

In the Matter of the
Arbitration Between

#794

OCSEA, Local 11
AFSCME, AFL-CIO

Union
and

State of Ohio

Employer.

Grievance No. 35-08-(91-11-27)-
0021-01-03

Grievant James Coleman

Hearing Date: June 19, 1992

Award Date: July 6, 1992

Arbitrator: R. Rivera

For the Employer: Barry Braverman
Paul Kirschner

For the Union: John Fisher
Maxine Hicks

Present at the Hearing in addition to the Grievant and Advocates were William L. Daniels, Youth Leader II (witness), Denny Baskin, Youth Leader II (witness), Larry M. McCrane, Youth Leader II (witness), Don Feldkamp, TICO Management Representative (witness), Karen Nichols, Personnel Officer TICO (witness), Debbie Carter (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award

for possible publication. Both the Union and the Employer granted permission. Witnesses were sequestered. All witnesses were sworn.

Joint Stipulations of Fact

1. The Grievant started on May 6, 1991 at the Freedom Center as a Youth Leader Specialist.
2. His starting pay was at Range 07, Step 1, \$9.63. He received a collective bargaining increase to \$10.02 in July.
3. He resigned this position on August 10, 1991 in a letter dated August 2, 1991.
4. The Grievant had an initial interview for the Youth Leader position at TICO with Sharon Allen and Karen Nichols.
5. The Grievant had a follow-up interview with Don Feldkamp.
6. The Grievant started on August 12, 1991 at TICO as a Youth Leader.
7. His starting pay was at Range 06, Step 1, \$9.62. When he was removed his pay was still \$9.62.
8. The Grievant was probationarily removed from the Youth Leader Position at TICO on November 23, 1991.

Joint Exhibits

1. 1989-92 Labor Agreement
2. Grievance Trail
3. State of Ohio Personnel Actions
Effective dates: 5-6-91, 8-10-91, 8-12-91, 11-23-91
4. Grievant's letter of resignation dated 8-2-91
5. Grievant's Mid-Probation performance evaluation dated September 30, 1991.
6. Removal letter and final probationary performance evaluation dated November 18, 1991.

7. Section 124.27 of the Ohio Revised Code.
8. Grievant's Position Description at Freedom Center.
9. Grievant's Position Description at TICO.
10. State of Ohio Classification specification for Youth Leader and Youth Leader Specialist.
11. Grievant's Ohio Civil Service Application dated 3-29-91.
12. Statement from Denna LaMons dated January 7, 1992.
13. Statements (15) from TICO staff dated 2/18/92-2/19/92.

Union Exhibits

1. Draft of letter dated 8/2/91 to William Baumgardner from Grievant.
2. Phone-O-Gram dated 8/19/91 to Grievant from Karen Nichols.

Employer Exhibits

1. Supplemental Employment Exhibit dated 8/27/91 signed by Grievant.
2. Award #31-10-910506-013-01-06.
3. Award #27-21-880923-0017-01-03.
4. Award #31-07-901025-0043-01-06.
5. Award #31-13-910225-0014-01-09.

Employer Issue

Did the Employer properly deny holding a Step 3 meeting on the probationary removal, as removals are not arbitrable? If not, what shall the remedy be?

Union Issue

Was Grievant removed for just cause, if not what should the remedy be?

Contract Sections

ARTICLE 25 - GRIEVANCE PROCEDURE

Section 25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

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.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union

and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. Written reprimands shall be grievable through Step Three. If a verbal or written reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal or written reprimand.

H. All settlement agreements that require payment or other compensation shall be initiated for payment within two payroll periods following the date the settlement agreement is fully executed.

Section 25.02 - Grievance Steps

Step 1 - Immediate Supervisor

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event. If being on approved paid leave prevents a grievant from having knowledge of an occurrence, then the time lines shall be extended by the number of days the employee was on such leave except that in no case will the extension exceed sixty (60) days after the event. The immediate supervisor shall render an oral response to the grievance within three (3) working days after the grievance is presented. If the oral grievance is not resolved at Step One, the immediate supervisor shall prepare and sign a written statement acknowledging discussion of the grievance, and provide a copy to the Union and the grievant.

Step 2 - Intermediate Administrator

In the event the grievance is not resolved at Step One, a legible copy of the grievance form shall be presented in writing by the Union to the intermediate administrator or his/her designee within five (5) days of the receipt of the answer or the date such answer was due, whichever is earlier. The written grievance shall contain a statement of the grievant's complaint, the section(s) of the Agreement allegedly violated, if applicable, the date of the alleged violation and the relief sought. The form shall be signed and dated by the grievant. Within seven (7) days after the grievance is presented at Step Two, the intermediate administrator shall discuss the grievance with the Union and the grievant. The intermediate administrator shall render a written answer to the grievance within eight (8) days after such a discussion is held and provide a copy of such answer and return a legible copy of the grievance form to the grievant and a copy to one representative designated by the Union.

Step 3 - Agency Head or Designee

If the grievance is still unresolved, a legible copy of the grievance form shall be presented by the Union to the Agency Head or designee in writing within ten (10) days after receipt of the Step Two response or after the date such response was due, whichever is earlier. Within fifteen (15) days after the receipt of the written grievance, the parties shall meet in an attempt to resolve the grievance unless the parties mutually agree otherwise. In the Ohio Department of Transportation Step 3 meetings will normally be held at the worksite of the grievant. If the meeting is held at the district headquarters the chief steward will be permitted to represent.

The Agency Head or designee shall process grievances in the following manner:

A. Disciplinary grievances (suspension and removal)

The Step 3 grievance response shall be prepared by the Agency Head or designee and reviewed by the Office of Collective Bargaining. The response will be issued by the Agency Head or designee within thirty-five (35) days of the meeting. The response shall be forwarded to the grievant and a copy to one representative

designated by the Local Chapter Officer. Additionally, a copy of the answer will be forwarded to the Union's Central Office. This response shall be accompanied by a legible copy of the grievance form.

If the grievance is not resolved at Step 3, the Union may appeal the grievance to arbitration by providing written notice and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given whichever is earlier.

B. All other grievances

The Agency Head or designee shall give his/her written response and return a legible copy of the grievance form within fifteen (15) days following the meeting. The Agency shall forward the response to the grievant and a copy to one representative designated by the Local Chapter Officer.

Step 4 - Office of Collective Bargaining Review

If the grievance is not settled at Step Three, pursuant to Step 3 (B), the Union may appeal the grievance in writing to the Director of The Office of Collective Bargaining by sending written notice, and a legible copy of the grievance form to the Employer, within ten (10) days after the receipt of the Step Three answer, or after such answer was due, whichever is earlier.

The Director of the Office of Collective Bargaining or his/her designee shall issue a full response to the Union and the grievant within twenty-one (21) days of the appeal. The response will include a description of the events giving rise to the grievance and the rationale upon which the decision was rendered. The Director of the Office of Collective Bargaining may reverse, modify or uphold the answer at the previous step or request a meeting to discuss resolution of the grievance.

A request to discuss the resolution of the grievance shall not extend the thirty (30) days in which the Union has to appeal to arbitration as set forth in Step Five.

Step 5 - Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Director of The Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given, in Step Four.

Section 25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the 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.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

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.

If either party desires a verbatim record of the proceeding, it may cause such a record to be

made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

Facts

The Grievant began his state employment on May 6, 1991 for the Department of the Youth Services as a Youth Leader Specialist at the Freedom Center. His starting pay was at Range 07, Step 1 which paid \$9.63. For his first 120 days, the Grievant was on probation. On July 1, 1991, he received a pay increase to \$10.02 as a consequence of the collective bargaining agreement. Sometime in July 1991, the Grievant received a call from the personnel office at TICO. He was asked to interview for the position of Youth Leader. Apparently, this request for an interview was as a consequence of the state application filed by the Grievant on March 29, 1991 (Joint Exhibit 11). The Grievant went through the regular two tier interview process at TICO. He was first interviewed Sharon Allen and Karen Nichols. Ms. Nichols, who is from TICO personnel, testified that she and Ms. Allen did a normal interview with Grievant but that not until at the end of the interview did she find out the Grievant was currently working at the Freedom Center. She said that she then informed him that he would have to resign from Freedom Center to accept the position at TICO because he was still in his probationary period there. Ms. Nichols also said that she probably called the Freedom Center twice with regard to the Grievant. The first time was routine: to verify his employment.

Then, she called to arrange his employment; again re-iterating that he would have to resign and that he could not transfer. After his interview with Ms. Allen and Ms. Nichols, the Grievant was interviewed by Mr. Feldkamp. Mr. Feldkamp testified that he remembered the Grievant because of his unique situation, namely, the Grievant was then currently employed at the Freedom Center. Mr. Feldkamp said that the Grievant wanted to transfer to TICO. Mr. Feldkamp maintained that he clearly and specifically told the Grievant that he [the Grievant] could not "transfer," but rather he must resign and begin with a new probationary period. According to Mr. Feldkamp, the Grievant said "he'd have no problem" with that arrangement. The Grievant said that he was never told in the two interviews that he would have to resign from the Freedom Center in order to accept the position at TICO. The Grievant testified that when he returned to the Freedom Center, he found his job posted and that he had "no choice" but to go to TICO. [The time interval involved was not specified by the Grievant.] The Grievant said that he first prepared a transfer letter (Union Exhibit 1), but he was then advised by his superior at the Freedom Center that TICO required him to resign to accept the job at TICO. The Grievant prepared, signed, and submitted a letter of resignation (Joint Exhibit 4). This latter sequence of events is supported by Denna LaMons, the secretary at Freedom Center (Joint Exhibit 12). The request and need for resignation by the Grievant from the Freedom Center is also supported by the testimony of Ms. Nichols.

The Grievant began his employment at TICO on August 12, 1991 as a Youth Leader. His starting pay range was 06, Step 1, \$9.62. (A loss in pay of \$0.40.) On September 30, 1991, the Grievant received an evaluation. The evaluation was marked "mid-probation" evaluation and was dated from 8-12-91 to 10-10-91. The Grievant signed the evaluation. On August 27, 1991, the Grievant signed a Supplemental Employment Agreement which began in the following manner "I, GRIEVANT, do hereby agree that as a condition of my initial employment, satisfactory completion of my probationary period and continued employment with the State..." (Employer's Exhibit 1).

The Grievant testified that neither Ms. Allen, Ms. Nichols, nor Mr. Feldkamp told him at his interview that he would have to resign from the Freedom Center in order to accept the TICO position. He also said that no one told him that he would have to be in a probationary period for the full 120 days at TICO. Moreover, the Grievant also said that he only resigned from the Freedom Center because he relied on the advice of his superior there. The Grievant said that at his evaluation in September, 1991 he was assured by Mr. Bowman that "he shouldn't worry about his probationary period." Moreover, the Grievant said that when he signed the Supplementary Employment Agreement, he paid "no attention as it was just some paper he was told they needed in the office." He also said he never saw the Union contract until he was writing his grievance and that he did not know who were the stewards at either institution.

On November 22, 1991, the Grievant was notified that he was being "removed" effective November 23, 1991 (Joint Exhibit 6a). This same letter indicated that the removal was during the probationary period, and therefore, pursuant to ORC 124.27. The Grievant filed a grievance on December 5, 1991 (Joint Exhibit 2). In that Grievance, he maintained that at the time of his removal he was no longer a probationary employee because his probationary period expired in September 1991. On December 5, 1991, the Grievant demanded a Step 3 response (Joint Exhibit 2B). On December 17, 1991, the Employer denied the request for a Step 3 on the grounds that the Grievant was a probationary appointee at the time of his removal and, therefore, he was not entitled to Contract rights pursuant to 25.01B (Joint Exhibit 2C). The Grievant then requested arbitration (Joint Exhibit 2D). Arbitration was held on June 19, 1992.

At Arbitration, the Employer and the Union agreed that the primary issue raised at the Arbitration hearing was whether a Grievance was properly before the Arbitrator pursuant to section 25.03.

Employer's Argument

This matter, in Management's opinion, is not arbitrable.

First, the agreement under Article 25.01(B) states "probationary employees shall have access to this grievance procedure, except those who are in their initial probationary period shall not be able to grieve disciplinary actions or

removals." Management's position is that the evidence showed that the Grievant was placed on notice and knew that he was in an initial probationary employment status at TICO, yet took no action until his removal.

Secondly, Management claims the grievance was not timely. Article 25.02 of the agreement establishes the timelines for filing a grievance and states in pertinent part . . . "all grievances must be presented no later than ten (10) working days from the date the Grievant became aware or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event." The Grievant became a Youth Leader at TICO on August 12, 1991. He filed no grievance. On September 30, 1991, he signed his mid-probation performance evaluation. Still, he filed no grievance on his probationary status. Then, on November 23, 1991, the Grievant was probationarily removed by Management and he submitted a grievance dated December 5, 1991. This time period is approximately one hundred and fourteen (114) days after he began in the Youth Leader position. Clearly, this action is outside the timelines set forth by the parties in 25.02.

Thirdly, Article 16.02 of the agreement clearly spells out when continuous service shall be interrupted. The first condition listed is "separation because of resignation." The evidence will show that the Grievant wrote a letter of resignation for the Youth Leader Specialist position at the Freedom Center.

Fourth, the grievance refers to procedural concerns involving no pre-D meeting, the just cause standard and the forty-five (45) day limitation to impose discipline. Management's position is that when an employee is in a probationary status, Management has the right to set certain standards of performance which must be met. And if not met, then Management has the right to carry out a probationary removal. Since probationary employees are barred from grieving removals, they cannot avail themselves of contractual procedures governing removals. Nothing in the agreement provides for pre-D meetings for probationary employees removed for unsatisfactory service.

Fifth, Management claims that under Article 25.03 of the agreement, the Arbitrator is limited in her authority. Management would argue that the parties have agreed that probationary removals are not for the arbitration process. Clearly, the language under 25.03 states in part . . . "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."

In closing, Management requests the Arbitrator to invoke the authority that is vested under 25.03. Again, under 25.03 the language states . . . "questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or is such preliminary determination cannot

be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute." The Grievance is not arbitrable.

Union's Argument

The Union alleges that TICO Management and Personnel violated ORC 124.27 in terminating Grievant because he had already completed his probationary period. Grievant served two months of a four month probationary period when he was initially employed by the State of Ohio in a provisional status as a Youth Leader Specialist at the Freedom Center in May 1991. ORC reads in significant part . . . "Service as a provisional employee in the same or similar class shall be included in the probationary period. If the service of a probationary employee is unsatisfactory, he may be removed at anytime during the probationary period after completion of sixty days or one-half of his probationary period, whichever is greater."

Because the positions of Youth Leader Specialist and Youth Leader are defined as same or similar pursuant to ORC 124.27, Grievant's probationary period should have ended in September, 1991.

The Grievant, being new to the system, was not aware of procedures regarding the acceptance of demoting positions, and thus was not knowledgeable in the procedures necessary to transfer. He trusted the word of the individuals instructing him instead.

In closing, the Union requests that the Arbitrator make the Grievant whole.

Discussion

The Employer argues that the matter at hand is not arbitrable for two reasons: 1) the Grievant was a probationary employee, and therefore, under the contract, he was not entitled to the right to challenge his removal, and 2) even if the Grievant's classification as probationary employee was improper, the Grievance was not filed in a timely manner under the contract.

The Union maintains that "transferring" the Grievant to TICO required that the Employer continue his probation and thus the Grievant was not a probationary employee at the time of his removal. Therefore, if the Grievant was not a probationary employee, he is entitled to contractual rights to settle the grievance surrounding his removal.

Obviously, a substantive disagreement exists between the Employer and the Union over the Employer's right to require a resignation of the Grievant prior to his move from Freedom Center to TICO. In essence, the Union maintains that the Grievant was entitled to a "transfer."

To decide whether the issue is properly before the Arbitrator requires a two step decision: was the Grievant a probationary employee and was the Grievance timely filed? The principle of efficiency and economy in arbitration requires that

the arbitrator to eschew deciding unnecessary issues. Therefore, rather than deciding if the Grievant was a probationary employee, the Arbitrator shall first turn to the issue of timeliness. Assume solely for the sake of argument that the Employer's decision to categorize the Grievant as a probationary employee was erroneous. If so, was the Grievance timely filed under 25.02?

Section 25.02 requires that a grievance to be timely must be presented not later than ten (10) working days from the date the grievant became or should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event. The event is not the Grievant's removal; rather the triggering event is the alleged improper classification of the Grievant as a probationary employee. The Grievant testified under oath that he did not know he was considered "probationary" until his removal. To credit that testimony requires the Arbitrator to find both Mr. Feldkamp and Ms. Nichols to have lied. Rather than engage in labeling either side as disingenuous, the Arbitrator turns to the second test under 25.02B, i.e., "should have known." If the Grievant did not "know" until November 22, should he have known sooner? The Arbitrator concludes that numerous occasions existed to put the Grievant on notice upon which a reasonable person in Grievant's shoes could have acted. The whole scenario about resigning versus transferring would have put an ordinary reasonable person on notice that he or she was losing rights held under the

previous job and beginning anew! Certainly, a loss of pay would indicate to the average person that he or she was not transferred but rather either demoted or in a totally new position. The evaluation which the Grievant signed and which he said he read was clearly marked "A MID-PROBATIONARY EVALUATION." Moreover, the Grievant volunteered in his own testimony that Mr. Bowman had said "don't worry about being on probation." Maybe the Grievant was misled, but he was clearly notified of his status. Then, the Grievant signed a second document (the Supplementary Employment Agreement) which clearly notified the Grievant yet again of his perceived status. Almost any one of these events would have caused an average person to inquire. Cumulatively, all these events should have caused the Grievant to recognize his status no later than September 30, 1991. The Grievant had ten days and no longer than 30 days to grieve. He missed that deadline by more than 60 days.

Lest a shadow be cast on the testimony of others, the Arbitrator has also concluded that not only should the Grievant have known his status, but he did know of his status. The Grievant's testimony was confusing, contradictory, and self-serving. He was unable to answer the simplest question in an honest and straight forward manner. Thus, the Arbitrator concluded that the Grievant was not credible.

Regardless of the underlying issue, the Arbitrator finds that the Grievance was not timely and, hence, no issue exists for arbitration.

Award

Grievance Denied in its entirety.

July 6, 1992
Date

Phonda Rivera
Arbitrator