

STATE OF OHIO  
LABOR ARBITRATION TRIBUNAL

#683

In the Matter of the Arbitration Between:

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

OPINION AND AWARD

GRIEVANCE OF  
APRIL IVY

This matter came on for hearing on September 25, 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.

Darryl A. Hines, Attorney with the firm of Jenkins, Jones, Hines, Taylor & Cure, presented the case for the grievant. Also in attendance on behalf of the grievant were Dwayne Knowles, Union delegate; April L. Alexander (Ivy), grievant; Ronald Alexander, observer; and Ervin Crenshaw, Assistant to the President.

Tim Wagner, Chief, Arbitration Services, appeared as advocate for the "State" or "Agency" and Bob Thornton assisted.

The subject of the pending dispute is the procedural propriety of the grievance. There was no presentation of evidence on the substantive merits of the case.

## GRIEVANCE

On June 7, 1989, the following dismissal letter was issued to the aggrieved:

Please be advised that Chapter 124, Section 27, of the Ohio Revised Code (R.C. 124.27), sets forth provisions for the removal of state employees whose service in their new position has been unsatisfactory during their probationary period. Consistent with these provisions you are hereby being removed from your position of Social Program Analyst II, in the Bureau of Surveillance and Utilization Review, effective at the close of business, Friday, June 9, 1989.

As indicated by your enclosed performance evaluation, you have been unable to adequately perform the duties, responsibilities and assignments of your position, after receiving the necessary training and instructions provided by your supervisor.

In accordance with Section 124-1-05 of the Ohio Revised Code, probationary removals are not appealable to the State Personnel Board of Review.

The dismissal was protested by the grievant on December 14, 1989 in a grievance seeking "reinstatement with all back pay and benefits and to be made whole in all ways." The statement of the grievance reads as set forth hereinafter:

Grievant was dismissed from employment for discriminatory reasons contrary to the contractual provisions for progressive discipline and just cause.

The Department of Human Services and its agents have repeatedly asserted to the grievant, Union, and Ohio Department of Civil Rights that the grievant is subject to an initial probationary period and not entitled to grieve disciplinary actions. This position was affirmed by the Office of Collective Bargaining. The Employer misled the parties as to the actual facts.

A review of employment records conducted this date (12/13/89) by the Union in preparation for an unemployment compensation hearing reveals that the grievant was not an initial probationary hire and is entitled to grieve.

### ISSUE

The Arbitrator finds that the issue in the present proceeding may be stated as follows: Is the grievance filed on December 14, 1989, arbitrable, and, if so, to what recourse is the grievant entitled?

### CONTRACT PROVISIONS

The following provisions from the Agreement between the parties are deemed to be pertinent to a proper resolution of the pending dispute:

#### **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.

##### **\$7.02 Definitions**

A. Grievance as used in this Agreement refers to an alleged violation, misinterpretation, or misapplication of specific article(s) or section(s) of the Agreement.

B. Disciplinary grievance refers to a grievance involving a suspension, a discharge, or a reduction in pay or position. Probationary employees shall not have access to the disciplinary 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.

Grievances submitted beyond the ten (10) day limit will not be honored. The grievance at this step shall be submitted to the immediate supervisor or designee on the grievance form. The immediate supervisor or designee shall indicate the date and time of receipt of the form. Within seven (7) days of the receipt of the form the immediate supervisor or designee shall hold a meeting with the grievant to discuss the grievance. At such meeting, the grievant may bring with him/her the appropriate delegate. The immediate supervisor or designee shall respond to this grievance by writing the answer on the form or attaching it thereto, and by returning a copy to the grievant and delegate within seven (7) days of the meeting. The answer shall be consistent with the terms of this Agreement. Once the grievance has been submitted at Step 1 of the grievance procedure, the grievance form may not be altered except by mutual written agreement of the parties. Meetings will ordinarily be held at the worksite in as far as practical.

**STATEMENT OF CASE**

The stipulated facts in this proceeding include the removal of the grievant from her job on June 9, 1989. At the time of the removal, the aggrieved held the job classification of Social Program Analyst 2 with the Department of Human Services.

A grievance dated May 25, 1989 alleging harassment and prejudicial treatment was pending at the time of the removal. The

Union appealed the grievance to arbitration and a hearing was held on February 28, 1990. In an arbitration award dated March 22, 1990, it was found that the grievance was not arbitrable as it was, in fact, an attempt to grieve a discharge during a probationary period. In the award the Arbitrator presumed the probationary status of the grievant. In a footnote to his award, the Arbitrator noted that the "issue of whether Ms. Ivy was in a probationary status at the time of her separation is an issue not presented to the Arbitrator for decision in this matter" and "that issue is the subject of another arbitral proceeding."

The evidence presented at the September 25, 1991 hearing addressing the probationary status of the grievant establishes that though not continuously employed by the state, the grievant has a state employment history dating back to 1979. In December of 1988, the grievant returned to state employment after leaving the private sector. She was removed in June, 1989. At the time of her removal, the grievant believed she was a "new hire." Thereafter while preparing for an unemployment compensation case, the grievant found a document in her personnel records referencing her "transfer" and "reinstatement." After discerning this information, the grievant filed her December 14, 1989 grievance protesting removal without just cause.

#### POSITION OF AGENCY

The Agency contends that the only issues before the Arbitrator for resolution are 1) the arbitrability of the grievance and 2) the standing of April Ivy to grieve. It is the

position of the Agency that April Ivy did not have standing to grieve because she was not an employee as of December 14, 1989 when she filed her grievance. Pursuant to Article 7.07(E)(1), only employees have the right to present grievances. As the employee status of the grievant was terminated effective June 9, 1989, she then lost the right to file a grievance on anything other than the removal.

The grievant did, in fact, protest her removal and an arbitration hearing was held on that subject. The Arbitrator found that the prior grievance was an attempt to protest a probationary removal which is not cognizable under the contract.

The attempt by the grievant to argue status as a regular employee on June 9, 1989 is simply reviving issues already processed through a final and binding arbitration proceeding. The grievant already had an opportunity to argue her case. She is barred from pursuing the matter further.

Finally, the grievance dated December 14, 1989 was filed over six months after the removal. Accordingly, it is barred as being untimely. Article 7 sets forth time restrictions for the processing of grievances. The present grievance is well beyond the contractual time limit for filing.

The grievance should be denied.

#### POSITION OF GRIEVANT

The grievant contends that the issue herein ought not to be drawn so narrowly. In dispute is whether or not the grievant was a probationary employee at the time of her removal. This

question was never resolved in the prior arbitration award. Indeed, the Arbitrator refused to consider that question as it was the subject matter of a subsequent grievance. Rather, the Arbitrator proceeded on the assumption the grievant was a probationary employee, a presumption the grievant challenges herein.

The question of standing to grieve must relate back to the event in question. On June 9, 1989, the grievant clearly had standing to grieve. Thus, to preclude the grievant from processing her complaint on the basis of standing is improper.

The timeliness of the grievance must also be resolved in favor of the aggrieved. The contractual time limits only start to run when the grievant realizes there has been a contract violation. In the case at hand, the grievant did not realize she was not a probationary employee until just prior to her filing of the December 14, 1989 grievance. The grievant had been led to believe she was a new employee rather than a reinstated employee.

The knowledge attained by the grievant provided her with a basis for grieving which she did not previously have. She ought not to be precluded from using this new knowledge to adjudicate her rights under the contract.

The grievance should be sustained.

#### DECISION

Although the pending dispute does not require the analysis of a complex factual situation, the questions raised in this proceeding are not easily disposed of and are of great significance to the parties in the administration of their grievance

mechanism. The arguments presented by the parties address the applicability, if any, of legal principles to the grievance procedure. In considering these principles, the Arbitrator recognizes that the parties have through negotiations created their own forum for resolving disputes arising under the contract. Reference must be made, then, to the interests and intentions of the parties rather than to unwavering adherence to legal principles.

The circumstances under which the grievance arose are readily set forth. The grievant had an employment history with the state which, though not continuous, related back to 1979. Her most recent employment was with the Department of Human Services and commenced in December, 1988. Effective June 9, 1989, the grievant was removed from her position. Anticipating the action to be taken by the Agency, the grievant filed a grievance prior to the termination alleging discrimination and harassment. This grievance was heard before an Arbitrator on February 28, 1990 and a decision rendered on March 22, 1990. The Arbitrator denied the grievance finding that the grievance, in fact, protested a disciplinary removal and was not grievable under the Agreement because of the probationary status of the employee.

Prior to the first Arbitration hearing, the grievant determined while preparing for an unemployment compensation hearing that the Agency may have erred in considering her a probationary employee. Thus, a second grievance was filed on December 14,



1989 protesting an unjust discharge. It is the later grievance that is the subject of the instant arbitration.

An initial question to be resolved is whether this proceeding is "res judicata" and, therefore, precluded from further processing. The argument made by the Agency is that the March 22, 1990 Award of Arbitrator Silver disposed of the issues raised in the pending grievance. Therefore, the Agency maintains that the grievant should be estopped from further adjudication of her claim. The grievant, on the contrary, contends that the question of her probationary status was never answered in the prior arbitration award.

The Arbitrator is of the opinion that issues raised and addressed in one arbitration case ought to be barred from further consideration. While "res judicata" is not applicable to the arbitration forum, the principle that there be a final and binding resolution of matters in dispute is a well established concept in labor arbitration. Thus, parties are generally precluded from processing grievances the substantive merits of which have been previously resolved.

In the case at hand, however, the Arbitrator finds that the question of the probationary status of the grievant was never addressed by the prior Arbitrator. Indeed, in a footnote, he specifically declined to rule on the "issue of whether Ms. Ivy was in a probationary status at the time of her separation," finding that question "is an issue not presented to the Arbitrator for decision . . . ." Accordingly, the pending grievance cannot be dismissed on the basis of the prior ruling.

The probationary status of the grievant was "presumed" but never considered as an issue in the earlier award.

A second question to be addressed is whether the aggrieved had standing to file the December 14, 1989 grievance. The Agency argues that as the grievant was removed in June, 1989, she lacked standing as an employee to file a grievance in December, 1989. The grievant maintains that standing must be resolved as of the time of the June, 1989 removal. Without resolving the legal applicability of "standing," the Arbitrator is of the opinion that it is the status as an employee at the time of the incident under protest that determines the right to file a grievance. As the grievant was an employee when she was terminated in June, 1989, she may grieve her termination subsequent thereto, provided her grievance is in all other respects, procedurally and substantively, proper.

It remains, then, to consider whether the December, 1989 grievance is procedurally arbitrable. To determine this question, reference must be made to Article 7 of the Collective Bargaining Agreement.

Article 7 sets forth the procedural requirements for the processing of grievances. A term agreed upon by the parties is that a grievance shall be presented "within ten (10) days of the date on which the grievant knew or reasonably should have had knowledge of the event." The question posed in this proceeding is whether or not the grievant should have been aware that she may have been able to file a grievance protesting her removal as other than a probationary employee at the time of her removal.

The advocate for the grievant argued that the grievant had been misled about her probationary status. It is the position of the grievant that her probationary status had been misrepresented to her by the Agency.

The Arbitrator is of the opinion that a valid argument could be made to toll the time limits of Article 7 in the event of fraud or misrepresentation. In the case at hand, however, there is no persuasive evidence of misrepresentation. On the contrary, the Arbitrator finds that the grievant knew her employment history with the state and at the very least could have questioned her probationary status prior to December, 1989. Indeed, in grievant's Exhibit #1, she refers to her transferring from one agency to another within the state.

Thus, the Arbitrator is of the opinion that the grievant had sufficient information to question the designation of her employment as probationary. The fact that the Agency insisted she, as a probationee, was precluded from arbitrating her removal could not prevent the grievant from raising that very issue through a grievance. Yet, the grievant waited six months to file a grievance challenging status as a probationary employee. In the opinion of the Arbitrator, the grievant had sufficient knowledge to file a grievance protesting her probationary removal in June, 1989. Because of her failure to do so until December, 1989, the instant grievance must fail due to timeliness.

In negotiating Article 7, the parties endeavored to establish an efficient and expeditious means of resolving employment disputes. The grievance procedure is designed to provide a

prompt means for addressing controversy. The time limits set forth in Article 7 are to assist in carrying out this purpose and the parties must be held responsible for adherence to these restrictions on processing grievances. It is incumbent upon the individual employee to be diligent in pursuing contractual rights.

In the opinion of the Arbitrator, the pending grievance must be denied having been filed well beyond the ten (10) day limitation. The grievant ought to have known she may have had a cause of action at the time of her removal. The failure to promptly address this question bars its consideration in the instant proceeding. Having been submitted beyond the contractual ten (10) day limit, the grievance cannot be arbitrable.

AWARD

The grievance is denied.

  
Margaret Nancy Johnson  
Arbitrator

Dated and made effective in Columbus, Franklin County, Ohio,  
this 25th day of October, 1991.