#1067

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 28-02-940913-0039-01-09
and	*	August 8, 1995
	*	
OHIO DEPARTMENT OF	*	Billie E. Shafer, Grievant
REHABILITATION &	*	Arbitrability
CORRECTIONS	*	

Appearances

For the Ohio Civil Service Employees Association:

Anne Light Hoke, Advocate
Billie E. Shafer, Grievant
Michael E. Martin, Staff Representative

For the Ohio Department of Rehabilitation and Corrections:

Georgia M. Brokaw, Office of Collective Bargaining; Advocate
Colleen Wise, Labor Relations Specialist, Office of Collective Bargaining
Charles Adams, Labor Relations Officer, Ohio Department of Rehabilitation & Corrections

Hearing

A hearing on this matter was held at 9:00 a.m. on July 25, 1995 at the offices of the Ohio Civil Service Employees Association in Columbus, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. The parties mutually agreed to a bifurcated hearing on the matter of arbitrability, with a second day of hearing on the merits should the threshold question be decided in the affirmative. The oral hearing on arbitrability concluded at 1:30 p.m., whereupon the record was closed. The Employer requested a bench decision, but the Arbitrator denied the request so that she might give full consideration to the record before her. This opinion and award is based solely on the record as described herein.

Stipulated Issue

Is the above captioned grievance arbitrable per the 1994-1997 collective bargaining agreement?

Statement of the Case

The Grievant was employed by the Department (DRC) at the Adult Parole Authority in Cincinnati, Ohio as an Office Assistant III. On August 18, 1994, she was informed she was removed from State employment effective August 19, 1994. With the assistance of OCSEA Staff Representative Michael Martin, a grievance form was prepared to protest this action. Martin was a new staff representative, still undergoing training for that position at

the time, although he had received other Union training and had previously held various Union offices when an employee of the Ohio Department of Mental Health.

Martin had difficulty finding out with whom he should file the grievance. He was unable to get the answer in the Union's regional office and got voice mail when he called the central office, so he phoned the Office of Collective Bargaining (OCB). Relying on information he got from the receptionist, Martin mailed the grievance to Robert Thornton at OCB. The grievance was received at that office on August 22 and ultimately found its way to Colleen Wise who was the OCB liaison to DRC.

Wise testified that she assumed there had already been a Step 3 hearing and so she awaited the Step 3 response. When Martin was not contacted to schedule the Step 3 hearing, he again called OCB and was referred to Ms. Wise. She informed him that the proper place to file the grievance was with Joe Shaver at DRC. Wise also testified she told him the time lines for filing were not extended, but Martin does not recall this remark. In any event, on September 12 Martin sent the grievance with a cover letter to Shaver. A third-step meeting was held on October 25, 1994, at which the Employer lodged a procedural objection on the grounds that the grievance was untimely filed. Holding this to be the case, the hearing officer, Charles Adams, denied the grievance, but also addressed the merits in his written response. The case thereafter was appealed to the fourth step and, finally, to arbitration where it presently resides for final and binding decision.

Arguments of the Parties

Argument of the Employer

The Employer argues that the language of Article 25 is clear and unambiguous. The parties mutually agreed to the importance of expeditious handling of discipline cases when they negotiated advance-step filing. This language has remained unchanged through four contracts, which fact testifies to its clarity. Citing a variety of panel decisions, the State points out that arbitrators have consistently dismissed grievances as nonarbitrable because of timing deficiencies and this arbitrator should do so now as a matter of equity and due respect for the negotiated procedure.

The Employer claims there is no ambiguity in "Agency Head or designee." The steward knew it was a DRC case and could have called that department to find out who the designee was. What is more, he was present at negotiations and had a copy of the contract with the signatures of both Thornton and Shaver identifying their affiliation. The Union was on notice from prior awards that filing grievances with OCB was improper, says the Employer citing the Bowers decision in the Jones case (Ohio Department of Youth Services v. OCSEA/AFSCME and Charles H. Jones, Grievant, March 15, 1994). The Employer points to Section 43.01's "no verbal statements" and contends the steward should have known not to rely on a verbal statement by a receptionist over the phone.

With respect to the Union's contention that it had waived its right to argue arbitrability by processing the grievance, the Employer points out that it raised the issue at its first opportunity--the third-step meeting. Moreover, the right to raise the issue is not waived even if it is not brought up until the arbitration hearing, says the Employer who cites

Elkouri & Elkouri and the parties' case number 04-00-100791-01-07 (Nelson, October 5, 1993).

Finally, the Employer offers the decision of Arbitrator Drotning in which the error of a clerk did not constitute circumstances sufficient to overwhelm contract language ("Arbitrability of 24," December 9, 1988).

The Employer concludes that if the Arbitrator rules for the Union, she will be exceeding her authority, and asks that the grievance be found not arbitrable as untimely.

Argument of the Union

The Union first points out that the Employer has the burden of proof and argues that any doubt should be resolved in favor of the grievant. It says that the term "designee" is ambiguous. "Designee" is whoever the Employer says it is, and in this case the Union relied on the statement of an employee of OCB. This is to be distinguished from the circumstances of the Bowers decision wherein an experienced Union staffer relied on the statement of a Union employee. What the steward in the instant case did as a new steward was reasonable and should be allowed.

The Union also contends that the Employer waived its rights to argue arbitrability by accepting and processing the grievance. The way in which the Employer processed the case, such as its third-step response and use of the fourth step, led the Union to believe it had waived time lines. Article 25.01 is specific in what does not constitute a waiver and the circumstances of this case are not among those listed.

In any event, this grievance was only a few weeks late, not a year late as in the case cited by the Employer. Any flaw in the grievance is simply a technicality and should not bar

hearing the merits of the case because the entire purpose of the grievance procedure is to resolve disagreements arising in the workplace.

The Union concludes that because of the Employer waiver and a reasonable interpretation of the term "designee," the case should be declared arbitrable and heard on its merits.

Pertinent Contract Provisions

ARTICLE 25 - GRIEVANCE PROCEDURE

25.01 - Process
I. The receipt of a grievance form or the numbering of a grievance does ot constitute a waiver of a claim of a procedural defect.

25.02 - Grievance Steps
Step 1 - Immediate Supervisor

...

Suspension, Discharge and Other Advance-Step Grievances
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. A grievance involving a suspension or a discharge shall be initiated at Step Three of the grievance procedure within fourteen (14) days of notification of such action.

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....

ARTICLE 43 - DURATION

43.01 - Duration of Agreement
....No verbal statements shall supersede any provisions of this Agreement.

Opinion of the Arbitrator

The entire point of grievance procedures is the constructive resolution of workplace disputes over the interpretation and application of the negotiated agreement. While I, like many arbitrators, am inclined to hear cases on their merits, I, like the parties, am bound by the terms of their contract. In this case, the parties negotiated a clear and unambiguous

fixed time limit for the filing of discharge grievances, and they agreed such grievances would be filed with "the Agency Head or designee." The circumstances that exist here are insufficient to overwhelm the very clear time limit language. The grievance was ultimately filed with the proper person, but it was several weeks late due to it being initially sent to the wrong agency.

The Union argues that the term "designee" is sufficiently ambiguous that the Arbitrator can construe it to mean Mr. Thornton at OCB because the staff representative relied on information obtained from an employee at that office. For me to do so would grant clerical employees of one office authority to appoint Agency head designees. Nothing was offered to even suggest this result was contemplated by the parties, and one cannot imagine either of the parties intending such a result as it would create substantial ambiguity and instability in grievance processing. As Arbitrator Drotning put it in the case cited, "to find for the Union on the grounds of a clerical error would be an injustice to both parties in their negotiations which resulted in the Contract language...."

In point of fact, what occurred was a mistake. The staff representative, recognizing the importance of timely filing of grievance, made a good faith effort to beat the deadline. But in his zeal to file on time, he did not wait to hear from his own organization, nor did he call DRC (which was clearly named on the removal notice), neither of which would have unduly delayed submission of the grievance. He thus filed prematurely, without reliable information. Although his desire to assist members efficiently is laudable, such efforts must be tempered by the necessity for care.

The Union's waiver argument is also misplaced. The Department clearly raised its procedural objection at the third-step meeting, which was its first formal opportunity to do so. That it thereafter discussed the case on its merits does not constitute a waiver. Indeed, discussion of the merits was appropriate, as it prepared the parties for settlement or arbitration should the arbitrability issue have been decided in favor of the Union.

Award

The grievance is dismissed as unarbitrable on account of being untimely filed.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
August 8, 1995