IN THE MATTER OF ARBITRATION

BETWEEN

OHIO OFFICE OF COLLECTIVE BARGAINING

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL-CIO

ARBITRATION AWARD

GRIEVANCE: Arbitrability - 24 grievances
HEARING DATE: December 9, 1988
ARBITRATOR: John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on December 9, 1988 at the Office of Collective Bargaining, 65 East State St., Columbus, Ohio. Appearing for the Union were: Daniel S. Smith, Esq. and Mr. Bruce Wyngaard. Appearing for the Employer were: Mr. Tim Wagner and Mr. Rodney Sampson.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 12/9/88. The discussion and award are based solely on the record described above.

II. ISSUE

The parties did not mutually agree on a submission. The Employer asked:

> Are the twenty-four grievances at issue arbitrable under Article 25.0 of the Contract between the parties?

The Union put the question as follows:

> Was the demand for arbitration of the grievance untimely?
>
> If untimely, was the filing excusable due to the circumstances surrounding the matter and practice of the parties?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1, #2 (excepting check marks dealing with nine grievants), #3, and #4.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. UNION

1. TESTIMONY AND EVIDENCE

Mr. Dan Smith testified that just prior to 11/27/87, the secretary for OCSEA had a baby and went on leave and he hired a temporary to handle the filings. Smith went on to say because of the volume of step 4 appeals, he assigned that task to the temporary and she sent out one appeal and assumed that it covered all twenty-four (fifteen) grievants and, therefore, she was directed by him to submit Joint Exhibit #4 to Mr. Brundige.

Smith went on to say that an OCSEA employee set up only one file for the twenty-four (fifteen) grievances and another employee discovered this on 12/1/87. At that time, Smith said he talked to Russell Murray and on December 31st, Murray notified OCB.

Smith went on to say that OCSEA had received a little less than 3000 grievances over one and one-half years and for a number of reasons, many of these were not meritorious. Smith went on to say that there were no step 3 meetings and both sides were at fault in the way in which grievances were handled. Smith noted that of all these grievances, only a handful were successfully resolved.

Smith went on to say that the grievance procedures were not working well and the Union could not address the merits of a case within thirty days, so therefore, it appealed everything to arbitration. He noted that OCB indicated it would appreciate a step 3 meeting, but if the parties did not meet, the OCB would

deny all grievances. As a result of these problems, the Union set up a grievance committee in June of 1987 and this committee met once a month and they were able to deal with approximately one hundred cases a month, but they were receiving almost two hundred cases a month. Thus, the parties set up grievance step four and one-half and in this procedure, a State and a Union representative went to various locals in order to 1) educate grievants, 2) resolve grievances, and 3) point out which grievances had merit.

Smith said that the pressure of arbitration can lead to the resolution of grievances in many cases, but the notice to arbitrate was to satisfy time lines and because of the plethora of grievances, the Union and Management had no opportunity to meet in order to resolve problems. Smith also stated that the fifteen grievants (see Joint Exhibit #2) involved in this case is the only situation where the unit failed to respond to a step four time line.

Mr. Bruce Wyngaard, Director of Arbitration, testified that he had previously been employed by AFSCME, Local 1000 in New York and came on board the Ohio CSEA on 2/1/88 as Director of Arbitration.

Wyngaard testified that Smith's testimony was accurate and the facts of this case would not open a flood gate of grievances. Wyngaard said he notified the State of the cases that it wanted to take to arbitration.

2. ARGUMENT

The Union argues that the appropriate Contract articles are Sections 25.02, 25.03, and 25.10. The Union asserts that on 12/1/87, a temporary employee inadvertently sent only one of twenty-four grievances to the Office of Collective Bargaining. The Union goes on to note that the error was discovered by another employee on 12/31/87 and the Office of Collective Bargaining was notified on January 5th, 1988.

The Union points out that by December of 1987, after only a year and one-half of the Contract, there were about 3000 grievances appealed to arbitration and the Union notes the problems as a result of that backlog.

The Union asserts that the demand for arbitration was timely and the defect in the demand should not make it untimely because it was an excusable mistake.

The Union reasserts that the appeal to arbitration was, in a sense, merely paper pushing and grievance resolution for the most part was taking place in alternative forums.

Moreover, the Union argues that the late filing in this case was not substantial and the Employer suffered no harm and the Union put the Employer on notice with respect to the clerical error.

For all these reasons, the Union asks that the grievance be declared arbitrable.

B. EMPLOYER

TESTIMONY, EVIDENCE, AND ARGUMENT

Mr. Tim Wagner acknowledged that Mr. Smith's scenario about the bogged down process was true and the parties were trying to speed up the grievance procedures. But, noted the Employer, there is a protection in the Collective Bargaining Agreement and if there is no answer from OCB, the Union's appeal must be allowed.

The Employer notes that step 4-1/2 was an additional effort to resolve grievances and it worked reasonably well, but the step did not extend time limits and Section 25.10 requires mutuality with regard to time extensions and that did not occur in this case.

The Employer notes that the grievance procedures are cumbersome, but it does not absolve the Union from Contract requirements. The Employer went on to say that they generally sent letters with respect to specific individuals and there is no way that appeals were automatic.

Arbitrability, notes the Employer, is an issue and timeliness is a question and the steps of the procedure must be followed with respect to timeliness.

The Employer notes that the December 1st letter shows four grievances and the other fifteen, twenty, or twenty-four in the stack were not appealed. The fact that there was internal Union problems is not the basis for overriding Contract language. It cites precedent as submitted at the Hearing. The internal

problems of the Union do not justify overruling Contract language, argues the Employer.

Management continued its argument by noting that it never waived time lines and there is harm to the Employer if the Arbitrator rules in favor of the Union since there is still a backlog of 2000 cases. Under these circumstances, Management would never know when a grievance might arise.

The Employer asserts that to support the Union would prove to be a bad message for both parties. Moreover, late cases are very hard to handle, notes the Employer, and in these fifteen cases, there may be back pay and/or discharges. Therefore, there could be significant financial consequences of supporting the Union's argument on arbitrability.

Therefore, the Employer asks that the grievance be denied.

V. DISCUSSION AND AWARD

The parties did not arrive at a mutual agreement on the issues, but the fundamental question is whether the issue is arbitrable. Article 25.02 (Step 5) indicates that an unsettled grievance may be appealed to arbitration by the Union as long as written notice is given 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. Article 25.10 noted by the Union talks about mutual agreement, but in this case it is clear that there was no mutuality.

The testimony and evidence indicates that on 1/5/88, the Union notified the Office of Collective Bargaining of an error with respect to the fifteen (15) grievants which had not been appealed to step 5 on 12/1/87 (see Joint Exhibit #3).

Article 25.05, entitled 'Time Limits', states in part in the first paragraph that:

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

As noted in the Arbitrator's prior award, the argument of the Union that internal personnel changes created a problem with respect to sending forth a step five response to the Employer justifies arbitrability is, as noted earlier, the same as saying that clear contract language is outweighed by a clerical problem. The language of the Contract must be given appropriate weight in situations like this and to find for the Union on the grounds of a clerical error would be an injustice to both parties

in their negotiations which resulted in the Contract language noted in Article 25.05.

The Employer noted that it had been consistent with respect to the question of timeliness in arbitration cases as noted in the Arbitrator's earlier award. Moreover, other awards submitted by the Employer support the position that time lines must be observed.

This Arbitrator in the prior case noted that the failure of appealing a grievance to the next step within time limits forced the abandonment of a grievance. Moreover, in that case, this Arbitrator relied on decisions with respect to timeliness by such noted arbitrators such as Arthur Stark, Russell Smith, Harry Dworkin, John F. Sembower, Vernon Stouffer, and Thomas J. McDermott. These arbitrators in the cases noted on page 9 of the Pearsall arbitration award held that adherence to contractual time lines is critical and for this Arbitrator to move the grievance forward requires circumstances and considerations which overwhelm contract language. In this case, the failure of the temporary employee to carry out the task in an appropriate manner is simply not the basis to override Contract language.

For these reasons, the Arbitrator rules in favor of the Employer and denies the grievance.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
December 30, 1988