

ARBITRATION DECISION NO.:

551

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation
Athens County Garage/
Washington County Garage

DATE OF ARBITRATION:

May 13, 1994

DATE OF DECISION:

July 23, 1994

GRIEVANT:

Betty Jarvis

OCB GRIEVANCE NO.:

31-10-(93-06-04)-0009-01-09

ARBITRATOR:

Nels Nelson

FOR THE UNION:

Janice G. Parsons, Advocate
Richard Sycks, Second Chair

FOR THE EMPLOYER:

Edith Bargar, Advocate
Michael Duco, Second Chair

KEY WORDS:

Bumping Rights
Displacement
Timeliness of Filing
of Grievance

ARTICLES:

Article 18 - Layoffs
 § 18.04 - Bumping in the Same Office, Institution or County
Article 25 - Grievance Procedure
 § 25.02 - Grievance Steps
 § 25.05 - Time Limits

FACTS:

The grievant worked at the Ohio Department of Transportation as an Administrative Assistant 1. Another ODOT employee had her position abolished and used her bumping rights, which resulted in the grievant

being displaced from her position. On May 5, 1992 the other employee grieved the abolishment of her position. This grievance was taken to arbitration. On May 13, 1993 the Arbitrator found that the abolishment of this employee's position was not made in good faith and the Arbitrator reinstated this employee and ordered her to be made whole for all lost wages and benefits.

On May 28, 1993 the grievant in this case protested her displacement from her position and requested to be made whole. Furthermore, the grievant filed a grievance on June 4, 1993. The State claimed that the grievance was not filed within the constraints outlined in the Contract. On July 29, 1993 "the Office of Collective Bargaining, in concurrence with ODOT, refused to review the grievance, because the grievance was not filed within a timely manner.

UNION'S POSITION:

The union argued that the grievance was filed in a timely manner. The union claimed that the grievant had nothing to grieve when the other ODOT employee's job was, abolished and this grievant was displaced. The union contended that a grievance arose when an arbitration decision returned the other employee to her job and the state did not return this grievant to her former position. The arbitration decision disaffirming the abolishment of the first employee's position was dated May 13, 1993 and this grievance was filed on June 4, 1993. Therefore, this grievance falls within 30 days to grieve under the Contract. The union concluded that the grievance was filed in a timely manner and that the grievant should be reinstated to her former job and be made whole.

EMPLOYER'S POSITION:

The state contended that the grievant did not file her grievance in a timely manner as required under Article 25 of the Contract. It maintained that the grievant received notice that she was being displaced on May 24, 1992 and that she had ten days from that date to file a grievance. Even if the Arbitrator decided that the grievant had 30 days to grieve, the state took the position that the grievance was not timely. The state asserted that such time limits for filing grievances prevent the union and individuals from holding back cases and filing them later. Furthermore, the state contended that the purpose of time limits in the context of filing grievances provided the state with the ability to measure its liability and to limit its liability.

ARBITRATOR'S OPINION:

The Arbitrator concluded that the grievance was timely under Article 25 of the Contract, because the grievant filed a grievance within 30 days of when she became aware of the occurrence giving rise to the grievance. The Arbitrator held that the event giving rise to the grievance was the failure of the state to return the grievant to her previous position and make her whole. The Arbitrator must, therefore, grant the grievance. The state was directed to return the grievant to her position as an Administrative Assistant 1 and to make her whole for any losses that she may have suffered.

AWARD:

The grievance was sustained. The grievant was to be restored to her position as an Administrative Assistant 1 and made whole for any losses she may have suffered. The Arbitrator will retain jurisdiction for 90 days from the date of this award to resolve any dispute that may arise over the proper remedy.

TEXT OF THE OPINION:

ARBITRATION DECISION

July 23, 1994

In the Matter of

State of Ohio, Department of Transportation

and

Ohio Civil Service Employees Association,
AFSCME Local 11

Case No.:

31-10-(06-04-93)-09-01-09

Grievant:

Betty L. Jarvis

APPEARANCES

For the State:

Edith Bargar, Advocate
Michael Duco, Assistant Legal Counsel
Pauline Mincks, Labor Relations Officer

For the Union:

Janice G. Parsons, Advocate
Richard Sycks, Co-Advocate
Betty L. Jarvis, Grievant

Arbitrator:

Nels E. Nelson

BACKGROUND

The basic facts are not in dispute. On May 2, 1992 the position of Administrative Assistant 3 at the Athens County garage was abolished. Phyllis Lorubbio, who held the position, exercised her contractual bumping rights to the Administrative Assistant 1 position at the Washington County garage which resulted in the displacement of Betty Jarvis on May 24, 1992. At the same time the state and the union agreed that Jarvis would be placed in a Project Inspector 1 position. Jarvis remained in that position until May 1993 when she made a lateral transfer to Account Clerk 1.

The initial action -- the abolishment of the Administrative Assistant 3 position at the Athens County garage -- was grieved by Lorubbio on May 5, 1992. The grievance charged:

“On Friday, May 1, 1992, Ms. Lorubbio was notified that her position was being abolished due to efficiency. ODOT has failed to notify or discuss with the exclusive representatives impacts this abolishment will have in accordance with 8.02 of the contract. ODOT has not provided documentation relative to the determination, or to place validity of the abolishment. Due to this abolishment bumping may occur.”

The remedy requested was as follows:

“That grievant be reinstated with full back pay and benefits, to include all bumped employees to be made whole and any other negotiated settlement.”

The grievance was denied at the various steps of the grievance procedure and subsequently appealed to arbitration. The arbitration hearing took place on March 11, 1993 before Arbitrator Rhonda Rivera. On May

13, 1993 Arbitrator Rivera found that the abolishment of the grievant's job was not in good faith and reinstated Lorubbio to her Administrative Assistant 3 position and ordered her to be made whole for all lost wages and benefits. Arbitrator Rivera retained jurisdiction "to be the final judge of award to the grievant and to be available should the parties desire assistance with the settlement."

On May 28, 1993 Jarvis, who is the grievant in the instant case, wrote a note protesting her displacement on May 24, 1992 from her position as Administrative Assistant 1 and requested to be made whole. The grievant showed the note to Pauline Mincks, the Labor Relations Officer, and George Collins, the ODOT district administrative assistant.

On June 4, 1993 the grievant filed a grievance. It charges:

"On or about May 22, 1992 I was displaced from my Administrative Assistant 1 position in the Testing Dept., Dist. 10. Person who displaced me has been returned to her previous position, thus I should have recall and returned to my previous position."

The grievance seeks as a remedy for the grievant "to be made whole or other negotiated settlement."

On June 8, 1993 the grievance was returned to the grievant. Mincks stated that the grievance was not filed within the constraints mandated by the contract. She indicated that no step two grievance hearing would be scheduled.

On June 21, 1993 Arbitrator Rivera issued a supplemental award regarding a number of issues related to her decision in the Lorubbio case. The union had raised the issue of the remedy for Jarvis who had been displaced by Lorubbio. Arbitrator Rivera stated that "she presumed that [Jarvis] would be reinstated in her old job and would be paid the differential lost in pay." However, she noted that the state did not accept her jurisdiction in the matter. Because Jarvis had filed a grievance, Arbitrator Rivera "left the matter to the new grievance and its resolution."

The union pursued the Jarvis grievance. On June 24, 1993 Jim Miller, ODOT Deputy Director of Labor Relations, returned the grievance to the union indicating that no step three meeting would be scheduled because the grievance was not filed within the time line constraints mandated by the contract and indicated the arbitrability of the grievance would be challenged for several additional reasons. At step four on July 29, 1993 the Office of Collective Bargaining concurred with ODOT's response and refused to review the grievance.

On August 3, 1993 the grievance was appealed to arbitration. The hearing took place on May 13, 1994. The record was closed at the conclusion of the hearing. However, the decision in the case was delayed due to an injury to the Arbitrator and subsequent surgery.

ISSUE

The issue as agreed to by the parties is as follows:

Is the grievance arbitrable?
If so what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 25 - Grievance Procedure

* * *

25.02 - Grievance Steps

Step 1 - Immediate Supervisor

... 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..

* * *

25.05 - 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 fails to meet the contractually mandated time lines. 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 notes that under Article 25.05 that "grievances not appealed within the designated time limits will be treated as withdrawn grievances.

The state contends that the facts indicate that the grievant did not file her grievance in a timely manner. It maintains that the grievant received notice that she was being displaced on May 24, 1992 and that she had ten days from that date to file a grievance. The state indicates that even if the Arbitrator concludes that the grievant had 30 days to grieve, the grievance clearly is not timely.

The state rejects the union's contention that the Lorubbio decision is the event which started the 30-day clock. It notes that "the grievant went to work just like any other day on the days before and the days after the [Lorubbio] arbitration decision." The state asserts that the Arbitrator cannot change the common meaning of "event" in Article 25.02.

The state asserts that the practical implications of the theory that an arbitration decision is an "event" are staggering. It charges that in a bumping situation it would never be sure of placements and years would pass with no true resolution. The state claims that wave after wave of grievances would be possible.

The state maintains that Arbitrator Rivera's supplemental award on June 21, 1993 does not control the instant case. It states that Arbitrator Rivera simply offered her opinion in dictum that a grievable issue did not arise until Lorubbio was reinstated. The state claims that Arbitrator Rivera did not have all or, perhaps, any of the facts associated with the grievant's situation. It emphasizes that she deferred the matter to the instant arbitration.

The state indicates that it also relies upon the theory of estoppel, laches, and the failure to prosecute. It claims that there are strategic reasons regarding when to file a grievance and whether to file a class action or an individual grievance which may have an impact on settlements and arbitration outcomes in the future. The state maintains that the 30-day time limit prevents the union and individuals from holding back cases and filing them later.

The state contends that the time limits for filing grievances provides it with the ability to gauge the liability it faces. It asserts that it should not have to face a grievance with ten months of pay rate differential mounting up. The state maintains that at some point it should know that it can maintain the status quo and not be subject to hidden liability.

The state concludes that the grievance is untimely and not arbitrable.

UNION POSITION

The union argues that the grievance was filed in a timely manner. It claims that at the time Lorubbio's job was abolished, the grievant had nothing to grieve because she presumed that the state acted properly in abolishing the job. The union further indicates that the grievant knew that Lorubbio was only exercising her right to bump her under Article 18 of the collective bargaining agreement.

The union contends that a grievance arose only when Arbitrator Rivera returned Lorubbio to her job and the state failed to return the grievant to her former position. It points out that the arbitration decision is dated May 13, 1993 and the grievance was submitted June 4, 1993. The union indicates that this falls within the

30 days to grieve under the collective bargaining agreement.

The union asserts that the grievant is entitled to be returned to her former position and made whole under the grievance filed by Lorubbio. It acknowledges that Lorubbio's grievance protests the abolishment of her job. The union stresses, however, that the remedy sought includes the request that "all bumped to be made whole."

The union maintains that Arbitrator Rivera agreed with its position. It points out that she "presumed that [Jarvis] would be reinstated in her old job and would be paid the differential lost in pay." The union indicates that the state refused to accept Arbitrator Rivera's jurisdiction over the matter so that she left the matter to the new grievance that had been filed.

The union concludes that the grievance is timely and that the grievant should be reinstated to her former job and be made whole.

ANALYSIS

The Arbitrator believes that he must hold that the instant grievance is timely. Under Article 25.02 of the collective bargaining agreement an employee must present a grievance within 30 days of when he or she "became or reasonably should have become aware of the occurrence giving rise to the grievance." In the instant case the event giving rise to the grievance was the failure of the state to return the grievant to her Administrative Assistant 1 position and make her whole for any losses she suffered after Lorubbio was restored to her position by Arbitrator Rivera on May 13, 1993.

The state's contention that the grievance arose when the grievant was bumped by Lorubbio on May 24, 1992 must be rejected. On that date the grievant had nothing to grieve because she was properly displaced under Article 18 of the contract. It would be unusual for the grievant to grieve that Lorubbio's job was improperly abolished. To encourage such grievances could result in a flurry of grievance activity.

The state's position that the grievant should have filed a grievance within 30 days of May 24, 1992 also asks her to assume that the state violated the collective bargaining agreement. The state takes many actions impacting one employee which may have a secondary effect on other employees. The vast majority of the actions taken by the state are consistent with the collective bargaining agreement and never challenged by employees or the union. Many of the actions that are grieved are subsequently upheld in the grievance procedure. Under these circumstances, it is not at all unreasonable for the grievant to assume that the state acted properly when it abolished Lorubbio's job so that there was no basis for her to grieve being bumped.

The Arbitrator recognizes the concern of the state that in a bumping situation might not be sure of a number of job placements while a single grievance was unresolved. The Arbitrator, however, believes that in most situations the state should be aware of its potential liability. In the instant case the state had to realize that if Lorubbio's job was improperly abolished, her subsequent bumping of the grievant was also improper. In considering Lorubbio's grievance the state should have taken into account the implications for the grievant.

The Arbitrator believes that it is instructive to try to determine what would have happened had the grievant filed a grievance following her bumping on May 24, 1992. First, as suggested above, the Arbitrator suspects that the state would have argued that the grievant had no basis to grieve because she was properly bumped under Article 18 and because she had no standing to grieve the abolishment of Lorubbio's position. Second, he is convinced that the state and the union would have agreed to hold any grievance filed by the grievant in abeyance until Lorubbio's grievance was settled. If it was determined that Lorubbio's job was properly abolished, there would be no issue regarding the grievant. If Lorubbio's job was not properly abolished, she would be returned to her job as Administrative Assistant 3 and the grievant would be returned to her job as Administrative Assistant 1.

While the Arbitrator must hold that the instant grievance is timely, he should note that the controversy could have been avoided. The grievance filed by Lorubbio recognizes that other employees were impacted by the abolishment of her job when it requested that "all bumped employees be made whole." Unfortunately, the grievance was not filed on behalf of all affected employees and the issue of other affected employees

apparently was overlooked by the parties in the subsequent arbitration.

Finally, the Arbitrator must note that his decision is consistent with the comments of Arbitrator Rivera in her first supplemental award in the Lorubbio case. In that award Arbitrator Rivera states that she "presumed that [the grievant in the instant case] would be reinstated in her old job and would be paid the differential lost in pay." She further indicated that she "did not believe that a grievable issue arose until [Lorubbio] was reinstated." However, since the grievant in the instant case had already filed a grievance and the state challenged her jurisdiction, Arbitrator Rivera "deferred and left the matter to the new grievance and its resolution." Although Arbitrator Rivera's comments are in no way binding on this Arbitrator, the state did have the judgment of one of its panel of Arbitrators on June 21, 1993 regarding the issue in the instant case and chose to proceed.

Based upon the above analysis, the Arbitrator must grant the grievance. The state is directed to return the grievant to her position as an Administrative Assistant 1 in the Athens County garage and to make her whole for any losses that she may have suffered. Since the parties provided no basis to estimate the back pay and/or benefits that may be due the grievant, he will retain jurisdiction for 90 days to settle any dispute regarding the proper remedy.

AWARD

The grievant is to be restored to her position as Administrative Assistant 1 in the Athens County garage and made whole for any losses she may have suffered. The Arbitrator will retain jurisdiction for 90 days from the date of this award to resolve any dispute that may arise over the proper remedy.

NELS E. NELSON

Arbitrator

July 23, 1994

Russell Township

Gewgaw County, Ohio