

#424

In the Matter of Arbitration

Between

Fraternal Order of Police-
Ohio Labor Council

and

The State of Ohio, Department
of Mental Retardation and
Developmental Disabilities

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Case No.:

MRDD FO 3-87-393

Before: Harry Graham

Appearances: For Fraternal Order of Police:

Ellen Davies
Fraternal Order of Police-Ohio Labor Council
3360 East Livingston Ave.
Columbus, OH. 43227

For Department of Mental Retardation and
Developmental Disabilities:

Edward L. Ostrowski
Labor Relations Coordinator
Department of Mental Retardation and
Developmental Disabilities
30 East Broad St., Suite 1020
Columbus, OH. 43266-0415

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on April 17, 1990 before Harry Graham. At that hearing both parties were provided complete opportunity to present testimony and evidence. The record was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Is the Grievance of Herbert Gouge, Case No. MRDD FO 3-87-393 arbitrable? If so, what shall the remedy be?

Background: There is no dispute concerning the events that lead to this proceeding. The Grievant, Herbert Gouge, is a Police Officer employed at the facility operated by the Department in Mount Vernon, OH. On July 13, 1987 he was notified that he was to serve a twenty day suspension. He promptly filed a grievance to protest imposition of that discipline. According to the Agreement of the parties at Section 20.08 Mr. Gouge's Grievance was filed at Step 3 of the Grievance procedure. They agree that filing at that Step was proper in this instance. The Grievance was received by the Department's representative, Michael Fuscardo, on July 20, 1987. Mr. Fuscardo conducted a Step 3 hearing on October 13, 1987. The hearing was reconvened on November 12, 1987. No written response was made by Mr. Fuscardo to the Grievance. There was, however, discussion between the representatives of the parties subsequent to the Step 3 meeting. In the course of those discussions Mr. Fuscardo indicated to Ed Baker, the Union Representative, that he did not intend to respond to the Grievance in writing. At that time Mr. Baker did not protest that Mr. Fuscardo's failure to respond in writing was improper. There the matter rested until February, 1990. In that month Mr. Fuscardo was called by Jack Holycross who had replaced Mr. Baker as staff representative for the bargaining unit of which Mr. Gouge is a member. Mr. Holycross inquired of Mr. Fuscardo about the status of Mr. Gouge's grievance.

Mr. Fuscardo indicated that he regarded the grievance to be dead. He told Mr. Holycross that if the Union had intended to move the grievance beyond Step 3 of the procedure it should have been done in 1987. It was his view that the Union was acting in untimely fashion in attempting to resuscitate the grievance some three years after its disposition at Step 3. The Union did not accept that response and appealed to Step 4 of the procedure. The Grievance was denied by the State at Step 4. It was the State's view that the grievance was both untimely and lacking in merit on its facts.

The Union sought arbitration of the denial of Mr. Gouge's grievance. The parties agreed that there would initially occur a proceeding concerning solely the arbitrability of the dispute. Should the dispute be determined to be arbitrable a hearing will occur on the merits of this case.

Position of the Union: In the Union's opinion this is a simple dispute that is governed by the terms of the Agreement at Article 20, Section 20.06, Step 3. The language found there provides that following the meeting held at Step 3 of the grievance procedure that the management representative, Mr. Fuscardo in this case, "shall render his/her decision in writing and return a copy to the grievant and the Fraternal Order of Police, Ohio Labor Council, Inc. within fifteen (15) days after the meeting with the grievant." That did not occur

and the State admits as much. The Agreement is mandatory in nature and indicates that a written response "shall" be made. No written response was ever made either to the Grievant or the Union. Management's representative at the third step took it upon himself to determine the grievance was without merit and dismissed it without acting as provided for in the Agreement. He cannot do this the Union insists. The Agreement is clear on the fashion in which third step grievances are to be responded to and the State did not comply with the explicit terms of the Agreement. Hence, the grievance must be considered to be arbitrable according to the Union.

In fact, the Union was not derelict in its responsibility to process this case it insists. From time to time the Staff Representative spoke with Mr. Fuscardo of the State and made inquiries about the Gouge grievance. He was assured by Mr. Fuscardo that a response would be forthcoming. As he was busy with other matters he relied upon the good word of his management counterpart. He expected a written answer. It never came. No explicit time extension was ever given to the State by the Union. According to testimony from the Union's staff representative, Ed Baker, had Mr. Fuscardo told him that no written response would be made he would have immediately advanced the grievance to the fourth step of the Grievance procedure. He relied upon the good word of Mr. Fuscardo and the Grievant should not be penalized as a

result.

A similar set of circumstances surrounds the action of the Grievant, Mr. Gouge. He personally spoke with Mr. Fuscardo in December, 1988, more than a year after the third step meeting and was told "be patient, we're working on it." The Grievant was patient. The Staff Representative was patient. Their patience was rewarded with rejection of the grievance on a procedural basis. This is improper according to the Union and it insists the Grievance be heard on its merits.

Position of the Employer: According to the State, Mr. Baker did not raise an objection when told by Mr. Fuscardo that a written answer would not be forthcoming to the Gouge grievance. Mr. Baker accepted Mr. Fuscardo's oral denial of the grievance as the Step 3 answer. As a result, it was incumbent upon the Union to advance the Grievance to Step 4 of the procedure within the time period specified in the Agreement. As it failed to do so, the grievance has been resolved with the Step 3 denial according to the State. By failing to advance the grievance the Union accepted the Step 3 answer even though it was given orally. At Section 20.5 the Agreement provides that when a decision has been accepted by the parties it is "final." Baker accepted Fuscardo's action on Mr. Gouge's grievance. Accordingly, it must be considered that the grievance was resolved on the basis of the Step 3

response.

Section 20.07, 5 of the Agreement contains the customary restrictions upon the authority of an arbitrator. The arbitrator shall have no power to "add to" to terms of the Agreement. If this grievance is found to be arbitrable, that is precisely what will have occurred according to the State. The parties resolved the grievance and now the Union seeks to resurrect it. As resurrection would occur in an untimely fashion under the Agreement the State asserts that if a hearing on the merits is permitted to occur it will represent precisely the sort of addition to the Agreement that the parties have prohibited from occurring.

At Section 20.11 the Agreement provides that if there is no mutual extension of the time limits for processing grievances "automatically" be considered submitted to the next step in the Grievance procedure. The Union did not bring the grievance to Step 4 until 1990. As the State reads the Agreement there exists a self-triggering mechanism for advancing the grievance when an answer is not properly forthcoming. If the Union wished to avail itself of that mechanism, the "automatic" advancement of the Grievance to Step 4, it could have done so. As it did not, the Grievance was resolved on the basis of Mr. Fuscardo's Step 3 rejection of it.

Well over two years passed from the answer at Step 3 to

the date the Union attempted to secure additional consideration of Mr. Gouge's grievance in 1990. This is highly inappropriate in the State's opinion and must be rejected it asserts.

Discussion: Representatives of both parties, Mr. Baker for the Union and Mr. Fuscardo on behalf of the Department, are experienced negotiators. Testimony received at the hearing from Mr. Baker indicated he was of the view that the Department and the Union had a good working relationship. It is impossible to believe that Mr. Fuscardo deliberately attempted to dupe his counterpart and the Union. As both he and Mr. Baker indicated, they were extraordinarily busy at the time Mr. Gouge's grievance arrived at Step 3 of the procedure. Mr. Fuscardo made a professional judgement on behalf of the State that Mr. Gouge's grievance lacked merit and communicated it to Mr. Baker in somewhat informal fashion, by word of mouth. Mr. Baker, in the press of business, did not immediately inquire or demand that a written answer be provided. As both parties acknowledge, the initial error in this dispute was made by the State. It was Mr. Fuscardo's failure to provide the written answer required at Step 3 of the Grievance procedure.

In the months that passed after Mr. Fuscardo told the Union of his rejection of the grievance he and Baker spoke three or four times about it. According to Baker, Fuscardo

told him to be patient and that a written response would be forthcoming. Fuscardo denies this version of events.

According to him he told Baker the grievance was without merit and that no response would be made. It is not within his authority to make such a representation to the Union. The clear language in the grievance procedure provides that without doubt a decision "shall" be made in writing and delivered to the grievant and the Union within fifteen (15) days of the conclusion of the third step meeting. As the State did not comply with this explicit provision of the Agreement the initial conclusion must be that as the State violated the provisions of Step 3 of the grievance procedure that the grievance be determined to be arbitrable. That conclusion is overly simplistic at this point in the discussion and overlooks arguments made by the State.

Section 20.11 1 of the Agreement provides that "any step in the grievance procedure may be skipped by mutual consent, written and signed by both parties." (Emphasis added). In this case, there was no such written consent given by the Union to bypass Step 3. If that view of the dispute is adopted, the State is required by the plain terms of the Agreement to consider the grievance as "automatically" advanced to Step 4 and provide an answer to the Union as specified at that step. In Section 20.11 1 the Agreement provides that:

In the absence of such mutual extension the grievance will, at any step where response is not forthcoming within the specified time limits, automatically be considered submitted to the next successive step in the grievance procedure. (Emphasis added).

That language places the burden upon the State to consider the Grievance at Step 4 of the procedure and provide a written reply to the Union. It did not do so. The word "automatically" means precisely what the State asserted that it meant at the hearing. The Union does not have to act. The State does. It would not be sound policy for the Union to continually sit on its hands at Step 3 and not file Step 4 appeals in timely fashion. The Agreement does not however, penalize it for doing so in this situation as the State failed to comply with the provisions of Step 3 of the Grievance procedure with respect to provision of a written answer.

An alternative view of the history of this dispute would indicate that by their action, or more accurately, inaction, the parties gave the sort of "mutual consent" to alter the grievance procedure contemplated in Section 20.11 2 of the Agreement. If that is so, the absence of a written answer by Mr. Fuscardo at Step 3 cannot now be held against the Union. Mr. Fuscardo delayed providing the written answer to the Union. He may well have explicitly told the Union no such answer would be forthcoming. In any event he did not provide a written Step 3 answer and the Union acquiesced in the

delay. When the Union understood that such an answer would not be forthcoming it made a timely Step 4 appeal.

Under any analysis of the handling of this grievance the Union must prevail. The State did not provide the written answer to a Step 3 grievance within the 15 day period mandated by the Agreement. If, as is a plausible view of these events, the parties did not mutually agree to waive the steps of the procedure per Section 20.11.1 the grievance should have automatically been advanced to Step 4. That did not occur. If the alternative view of the dispute is adopted, that there was mutual consent to delay receipt of the Step 3 answer, when the Union withdrew its consent in early 1990 it was necessary that the State continue to process the Grievance which in fact it did.

The Union and Management officials involved in this situation, Messrs. Baker and Holycross on behalf of the Union and Mr. Fuscardo on behalf of the State are experienced in contract administration. There is no reason to believe they are anything other than honorable men whose promise serves to bind them. In this situation it is apparent that a misunderstanding occurred. Strict and explicit adherence by both parties to the provisions of the grievance procedure would serve to minimize those occurrences. It is unfortunate that a hearing on Mr. Gouge's grievance has been delayed for almost three years. In the absence of a definitive agreement

by the Union to drop his case consideration of the procedural errors committed, albeit of their unintentional nature, compels the conclusion that this dispute must be heard on its merits.

Award: The grievance is timely. A hearing on the merits of Herbert Gouge's suspension is to be held.

Signed and dated this 9th day of May, 1990 at South Russell, OH.

Harry Graham
Harry Graham
Arbitrator