issue of arbitrability until the arbitration hearing." The state notes that Elkouri and Elkouri offer numerous Arbitrators' decisions in support of that proposition.

The state contends that it did not agree to waive the time limits. It indicates that under Article 25.05 an extension of the time limits must be by mutual agreement and must be in writing. The state acknowledges that it agreed to an extension for step three but indicates that it was to allow the union time to provide documents to prove its case. It emphasizes that the extension had nothing to do with the untimely filing of the grievance.

The state asks the Arbitrator to determine that the grievance is untimely and not arbitrable.

UNION POSITION

The union argues that the grievance should be held to be arbitrable. It contends that the grievant initiated his grievance as soon as he discovered that his rights under the contract were violated. The union points out that in 1991 the grievant transferred to a new chapter closer to his home. It states that in a chapter meeting in July, 1991 T. Rex Pritchard, the chapter president, told the grievant that the state could not require him to use his sick leave. The union emphasizes that the grievance then was filed without delay.

The union cites State of Ohio, Ohio Bureau of Employment Services and OCSEA, Local 11, AFSCME, AFL-CIO, grievance no. G-87-0733. It states that in that case two employees who were laid off filed grievances four months late but immediately upon becoming aware that their seniority dates were incorrect. The union stresses that Arbitrator Linda DiLeone Klein concluded that the grievance was timely.

The union contends that the state waived its right to raise the timeliness issue. It points out that the grievance was processed through each step of the grievance procedure without objection. The union notes that less than 24 hours before the hearing the state indicated that it intended to challenge the arbitrability of the grievance on the basis of timeliness. It claims that once arbitration was requested the state had waived its right to raise the timeliness issue.

The union offers Aeolian Corp., 72 LA 1178 (1979) In support of its position. It Indicates that in that case

an employee who was compensated at the incorrect rate of pay for several months did not grieve until more than six months after she was notified of the correct rate. The union notes that the employer did not raise the timeliness issue until the arbitration hearing. It stresses that Arbitrator George U. Eyraud Jr. held that "the timeliness argument must be raised during the discussion of the grievance at each appropriate step and that the defense must be preserved in oral discussions as well as final submission to arbitration." (page 1180).

The union urges the Arbitrator to find that the grievance is timely and arbitrable.

ANALYSIS

The facts regarding the timeliness issue are not in dispute. The grievant went off work on June 4, 1990 due to a work-related injury. While waiting for workers' compensation benefits to begin, he requested to use vacation. The state refused to grant the vacation and told the grievant that he had to use sick leave. The grievant then opted to use sick leave and did so until July 12, 1990 when he began to receive workers' compensation. On July 10, 1991 the grievant filed a grievance protesting the denial of vacation and requesting pay for the sick leave he was required to use. The grievance was processed through the various steps of the grievance procedure without the issue of timeliness being raised. However, the day before the arbitration hearing the state noticed that the grievance was filed approximately one year after the grievant was denied the use of vacation and informed the union that it would argue at the arbitration hearing that the grievance was untimely and that arbitration was barred.

The state's position that the grievance is untimely is based upon Article 25.02. It states:

"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 Arbitrator believes that the grievant became aware of his grievance or at least should have become aware of it in June, 1990. The grievant's August 10, 1993 letter to Pritchard indicates that Carol Rinehart, an accountant in the Department of Agriculture's payroll office, told him that other employees in the department used vacation while waiting to get workers' compensation so that they would not lose their sick leave. When he was later denied the use of vacation by his supervisor and division chief, he did not contact the union or the Bureau of Workers' Compensation. It was not until he met Pritchard at a union meeting in July 1991 that he filed his grievance. The grievant failed to act in a timely fashion to protect his interests.

The union argued that the state waived the right to protest the timeliness of the grievance by not raising the issue prior to the arbitration hearing. The Arbitrator must disagree. First, it is not a case of the state deliberately failing to raise timeliness with the intent of surprising the union at the arbitration hearing. It is clear that the state did not notice the fact that the grievance was filed approximately one year after the fact. When the late filing was discovered the day before the hearing, the state informed the union that it intended to raise the issue at the hearing.

Second, it is well established in arbitration that the failure to raise the timeliness issue prior to the arbitration hearing does not result in waiving the argument. Elkouri and Elkouri's How Arbitration Works states on page 220 that "the right to contest arbitrability before the arbitrator is not waived merely by failing to raise the issue of arbitrability until the arbitration hearing." They cite numerous Arbitrators' decisions in support of this position.

The two arbitration decisions offered by the union do not alter the Arbitrator's conclusion that the instant grievance is untimely. In Aeolian Corp., 72 LA 1178 (1979) Arbitrator Eyraud faulted the employer for failing to raise the timeliness issue prior to the arbitration but the case differs from the instant case in a number of respects. First, in contrast to the instant case the employer was aware of the timeliness issue but failed to raise it until its opening statement at the arbitration hearing. Second, the grievant stated that she did not file her grievance immediately because her father was very ill and she was unable to attend to business as she would have done under normal circumstances. In the instant case no reason was given for the grievant's

delay in filing the grievance.

The Arbitrator's decision in the instant case is consistent with the decision in State of Ohio, Ohio Bureau of Employment Services and OCSEA, Local 11, AFSCME, grievance no. G-87-0733, December 11, 1989. In that case the issue was the grievant's entitlement to seniority credit for time on layoff. The grievance was not filed until four months after the effective date of the first collective bargaining agreement but Arbitrator Linda Klein held that "it was nevertheless timely because it was initiated as soon as the grievants became aware that their seniority dates were incorrect." (page 2). In the instant case the grievant was denied the use of vacation and told that he must use sick leave in June, 1990 but he did not grieve until one year later.

Based upon the above analysis the Arbitrator must declare the instant grievance untimely and not arbitrable.

AWARD

The grievance must be denied as untimely.

NELS E. NELSON

Arbitrator

October 5, 1993

Russell Township

Geauga, County, Ohio