

**ARBITRATION DECISION NO.:**

538

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Youth Services

**DATE OF ARBITRATION:**

March 9, 1994

**DATE OF DECISION:**

March 15, 1994

**GRIEVANT:**

Charles H. Jones

**OCB GRIEVANCE NO.:**

No number assigned

**ARBITRATOR:**

Mollie Bowers

**FOR THE UNION:**

Marva McCall

**FOR THE EMPLOYER:**

Brad Rahr

**KEY WORDS:**

Removal  
Improperly Filed Grievance  
Timely Filed Grievance  
Arbitrability

**ARTICLES:**

Article 25 - Grievance Procedure  
    § 25.02 - Grievance Steps  
    § 25.05 - Time Limits  
    § 25.07 Other Grievance Resolution Methods

**FACTS:**

The grievant, a DYS employee who had been terminated, filed a grievance through his staff rep, who in turn delivered it to the chief steward for step 3 processing. The steward called OCSEA to find out how to obtain a grievance number. Allegedly a secretary checked and told the steward to send the step 3 grievance to OCB. At this point in time, the contractual time limit for timely filing of the grievance had not yet expired.

The step 3 grievance was sent to OCB and was logged in and distributed to the appropriate individual who would respond to the grievant. The grievance was then deposited in an in-basket where it waited its chronological turn for review. At no time, up until this point, was the grievance examined for procedural

defects. It was only after it was removed from the in-basket that the procedural defect was discovered. At that time (seven days after the filing deadline and twelve days after receipt), the Chief of Contract Compliance at OCB wrote a letter to the grievant informing him that according to Article 25.02, the grievance must be "presented directly to the Agency Head or designee in writing." By this time, the time limit for timely filing of the grievance had expired and thus a refiling of the grievance was not possible.

**UNION'S POSITION:**

The Union argued that the grievance was timely filed at Step 3 and that, even though the package was sent to the wrong person and location, OCB had constructive notice that the grievant's termination was being challenged. In addition, the steward acted on the best advice that was available to her after making a good faith effort to obtain information regarding the procedure. Finally, the union contended that the grievance was at OCB for an inordinately long period of time before it was returned with notification of the defect, and therefore management should be estopped from challenging the arbitrability of the grievance.

**EMPLOYER'S POSITION:**

The state argued that under Article 25.02, the step 3 grievance must be filed with the agency head or designee. Since this was not done, the grievance was defective and should be deemed to be void. As such, no valid step 3 appeal was ever filed by the grievant which met the time requirements of Article 25.07 (must be filed within fourteen days of notification of the discharge). The state then argued that Article 25.05 provides that "grievances not appealed within the designated time limits will be treated as withdrawn grievances." Therefore, the state concluded that the dispute was not arbitrable.

**ARBITRATOR'S OPINION:**

The arbitrator first pointed out that a steward with seven years experience should have known "not to rely upon a receptionist to provide advice about the proper filing of a grievance." Then, the arbitrator held that the contract language is clear and unambiguous as to the time and place of filing the step 3 grievance and that, although there was a change in policy regarding the location of where a grievance number is obtained, this policy change does not in any way modify the express terms of the contract. Finally, the arbitrator concluded that for at least two years before the present grievance was filed, OCB had made it clear that any delay in returning an improperly filed grievance would count against the time for filing a grievance.

**AWARD:**

This case is not arbitrable.

**TEXT OF THE OPINION:**

**IN THE MATTER OF THE ARBITRATION BETWEEN:**

**State of Ohio Department of Youth Services**

and

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

**Grievant:**

Charles H. Jones

**ARBITRATOR:**

Mollie H. Bowers

**APPEARANCES:****For the Department:**

Brad Rahr

**For the Union:**

Marva McCall

This case was brought to arbitration by the OCSEA/AFSCME, Local 11, AFL-CIO (the union), claiming that the State of Ohio Department of Youth Services (the Department/the DYS) lacked just cause for the termination of Charles H. Jones (the Grievant). Both at the Hearing and before, the Department raised a threshold question of procedural arbitrability based upon the assertion that no grievance was filed in this case by the Union or by the Grievant in contravention of Article 25 of the collective bargaining Agreement.

The Hearing in this case was held on March 9, 1994, at 9:30 a.m. in conference Room B of the OCSEA/AFSCME headquarters in Columbus, Ohio. Both parties were present and were represented at this proceeding. They presented evidence and testimony on the threshold question and cross-examined that presented by the opposing party. Thereafter, the parties requested that the Arbitrator make a bench decision on this issue before proceeding with the merits of the case. The Arbitrator declined to make such a decision because she wanted sufficient time to thoroughly and carefully consider the record. The decision which follows results from such deliberations.

**BACKGROUND**

Most of the facts of the arbitrability portion of this case are undisputed. The following is a summary of the parties' joint stipulations:

- 1) AFSCME Representative, Marva McCall, did write a grievance form for the Grievant and did had it to Chief Steward, Jane Mackey, for Step 3 processing;
- 2) AFSCME Union did receive Joint Exhibit 4, a letter from Michael Duco, stating, in essence, that the Office of Collective Bargaining was not the proper place to file a Step 3 appeal of the removal in question;
- 3) DYS Human Resources Administrator, Chet Christie, also received Joint Exhibit 4;
- 4) After receipt of the letter from Mr. Duco, Staff Representative, Marva McCall, on advise from the AFSCME Legal Department, did file the Arbitration Request contained in Joint Exhibit 8;
- 5) Grievance in question was not filed at Step 3 in the manner required by the Agreement; and
- 6) Teri Decker was the Liaison at the Office of Collective Bargaining to DYS at the time this case arose.

Ms. Jane Mackey was the Union Steward who filed the grievance in question. She had served in this capacity and as Chief Steward for DYS for seven years. The parties agree that a change in policy occurred by which the Steward had to "call downtown" to obtain a number for a grievance, in contrast to the previous policy whereby this number could be obtained from the Department. Ms. Mackey testified that she was not informed that she could not informed that she could no longer get the grievance number from DYS. Nevertheless, when the instant case arose, Ms. Mackey testified that she called the Union headquarters to inquire of a Field Representative how to obtain a grievance number. She stated that the Secretary (unnamed) that she spoke to "checked" and told her to send the Step 3 termination grievance to Rene Coyle at the Office of Collective Bargaining (the OCB). Joint Exhibits 2 and 3 show that Ms. Mackey

followed this advice. At this juncture, the contractual time limit had not expired for timely filing the grievance in question.

Joint Exhibit 4, dated March 17, 1993, indicates that the then Chief of Contract Compliance for the OCB, Michael Duco, wrote to the Grievant to inform him that his grievance had not been filed at the proper place, that according to the Agreement, it must be "presented directly to the Agency Head or designee in writing," and that "This letter does not constitute a Step 3 answer, nor does it act as an extension of the timeframes" set forth in the Agreement. Mr. Duco testified that a letter of this sort was the standard response OCB had given in such cases and that he enclosed the grievance package with the letter to the Grievant, also in accordance with established practice. Department Exhibit 1 contains six other examples of similar letters to other parties.

The Union questioned Mr. Duco about the reasons why it took so long for OCB to provide the advice that the instant grievance had been filed at the wrong place. He testified that the OCB has no way of knowing when any grievance comes in whether it has been filed properly or not. After it is logged and distributed to the appropriate Liaison, it is placed in the in-basket in order of receipt and addressed as promptly as possible. He stated that this is a major reason why the OCB advises each grievant whose appeal is improperly filed that the contractual time limits are not waived by such filing.

Joint Exhibit 6 is a letter from Chester Christie, Human Resources Administrator, DYS, David Johnson, Regional Director of the Union, dated January 27, 1993, which addresses, in general terms, the procedural question which has arisen in the challenge to arbitrability at bar here. This letter states, in pertinent part:

"The current practice of having the local facility assign grievance numbers to grievances before being filed at Step 3 in our Central Office shall be discontinued. All grievances which are originally filed at Step 3 shall be transmitted via U.S. mail to our Central Office by the designated Union Steward as prescribed in Article 15.01D [of the Agreement]. When the grievance is received by our central office it will be date stamped, and at that time, a grievance number will be assigned. . . ."

These are, in essence, the circumstances which gave rise to the Department's claim that the instant dispute is not arbitrable for procedural reasons.

## **CONTENTIONS OF THE PARTIES**

### **Department Position:**

The Department maintains that it has shown this case is procedurally defective in significant respects and, thus, that a ruling should be made that a hearing on the merits should not be held. Its position has two essential prongs based upon citation of several portions of Article 25 of the Agreement. The Department relies, first, upon Article 25.07 to assert that the grievance was not timely filed at Step 3 "within fourteen (14) days of notification of such action [discharge]." The information contained in Joint Exhibit 4, together with Mr. Duco's testimony, is used to further buttress the Department's position that the instant grievance was not timely filed.

Leveraged from this contention, the Department also refers the Arbitrator to Article 25.05 of the Agreement and, particularly, to the language therein which states that "Grievances not appealed within the designated time limits will be treated as withdrawn grievances." According to the Department, it has shown that the instant grievance must be treated as "withdrawn."

Second, the Department points to Article 25.02, Step 3 of the Agreement to contend that the Union had no right to request arbitration in the instant case. It contends that the Union failed to comply with the following express language of the Agreement:

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

A. Disciplinary grievances (suspensions and removal)

The Step 3 grievance response shall be prepared by the Agency Head or designee and reviewed by the Office of Collective bargaining. . . .

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.”

Based upon this language, the facts of record, and the language contained in Article 25.05 of the Agreement that "Grievances not appealed within the designated time limits will be treated as withdrawn grievances," the Department maintains that this dispute is not arbitrable. It asks that this result be affirmed by this proceeding.

### **Union Position:**

The union's position is that the grievance in question was timely filed at Step 3 and, even though the package was sent to the wrong person and location, the OCB and the Department had constructive notice that the Grievant's termination was being challenged. Ms. Mackey's testimony is cited in support of this position. The Union emphasizes her un rebutted statements that not only do the OCB Liaisons change frequently and without notice, but also that she followed the best advice she could obtain as to the filing of the grievance package to obtain a number. It also relies upon Ms. Mackey's testimony that she was never advised of the information contained in Joint Exhibit 6 and contends, therefore, that the Grievant should suffer as a consequence.

The Union also asks that the Grievant be held harmless for the fact that his grievance was at OCB an inordinately long time before it was returned to him with notification that the filing had been at the wrong location. In support of this request, the Union points out that "7 days after the filing deadline [for a timely grievance] and 12 days after receipt, OCB advised the [G]rievant and the Union that the grievance had been filed at the incorrect agency." For all of the aforesaid reasons, the Union asks that the Arbitrator reject the Department's challenge to the arbitrability of this case and proceed to the merits.

## **DISCUSSION**

The Arbitrator carefully considered the evidence and testimony presented by both parties, as well as the collective bargaining Agreement between them, in determining what the outcome of this case shall be. She finds that the Department must prevail in its claim that this case is not arbitrable. This ruling is based upon several factors. First, the Arbitrator understands that Ms. Mackey made a good faith effort to timely and properly file the grievance in question. As a Steward with seven years' experience and given her testimony that procedures and Liaisons were always changing without notice, Ms. Mackey knew or should have known not to rely upon a Receptionist to provide advice about the proper filing of a grievance.

Second, the Arbitrator considered the clear and unambiguous language of Article 25.02, Step 3 which states and restates that "the grievance form shall be presented by the Union to the Agency Head or designee," that "The Agency Head or designees shall process grievances in the following manner:," and that "The Step 3 grievance response shall be prepared by the Agency Head or designee and **reviewed** by the Office of Collective Bargaining." (emphasis added) There is nothing in the record which indicates that any change in policy regarding the location from which a grievance number is obtained conflicted in any way with this language. Given these facts, the Arbitrator must rule that the contractually established procedure was not followed in the instant case and, thus, that the grievance is not arbitrable.

Third, the record further supports the Department's position that the grievance was not timely filed. Based upon testimony provided by Mr. Duco and the evidence contained in Department Exhibit 1, the Arbitrator concluded that for at least two years before the instant grievance was filed, if not more, the OCB had made it clear that any delay in returning a grievance when it was improperly filed with its Liaisons would count against the time for filing a grievance. This notice was provided to the Grievant and does not represent arbitrary and capricious, or disparate treatment of him. The Arbitrator rules, therefore, that the instant grievance was not timely filed and must be treated as withdrawn under Article 25.05 of the Agreement.

Finally, it follows from the aforesaid that this grievance was not eligible to be advanced to arbitration and,

thus, that it is improperly before the Arbitrator.

**AWARD**

This case is not arbitrable by reason of the procedural defects found in the foregoing discussion. Therefore, no hearing on the merits of the case shall be held.

MOLLIE H. BOWERS, Arbitrator

Date: March 15, 1994