STATE OF OHIO AND OHIO
CIVIL SERVICE EMPLOYEES
ASSOCIATION LABOR ARBITRATION
PROCEEDING

#682

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF
HIGHWAY SAFETY, BUREAU OF MOTOR VEHICLES

-and-

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

GRIEVANCE: Mark Barnes (Discharge)

OCB Case No.: 15-02-(91-03-01)-0012-01-09

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: October 24, 1991

APPEARANCES

For the Employer

Bessie L. Smith	Personnel Officer
Bruce Watts	Distribution Center Manager
Lou Kitchen	Second Chair
Edward A. Flynn	Advocate

For the Union

Mark Barnes	Grievant
Dave Braddy	Staff Representative
Marilyn Levine	Chapter President
Brenda Goheen	Staff Representative

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Highway Safety, Bureau of Motor Vehicles, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1989 to December 31, 1991. (Joint Exhibit 1).

The arbitration hearing was held on September 12, 1991 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator. At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs. They instead decided to submit written closing arguments which were postmarked on or before September 27, 1991.

ISSUES

Was the grievance filed in a timely fashion in accordance with the Collective Bargaining Agreement (Joint Exhibit 1), and thus, arbitrable?

Was the grievant removed for just cause, and if not, what shall the

remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

Section 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

...

(Joint Exhibit 1, Pgs. 37-38)

Section 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and

Union shall be notified in writing. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

...

(Joint Exhibit 1, Pg. 39)

ARTICLE 25 - GRIEVANCE PROCEDURE

Section 25.01 - Process

...

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.

...

(Joint Exhibit 1, Pgs. 40-41)

Section 25.03 - Arbitration Procedures

...

Questions of arbitrability shall be decided by an arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

...

Only disputes involving the interpretation, application or alleged violation of a provision of the 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 expressed language of this Agreement.

...

(Joint Exhibit 1, Pgs. 43-44)

Section 25.05 - Time Limits

Grievances may be withdrawn at any step of the grievance procedure. Grievances not appealed within the designated time limits will be treated as withdrawn grievances.

The time limits at any step may be extended by mutual agreement of the parties involved at that particular step. Such extension(s) shall be in writing.

In the absence of such extensions at any step where a grievance response of the Employer has not been received by the grievant and the Union representative within the specified time limits, the grievant may file the grievance to the next successive step in the grievance procedure.

(Joint Exhibit 1, Pgs. 44-45)

Section 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.

Section 25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

(Joint Exhibit 1, Pg. 45)

STIPULATIONS

Facts:

1. Mark Barnes was terminated and received notification of his termination on February 8, 1991.

2. Kim Sherfield, Secretary for Highway Safety, Administration/Labor Relations office, received grievance appeal to Step 3 on March 1, 1991.

3. Envelope which contained grievance appeal was postmarked February 25, 1991.

4. Richard Saunders, Administrative Assistant to the Director, on March 5, 1991 was acting Labor Relations Administrator.

5. On March 5, 1991, Richard Saunders issued a letter to Mark Barnes informing Mr. Barnes that his grievance was processed untimely and that management will treat the grievance as being withdrawn.

CASE HISTORY

Mark A. Barnes, the Grievant, has been employed by the Bureau of Motor Vehicles, the Employer, for over thirteen (13) years. At the time of the removal decision, the Grievant was serving as a Storekeeper II; a lead person position in shipping and receiving. He was required to distribute license plates and other items to deputy registrars and dealers around the state.

Prior to the series of incidents which led to the Grievant's removal, he was disciplined a number of times for neglect of duty; he failed to follow proper notification procedures. A verbal reprimand (Joint Exhibit 4(L)) was issued on August 11, 1988. It appears that the Grievant, on four distinct occasions, failed to notify the Employer about these absences by the predetermined time limit. Three disciplinary reprimands were issued in 1989. Two of these incidents were of the written reprimand variety (Joint Exhibits 4(I) and (J)). The remaining incident, however, concerned a one day suspension for failure to follow the proper call-in procedure (Joint Exhibit 4(H)). The Grievant continued to experience notification difficulties during 1990. On January 22, 1990, the Grievant received a five day suspension for failure to follow call-in procedures (Joint Exhibit 4(G)). A progressively more severe penalty was administered on April 3, 1990. On

this date, the Grievant received a ten day suspension for notification procedure violations (Joint Exhibit 4(F)).

Bruce Watts, the Distribution Center Manager, reviewed the Employer's policy dealing with leave without pay. He acknowledged that Section 29.02 allows the granting of leave without pay. This practice, however, was thought to be permissive and not mandatory. As such, the Employer had a practice of disapproving all leaves without pay unless extenuating circumstances surrounded an incident. Otherwise, discipline was administered once an employee accumulated eight hours leave without pay. These guidelines more purportedly applied to the sequence of events which eventually resulted in the Grievant's removal.

On or about September 28, 1991, the Grievant's mother experienced a medical emergency. This caused the Grievant to submit a Request for Leave Form requesting leave without pay for the day in question (Joint Exhibit 8(A)). Both the Grievant and Watts testified that Watts initially rejected this leave request. After some additional analysis, Watts changed his mind because he remembered that he had granted leave to another employee under similar circumstances. Watts advised the Grievant that even though he would not be compensated for the day in question, he would not be disciplined. Watts, however, maintained he notified the Grievant these hours would be applied if he accrued additional leave without pay hours.

On October 1, 1990, the Grievant was involved in an automobile accident. This circumstance resulted in a leave request for two hours leave without pay (Joint Exhibit 8(B)).

An additional request for leave without pay was tendered for December 7, 1990. The Grievant testified he became sick during the course of the shift which resulted in his early departure; approximately one hour and fifteen minutes prior to the shift's conclusion (Joint Exhibit 8(C)). The Grievant claimed he was granted verbal permission and was never told he would be disciplined if he departed.

A great deal of disagreement surrounds the Grievant's leave requests for December 19, 1990 and December 20, 1990; a total of sixteen hours of leave without pay (Joint Exhibit 8(D)-(G)). The Grievant testified he submitted this request far in advance on or about September 12, 1990. He, moreover, emphasized he originally requested leave for December 19, 1990. When he contacted the Employer on December 20, 1990 concerning another leave request, his immediate supervisor asked him about the December 19, 1990 absence. The Grievant reminded him that he had previously submitted a leave request form for December 19, 1990. At the time of the incident, the Grievant purportedly had nine hours of sick time available. As such, eight of these hours were applied to the December 20, 1990 request because the Grievant had called-in in a timely manner. This meant that only one hour could be applied to the December 19, 1990 incident; which left seven hours unaccounted for.

On January 14, 1991, the Grievant was notified about a forthcoming pre-disciplinary meeting dealing with his potential termination. The reasons for termination were listed as: Neglect of duty/excessive absenteeism and failure to follow proper notification procedures (Joint Exhibit 4(B)). Although the meeting was originally scheduled for

January 18, 1991, it was re-scheduled to be held on January 24, 1991 (Joint Exhibit 4(C)). It should be noted the meeting officer determined that just cause for discipline existed (Union Exhibit 3).

On February 8, 1991, Charles D. Shipley, Director of the Department of Highway Safety, issued an order of removal. It contained the following relevant particulars:

"...

> You are hereby advised that your services with the Department of Highway Safety/Bureau of Motor Vehicles are terminated at the close of business on Friday, February 8, 1991.
>
> You are being terminated for Neglect of Duty/Excessive Absenteeism.

..."

(Joint Exhibit 4(D))

A verification receipt (Joint Exhibit 4(E)) submitted at the hearing indicates the Grievant received and accepted the above-mentioned letter on February 8, 1991. It should also be noted that Dave Goldberg, the Executive Director of OCSEA, was carbon copied on the removal letter (Joint Exhibit 4(D)).

On February 22, 1991, the Grievant authored a formal grievance contesting the Employer's removal decision. It contained the following statement of facts:

"...

> Mark A. Barnes was terminated on February 8, 1991 for Neglect of Duty/Excessive Absenteeism. Not commensory to the offense.

..."

(Joint Exhibit 3(A))

On March 5, 1991, Richard Saunders, Administrative Assistant to the

Director, refused to process the grievance. He provided the following rationale in support of his decision:

"...

> I received the above-numbered grievance on March 1, 1991. Pursuant with Section 25.07 of the Collective Bargaining agreement, you had fourteen days from the date in which you were terminated to initiate your appeal to Step III of the grievance procedure.
>
> Section 25.01 (D) of the agreement states that "the mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period." In that your grievance appeal was postmarked February 25, 1991 and you were terminated on February 8, 1991 your appeal has not been timely initiated. Therefore, pursuant with Section 25.05 of the agreement, management will treat this grievance as being withdrawn

..."

(Joint Exhibit 3(C))

Bruce A. Wyngaard, Director of Arbitrations, on March 12, 1991, notified the Employer that the grievance was to be taken to arbitration pursuant to Section 25.02.

THE PARTIES' ARBITRABILITY ARGUMENTS

The Position of the Employer

The Employer asserted the disputed grievance was not arbitrable as a consequence of a procedural defect. It was, more specifically, alleged the grievance was withdrawn because of an untimely filing.

Notification requirements in accordance with Section 24.05 particulars were adhered to by the Employer. Edward A. Flynn, the Labor Relations Officer, maintained Charlene Collins, the Chapter President,

contacted him on February 8, 1988 and asked to see him. At approximately 4:00 p.m. (Employer Exhibits 1 and 2) she arrived and asked him for a copy of a Hearing Officer's recommendation dealing with the Grievant's matter. Flynn provided her with a copy but asked her to keep it confidential. In Flynn's opinion, this exchange fulfilled the requirement in Section 24.05 dealing with Union notification after a final decision is made to impose discipline. In a like fashion, the Employer claimed the Grievant was also properly notified on February 8, 1990. He signed a termination verification receipt (Joint Exhibit 4(E)) on February 8, 1991.

The Employer challenged the Union's contention that the Staff Representative, Brenda Goheen, was the legitimate designee selected by the Union to receive notice of a final decision to impose discipline. Flynn emphasized that he had solicited the names of those individuals selected as designees by the Chapter President. And yet, he was never provided with the requested listing. As a consequence, he was never properly notified that one of the designees would be the Staff Representative.

The Employer argued that the Union violated Sections 25.07 and 25.01 timing requirements which rendered its grievance defective on the basis of timeliness. Section 25.07 requires the initiation of a grievance at Step Three within fourteen days of notification of a suspension or a discharge. Section 25.01 discusses timely appeals if postmarked within the appeal period specified in Section 25.07. Since the termination notice was received on February 8, 1991 (Joint Exhibits

4(D) and (E)), and the grievance appeal letter was postmarked February 25, 1991 (Joint Exhibit 3(B)), the appeal was not initiated in a timely fashion. As such, the Employer, pursuant to Section 25.05, accurately viewed the grievance as being withdrawn.

The various arguments posited by the Union regarding internal Union difficulties in processing grievances were viewed as irrelevant. These mitigating circumstances were thought to be invalid because they would create language not negotiated by the Parties.

The Employer urged the Arbitrator to confine his analysis to the particular terms and conditions negotiated by the Parties. To do otherwise could result in a violation of Section 25.03 which restricts the scope of an arbitrator's authority to limitations and obligations expressly articulated in the Agreement (Joint Exhibit 1).

The Position of the Union

It is the position of the Union that the Grievant was timely, and therefore, arbitrable. This position was supported based on notification defects and proper application of timeliness guidelines.

Section 24.05 notification requirements were violated by the Employer. The Employer never properly established when the Grievant received notification concerning the imposition of discipline. Also, the Staff Representative, the designee selected by the Chapter President, never received proper notice. The role of the Staff Representative as the appropriate designee was established via testimony provided by the former Staff Representative, Dane Braddy, and the present Staff Representative, Brenda Goheen. Both admitted that

grievances were not being processed in a timely non-discriminatory manner by the reigning Chapter President. As a consequence Braddy and Flynn entered into an arrangement where Braddy would serve as the Chapter's designee in terms of Section 24.05 requirements. This practice was continued when a reorganization took place and Goheen replaced Braddy. A series of documents (Union Exhibits 1 and 2) were introduced in support of this contention. All of these disciplinary notices carbon copied the Union's Executive Director and Braddy or Goheen. Interestingly, the Grievant's disciplinary notice (Union Exhibit 4) failed to carbon copy Goheen. Flynn, therefore, and the Employer, were bound by the agreement to notify the Staff Representatives in lieu of the Chapter.

The Union asserted that the grievance was filed in a timely fashion. As such, the filing properly complied with the fourteen day proviso specified in Section 25.07. If the Grievant received his termination notice on February 8, 1991, the postmarked appeal of the grievance on February 25, 1991 (Joint Exhibit 3(B)) qualified the grievance as timely. This conclusion was based upon an application of Section 25.01 requirements dealing with the definition of the word "day" and the manner a postmarked grievance appeal constitutes a timely appeal.

An alternative timeliness argument was offered by the Union, it dealt with the notification of the Union's central office as designated in Section 24.05. The Employer mailed the Grievant's termination letter on February 12, 1991 and it was received by the Executive Director's

office on February 19, 1991 (Union Exhibit 4). If one considered the February 19, 1991 date as the triggering event, the postmarked appeal on February 25, 1991 fell well-within the fourteen day requirement specified in Section 25.07.

THE ARBITRATOR'S OPINION AND AWARD DEALING WITH THE ARBITRABILITY ISSUE

From the evidence and testimony introduced at the hearing, a complete review of the record, and pertinent contract provisions, it is my opinion that the grievance was untimely because it was initiated outside the fourteen-day proviso specified in Section 25.07. As such, the Employer properly viewed the grievance as withdrawn.

The record clearly establishes the Grievant received notice regarding the final imposition of discipline on February 8, 1991. He signed a termination verification receipt (Joint Exhibit 4(E)) on this date; acknowledging he accepted the envelope with the enclosed document. As such, February 8, 1991 served as the appropriate triggering event for application of Section 25.07 requirements. This section provides for the initiation of a grievance at Step Three within fourteen days of notification.

Section 25.07 however, can only be properly applied by considering the guidelines contained in Section 25.01, Subsections C and D. Subsection C defines "day" as calendar day and days are counted by excluding the first and including the last day. If 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. Subsection D specifies that timely grievance appeals shall take place if postmarked within the appropriate appeal period.

Application of the above guidelines clearly indicates that the grievance was filed in an untimely fashion. The last day for proper submission was Friday, February 22, 1991. The Grievant's appeal was unfortunately postmarked on February 25, 1991 (Joint Exhibit 3(B)).

Section 25.05 specifically limits an arbitrator's review authority because it renders untimely Step Three grievances as nullities. The Parties negotiated clear and unambiguous language which treats untimely grievances as withdrawn grievances. The only exception agreed to by the Parties involves the mutual extension of time limits in writing. In this case, the Parties never mutually agreed to extend the time limits by written mutual agreement. Also, nothing in the record indicates that the Employer engaged in conduct which can be inferred as raising a justifiable inference of waiver.

The circumstances surrounding the disputed matter, moreover, fail to suggest that certain extraordinary factors excuse an untimely filing. The following reflect a sampling of circumstances referred to by arbitrators as excusing untimely filings: continuing violations; prior laxness in enforcement of time limits; negotiation of the merits at pre-arbitral stages without raising timeliness objections; and notice to the employer specifying a reasonable basis for a grievance filing delay. None of these circumstances, nor other reasonably valid excuses, were

raised in support of the delay.

The Union's reliance on a Section 24.05 violation in support of its timeliness arguments was not totally supported. This section specifies "the employee and Union shall be notified in writing." The record clearly indicates that the Grievant was notified on February 8, 1991 Joint Exhibit 4(E), while Paul Goldberg, the Union's Executive Director, received the identical document on February 19, 1991 (Union Exhibit 4). At such, the letter and spirit of this contractual requirement were adhered to by the Employer. The alternative procedure testified to by Goheen and Braddy serves as an extra-contractual condition; one that requires unequivocal documented mutual agreement in order to have any enforcement value. An alternative interpretation would obviate another Section 24.05 proviso which states as follows:

> The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter.

Neither the prior nor the present Chapter President have formally tendered a listing of proper designees. If such a listing exists it should have been submitted as evidence at the hearing. If Flynn and the Staff Representatives entered into an extra-contractual arrangement which modified or somehow expanded the designee language, such an agreement should have been properly documented as evidence of mutual agreement. Carbon copy indicators and testimony do not substitute for the evidence necessary to modify a mutually negotiated term and condition of employment.

Even if the Union was able to establish a bonafide Section 24.05

defect, the Union would have been hard pressed to establish a nexus between such a violation and the filing requirements contained in Section 25.07. The Grievant initiated the grievance at Step Three and one would have to infer that he was on constructive notice concerning the filing deadline. In fact, the Union never posited any nexus argument.

As this Arbitrator has previously discussed, he is somewhat reluctant to dismiss grievances on purely technical grounds. Obviously, the Parties would be better served by an unequivocal award dealing with the truths of the matters asserted. And yet, I am also duty bound by Section 25.03 which restricts the scope of my authority in terms of imposing limitations or obligations not specifically required by the expressed language of the Agreement (Joint Exhibit 1). Expanding the appeal filing deadline without mutual agreement or some inference of an explicit waiver could constitute an imposition of an obligation not mutually agreed to by the Parties. A similar unintended result would be engendered if one agreed with the Union's Section 24.05 claim.

AWARD

The grievance is dismissed.

October 24, 1991

Dr. David M. Pincus
Arbitrator