

#821

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 27-12-020326-1642-01-03-T
and	*	
	*	Harvey Savage, Grievant
OHIO DEPARTMENT OF	*	
REHABILITATION & CORRECTION	*	Arbitrability
	*	Discharge

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Michael Hill, Staff Representative
Mike Keltner, Second Chair
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Rehabilitation & Correction:

Dean McCombs
Ohio Department of Rehabilitation & Correction

I. HEARING

A hearing on this matter was held at 9:30 a.m. on November 12, 2002, at the Lima Correctional Institution in Lima, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties presented issues on arbitrability and substance. These issues are set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation & Correction (the "Department") were Paul Custer, Investigator; David Irving, Inmate A-400-032; Correction Officer ("CO") Nicole Weekly (by subpoena); CO Angela D. Green-Napier (by subpoena); CO Michael Shroyer (by subpoena); and CO Travis Cress (by subpoena). Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Craig Bradford, Chapter President; CO Teraca Jackson, Chapter Secretary; Captain John Alberts (by subpoena); and the Grievant, Harvey Savage. Also in attendance was Michael J. Kaskel, Chief Steward. A number of documents were entered into evidence: Joint Exhibits 1-5 and Union Exhibits 1-8. The oral hearing was concluded at 1:30 p.m. Written closing statements were timely filed and exchanged by the Arbitrator on December 6, 2002, whereupon the record was closed. This Opinion and Award are based solely on the record as described herein.

II. BACKGROUND

The Grievant was hired as a correction officer at the ~~Lima Correctional Institution~~ on June 9, 1997. He was removed from this position on March 1, 2002 after an internal investigation found he had opened a cell door in a segregation unit without the inmate being cuffed and then assaulted that inmate. These actions were found by the Department to constitute violations of Rule 37 (actions that could harm or potentially harm the employee, fellow employees or a member of the general public) and Rule 43 (physical abuse of any individual under the supervision of the Department) of the Standards of Employee Conduct.

A grievance protesting this removal was signed by Chapter President Craig Bradford that same day. Article 25.02 of the Contract provides that a "grievance involving a layoff or a discipline shall be initiated at Step Three (3) of the grievance procedure within fourteen (14)

days of notification of such action.” Step 3 is “Agency Head or Designee,” but Article 25.02 requires the Agency to “forward a copy of the grievance with the grievance number to the Office of Collective Bargaining [Step 4] at the time the grievance is filed at Step Three (3).” Bradford testified that he was unable to get a grievance number from the acting labor relations officer at the institution and was advised by the outgoing chief steward that the address for Step 3 submissions had changed. He told Steward Teraca Jackson to get the new address. She telephoned the Office of Collective Bargaining (“OCB”). A person there gave her OCB’s new address. She therefore sent a number of grievances to OCB at its new address by certified mail, one of which she testified was the instant grievance. These grievances were received by OCB on March 11. Later, when the error of submission to the wrong step was discovered, a new package of these grievances was prepared and sent by express mail on March 23 to the Department’s central office in Columbus, which received it on March 25, time stamping it and assigning a grievance number on March 26. Officer Jackson also sent new packages to OCB and these were received on March 25.

At Step 3 the grievance was denied on both procedural and substantive grounds.

Remaining unresolved, the case came to arbitration where the hearing was bifurcated on two issues:

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Was the grievance timely filed and therefore arbitrable?

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If so, was the Grievant, Harvey Savage, removed from employment as Correction Officer for just cause? If not, what is the remedy?

With respect to the arbitrability question, the Department argues that the grievance was filed at Step 3 24 days after the Union was informed of the termination. The Union admits its

mistake. Its evidence of due diligence is shallow and unsupported by any article of the Contract. The Department cites several panel decisions holding that grievances filed outside the contractual time frame are procedurally defective and not arbitrable, that the minimum the union must show is that the grievance was placed in a properly addressed and stamped envelope and mailed, and that a good faith effort is not enough. The grievance, it submits, should be dismissed as untimely. On the merits, the Department argues that it presented credible evidence the Grievant is guilty as charged. If the grievance survives the arbitrability question it should be denied on the merits.

The Union contends the grievance was timely filed, but at Step 4 instead of Step 3. When it discovered the error, it did not sit on its hands, but exercised due diligence to rectify the mistake by promptly refiled at the proper step by express mail. The Department declares that the grievance is untimely, but this did not stop them from settling two related grievances which were filed in the same manner at the same time as the instant grievance. Dismissing this grievance on procedural grounds would be grossly unfair to the Grievant in light of what happened to his fellow officers. The Union asks that the Arbitrator declare the grievance arbitrable and decide it on its merits. Turning to the just cause issue, the Union submits that the Department's case against the Grievant is simply not credible. For this reason the Grievant should be reinstated and made whole.

III. DISCUSSION

The Contract is specific and clear. Discharge grievances are to be filed with the Agency Head or designee within fourteen days of notification. Such clear language must be upheld except in cases of waiver or unusual circumstances, such as lax observation of time limits or

circumstances that would make enforcement of time limits unreasonable. No such circumstances exist here. For years discharge grievances have been initiated at Step 3 and since the inception of collective bargaining Step 3 has been the Agency Head or designee. Never has Step 3 been the Office of Collective Bargaining. To be sure, OCB did have a new address and there were new players for both the Union and institution. Those factors may have confused things, but the fact that it was OCB and not the Department's central office as called for in the contract should have raised a red flag. The Union did show due diligence once it discovered its mistake, but that does not overcome its error. The grievance was not filed at Step 3 until well after the deadline and so was untimely. This renders it not arbitrable.

As for the argument that failure to reach the merits would be an injustice to this Grievant because the Department was willing to overlook procedural flaws to settle other grievances, be that as it may. The parties, themselves, have the right to settle or not settle grievances and to waive or not waive timelines as they see fit. To require arbitration on the merits simply because the employer yielded where it may have had a similarly strong procedural case would chill grievance negotiations and nullify clear contract language. The Arbitrator is unwilling to do either and lacks the authority to do so in any case. Since the grievance is not arbitrable, the merits cannot be addressed.

IV. AWARD

The grievance is untimely and therefore not arbitrable. It is accordingly dismissed.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
February 20, 2003

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