

**VOLUNTARY LABOR ARBITRATION**

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In the Matter of the Arbitration  
-between-

#296

**THE STATE OF OHIO, DEPARTMENT  
OF MENTAL RETARDATION AND  
DEVELOPMENTAL DISABILITIES**

**ARBITRATOR'S OPINION**

-and-

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

**FOR THE STATE:**

**DAVID S. NORRIS  
Labor Relations Specialist  
Ohio Department of  
Administrative Services  
Office of Collective Bargaining  
65 E. State Street, 16th Floor  
Columbus, Ohio 43215**

**FOR THE UNION:**

**STEVE LIEBER  
Staff Representative  
Ohio Civil Service Employees  
Association  
Northern Ohio Regional Office  
77 N. Miller, Suite 204  
Fairlawn, Ohio 44313**

**DATES OF THE HEARING:**

**May 13, 1988, October 12, 1988  
and May 11, 1989**

**PLACE OF THE HEARING:**

**Ohio Dept of Administrative  
Services, Office of Collective  
Bargaining Columbus, Ohio--  
Broadview Developmental  
Center, Broadview Heights, Ohio**

**ARBITRATOR:**

**HYMAN COHEN, Esq.,  
Impartial Arbitrator  
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Telephone: 216-442-9295**

\* \* \* \* \*

The hearing was held on May 13 and October 12, 1988; and May 11, 1989 at the The Ohio Office of Collective Bargaining, Columbus, Ohio; and Broadview Development Center, Broadview Heights, Ohio before **HYMAN COHEN**, Esq., the Impartial Arbitrator selected by the parties.

The hearing scheduled for May 13, 1988 was postponed at approximately 9:00 a.m., when the hearing was scheduled to begin. The hearing on October 12, 1988 began at 10:00 a.m. and concluded at 2:55 p.m. The hearing on May 11, 1989 began at 10:30 a.m. and concluded at 11:30 a.m.

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**EUGENE WREGZYNSKI** filed a grievance with the **OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES**, the "State", protesting his removal as a Carpenter I effective June 1, 1987. At the Step 3 Grievance hearing the State denied the grievance on the merits and also asserted that the grievance was not timely filed under the applicable provisions of the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO**, the "Union".

Based upon the agreement of the parties, this arbitration decision solely addresses the procedural or timeliness issue.

#### **FACTUAL DISCUSSION**

The Board's case primarily relied upon the testimony of Marilyn Reiner, Labor Relations Coordinator. Among the Development Centers that are under her responsibility is the Broadview Development Center located at Broadview Heights, Ohio where the Grievant had been employed before he was terminated.

Reiner set forth the procedure used in the State's Columbus office for the receipt and recording of Step 3 grievances by indicating that after the secretary opens the mail, she stamps the grievance with the time and date. She then logs in the grievance after which she prepares a file. The Secretary identifies the grievance by the name of the Grievant, number and development center, after which she gives the file to the appropriate Labor Relations Specialist.

It should be noted that on July 3, 1986, Robert E. Brown, Director of the Ohio Department of Mental Retardation and Developmental Disabilities sent a letter to Russell Murray, Executive Director of the Union in which he advised Murray that all Step 3 grievances are to be forwarded to the attention of the Department's Labor Relations Section located in Columbus.

Turning to the instant grievance, Reiner referred to the stamp located in the middle of the grievance form indicating that it was received on June 22, 1987. She said that the stamp was the "official stamp" of the Department's Office of Labor Relations. Another stamp which in my judgment indicates the date of June 15, 1987 is located at the top right side of the grievance form. Reiner was unable to identify this stamp. The two (2) stamps will be considered later in this decision.

The Grievant indicated that he had problems in reading, English. His wife is his interpreter. After being fired, the Grievant said he went to the Union. If he has questions about the Agreement or filing documents, he said that he would talk to Rhonda Townsend, Residential Care Supervisor at the Broadview Center, who was the Steward at the time of the Grievant's termination.

When the Grievant received his order of termination from the State, he also called his wife. Mrs. Wegrzynski indicated that he did not understand the order of removal. When he came home, Mrs. Wregzynski called "Shirley" in Personnel who told her to "prepare papers through the Union Steward". Mrs. Wregzynski then called Townsend who told her to collect the necessary documents--she was to get "everything ready quickly". Approximately one (1) week later Mrs. Wregzynski went to Broadview Center and gave the "papers" to Townsend. According to Mrs. Wregzynski, Townsend told her that "everything is completed and there was nothing [for her] to do". Townsend also told her that she "will be notified one (1) way or another in ten (10) days". After completing the filling out of the papers, she said that she waited for the hearing to be held. Mrs. Wregzynski acknowledged that Townsend filled out the grievance including the signing of the Grievant's name.

Townsend testified that she handled the grievance papers when the Grievant was terminated. She acknowledged that she filled out the grievance form and signed the grievance for the Grievant. She signed the Grievant's name because she was fearful that the grievance "would lapse" before it was sent to the third step of the grievance procedure. After filling out the grievance, Townsend said that she sent the grievance by certified mail to the Columbus office of the State. Based on a log, that is maintained at the Broadview Center, which itemizes information on the certified mail sent from the Center to the State's office in Columbus, Townsend said that "it is possible that the grievance was sent on June 8 or 9, 1987".

After the grievance was filed the Step 3 response to the grievance signed by both Reiner and John A. Beattie, Chief of the Department's Office of Labor Relations, in relevant part, stated:

\*\* \* Mr. Wegrzynski received notice of his removal on May 29, 1987. The grievance was not received in the Department of Mental Retardation and Developmental Disabilities Office of Labor Relations until June 22, 1987. Pursuant to Article 25, Section 25.07, the last sentence states: '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. One stamped date showing 'RECEIVED JUN either 15 or 16 1987 OFFICE OF LABOR RELATIONS' (the stamped date is blurred) which is still two (2) or three (3) days after the date the grievance should have been filed. It is not known where the grievance was stamped in on June 15 or 16, 1987, or by whom. The stamped date showing RECEIVED 87 JUN 22 PM 1 41 MR-DD LABOR RELATIONS is the stamp of the Department's Office of Labor Relations which shows that the grievance was received at Step Three twenty-four (24) days after the employee was notified of his Removal. No proof of earlier filing has been produced. Therefore, the grievance is clearly untimely. The grievance is denied on this basis alone; \* \* \*

### DISCUSSION

The issue to be resolved by this arbitration is whether the grievance was timely filed under the Grievance Procedure contained in Article 25 of the Agreement?

Townsend's testimony resolved any doubt as to the Step at which the grievance was filed. She indicated that she filed the grievance at Step Three of the Grievance Procedure.

Consistent with the Brown's July 3, 1986 letter to Murray, Townsend testified that she initiated the grievance at Step Three by forwarding it to the State's office located in Columbus by certified mail.

In light of Townsend's testimony, Article 25.07 is applicable to the instant dispute. It provides as follows:

"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.\* \* \*

Thus, Article 25.07 provides that a grievance involving a suspension or discharge may initiate the grievance at "Step Three \* \* within (14) days of such action". The Grievant was notified of his termination on May 29, 1987. Since the grievance was not received at Step 3 until June 22, 1987, the Board contends that the grievance is untimely inasmuch as it was not



initiated "with fourteen (14) days" of the Grievant's termination as required by Article 25.07.

At this point in the discussion, it is important to review and evaluate several essential details of the Union's case. As the Grievant indicated, he contacted the Union after he was notified of the State's order of termination. Thus as Townsend indicated on "that day", she wanted him to sign the grievance so that she could initiate the grievance at Step Three.

Turning to the testimony of Mrs. Wregzynski it is not entirely consistent with Townsend's testimony. Based upon Mrs. Wregzynski's testimony, she delivered the "papers" to Townsend approximately one (1) week after the Grievant was terminated. However, Townsend said that after a "few days passed" without the Grievant getting back to her to sign the grievance, she filled out the grievance and signed the Grievant's name because of her concern that the grievance would lapse before it was initiated at the third step. Townsend said that she did not know if Mrs. Wregzynski "actually talked" to her but she added, that "she [Mrs. Wregzynski] called the Union often".

Townsend testified that "it is possible that the grievance was sent on June 8 or 9, 1987". The Union also submitted two (2) Post Office green cards which correspond with the June 8

and 9 entries on the certified mail log maintained at the Broadview Center. The cards indicate that the certified mail on those dates were delivered to the State's Columbus office on June 10 and 11, 1987. Townsend said that "it is possible" that either one of the "green cards" could be the certified mail containing the instant grievance that she sent to Columbus.

Townsend's testimony is uncertain, and perhaps even flawed, on the "possibility" that the entries on the certified mail log for June 8 and 9, correspond to the green cards showing delivery to the State's Columbus office. I am inclined to believe Townsend's testimony that she was concerned about the "time frame" for filing the grievance. However, had the Union been required to carry the burden of proving that the instant grievance was timely filed, it would not be successful.

Since the State has raised the issue of timeliness, it "has raised an affirmative defense; therefore [it] has the burden of proof, whether in the sense of going forward with the evidence or establishing its case by a preponderance of the evidence". *Miami Industries* 50 LA 978, 984 (Howlett, 1968).

Despite the flaws in the Union's case, there are serious deficiencies in the State's evidence on the Union's failure to file

the instant grievance in a timely manner under the Agreement.

In this connection, Article 25.01, in relevant part, provides:

"\* \* The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period".

Thus, it is when the envelope is postmarked which is crucial in determining the timeliness of the filing of the instant grievance. It is of great weight that Reiner was uncertain as to whether the grievance was sent by mail or by interoffice mail. She added that the grievance "could have been sent" by mail. Reiner added that since she did not have an envelope she allows for "two (2) or three (3) days mail". Reiner said that if the grievance is sent by mail, the Columbus office saves the envelope containing the grievance. Balanced against Reiner's uncertainty--indeed lack of knowledge as to whether the grievance was sent by mail or by interoffice mail, I am inclined to believe Townsend's clear and unequivocal testimony that she sent the grievance to Columbus by certified mail.

Since Reiner is uncertain as to whether the grievance was sent by mail or by interoffice mail, the State's case relies solely on the stamp located in the middle of the grievance form which, in relevant part, sets forth the date of June 22, 1987. However, pursuant to Article 25.01 D, it is not the date on the stamp which

is crucial to the timeliness of the grievance; rather it is the postmarked date on the envelope containing the grievance which is crucial.

Since the Board's case relies primarily on the stamp which Reiner characterized as the "official stamp", consideration must be given to both stamps on the grievance. The so-called official stamp indicates the word "received" along with the date of June 22, 1987, the time, and "MR-DD Labor Relations". The second or other stamp on the grievance form located at the top right side of the grievance document indicates the word "received", the date of June 15, 1987 and the phrase "Office of Labor Relations".

Reiner could not account for this stamp. She could not identify it; she had never seen it; and she did not know who stamped it or, why the grievance had the imprint from this stamp. I have concluded that the two (2) stamps create uncertainty as to when the grievance was received by the State's Columbus office. If the grievance was received from the Broadview Center with the June 15 stamp on the document, it is reasonable to assume that it would have been noted on the form, with some explanation. Moreover, it can be said with some certainty that the Union is not responsible for the stamp. In my judgment, the State carries the burden of explaining the

stamp on the grievance. Clearly, it failed to do so. It is reasonable to believe that when the stamp was placed on the instant grievance, the grievance was in the possession of the State's Labor Relations office. Furthermore, the same imprint from the "unofficial" stamp appeared on the top right side of another grievance filed with the State, namely, the grievance of Mary L. Bittinger, which also had the so-called "official stamp" located in the middle of the grievance. Moreover, Reiner did not shed any light on the "unofficial" stamp in question. Nor did she know whether the instant grievance was sent by inter-office mail or by U. S. Mail.

In light of these considerations I cannot conclude that the instant grievance was received on June 22, 1987 rather than June 15, 1987. As I have already indicated, it is not when the grievance was received by the State's Columbus office which is critical to the timely filing of the grievance. Under Article 25.01 D, it is the postmarked date within the appeal period which is crucial. In connection with the "appeal period", the Grievant indicated that he worked on June 1, 1987. Thus, although he received the State's order of termination on May 29, 1987, he worked on June 1, 1987. It may very well be that the substance rather than the form of termination took place on June 1, 1987, which the Grievant's supervisor said was his last day. In light

of the issue of timeliness raised by the State, I believe it would be highly inappropriate to utilize the date of termination of the Grievant as May 29, 1987 rather than June 1, 1987. If June 1, 1987 is the beginning of the "appeal period" under Article 25.01 D. then June 15, 1987 might very well be the date that the State's Columbus office received the instant grievance; and the postmarked date would surely be within the "appeal period" which began on June 1, 1987.

I find *Miami Industries*, 50 LA 978 (Howlett, 1968) to be of some weight in arriving at the decision in this case. In his decision the Arbitrator indicated "that there is no specific evidence to support the contention" of either the Company or the Union concerning "the timeliness of the submission of the grievance to arbitration". Since the Company raised an affirmative defense, the Arbitrator declared that it "has the burden of proof whether in the sense of going forward with the evidence of establishing its case by a preponderance of the evidence". *Miami Industries* at page 984.

Based on the evidence presented by the State, I cannot conclude that the instant grievance was not timely filed under Articles 25.07 and 25.01 D. Because of the State's failure to sustain its burden concerning the procedural objection it has

raised, the defense is denied and the case is required to be heard on the merits.

Finally, under Article 25.01 B, the parties agreed that "grievances may be processed by the Union \* \*." Consequently, the signing by Townsend of the Grievant's name to the grievance document was not an issue at the hearing.

### CONCLUSION

This case was first scheduled to be heard on May 13, 1988. At the time when the hearing was scheduled to begin, it was postponed because Townsend, who was subpoenaed by the Union was unable to be present at the hearing to provide testimony. The hearing was postponed until October 12, 1988. At the conclusion of the October 12 hearing it was agreed by the parties that if the Arbitrator was able to decide the case without the testimony of Townsend [who was not present at the hearing] he would do so. If, in fairness to the parties, the Arbitrator was unable to do so, a hearing would be held at Broadview Development Center for the purpose of obtaining the testimony of Townsend. The Arbitrator decided that in light of the issue of timeliness raised by the State and Townsend's involvement in the handling of the grievance, it would be consistent with standards of justice and fairness, and consistent with the

Agreement if the testimony of Townsend would be obtained. A hearing was held on May 11, 1989 at the Broadview Development Center to receive the testimony of Townsend.

Townsend's testimony was primarily essential to the Union's case. Thus, it was the Union's obligation to see to it that Townsend was present at the hearing to provide testimony. Accordingly, at the October 12, 1988 hearing the Arbitrator indicated that if Townsend's testimony was needed, and subsequently received, and the Arbitrator found the grievance timely under the applicable terms of the Agreement, the period between May 13, 1988 and the date of the rendering of this decision would not be included in a back pay award, should the grievance on the merits be sustained.

#### **AWARD**


In light of the aforementioned considerations the grievance was filed in accordance with Articles 25.07 and 25.01 of the Agreement.

The grievance is sustained.



Should the grievance be sustained on the merits, the period between May 13, 1988 and the date of this decision and award is not to be included, in the event back pay is awarded.

Dated: July 10, 1989  
Cuyahoga County  
Cleveland, Ohio

  
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