

STATE OF OHIO PERMANENT JURY

1989 FEB -8 PM 1:42

BOARD OF REVIEW
OHIO BUREAU OF EMPLOYMENT
SERVICES

In the Matter of an Arbitration:

--between--

OCSEA, LOCAL 11, AFSCME,
AFL-CIO

--and--

UNEMPLOYMENT COMPENSATION
BOARD OF REVIEW

Grievance of Mary Lou Patterson

ARBITRATOR'S DECISION AND AWARD

J.O. Schaffner
For the Board

John Porter, Esq.
For the Union

February 3, 1989

Calvin William Sharpe
Arbitrator

On February 3, 1988, Mary Lou Patterson filed a grievance against the "Ohio Bureau of Employment Services (OBES) (U.C. Board of Review)" (BOARD) in Akron, Ohio protesting her layoff to be effective on February 6, 1988. Neither the OBES nor the Board responded to Ms. Patterson's grievance. Being dissatisfied with the relief granted at earlier stages of the proceedings the OCSEA/AFSCME Local 11, (UNION) has now brought the matter to arbitration. A hearing was held on January 3, 1989, in Akron, Ohio

I

STATEMENT OF THE CASE

A. ISSUE

1. Is the grievance procedurally arbitrable?

B. RELEVANT PROVISIONS OF THE 1986-1989 AGREEMENT

ARTICLE 25 - GRIEVANCE PROCEDURE

Section 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.

Section 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 (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.

C. BACKGROUND FACTS

Ms. Patterson has been an employee of the State of Ohio for approximately 10 years. From 1978-1979 she worked at the

Department of Transportation and from 1980-1988 at the Unemployment Compensation Board of Review. During her tenure with the Board she was a Technical Typist reporting to Referee, Boris Rokowsky. In her capacity as Technical Typist Ms. Patterson typed referee decisions and forwarded them to the Columbus office of the Board. She also answered phones and acted as a receptionist in the Board's Akron Office. Most of the Board's employees worked in the Columbus Office; the Grievant was the only Board employee working in the Akron Office. There she worked next to employees of OBES.

In a letter dated January 21, 1988, John E. Jones, Chairman of the Board informed Miss Patterson of her layoff from the position of beginning Technical Typist "due to the abolishment of [that position] by the Board of Review". The letter further indicated that the abolishment was the result of the Board's reorganization "to insure its efficient and economical operation". The effective date of the layoff was February 6, 1988. Along with Miss Patterson's grievance of February 3, 1988, Region 3 Chief Steward, Richard Svoboda, filed an Inter-Office Communication with D. Keith Nichols, Director of Labor and Human Resources, on February 3, 1988. That communication contained the following request:

"As you can see by the nature of this grievance, it is very sensitive to a timely hearing at a level that a decision can be made. Therefore, in accordance with Article 25.07, we are asking that this be heard at level 3."

Before filing her grievance Miss Patterson notified Mr. Jones in a letter dated January 26, 1988 that she wished to

exercise her "bumping privileges within the Akron office of the Bureau of Employment Services in accordance with the contract between the State of Ohio and the OCSEA". In response to this letter Board Secretary, Jeffery O. Schaffner, wrote the following to Miss Patterson in a letter dated January 29, 1988:

I must inform you that it is impossible for you to exercise your bumping privileges within the Akron office of the Ohio Bureau of Employment Services. No unemployment compensation board of review clerical positions exist in that facility for you to occupy as a result of your bumping rights.

In addition, Section 18.05 of the OCSEA/AFSCME Contract for Unit 9 prohibits inter-agency bumping. As the U. C. Board of Review and O.B.E.S. are separate agencies, this section prohibits you from displacing bureau employees.

The terms of the Board's notice to you dated January 21, 1988 are still in effect. If you choose to exercise your rights pursuant to the contract or said notice, please contact me.

Following these exchanges and the grievance filing, Mr. Nichols informed Mr. Svoboda on or about February 8, 1988, that he had received the grievance. He added that the grievance should be handled by the Board at the third step and that Mr. Schaffner would probably hear it. Mr. Nichols informed Mr. Svoboda in that conversation that Gerald Burlingame, OCSEA upper and lower staff representative, and Mr. Schaffner would get together to decide the time and place for a meeting. Mr. Nichols also informed Mr. Svoboda that he had forwarded the grievance to Mr. Schaffner.

In a letter dated February 10, 1988, Mr. Nichols informed Mr. Burlingame:

Because the Board of Review is a separate appointing authority and has a separate grievance system, I cannot accept the grievance concerning Mary Lou Patterson.

The letter prompted Mr. Burlingame to call Mr. Nichols, who repeated what he had said in the letter and informed Mr. Burlingame that he had sent a copy of the grievance to Mr. Schaffner and that Mr. Schaffner would be the person with whom the union would deal. He said that Mr. Schaffner would handle

the third step in the future. Mr. Burlingame then called Mr. Schaffner, informed him that he had spoken to Mr. Nichols who said that Mr. Schaffner would handle the grievance. Mr. Burlingame also related to Mr. Schaffner his conversation with Mr. Nichols about the forwarding of the grievance to Mr. Schaffner. Mr. Schaffner acknowledged that he had received it and, in response to a question from Mr. Burlingame, indicated that he would not need the original. In that conversation, Mr. Schaffner and Mr. Burlingame agreed that the third step grievance meeting would take place in the Akron office of the Board on February 29, 1988, at 11:00 A.M.

Before the February 29, 1988, meeting Mr. Schaffner wrote Mr. Burlingame a letter dated February 16, 1988. The letter stated the following:

This letter is in regard to the grievance Ms. Patterson filed with the Ohio Bureau of Employment Services concerning her layoff. Said grievance was filed with the Director of Labor and Human Resources of O.B.E.S.

It is the opinion of the Unemployment Compensation Board of Review that the grievance has been filed improperly. This is due to the fact that the grievance was not filed with the proper agency.

In that the grievance has been improperly filed, the Board will not schedule a hearing to discuss the complaint. When and if a grievance is filed with the Board concerning a matter of employees' rights and privileges the Board will act promptly to fulfill its obligations as listed in the contract.

If you have any questions, please contact me.

Mr. Burlingame testified that the February 16, 1988, letter came after his conversation with Mr. Schaffner and was confusing, but that he thought the matter would be resolved at the third step hearing.

The meeting on February 29, 1988, was a short one. Present were Ms. Patterson, Mr. Burlingame, Mr. Svoboda and Mr. Schaffner. Mr. Burlingame recalls Mr. Schaffner's starting the meeting by saying, "I don't know whether this a grievance." He also recalls that he became angry at that point and said, "then give us your answer and we'll do what we have to do." Moments later the meeting ended. Mr. Burlingame testified that following this meeting the Union decided to wait for Mr. Shaffner's answer and appeal it to the next step, if it disagreed with the answer.

After the Union received no answer, Mr. Svoboda filed a Step 4 grievance with the Office of Collective Bargaining on March 18, 1988. The Office of Collective Bargaining did not issue a Step 4 response. Bruce A. Wyngaard, Director of Arbitration for OCSEA/AFSCME Local 11, in an April 28, 1988, letter to Eugene Brundige, Deputy Director of the Office of Collective Bargaining, requested that the "grievance be taken to arbitration pursuant to Section 25.02 of the contract with the State of Ohio."

II.

CONTENTIONS OF THE PARTIES

A. THE BOARD'S POSITION

The Board argues that the grievance was not properly filed for two unrelated reasons. First, it argues that the Board and the OBES are separate agencies. By filing the grievance with Mr. Nichols of the OBES, the Board continues, the Union failed to comply with Section 25.02 Step 3 of the Agreement. Second, the Board argues that the Union failed to prove that it complied with

Section 25.02, Step 4 of the agreement, since the date stamp on the back of the Step Four Grievance indicates that it was not received until September 27, 1988, well outside the grievance timetable.

B. THE UNION'S POSITION

The Union makes two arguments in response to the Board's contentions. First, the Union argues that the key question is whether the Board received notice of Miss Patterson's grievance. In support of this argument, it points out the interrelatedness of the OBES and the Board and claims that the latter is a division of the former. Based on evidence that arguably creates the impression that Miss Patterson was working for OBES and shows the Union's history of filing grievances with OBES, the Union argues that the grievance was properly filed in this case. Second, the Union claims that the Board's objection to the Step Four grievance was raised for the first time at the hearing and, therefore, may not be properly considered. Furthermore, it argues that the evidence shows that the Union's Step 4 grievance was timely filed.

III

DISCUSSION AND OPINION

In part the dispute in this grievance centers upon the meaning of Agency Head in Article 25, Section 25.02, Step 3. Through Mr. Nichols, Ms. Patterson filed her grievance within the time limitations of Article 25 with Mr. Nichols, Director of Labor Relations and Human Resources for the OBES. On the Grievance Form the Grievant notes as the Agency "OBES (U.C.

Board of Review)". The Board contends that the Board, not the OBES, was the appropriate agency head for grievance filing under Step 3. Thus, it urges that the Arbitrator has no jurisdiction over this grievance, since it was improperly filed.

To counter this argument the Union cites a number of documents, including Ms. Patterson's employee identification card, check stub, record of appointment, position description, the OBES telephone directory, record of lay-off, records of personnel action, a State Personnel Board of Review Order, an Ohio Department of Administrative Services notice of approval of disability claim, an approved application for leave, and nine performance evaluations, all indicating that the Board is a division of OBES. In addition, Ms. Patterson's testimony indicates that she worked in the same office as OBES employees and helped out, often voluntarily with work done by OBES employees.

Given the factual posture of this case, it is not necessary for the Arbitrator to decide the meaning of "Agency Head" in Article 25, Section 25.02 in order to resolve the dispute regarding the arbitrability of this grievance. Here the Grievant and Union reasonably believed that they had complied with Section 25.02 and the Board actually received the grievance within the time limits of Section 25.02.

The parties have stipulated that the grievance was filed on February 3, 1988, by Mr. Svoboda and received on February 8, 1988 by Mr. Nichols. Mr. Svoboda gave undisputed testimony that he had filed earlier grievances with Mr. Nichols. However, Mr. Nichols informed Mr. Burlingame in a letter dated February 10,

1988, that the Board "is a separate appointing authority and has a separate grievance system, [and that he could] not accept the grievance concerning Mary ' Lou Patterson". Even so, simultaneously he forwarded the grievance to Board Secretary Mr. Schaffner, who acknowledged to Mr. Burlingame that he received it and declined Mr. Burlingame's offer to send the original. In that same conversation, Mr. Burlingame and Mr. Schaffner set up the Step 3 meeting for February 29, 1988, in the Akron office of OBES. Although truncated, the meeting was held as scheduled on February 29.

The Board argues that letters directed or copied to Russ Murray, Executive Director of AFSCME-OCSEA, and correspondence between Staff Representative Royce Martin and representatives of the Board including Mr. Schaffner put the Union on notice of the Board's independent status. In support of its argument the Board also cites Ohio Revised Code (ORC) Section 4141.06 creating the Board.

In the Arbitrator's view there are two reasons why the letters give insufficient notice of the Board's independence for grievance filing. First, unlike Mr. Nichols' letter of February 10, 1988, none states that the Board has a separate grievance system. Second, the letters dated between April 10, 1986, and December 9, 1987, were written when the Board's practice was to process grievances through Mr. Nichols of the OBES.

Nor do the ORC sections creating the Board offer much support for the Board's position. Those sections are part of a more comprehensive article, ORC 4141 creating unemployment

compensation rights and the administrative apparatus to protect those rights. While not specifically designated as a division, the Board is an integral part of that structure. Furthermore, the paragraph in 4141.06 authorizing the Board to employ clerical employees, specifically noted by the Board during the hearing, also requires the Board to use offices, equipment, and supplies provided by OBES. Thus, this provision reinforces the close relationship that has contributed to the administrative confusion surrounding the filing of this grievance.

The Board's second argument is that the Arbitrator lacks jurisdiction, since the grievance was not timely processed at Step 4, which permits the Union to appeal a Step 3 answer to the Office of Collective Bargaining within 10 days of the receipt or due date of the answer. Mr. Svoboda wrote an Inter-Office Communication to Dick Baubenmire, Contract Compliance Chief, on March 18, 1988, well within the limitations period. However, the date stamp on the back of the document indicates it was received by the Office of Collective Bargaining on September 27, 1988. The Board argues that the Union has failed to meet its burden of establishing a timely grievance, since it cannot produce a postmark verifying the March 18, 1988, date and since the date stamp indicates the Step 4 request was untimely filed. The Union counters with indirect evidence that the request was timely filed. The Union also contends that the matter of timeliness cannot appropriately be raised for the first time at arbitration.

Arbitrators are creatures of the contract and may not expand their jurisdiction to consider matters outside their authority.

Contractual limitations periods are jurisdictional, and arbitrators typically hold in the absence of waivers that such matters may be raised for the first time at the hearing. See e.g. Joy Manufacturing Co., 44 LA 304, 306-307 (Sembower 1965). An added factor in this case is that the parties did not significantly discuss the grievance before arbitration. Thus, the matter of timeliness is properly before the Arbitrator.

The Arbitrator finds that the Step 4 request was timely filed. The Union produced an Inter-Office Communication containing the request dated March 18, 1988. In addition, the Union produced a cover memorandum from Staff Representative Gerald Burlingame to Bruce Wyngaard, Union Director of Arbitration, with a date stamp of April 13, 1988, which contained the grievance documents. The Union explained that the staff representative does not receive the grievance materials until after the Steward files the Step 4 request with the Office of Collective Bargaining. The parties' Joint Exhibit 2, page 4 also indicates that Bruce A. Wyngaard, the Union's Director of Arbitration, requested arbitration of the grievance on April 28, 1988. Such a request is not appropriate under Section 25.02, Step 5 until 30 days after a Step 4 answer is received or due.

As the Board points out, the Steward's recollection of how he mailed the Step 4 request is not clearly stated in the record. However, without evidence showing that the Board did not receive the Step 4 request in a timely manner, the foregoing evidence is persuasive of its timely filing. Citing Mr. Wyngaard's letter of September 22, 1988, to Tim Wagner of the Office of Collective

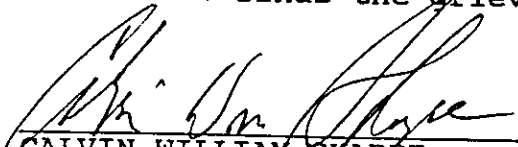
Bargaining the Union argues that the date stamp of September 27, 1988, reflects the Office of Collective Bargaining's receipt of duplicates that it requested and received from the Union. While the Wyngaard letter itself does not show that the documents were duplicates rather than originals, it is noted that the Step 3 Grievance Form also contains a date stamp of September 27, 1988, and there is no dispute, indeed the parties stipulated, that it was received on February 8, 1988. This evidence tends to corroborate the Union's argument that the grievance packet received on September 27, 1988, contained duplicates of earlier documents that were timely filed by the Union. Similarly, the Board has not complained that the Step 5 notice, which is appropriate only after the Step 4 procedure has been exhausted, was untimely filed. For these reasons, the Arbitrator finds that the Union timely filed the Step 4 request.¹

¹ The Board cites Arbitrator Michel's award in OCB Case No. G-87-2458 in support of its untimeliness argument. There, Arbitrator Michel held that Section 25.05 of the instant Agreement did not absolve the Union of the duty to make a timely written notice of appeal to arbitration to the Office of Collective Bargaining. In dismissing the grievance as non-arbitrable the Arbitrator noted that the Union presented no evidence of a written or oral notice to either the Employer or the Office of Collective Bargaining, nor did it present any evidence of a past practice of ignoring non-compliance with the written notice requirement. In this case, on the contrary, the Union has presented persuasive evidence that it filed a timely Step 4 appeal.

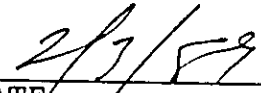
IV

AWARD

For reasons discussed in Part III of the decision, the Arbitrator finds the grievance to be arbitrable.



CALVIN WILLIAM SHARPE



DATE