

IN THE MATTER OF ARBITRATION

Between

STATE OF OHIO,
INDUSTRIAL COMMISSION

The Employer

-and-

OHIO HEALTH CARE EMPLOYEES UNION
DISTRICT 1199, WV/KY/OH
NATIONAL UNION OF HOSPITAL
AND HEALTH CARE EMPLOYEES,
SEIU, AFL-CIO

The Union

OPINION AND AWARD

Gordon H. Blickle
Work Reassignment
Grievance

17-00-(01-30-90)-08-02-12

APPEARANCES

For the Employer:

Valerie Butler, Contract Compliance Officer
Advocate

Rodney Sampson, Asst. Chief, Arbitration Services
Gretchen Green, Acting Director Human Resources - BWC
Doris J. Higgins, Field Office Supervisor
BWC-Rehabilitation Division
Dave Norris, Director of Labor Relations
Mental Retardation & Developmental Disabilities

For the Union:

Jeff Fogt, Organizer
Advocate

Gordon H. Blickle, Grievant

JERRY A. FULLMER
Attorney-Arbitrator
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This case¹ concerns a claim about work assignment redistribution by the Grievant, Gordon H. Blickle.

I. FACTS

A. Background Facts

The Grievant is a Case Manager in the Dayton office of the Rehabilitation Division (hereafter referred to as "the Division") of the Industrial Commission. He started with the Division in 1981 and is apparently the senior Case Manager in that office. The Employer indicates, without contradiction, that:

"The primary objectives of the Rehabilitation Division are to return industrially disabled workers to gainful employment, and/or lessen their disability. The Division tries to return the injured workers to their original job. However, when this is not possible, efforts are made to modify the original job or find a different job with the same employer, thus retaining the worker's

¹ The State of Ohio (hereafter referred to as "the Employer" and Ohio Health Care Employees Union, District 1199, WV/KY/OH National Union of Hospital and Health Care Employees, SEIU, AFL-CIO (hereafter referred to as "the Union"), are parties to a collective bargaining agreement (Jt. Ex. 1) providing in Article 7 for settlement of disputes through a grievance and arbitration procedure. A dispute has arisen between the parties concerning work assignment redistribution by the Grievant, Gordon H. Blickle

The Union's grievance (Jt. Ex. 2, #17-00-(01-30-90)-08-02-12)) concerning this matter was dated January 24, 1990. It was submitted to arbitration before this arbitrator who serves on the parties' permanent arbitration panel. A hearing was held on April 10, 1990 in Conference Room B of the Employer's Office of Collective Bargaining in Columbus, Ohio. Both advocates made opening and closing statements and presented and cross-examined witnesses. The Union was willing to stipulate that the grievance was both procedurally and substantively arbitrable; that the time limits in the grievance procedure had either been met or waived and that the arbitrator has been properly chosen and has jurisdiction to hear the case. The Employer declined to so stipulate.

seniority." (Employer's Opening Statement, p. 1)

The system for carrying out this mission seems to be as follows. Persons who suffer industrial injuries are under no obligation to participate in the Division's programs. They must volunteer. Both these persons and participating employers must be recruited to participate. Referrals of persons to the Division are made by relatives, employers, physicians, lawyers and other diverse persons. The referrals come in through the intake function of the office and are assigned to a Case Manager. They then become a "case". The Case Manager then marshalls his persuasive, medical and industrial resources toward the end of returning the person to work (preferably to his original job) or lessening his disability. Statistics are kept as to the case load of the various case managers and the progress of particular cases in their case load. A premium is placed upon Case Manager's moving the case load and achieving a high number of "return to works" (i.e. "RTWs").

Part of the Case Manager's job is maintaining contact with employers and encouraging them to make referrals and accept RTWs. Obviously continuity is valuable in performing these duties. For this reason certain employers are assigned to certain Case Managers and all the referrals from the assigned employer are given to that Case Manager.

B. The Events Leading to the Grievance

As of January 26, 1989, the Grievant's team² had 58 active cases. (Employer Ex. 3) In the following month two employers (Honda (Anna plant) and Miami Industries) were taken away from the Grievant and assigned to other Case Managers. The same was true of one case from Stolle Corporation. The District Office Supervisor, Doris Higgins, testified that she took this action because the Grievant had been complaining that his case load was too heavy. The Grievant took exception to the action because he serviced another Honda plant and apparently regarded all Honda operations as being within his bailiwick. In addition the Grievant felt that the moves were part of an effort to remove larger, unionized and progressive employers from his case load and replace them with small, non-union, backward employers.

The Grievant testified at the arbitration hearing that during the following eleven months he took up his dissatisfactions informally with the management of the Dayton office. Finally, with the advent of single case management³ on January 16, 1990 the Grievant testified that he realized that no changes were likely to be made by that management. A grievance was filed on January 24, 1990 (Jt. Ex. 2) which stated that:

"Unfair labor practices and discrimination (Disregard of seniority. *See attached two (2) page documentation.

² At that time case management was organized in teams with a case manager and a nurse assigned to each team. The nurse was responsible for the medical aspects of the administration and the case manager of the other aspects.

³ This was the abandonment of the team concept. Henceforth both the case managers and the nurses were to have their own independent case loads.

Article 28 - Sect 28.04 Article No. 6, Article No. 5"

By February 26, 1990 the Grievant's team's⁴ case load was 55 cases.

(Employer Ex. 5) The grievance progressed through the grievance procedure to arbitration with the Employer taking the position at each step that the grievance was untimely and that it lacked merit.

By March 22, 1991 the Grievant's case load was 88 cases.
(Employer Exhibit 6)

II. APPLICABLE CONTRACT PROVISIONS

ARTICLE 6 - NON-DISCRIMINATION

Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining units on the basis of race, sex, creed, color, religion age, national origin, political affiliation, union affiliation and activity, handicap or sexual preference, or discriminate in the application or interpretation of the provisions of this Agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job and in compliance with the existing laws of the United States, the State of Ohio, or the Executive Orders of the State of Ohio.

The Employer and Union hereby state a mutual commitment to affirmative action, as regards job opportunities within the agencies covered by this Agreement.

ARTICLE 7 - GRIEVANCE PROCEDURE

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Sec. 7.04 Grievant

A grievance under this procedure may be brought by any bargaining unit member who believes himself/herself to be aggrieved by a specific violation of this Agreement. When a group of bargaining unit employees desires to file a grievance involving an

⁴ The statistics as of that date were still kept on a team basis despite the advent of single case management on January 16, 1990.

alleged violation that affects more than one (1) employee in the same way, the grievance may be filed by the Union. A grievance so initiated shall be called a Class Grievance. Class Grievances shall be filed by the Union within ten (10) days of the date on which the grievant(s) knew or reasonably could have known of the event giving rise to the Class Grievance.....

...

Sec. 7.06 Grievance Steps

The parties intend that every effort shall be made to share all relevant and pertinent records, papers, data and names of witnesses to facilitate the resolution of grievances at the lowest possible level. The following are the implementation steps and procedures for handling a member's grievance.

Preliminary Step

A member having a complaint is encouraged to first attempt to resolve it informally with his/her immediate supervisor at the time the incident giving rise to the complaint occurs or as soon thereafter as is convenient.....

Step 1 - Immediate Supervisor or Agency Designee

A member having a grievance shall present it to the immediate supervisor or agency designee within ten (10) days of the date on which the grievant knew or reasonably should have had knowledge of the event.

Grievances submitted beyond the ten (10) day limit will not be honored.....

ARTICLE 28 - SENIORITY

Sec. 28.04 Shift and Assignment Openings

Shift and assignment openings shall be filled by the qualified employee within the classification at the worksite having the greatest state seniority who desires the opening.

III. ISSUE

Was the grievance timely filed? If so, did the removal of the employers from the Grievant's case load violate either Article VI

or Section 28.04 of the parties' agreement? If so, what shall be the remedy?

IV. POSITIONS OF THE PARTIES

The Union Position

There is a qualitative difference between the various employers involved in the Division's programs. Some are obviously easier to work with and easier to obtain return to works with. It is a basic seniority right, guaranteed by Section 28.04, for a Case Manager to retain those desirable employers previously on his case load. This right was violated here when the administrators took away Honda (Anna), Miami Industries and the Stolle case from the Grievant's case load. This action was compounded in this case when the administrators heaped new cases on the grievant's case load after he filed the grievance in this case. The grievance is timely because the Grievant took it up at the Preliminary Step of the grievance procedure within the requisite ten (10) days.

The Employer Position

The Employer maintains that the grievance is clearly untimely since it was filed some eleven months after the two employers were removed from the Grievant's case load. Article VII, Step 1 states clearly that "Grievances submitted beyond the ten (10) day limit will not be honored." The arbitrator has no choice but to enforce these provisions.

Should the arbitrator nevertheless choose to consider the case

on the merits the conclusion is inevitable that the grievance lacks merit. Section 28.04 only covers shift and assignment openings. Neither is involved in this case. The Case Managers work only during the day rather than in shifts and there are no open assignments involved. The bargaining history of the parties' agreement shows that there has been no agreement on the question of case work loads. The grievance must be denied on both procedural and substantive grounds.

V. DISCUSSION

A. Introduction

Both procedural and substantive issues are presented. The procedural ones will be considered first and then, if necessary, the substantive ones.

B. The Procedural Issues

There is no doubt but that Section 7.06, Step 1 requires that a grievance must be presented within ten (10) days of the date on which the grievant knew or reasonably should have had knowledge of the event.

The date "on which the grievant knew ... of the event" does not seem to be in serious issue. His basic complaint is with the removal of the Honda (Anna), Miami Industries and Stolle Corporation (1 case) from his case load. This occurred in February,

1989 and the Grievant knew about it at that time. In fact, he took up his complaint informally at that time with the administration.

The grievance, Joint Exhibit 2, was not filed until January 24, 1990, some eleven months later. The question is whether, as the Grievant maintains, the ten day limitation is avoided by his first taking up the complaint at the "Preliminary Step".

The parties have agreed in Section 7.06 that there is to be an opportunity for a grievant to take up a complaint first at the Preliminary Step:

"A member having a complaint is encouraged to first attempt to resolve it informally with his/her immediate supervisor at the time of the incident giving rise to the complaint occurs or as soon thereafter as is convenient."

It is clear that the drafters of the agreement intended that the Preliminary Step take place promptly. It is to take place at "the time of the incident" or "as soon thereafter as is convenient". There is no indication in the language that a long drawn out procedure is contemplated. After the Preliminary Step, "if the member is not satisfied with the result" the member "may pursue the formal steps which follow:".

It is at the outset of these formal steps, i.e. in the first sentence of Step 1, that the ten day limitation is set out. It is significant that the ten days starts with "the date on which the grievant knew ... of the event", not with the date on which the Preliminary Step of the grievance procedure concluded.

It seems clear from the structure and language of Section 7.06 that the Preliminary Step of the grievance procedure is to be

concluded within the ten days specified for the filing of the grievance at Step 1. Were the opposite construction adopted, the ten day limit of Step 1 would be rendered largely a nullity because years could be consumed in the consideration of employee complaints at the Preliminary Step before the employee finally decided to file a grievance. This would result in the consideration of stale grievances in the grievance procedure and eventual arbitration hearings involving stale evidence. In the end, the parties stated goal of providing "a procedure ...whereby employees can be assured of prompt, impartial and fair processing of their grievances" would be frustrated. (See Section 7.01)

B. Conclusion

The grievance was not filed within ten days of the event in question within the meaning of Section 7.06, Step 1 of the parties' agreement.⁵ The arbitrator is thus without jurisdiction to hear the merits of the grievance.

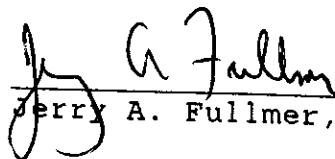
VI. AWARD

Grievance denied.

⁵ It is clear that the procedural arbitrability question was raised by the Employer at each step of the grievance procedure so that there can be no finding that the Employer waived its rights to assert the procedural arbitrability defense.

It is also clear that the evidence on the record indicates that it was the Grievant who made the decision to continue his efforts to resolve the grievance at the Preliminary Step for eleven months before filing a grievance. There was no evidence that the Union or any officer or agent of the Union was involved in that decision or participated in the keeping of the complaint at the Preliminary Step during this period. Once the Grievant involved the Union, all the applicable time steps seem to have been met.

Made and entered this
24th day of April, 1991
at Cleveland, Ohio


Jerry A. Fullmer, Arbitrator