

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 746

OCB GRIEVANCE NUMBER: 34-02-910820-0144-02-11

GRIEVANT NAME: HARREL/SCHIFFERLY

UNION: 1199

DEPARTMENT: BWC

ARBITRATOR: FULLMER, JERRY

MANAGEMENT ADVOCATE: EASTMAN, BRIAN

2ND CHAIR: PRICE, MERIL

UNION ADVOCATE: HETRICK, LISA

ARBITRATION DATE: MARCH 17, 1992

DECISION DATE: MARCH 31, 1992

DECISION: GRANTED

CONTRACT SECTIONS

AND/OR ISSUES: GRIEVANTS' APPLICATIONS FOR PROMOTIONS  
WERE NOT RECEIVED BY INTERNAL DEADLINE,  
THEREFORE WERE CONSIDERED WITH THE EX-  
TERNAL APPLICATIONS.

HOLDING: GRIEVANTS MAILED THEIR APPLICATIONS THROUGH USPS.  
ENVELOPES RECEIVED BY MGMT DID INDICATE A TIMELY  
POSTMARK SPECIFIED IN SECTION 30.02

COST: \$988.08

IN THE MATTER OF ARBITRATION

Between

STATE OF OHIO,  
BUREAU OF WORKERS' COMPENSATION

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

Harrel/Schifferly  
Job Application  
Grievance

34-02-910820-0144-02-11

APPEARANCES

For the Employer:

Brian Eastman, Esq.  
Assistant Legal Counsel

Meril J. Price, Executive Assistant to Deputy Director  
Gretchen Green, Labor Relations Officer

*2nd Chair*

For the Union:

Lisa Hetrick, Organizer  
Dennis McMickens, 1199 Delegate  
Pauline Harrell, Grievant  
Fritzie Schifferly, Grievant

JERRY A. FULLMER  
Attorney-Arbitrator

Cleveland, Ohio

This case<sup>1</sup> concerns the timeliness of two applications by Grievants Pauline Harrell and Fritzie Schifferly for a posted job classification of Industrial Rehabilitation Nurse.

## I. FACTS

### A. Background Facts

The Grievants are employed by the Bureau of Workers Compensation (sometimes hereafter referred to as "the Bureau") in its Toledo Field Office as Rehabilitation Case Managers. Grievant Harrell has been employed by the State for 12 years and by the Rehabilitation Division for 10 years. Grievant Schifferly has been employed by the State for 4 years and by the Rehabilitation Division for 3 years.

The Bureau, in addition to the Field Offices of the various

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<sup>1</sup> 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 the timeliness of two applications by Grievants Pauline Harrell and Fritzie Schifferly for a posted job classification of Industrial Rehabilitation Nurse.

The Union's grievance (Jt. Ex. 2a, i.e. #34-02-910820-0144-02-11) concerning this matter was dated August 12, 1991. It was submitted to arbitration before this arbitrator who serves on the parties' permanent arbitration panel. A hearing was held on March 17, 1992 in Room 705 of the Employer's Office of Collective Bargaining in Columbus, Ohio. Both advocates made opening and closing statements and presented and cross-examined witnesses. It was stipulated by the parties 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.

Divisions, maintains a Human Resources Department in Columbus, in the William Green Building. Within this Department there is a Recruitment Unit which is responsible for processing posted job vacancies and the resulting applications. The Front Desk Receptionist for this Department is one Elizabeth Diane Wycoff.

B. Facts Leading to the Grievance at Issue

On May 21, 1991, the Bureau posted a notice of vacancy for a job classification of "Industrial Rehabilitation Nurse". This bore the "working title" of "SDES Nurse". The vacancy was located in the Government Center in Toledo, Ohio. The listed Supervisor was Wanda Keesy. The posting (Joint Ex. 3) concluded with the following information:

"This vacancy shall remain posted for a period of seven calendar days. Persons presently employed by the Bureau of Workers' Compensation must apply for this position in writing not later than the end of the posting period of the vacancy. Submit your application to:

DEPARTMENT: Human Resources - Recruitment Unit

LOCATION: Wm. Green Building 30 W. Spring St., Level 6, Columbus, OH 43266-0581

PHONE NO.: (614) 466-7080 END OF POSTING: May 27, 1991

The Grievant's both made application. Grievant Harrell testified that her application (Joint Ex. 5) was placed in the USPS mail chute in her office building on Friday morning, May 24, 1991. Grievant Schifferly testified that she placed her application (Joint Ex. 4) in the mail box at the Waterville, Ohio post office on Saturday morning, May 25, 1991. The applications were filed on the forms to be used by "internal" applicants, i.e. those currently

employed by the Bureau in bargaining unit positions. The applications as eventually received in the Human Resources Department in Columbus were stamped with the "received" dates of "June 4, 1991" in the case of the Harrell application and "June 3, 1991" in the case of the Schifferly application.

The Human Resources Department also received an application for the position from Wanda Keesy. Ms. Keesy, although a supervisor in the Bureau, was considered to be an "external" candidate because she was not employed within the bargaining unit.

Grievant Harrell and external applicant Keesey were interviewed for the posted vacancy, apparently on June 26, 1991. Grievant Schifferly was not interviewed at all. Eventually the vacant job was awarded to external applicant Keesey. Grievant Harrell found out about this award on August 5, 1991, through conversations with the Acting Director of the Bureau's Toledo Field Office, Bobbie Wiggins. On August 5, 1991, both Grievants were sent virtually identical letters indicating that their earlier applications were untimely:

"This is to inform you of the status of the application you submitted for PCN 7308.0, Industrial Rehabilitation Nurse, in the Toledo District Office.

"According to article 30.02 of the 1199 contract, employees may file timely applications for promotions. Your application was not received by this office until [June 3, 1991 for Grievant Schifferly and June 6, 1991 for Grievant Harrell] The deadline date to apply for this position was May 27, 1991. Since your application was not received timely, it will be considered with the external applications for this position.

Should you have any questions regarding this matter, please contact me at 614-466-7080." (Joint Exs. 6 and 7)

(bracketed and underline material added)

The grievance at issue was filed on August 12, 1991:

"Management alleges that both grievants did not file timely applications for bargaining unit position PCN 7308.0. Contract stipulation of 'postmarked' date of both applications were ignored. Union contends both applications were filed timely."

(Joint Ex. 2a)

The Level III Finding by Labor Relations Manager Nancy V. Seman, dated September 30, 1991 stated:

"After a careful review of the testimony presented at the Level III meeting, I fail to find a contract violation. There was much discussion as to when the internal applications were sent to the Human Resources Department and the agency's own procedure for receiving them. However, Article 30.02 of the contract states in part, 'Applications will be considered timely filed if they are received or postmarked no later than the closing date listed on the posting'. The applications were received and time-stamped seven and ten days after the deadline and there is no written evidence of mailing prior to or on May 27, 1991, (e.g., certified mail receipt or inter-office overnight courier.) Management's notification to the grievants of untimely applications was reasonable and appropriate. Also, there is no contract provision which burdens management with providing proof of an employee's mailing date of an application."

(Joint Ex. 2b)

The grievance proceeded through the specified steps to arbitration.

## II. APPLICABLE CONTRACT PROVISIONS

### **Sec. 30.02 Awarding the Job (Transfers and Promotions)**

Applications will be considered filed timely if they are received or postmarked no later than the closing date listed on the posting. All timely filed applications shall be reviewed considering the following criteria: qualifications, experience, education, and work record, and affirmative action. Among those that are qualified the job shall be awarded to the applicant with the most state seniority unless a junior employee is significantly more qualified based on the listed criteria.....

### III. ISSUE

Were the applications submitted by grievants filed timely? If so, what shall the remedy be?

### IV. POSITIONS OF THE PARTIES

#### The Union Position

The Union points out that the vacant position was eventually awarded to a supervisor who wanted to move to Toledo to be close to her fiance - boyfriend. This alone should cast some suspicion upon the Employer's procedures. The evidence is clear that the Grievants mailed their applications to Columbus through the USPS. The Employer should have been in possession of the envelopes and been able to prove that they bore late postmarks if that was the case. The Employer's own witness, Receptionist Wycoff, indicated that the envelopes were saved and stapled to the applications when they were received after the "end of posting" date, but no envelope was ever produced. There are strong suspicions that the Employer has been destroying the applicable proof here. The arbitrator should rule in favor of the Union in this case and see that the job is awarded to the senior internal applicant, Grievant Harrell.

#### The Employer Position

The provisions of Section 30.02 are clear and unambiguous. The Union bears the burden of proof in contract interpretation cases and must prove that the Grievants' applications were either received or postmarked before the closing date. It has failed to muster such proof. The testimony of Receptionist Wycoff as to the

Employer's procedures was clear. The applications are time stamped upon receipt. The stamps upon the Grievant's applications show that they were not received by May 27. When and if the applications are sent by the USPS and are received after the closing date, the envelope is saved and stapled to the applications. No such envelope was in the file in this case, indicating that the applications were not mailed through the USPS, but by the Bureau's internal system.

The Grievants' proof of mailing through the USPS was totally inadequate. They could have sent them by certified mail, but they did not. There were no witnesses to their actually having mailed them through the USPS. The contract language is clear. The Grievants have not met their burden. The grievance should be dismissed as being without merit.

## V. DISCUSSION

### A. Introduction

Section 30.02 of the parties' agreement establishes a requirement that:

Applications will be considered filed timely if they are received or postmarked no later than the closing date listed on the posting.

The issue in this case is a rather narrow one, namely whether the Grievants' applications for the posted vacancy were "filed timely" or not. As in all contract interpretation cases, the Union bears the burden of establishing that a contract violation has taken place.

The quoted section sets out two methods of establishing



timeliness. One is on the basis of the date of receipt and the other is on the basis the date of postmark. The date of receipt refers to receipt by the Employer in the office designated on the posting, in this case the "Human Resources - Recruitment Unit" in Columbus. The received date as shown by the time stamps on the applications were, respectively, June 3, 1991 for Grievant Schifferly and June 4, 1991, for Grievant Harrell. (Joint Exs. 4 and 5). The closing date of the posting was May 27, 1991. The Union presented no evidence impeaching the time stamp dates and concedes that it cannot prevail in this case on the basis of date of receipt.

We turn then to the second means of establishing timeliness, i.e. postmark. The evidence indicates that there is an inter-office courier system for transmitting documents between offices of the Bureau. The envelopes used for this purpose are ones which are re-used for successive transmissions. The envelopes used in this system bear no postage stamps and/or postmarks. "Postmarks" as used in the parties' agreement are those placed on envelopes sent through the facilities of the United States Postal Service ("USPS"). The Grievants testimony indicates that they mailed<sup>2</sup> their applications to Columbus by placing them, respectively, in a USPS mail chute on May 24, 1991 (Grievant Harrell) and in a USPS mail box on May 25, 1991 (Grievant Schifferly). The Grievants maintain

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<sup>2</sup> The word "mail" and "mailed" will henceforth be used only in connection with the use of the USPS. The inter-office courier system will be described as such.

that their envelopes thus should have borne the USPS postmark for the date that they mailed them and that these postmark dates preceded the due date of May 27, 1991.

The postmark issue presents two sub-issues. If it is assumed that the applications were indeed mailed by the Grievants through the USPS, the first issue is simply whether the evidence indicates that the postmark was timely or not. The second issue is whether the applications were in fact mailed through the USPS or, alternatively, sent through the inter-office courier system. We turn to these two sub-issues in the order stated.

B. Does the Evidence Indicate That the Postmarks Were Timely?

The discussion in this section assumes that the Grievants mailed their applications through the USPS. The reason for making such an assumption is that the case proceeded up through the grievance procedure on that basis.

As indicated above, the Grievants testified at the arbitration hearing that they mailed their applications by placing them, respectively, in a USPS mail chute on May 24, 1991 (Grievant Harrell) and in a USPS mail box on May 25, 1991 (Grievant Schifferly). There is no direct evidence rebutting the Grievant's testimony on this point. This is not surprising, since it would have taken a great deal of foresight on the Employer's part to have had the Grievant's followed on the days in question so that an Employer witness could testify that he watched them all day and saw that they did not place any applications in the USPS mail.

The Employer did present evidence from Receptionist Wycoff as

to her handling of applications received through the USPS. This testimony indicated that if the envelopes were received prior to the closing date on the posting, the envelopes were discarded. The reasoning of Ms. Wycoff and of Labor Relations Officer Green for this practice is that such applications are obviously timely on the basis of date of receipt. The envelope with the postmark is thus redundant to the timeliness question and only serves to unnecessarily bulk out the files. But, when an application is received through the USPS after the closing date, the envelope is retained and stapled to the application. The reason for the retention is that the postmark date on the envelope is important in such cases as either establishing or negating the timeliness of the application. (Such an application cannot, by definition, be considered timely on the basis of receipt.)

In the present case, the applications of the Grievant were received on June 3 and June 4, after the May 27 closing date. Under the practice described by Ms. Wycoff the envelopes with the postmarks would have been stapled to the applications and retained in the file. The Employer's file on the posting was not placed in evidence at the arbitration hearing as an exhibit. It was however proffered for examination by the Employer's counsel and it was indicated by counsel that there were no envelopes from the Grievants with USPS postmarks in the file.

The Employer maintains that it is up to the Grievants to prove that their envelopes bore a postmark of May 27, 1991 or before. The arbitrator does not agree, for several very practical reasons.

1. A person placing a letter in a mail box has no control over the postmarking process<sup>3</sup>, he or she just walks away from the mail box. The effort involved in getting the USPS to accept a piece of mail, postmark it, give it back long enough for the person to make a Xerox copy of the envelope, and return it to the USPS would be extraordinary even if the process were possible.

2. Questions from Employer counsel at the arbitration hearing and the Level III Finding in the grievance procedure seemed based on a viewpoint that the Grievants could have or should have mailed their applications by certified mail. But, the existence of the certified mail procedures is common knowledge to the negotiators of labor agreements. The fact is that the provisions of Section 30.02 only require a "postmark", not the use of certified mail. There is no reason to imply a requirement for its use.

3. Under the process described above, the party which ends up in possession of the postmarked envelope is the Employer. Indeed, the testimony of Receptionist Wycoff

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<sup>3</sup> By this the arbitrator means simply that the person does not follow the letter on its way and look over the shoulder of the postal workers to watch the postmark being made. Obviously there is some control in the sense that the person doing the mailing must do some checking as to the mail pick-up schedule. For example the sign on the neighborhood mail box may indicate daily pick-ups Monday through Friday at 1:00 p.m.. A person mailing a letter in that mail box on Friday at 7:30 p.m. cannot claim to be surprised that it eventually bears a post-mark of the following Monday.

is that the envelope, under the circumstances here present, is saved in the file. The retention is quite rational and is obviously for use in resolving controversies as to whether the postmark was timely or not. Under the circumstances, the burden of producing the evidence (i.e. the envelope with the postmark upon it) should be upon the party in physical possession of the evidence, i.e. the Employer.

In the absence of the production of this documentary evidence, the only evidence on the subject is the Grievants' rather detailed testimony that they mailed their applications on May 24 and May 25, under circumstances where the envelopes would be postmarked with those dates<sup>4</sup>. In the absence of rebutting testimony the arbitrator considers the fact of the pre-May 27, 1991 postmarks to have been established by the evidence.

C. Were the Applications in Fact Mailed Through the USPS or, Alternatively, Were They Sent Through the Inter-Office Courier System?

As stated, the previous section of the discussion was based on the assumption that the Grievants did mail their applications through the USPS. As the arbitration hearing developed, the Employer indicated that this may not have been the case and that

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<sup>4</sup> By this the arbitrator means simply the May 24 mailing in the morning in the mail chute of an urban building prior to the last collection of the day (Grievant Harrell) and the May 25 mailing in the mail box actually in the Waterville Post Office prior to the office's closing time (Grievant Schifferly).

possibly the Grievants may have used the inter-office courier system instead. The difference in method is important because postmarks are not used in the inter-office courier system and timeliness must necessarily be established on the basis of the date of receipt in Columbus. These dates, June 3 and June 4 are concededly beyond the May 27, 1991 closing date of the posting.

As the arbitrator understands the Employer's argument, it is not based on direct evidence. In other words, Receptionist Wycoff is not able to testify that "I remember the applications of the Grievants and I remember that they came in by the inter-office courier system." It is rather based on an inference from the practices as testified to by Ms. Wycoff. That is, when an application is received through the USPS after the closing date, the envelope is retained and stapled to the application. When an application is received through the inter-office courier system before or after the closing date, the date is simply stamped on the application. The argument proceeds to the conclusion that since there were no post-marked envelope in the file in this case, the applications must have arrived by inter-office courier.

In considering this argument (hereafter sometimes referred to as the "inter-office courier argument"), the arbitrator must point out that he understands, and is sympathetic toward, the considerations pointed out in the Employer's opening argument, i.e. that:

"the agency processes a tremendous volume of applications daily, which will underscore the necessity of having a consistent, centralized procedure that will ensure that

all applicants are treated fairly."

The timeliness of applications for vacancies is a potential problem area in contract administration. The benefits of centralization and objectivity through written applications, time stamps, logs and postmarks are obvious and have been recognized by the drafters of the parties' agreement.

Nevertheless there are two main problems with the inter-office courier argument. The first is that there is reasonably detailed and convincing evidence from the Grievants that they did indeed use the USPS mails rather than the inter-office courier system. The second is that the argument seems to have been something of a late bloomer. For instance, the "Management Contention" at the Level III proceeding was as follows:

"....The grievants' internal applications were received and time stamped in Human Resources on June 6, 1991, and June 3, 1991, respectively. The envelopes were not attached; therefore, the mailing dates could not be verified. Usually regular mail is received and opened in the agency's Office Services Department and often the applications are forwarded to Human Resources without the envelopes. As the deadline date for applying was May 27, 1991, the two grievants were sent letters indicating their applications were untimely. Management also believes an employee is responsible for ensuring that his/her application is timely received and and/or to provide specific evidence of mailing."

(Joint Ex. 2b)

This argument seems to be based on the assumption that the applications had been mailed through the USPS.<sup>5</sup> There was no

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<sup>5</sup> The argument that the burden is on the employee to prove the postmark date has been dealt with above in Section V. B. of this Opinion and Award.

indication whatsoever that the Employer maintained that the applications had been sent through the inter-office courier system.

The same is true of the Employer's opening argument at the arbitration hearing which essentially asserts that:

"there are no records available that prove whether either of the applications were postmarked prior to the posting deadline....the burden is on the grievants to produce a document that establishes that their applications were postmarked timely."

Again, there is no assertion in the opening argument that the Grievants' applications had in fact been sent by the inter-office courier system.

It is thus clear on the record that both parties had proceeded through the grievance procedure and into the meat of the arbitration hearing on the basis of that the Grievant had mailed their applications through the USPS. The inter-office courier argument thus comes too late and is of insufficient weight to rebut the Grievants' direct evidence of the use of the USPS.

#### D. Conclusion

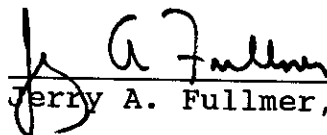
The Grievants mailed their applications through the USPS. Their testimony that they mailed them on May 24 and May 25, 1991 under circumstances indicating that the envelopes would bear those postmarks was not rebutted by evidence from the Employer as to the postmarks on the envelopes that it did receive. Under the circumstances it must be held that the Grievants' applications were timely on the postmark basis specified in Section 30.02 of the parties' agreement.



VI. AWARD

Grievance sustained. The Employer violated Section 30.02 of the parties' agreement when it ruled on August 6, 1991 that the application of the senior qualified internal applicant, Grievant Pauline Harrell, for the posted Industrial Rehabilitation Nurse vacancy (P.C.N. 7308.0) was untimely.

Within fifteen (15) days of the date of this Award, the Employer shall offer Grievant Pauline Harrell the previously posted Industrial Rehabilitation Nurse vacancy (P.C.N. 7308.0). The Employer shall not be required to pay Grievant Pauline Harrell any back pay or benefits. If Grievant Pauline Harrell accepts the previously posted Industrial Rehabilitation Nurse vacancy (P.C.N. 7308.0), the person previously awarded the vacancy in August, 1991, i.e. Wanda Keesy, shall be removed by the Employer from the position. Following the removal, Ms. Keesy shall enjoy only such rights, if any, as are given her by virtue of her service within the bargaining unit during the period between approximately August 12, 1991 and the date of her removal.

  
Jerry A. Fullmer, Arbitrator

Made and entered this  
31st day of March, 1992  
at Cleveland, Ohio