IN THE MATTER OF:

VICKIE ANDERSON
(DAN MYERS' TERMINATION FROM THE OHIO STUDENT LOAN COMMISSION)
OCB CASE NO. G-87-2458

OPINION AND AWARD

APPEARANCES:

For the Office of Collective Bargaining
and the Ohio Student Loan Commission:

JACK D. BURGESS, CHIEF
ARBITRATION SERVICES

TIM WAGNER
FELICIA BERNARDINI

For the Union:

BRUCE A. WYNGAARD
DIRECTOR OF ARBITRATION

LINDA K. FIELY
ASSOCIATE GENERAL COUNSEL
OCSEA/AFSCME LOCAL 11

BEFORE: THOMAS P. MICHAEL
PANEL ARBITRATOR

Grievance No. G-87-2458, Vickie Anderson (Dan Myers)

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Ohio Student Loan Commission (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO (hereinafter "Union").

A hearing was held at the Office of Collective Bargaining on August 18, 1988, on the threshold procedural question of whether or not the subject grievance is arbitrable. The Employer has preserved its jurisdictional objection to the authority of the Arbitrator to hold that hearing and to issue a binding decision in this matter. This matter has been submitted to the Arbitrator on the testimony and exhibits offered at the August 18, 1988 hearing and the well-prepared briefs of the parties received herein on September 26 and 27, 1988, whereupon the record was closed.

ISSUE

The Union posits the issue before the Arbitrator thusly:

The issue generally is:

Is this matter arbitrable?

More specifically, the issues are:

1) Does the employer's failure to respond at Step 4 automatically advance the grievance to Step 5 in accordance with Section 25.05 of the parties' agreement?

2) Alternatively, if the Arbitrator fails to adopt the Union's interpretation of Section 25.05 of the contract, do the specific circumstances of the case mitigate against a finding that this matter is not arbitrable and require a determination on the merits?

The Employer states the issue as follows:

> Was the grievance timely appealed to arbitration under Article 25.02 - Step 5, and therefore arbitrable?

The Arbitrator instead adopts the following statement of the issue:

> Does the language of §25.05 of the Contract operate to relieve the Union of the responsibility to provide the written notice of appeal to arbitration as provided in §25.02, Step 5 of the Contract?

PERTINENT CONTRACTUAL PROVISIONS

PREAMBLE

This Agreement, entered into by the State of Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union or the Exclusive Bargaining Agent, has as its purpose the promotion of harmonious relations between the Employer and the Union; the establishment of an equitable and peaceful procedure for the resolution of differences; and the establishment of wages, hours, and other terms and conditions of employment.

ARTICLE 25 - GRIEVANCE PROCEDURE

§25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the

grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

Those employees in their initial probationary period as of the effective date of this Agreement shall retain their current rights of review by the State Personnel Board of Review for the duration of their initial probationary period.

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. If a verbal reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal reprimand.

§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, it 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 to the Union and the grievant.

Step 3 - Agency Head or Designee

If the grievance is still unresolved, it 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.

The Agency Head or designee shall give his/her written response within fifteen (15) days following the meeting.

If no meeting is held, the Agency Head or his/her designee shall respond in writing to the grievance within ten (10) days of receipt of the grievance.

Step 4 - Office of Collective Bargaining Review

If the grievance is not settled at Step Three, the Union may appeal the grievance in writing to the Director of The Office of Collective Bargaining by written notice 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 notify the Executive Director of the Union in writing of his/her decision within twenty-one (21) days of the appeal. 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 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 Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. 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.

§25.04 - Arbitration Panel

A. The parties agree that a panel of twelve (12) arbitrators shall be selected to hear arbitration cases covered under this Agreement.

The procedure for selecting this panel shall be as follows:

1. The parties will make an attempt to mutually agree on panel members.

2. If mutual agreement cannot be reached on twelve (12) arbitrators, then the remaining number will be selected by the following procedure: The parties shall request from the American Arbitration Association a list of at least twice plus one the number of arbitrators needed. The parties shall then alternately strike names until the proper number remains.

3. After (1) year, either party may eliminate up to two (2) arbitrators from the panel. Thereafter, the parties may eliminate two (2) additional arbitrators at the end of each twelve (12) month period.

4. In replacing the arbitrators that were eliminated from the panel, the procedure enumerated in (1) and (2) above shall be used. Any arbitrator eliminated may not be placed back on the panel.

B. Panel members shall be assigned cases in rotating order designated by the parties. Within sixty (60) days of the effective date of this Agreement, the

parties will mutually agree on a set of rules of arbitration. Should the parties be unable to agree upon the rules of arbitration, this question shall be submitted to the first panel arbitrator for determination.

§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.

The time limits at any step may be extended by mutual agreement of the parties involved at that particular step.

The Employer's failure to respond within the time limits shall automatically advance the grievance to the next step.

* * *

§25.07 - Advance Grievance Step Filing

Certain issues which by their nature cannot be settled at a preliminary step of the grievance procedure or which would become moot due to the length of time necessary to exhaust the grievance steps may by mutual agreement be filed at the appropriate advance step where the action giving rise to the grievance was initiated. An employee with a grievance involving a suspension or a discharge may initiate the grievance at Step Three of the grievance procedure within fourteen (14) days of notification of such action.

* * *

§25.10 - Miscellaneous

The parties may, by mutual agreement, alter any procedure or provision outlined herein so long as the mutual agreement does not differ from the spirit of this Article.

FACTUAL BACKGROUND

The grievance herein was filed to contest the termination of Daniel Myers by the Ohio Student Loan Commission. Pursuant to the terms of §25.07 of the Contract, the grievance was filed by mutual consent at Step 3 of the grievance procedure on November 9, 1987 (Joint Exhibit 2). A Step Three meeting was not held and on December 8, 1987, the Union apparently mailed its Step Four appeal to the Office of Collective Bargaining, which acknowledges receipt of the Step Four Appeal on December 9, 1987.

No Step Four response was issued to the Union within the twenty-one (21) days answer period provided the Office of Collective Bargaining by §25.02 of the Contract. That contractual section provides the Union thirty (30) days from the due date of the answer to appeal from the Office of Collective Bargaining to arbitration (Step Five). That thirty (30) day appeal period expired on January 29, 1988.

At a settlement, or so-called "4-1/2", meeting of the parties held on May 12, 1988, the Union attempted to discuss a resolution of this grievance but was rebuffed by the Employer on the basis that the Union had never filed a request for arbitration with the Office of Collective Bargaining. Thereafter, on May 18, 1988, a written request for arbitration was filed by the Union. The filing came 140 days after the Step Four response was due and 110 days after the due date specified in §25.02.

POSITION OF THE UNION

This matter is arbitrable. Section 25.05 of the contract provides that the Employer's failure to respond within the time limits previously set forth in the contact shall automatically advance the grievance to the next step. The Employer failed to respond within the time limit imposed by §25.02, Step 4, which mandates the Director of the Office of Collective Bargaining to notify the Executive Director of the Union in writing of his decision within twenty-one days of the appeal.

The language of §25.05 is clear and unambiguous. This grievance was automatically advanced to arbitration due to the failure of the Office of Collective Bargaining to respond at Step 4. The written notice of appeal to arbitration referred to in §25.02, Step 5, is merely permissive, not mandatory, on the Union when the Office of Collective Bargaining fails to issue a Step 4 response.

The Arbitrator is bound by the clear language of §25.05. To find that the Union was required to submit a written notice to the Employer in accordance with §25.02, Step 5, would impose an additional obligation on the Union not specifically required by §25.05. The imposition of this requirement by the Arbitrator would be beyond the Arbitrator's powers as limited by §25.03 of the contract.

Further, even if the Arbitrator determines that the language of the third paragraph of §25.05 is ambiguous, established rules of construction support the Union's interpretation. First, the operative language of §25.05 was first proposed by the Union

(Union Exhibit 4) and eventually adopted by the parties when the Union rejected a counterproposal by the Employer which deleted the automatic advancement language (Union Exhibit 5).

Secondly, the Union's interpretation gives effect to all provisions of the contract while the Employer's interpretation would effectively nullify the language of the third paragraph of §25.05. This would be contrary to the principal of statutory construction that requires contracts to be construed where possible so as to give effect to every provision.

Thirdly, §25.05 is the specific provision regarding time limits which overrides the general grievance procedure set forth in §25.02. Thus, any possible conflict should be resolved in favor of the specific provision.

Finally, contracts are to be interpreted so as to avoid a forfeiture. The Employer's interpretation results in a forfeiture by the Union of its right to arbitrate this termination grievance.

Alternatively, even if the Arbitrator disagrees with the Union's interpretation of §25.05, a balancing of equities requires a finding that the Employer has waived the time limits by its repeated failure to abide by its own contractual time limits.

POSITION OF THE EMPLOYER

The Union's appeal to arbitration was filed three and one-half months too late and this grievance is not arbitrable. The Union has not established any of the circumstances generally recognized by arbitrators as exceptions to strict application of contractual time limits.

The contract clearly and expressly provides that the Union must file its appeal to arbitration "within thirty (30) days of the answer, or the due date of the answer if no answer is given, in Step Four." To accept the Union's argument would effectively nullify that language. On the other hand, the Employer's interpretation also gives effect to the third paragraph of §25.05, which provides that, where the Employer has failed to timely respond at Step 4, the Union has the right to "automatically advance" a grievance to arbitration without waiting for such response or meeting any other conditions, provided the written appeal provision of §25.02, Step 5, is satisfied. The words "automatically advance" mean only that the Union can make its own determination on whether or not to appeal without waiting for an untimely response from the Employer.

The Union's interpretation of §25.05 is contrary to the established practice of the parties in that the Union has been unable to cite a single instance of a grievance "automatically" going to arbitration without a written Union request.

Finally, the Union's interpretation is unworkable. It would mean that any time management responds late or fails to respond the grievance is alive indefinitely without any

affirmative action on the part of the Union. This means that cases could be held back indefinitely by the Union and reasserted at will. The resultant effect on back pay or other monetary awards would create an impossible condition for the State which could not possibly have been intended by the parties.

OPINION

This Arbitrator had made the observation in prior opinions that notions of burden of proof are not helpful in determining contract interpretation cases and that position is reaffirmed in the context of this case.

Upon examination of the testimony and exhibits presented at the hearing and the arguments proffered by the parties, it must be concluded that this matter is not arbitrable on the merits.

The contract expressly provides (§25.03) that "questions of arbitrability shall be decided by the arbitrator." Therefore the Arbitrator reaffirms his earlier ruling that it is within his jurisdiction to determine the procedural arbitrability issue under the circumstances of this case.

Similarly, the Arbitrator is fully aware of the caution set forth by the Union that "(t)he 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 not specifically required by the expressed language of this Agreement." (§25.03). This Award is rendered within that contractual mandate and toward the view of giving full meaning to all the language of the contract wherever possible.

The Union has appropriately enumerated numerous rules of contractual construction. However, it is the conclusion of this neutral that application of those same rules perforce requires the conclusion that the interpretation of the Employer is the more plausible alternative and the alternative that wreaks the least havoc on the contractual grievance provisions and the stated intent of the parties in adopting the contract.

The relevant guiding intent of the parties is set forth in the Preamble, or purpose, clause of the contract as "...the promotion of harmonious relations between the Employer and the Union; the establishment of an equitable and peaceful procedure for the resolution of differences." To interpret §25.05 as the Union requests would run counter to that purpose by indefinitely postponing the ultimate resolution of grievances and destroying the balanced contractual scheme for meeting the expressly stated goal of the grievance procedure:

> It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedures. (§25.01 F.).

The Union argues that §25.05 is a <u>specific</u> provision on time limits which controls over general grievance procedures set forth at §25.02. This Arbitrator disagrees. Section 25.05 is rather a <u>general</u> provision which further explains and supplements the specific time limits imposed on <u>both</u> parties in §25.02. As Union witness Tom King himself testified, §25.05 establishes that a grievance is the property of the Union which has the right to withdraw the grievance at any step. However, contrary to the

assertion of the Union the first paragraph of §25.05 is not limited in its terms only to those grievances which have been favored with a timely written response from the Employer. Rather, that paragraph serves to reconfirm the specific time limits imposed upon the Union at Steps 2, 3, and 4 of the grievance procedure. Section 25.02 expressly and specifically contemplates those cases where the Employer has rendered an untimely response or no response at all at each of those three steps. The Arbitrator agrees with the Employer that the third paragraph of §25.05 serves merely to affirm that the Union has a window within which to perfect its appeals to Steps 3, 4, and 5 which can in no way be adversely affected by any late response or action of the Employer after the due date for the Employer's response. The second paragraph of §25.05 establishes that neither the time limits for the Employer to respond nor the time limits for the Union to perfect its appeal can be extended absent the mutual agreement of the parties. When the provisions of §§25.02 and 25.05 are read in pari materia this is the only interpretation that gives full meaning to all the provisions of both sections.

The Union argues that the provision for written appeal to Step 5 is only permissive because of the use of the word "may" at §25.02, Step 5. The use of "may" in that context is only another contractual recognition that the grievance is the property of the Union and that the Union is not required to appeal every grievance to Step 5. Once again, the first paragraph of §25.05 establishes the effect of the Union's election not to perfect an

appeal:

> Grievances not appealed within the designated time limits will be treated as withdrawn grievances.

The testimony establishes a legitimate Union concern that the grievance procedure could be thwarted by undue delays at the Office of Collective Bargaining. However, the Contract provides for that concern by establishing a brief twenty-one (21) day period for the Office of Collective Bargaining to act or lose jurisdiction over the appeal. The Union has not enunciated any credible argument for concluding that the parties intended to establish a separate category for grievances which receive no response at Steps 2, 3 or 4. Contrary to the Union's assertion, its interpretation of §25.05 would require this Arbitrator to add to the terms of the contract by requiring the Union to affirmatively give notice of withdrawal of a grievance in the event the Employer has failed to issue a response. The contract (§25.05) provides instead that a grievance not appealed within the designated time limits is treated as withdrawn without any affirmative obligation on the part of the Union. It strains credulity to conclude that the parties intended that the Union be required to affirmatively <u>appeal</u> a grievance in the event of a timely response while it is at the same time required to affirmatively <u>withdraw</u> a grievance when no answer or a late answer is forthcoming. This procedure would be directly contrary to the specific terms of §25.02 and the first paragraph of §25.05.

This decision does not result in an involuntary forfeiture by

the Union of its appeal rights. The contract provides a window of thirty (30) days for the Union to exercise its appeal to Step 5; that window is available in all grievances which have been at Step 5 for up to twenty-one (21) days, whether responded to or not. The "forfeiture" complained of was voluntarily agreed to when the contract was executed and represents a logical quid pro quo for the twenty-one (21) day requirement for the Office of Collective Bargaining to respond or lose jurisdiction.

The Union cites the case of M.H. Rhodes, Inc., 25 LA 243 (1955) in support of its argument (Union Brief, p. 10). However, there is no evidence in the report of that case that the contract therein expressly provided for forfeiture of appeal rights by the Union where the appeal dates have not been met. To the contrary, the first paragraph of §25.01 of the Contract in this case is "strong evidence", in the words of the Rhodes arbitrators, that the parties herein agreed to termination of the Union's appeal rights in such a circumstance. Additionally, the Rhodes case contained evidence that an oral grievance was initiated within the ten-day contractual period provided by that contract even though the grievance was not reduced to writing for approximately one week thereafter.

Finally, much as this Arbitrator may be sympathetic toward the argument that Mr. Myers has been deprived of a hearing because of the technical application of contractual terms, the circumstances of this case do not authorize this neutral to order an arbitration hearing on the merits on equitable grounds. Citing the case of Dockside Machine & Boilerworks, Inc., 55 LA

1221, at 1225, the Union argues that where reasonable doubts exist on the time limits set forth in a grievance procedure, the Arbitrator should resolve such doubts in favor of finding arbitrability on the theory that the long term interests of the parties are better served by resolving disputes on the merits rather than upon technical grounds. While this Arbitrator concurs with that general maxim, the further statement by Arbitrator Block in the Dockside case is more apropos this case:

> However, an Arbitrator does not have an unfettered discretion in such matters. His primary duty of interpreting the Collective Bargaining Agreement requires him to reject an untimely grievance unless some basis exists for waiving the prescribed time limits. 55 LA 1221, at 1225.

The Union has not set forth a legitimate basis for waiver of the contractual time limits in this case. There is no evidence that any notice of appeal to Step 5, written or oral, was presented to the Employer or to the Office of Collective Bargaining within the contractual time limit nor for several months thereafter. Nor is there any evidence of a past practice of the Employer of accepting grievances for arbitration in the same or similar circumstances.

The EIMCO Corp. case, 41 LA 1184, is also cited by the Union and is also inapposite. In that case the Arbitrator found that the grievance was in fact timely by construing two separate contractual provisions in support of that conclusion. There was no need in that case to apply equitable principles to support a finding of timeliness.

While this Arbitrator agrees that this finding is harsh in

that it denies a merit hearing to Mr. Myers, this neutral is unwilling to impose an ad hoc penalty on the Employer for its failure to previously provide a response or hearing in this case. As the hearing testimony vividly established, the Union contemplated just such a possibility during its negotiations and extracted the contractual right to perfect an appeal to arbitration in just such a circumstance. Absent some compelling fact to distinguish this case from any other situation where the Employer has failed to issue a timely response, this Arbitrator lacks the jurisdiction to fashion the remedy requested by the Union.

AWARD

For the foregoing reasons the grievance is held to be untimely and is hereby dismissed.

DATED: November 15, 1988

Thomas P. Michael, Arbitrator