

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 607

OCB GRIEVANCE NUMBER: 23-18-910130-0603-02-12

GRIEVANT NAME: PARENT, CAROLE

UNION: 1199

DEPARTMENT: MENTAL HEALTH

ARBITRATOR: JOHNSON, MARGARET NANCY

MANAGEMENT ADVOCATE: NASH, GEORGE

2ND CHAIR: DUCO, MICHAEL P.

UNION ADVOCATE: MARGEVICIUS, MARIA

ARBITRATION DATE: MAY 2, 1991

DECISION DATE: JUNE 1, 1991

DECISION: NOT ARBITRABLE

CONTRACT SECTIONS
AND/OR ISSUES:

ARBITRABILITY OF GRIEVANCE FILED ON BEHALF OF
C. PARENT WHO WAS REMOVED FROM HER POSITION AT
WESTERN RESERVE PSYCHIATRIC HAB. CENTER.

HOLDING: "WHERE THE PARTIES NEGOTIATED OBLIGATORY TIME
CONSTRAINTS FOR PROCESSING GRIEVANCES, THE SAME MUST BE
ACKNOWLEDGED AND ADHERED TO. THE ARBITRATOR HAS NO AUTHORITY
TO IGNORE THE EXPLICITLY STATED PREREQUISITES FOR FILING OF
GRIEVANCES. MEMBERS OF THE B/U ARE DEEMED TO KNOW WHAT THE
NEGOTIATED PROVISIONS REQUIRE. ...ONLY WHEN EVIDENCE CLEARLY
ESTABLISHES MUTUAL INTENT TO BYPASS THE NEGOTIATED MANDATES
SHOULD A WAIVER BE RECOGNIZED. WAIVERS MADE IN ONE CASE MUST
BE UNDERSTOOD TO APPLY ONLY TO THE CASE IN CONSIDERATION."

ARB COST: \$ BILL NOT RECEIVED WITH DECISION

STATE OF OHIO
LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

#607

Office of Collective Bargaining)
State of Ohio)

OPINION AND AWARD

and)

Ohio Health Care Employees Union)
District 1199)
National Union of Hospital and)
Health Care Employees, SEIU)
AFL-CIO)

GRIEVANCE OF
CAROLE PARENT

This matter came in for hearing on May 2, 1991, in a conference room at the Office of Collective Bargaining in Columbus, Ohio, before Margaret Nancy Johnson, member of The Arbitration Panel selected in accordance with the terms of the agreement between the parties.

Maria Margevicius, Staff Representative, presented the case on behalf of the Ohio Health Care Employees Union, District 1199, hereinafter "Union". Also in attendance on behalf of the Union were Ervin Crenshaw, Assistant to President; William C. Keen, Union delegate; and Carole Parent, grievant.

George Nash appeared as advocate for The State of Ohio, Office of Collective Bargaining, hereinafter "Employer". Also present for the Employer were S. A. Brown, R.N., WRPH; Mary Ann

Pason, R.N., WRPH; Betty Lou Milstead, LRD, WRPH; F. J. Frese, III, Ph.D., Psychology Department; Rodney Sampson, Assistant Chief, Arbitration Services, and Michael Duco, Assistant Chief, Contract Compliance.

The Employer raised an initial question as to the procedural arbitrability of the pending grievance. Accordingly, prior to a consideration of the merits of the grievance, the Arbitrator was requested to hear evidence and argument on the issue of arbitrability and to render a decision thereon before hearing evidence on the substantive issue.

GRIEVANCE

A grievance dated November 9, 1990, alleged a violation of the "just cause" standard of Article 8 when the aggrieved was removed from state service.

The grievance and a cover letter of the same date addressed to the Office of Collective Bargaining and requesting the grievance be moved to arbitration, bears a time stamp of January 29, 1991 from the Office of Labor Relations.

On the same date the Office of Labor Relations received a letter from the Staff Representative of the Union which states the following:

Enclosed please find a grievance for Carole Parent. We have filed this grievance previously at Step 4, but due to your objections, we are now filing this grievance at Step 3. Please have your Step 3 designee phone me at (216) 321-1199 to schedule the Step 3 meeting.

An answer to the above letter, issued on February 1, 1991, denied the grievance as follows:

This is in response to your request of January 25, 1991 for a Step 3 meeting on the Carole Parent grievance which concerns her removal from Western Reserve Psychiatric Habilitation Center. For purposes of identification only, we have numbered this grievance as:

23-18-910130-0603-02-12

Ms. Parent was removed in early November, 1990. Your request for a Step 3 meeting was not received in this office until January 29, 1991. I also checked with the Office of Collective Bargaining and found that they have never received such grievance.

Because the grievance was not properly filed and it was extremely untimely, we must reject your request for a Step 3 meeting.

On February 8, 1991, the Union appealed the grievance to arbitration.

ISSUE

The parties stipulated the issue of arbitrability to be: Should this form be accepted as a grievance filed properly and timely for appeal to Arbitration per Article 7 of the Contract?

CONTRACT PROVISIONS

The following provisions from the Agreement between the parties are deemed to be pertinent to a proper resolution of the procedural issue raised herein:

ARTICLE 7 - GRIEVANCE PROCEDURE

§7.01 Purpose

The State of Ohio and the Union recognize that in the interest of harmonious relations, a procedure is necessary whereby employees can be assured of prompt, impartial and fair processing of their grievance. Such procedure shall be available to all bargaining unit employees and no reprisals of any kind shall be taken

against any employee initiating or participating in the grievance procedure. Since this Agreement provides for final and binding arbitration of grievances, pursuant to Section 4117.10 of the Ohio Revised Code, the State Personnel Board of Review shall have no jurisdiction to receive and determine any appeals relating to matters that are the subject of this grievance procedure.

§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.

At this meeting there may be a delegate present. If the member is not satisfied with the result of the informal meeting, if any, the member may pursue the formal steps which follow:

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.

Step 3 - Agency Head or Agency Designee

Should the grievant not be satisfied with the written answer received in Step 2, within seven (7) days after the receipt thereof, the grievance shall be file with the agency head or designee. Upon receipt of the grievance, the agency head or designee shall hold a meeting and render a decision within thirty (30) days. The grievant may be accompanied at this meeting by a delegate and/or organizer. The agency head or designee shall render the decision in writing and return a copy to the grievant and the Union. Meetings will ordinarily be held at the worksite in as far as practical. By mutual agreement the parties may waive the meeting and the agency head or designee shall render a decision within ten (10) days of the agreement. In this case the agency head's decision shall be based on documents only.

By mutual agreement the Union and agency may waive any preceding step of the grievance procedure.

Step 4 - Office of Collective Bargaining Review

If the grievant is not satisfied with the written

answer received at Step 3, the grievant may, within five (5) days after the receipt thereof, appeal to the Director of the Office of Collective Bargaining. The appeal shall be made in writing by sending a copy of the grievance form, to the Director of the Office of Collective Bargaining with a copy to the agency head or designee. No hearing shall be required. The Director of the Office of Collective Bargaining or designee shall review the documents submitted and issue a decision in writing and return a copy to the grievant, the Union and the agency head or designee within twenty (20) days of the appeal.

Step 5 - Arbitration

If the Union is not satisfied with the answer at Step 4, it may submit the grievance to arbitration, by serving written notice of its desire to do so, presented to the Director of the Office of Collective Bargaining with a copy to the agency head or designee, within fifteen (15) days after receipt of the decision in Step 4.

The parties agree to meet no less than monthly for the purpose of scheduling arbitration cases, and further agree to schedule cases in an expeditious manner.

§7.07 Arbitration

E. Arbitrator Limitations

1. Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

§7.08 Disciplinary Grievances and Arbitrations

An employee with a grievance involving a suspension, a discharge, or reduction in pay and/or position shall be subject to an expedited grievance/arbitration procedure and shall be excluded from the regular procedure outlined in Section 7.07. In this expedited procedure the grievance is filed directly at Step 3 except that probationary employees shall not have the right or ability to file disciplinary grievances under this Agreement. If the employee is not satisfied with the answer at Step 3, he/she may appeal to Step 4 (Steps 3 and 4 in this expedited process are identical to the same steps in Section 7.07). If the Union is not satisfied with the decision issued at Step 4, it may submit the disciplinary grievance to expedited arbitration by

sending written notice to the Director of the Office of Collective Bargaining with a copy to the agency head or designee within ten (10) days of the receipt of the Step 4 answer.

§7.10 Miscellaneous

The grievant or the Union representative and representatives of the Employer may mutually agree at any point in the procedure to a time extension.

Within Steps 1 through 3, if the agency fails to respond to the grievance within the specified time limits, the grievance shall proceed to the next step in the procedure as though the answer at the prior step had been given and was unsatisfactory.

POSITION OF THE EMPLOYER

The Employer contends that the grievance under consideration was not filed in a timely manner and is, therefore, not properly before the Arbitrator for resolution. The Agreement between the parties sets forth specific time constraints for the processing of grievances. Pursuant to the Collective Bargaining Agreement grievances not filed within the initial 10 day requirement "will not be honored." As the grievance was not initiated in a timely manner, it must be deemed inarbitrable.

The grievant herein was removed on November 9, 1990. A total of eighty-one days lapsed before a grievance was received by the Office of Labor Relations on January 29, 1991.

A letter purportedly sent by the Union delegate on November 9, 1990 to the Office of Collective Bargaining would have been a Step 4 appeal. The terms of the Agreement between the parties very specifically set forth an expedited procedure for disciplinary discharges and suspensions. These grievances are

initiated at Step 3. The Agreement between the parties further established time constraints for the appeal of a decision.

The Union must be required to adhere to the agreed upon time requirements for the processing of grievances. These limitations are designed to ensure prompt resolution of pending disputes. Each step of the process includes time restriction for appeal so that disputes do not linger on unresolved. The failure to file a timely grievance in the instant case renders the dispute inarbitrable.

The Arbitrator herein has no jurisdiction to hear a grievance which has not been properly filed. The terms of the Agreement between the parties very explicitly restricts the authority of the Arbitrator and precludes any deviation from express contractual provisions. Thus, the time constraints in this case cannot be nullified or ignored by the Arbitrator.

The grievance should be denied.

POSITION OF THE UNION

The Union maintains that in the instant case a good faith effort had been made by the Union delegate to file a grievance arising from the November 9, 1990 removal of the aggrieved. The delegate sent the grievance on November 9, 1990 to the Office of Collective Bargaining. While the grievance was filed in the wrong office, it was nonetheless filed with the State in an effort to initiate the grievance procedures.

The grievance procedure negotiated by the parties is a complex process with disciplinary discharges and suspensions handled differently. The timely filing of a grievance at the wrong step should not be used to defeat the intent of the parties to have an independent review of disciplinary discharges and suspensions.

The evidence establishes that in November, 1990 the Office of Collective Bargaining had knowledge of the grievance. In a conversation with the Assistant to the President of the Union, the Assistant Chief of Arbitration Services brought up the grievance and proposed consolidating it with a pending grievance on a disciplinary suspension. Clearly the Employer had knowledge of the pending grievance. A technical fault ought not to be used to obviate contractual rights arising under the Collective Bargaining Agreement. There has been no prejudicial harm to the Employer in this matter of improper filing.

In prior cases in which grievances have not been properly filed, the Employer has considered the merits of the case. Indeed, grievance settlements have even been offered by the Employer on improperly filed grievances.

The evidence establishes that the Employer has been lax in meeting contractual time limits. The Union grants extensions of time on a regular basis to the State. It is not uncommon for the Employer to fail to answer grievances or appeals made on behalf of an employee. Accordingly, the lapse in time in hearing from

the State in this instance did not signal a warning to the Union delegate.

The Employer has in the past proceeded to schedule hearings even before grievances are filed. Indeed, the Employer has on many occasions asked the Union to supplement the Employer file, or to send copies of missing documents. Any objections to procedural defects in this case ought to be deemed waived.

The grievance should be sustained.

DECISION

The issue presented to the Arbitrator for resolution is the arbitrability of a grievance processed on behalf of an employee terminated from state service on November 9, 1990. Stipulated facts included the classification of the aggrieved as a Psychology Assistant at the time of her removal. She had been employed by the Western Reserve Psychiatric Hospital since February 11, 1980.

The grievant was informed of her removal on November 9, 1990. The termination notice included a statement that should the employee wish to appeal the action, the employee:

"must file a written grievance with the Agency Director within Ten (10) days of notification of this action. To file a written grievance, send it to John Rauch, Manager, Labor Sector, Ohio Department of Mental Health, Room 1120, 30 E. Broad Street, Columbus, Ohio 43215."

A grievance dated November 9, 1990 signed by the aggrieved

was submitted into evidence as Joint Exhibit 3(b). A cover letter from a Union delegate, also dated November 9, 1990, is addressed to the Office of Collective Bargaining. Both exhibits are time-stamped Jan. 29, 1991 by the Office of Labor Relations. The Union maintains that this grievance had been filed with the Step 4 Office of Collective Bargaining in a timely manner but was refiled on January 29, 1991 due to the objections of the Office of Labor Relations at the Department of Mental Health.

The Office of Collective Bargaining contends that it had never received the November 9, 1990 grievance. Testimony elicited by both parties established, however, that having been informed of the removal of the aggrieved, the Office of Collective Bargaining had anticipated the present grievance. Accordingly, the Office of Collective Bargaining proposed consolidating an arbitration hearing on a pending suspension with the termination of the grievant. Although the Union refused to consolidate the grievances for arbitration, it contends that the Office of Collective Bargaining's proposal establishes the knowledge of the State of the November 9, 1990 grievance and under the facts of the case should estop the State from raising the timeliness issue.

A ruling of procedural inarbitrability ought to be rendered only after a careful consideration of all the relevant facts and the applicable contract language. The preference for resolving disputes on the merits rather than precluding a hearing on

substantive rights due to a procedural defect is generally recognized. Thus, the contractual language and procedural practice of the parties will be liberally construed so as to accommodate the intent to resolve disputes through review.

Nonetheless, where the parties have negotiated obligatory time constraints for processing grievances, the same must be acknowledged and adhered to. The Arbitrator has no authority to ignore the explicitly stated prerequisites for filing of grievances. Indeed, in the pending case, the terms of the Agreement specifically limit the jurisdiction and power of the Arbitrator so as to preclude deviation from the exact contract requirements.

The Arbitrator has, therefore, analyzed the case under consideration so as to preserve the right of substantive review without violating the agreed upon procedural requirements. An effort has been made to construe the operative facts in favor of arbitrability.

The Union has argued that the November 9, 1990 letter and grievance were a bona fide Step 4 appeal. Assuming that, indeed, the grievance was filed at Step 4 with the Office of Collective Bargaining, as alleged, between November 9, 1990 and January 25, 1991, there was no action taken on this appeal. Applying the Step 4 procedure, the Arbitrator finds that an appeal from the Step 4 answer, due within twenty days from its receipt, had to be made within fifteen days. Thus, it was

incumbent to appeal the Office of Collective Bargaining decision by mid-December, 1990. The evidence establishes, however, that no written appeal was made until January 25, 1991.

The Union has argued that the time requirements in this case should be relaxed due to the apparent confusion arising from the complexity of the negotiated grievance procedure. This argument, however, is undermined by the very explicit directions provided in the November 9, 1990 letter to the grievant that an appeal must be made within ten (10) days to the Labor Section Manager whose address is also provided for the benefit of the aggrieved.

Moreover, the members of the bargaining unit are deemed to know what the negotiated provisions require. Lack of knowledge of contract provisions is not a valid defense for failure to comply with contractual commitments.

The Union also contends that the Office of Collective Bargaining waived its defense of timeliness by offering to arbitrate the removal at the same time as a preceding suspension. In the opinion of the Arbitrator waivers of contractual commitments cannot be lightly inferred. Only when the evidence clearly establishes mutual intent to bypass the negotiated mandates should a waiver be recognized. In this case the Office of Collective Bargaining made an offer to consolidate grievances. However, this offer cannot be construed as a waiver of the requirement that a written grievance be filed in accordance with

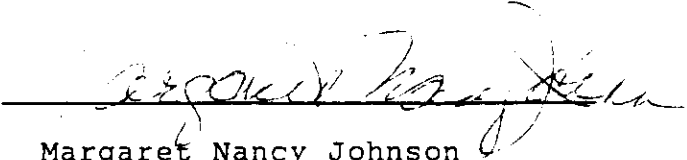
contractual provisions. There is no indication the Office of Collective Bargaining intended to relieve the aggrieved of the need to file a written grievance

Additional arguments raised by the Union include prior grievances which the Office of Collective Bargaining agreed to arbitrate or process without compliance with contractual prerequisites. The Arbitrator finds, however, that waivers which are made in one case must be understood to apply only to the case in consideration. Action taken in one proceeding cannot be deemed to create a binding precedent in a subsequent situation. If waivers, grievance settlements or compromises were to be given status as binding precedent the dispute resolution process would become stymied in formalism and the negotiated procedure be rendered meaningless.

In the opinion of the Arbitrator the facts of this case do not establish a mutually agreed upon waiver of the procedural requirements of Article 7 of The Collective Bargaining Agreement. The failure of the grievant to process her grievance within the time frame set forth therein precludes the Arbitrator from considering the merits of the dispute.

AWARD

The grievance herein is denied.


Margaret Nancy Johnson
Arbitrator

Dated and made effective at the Western Reserve
Physiatric Hospital in Sagamore Hills, Summit Hospital, this
1st day of June, 1991.