IN THE MATTER OF THE ARBITRATION BETWEEN:	*	
	*	
The Department of Youth Services, State of Ohio	*	Case Number
	*	35-04(02-07-94)
- and -	*	01-06-10
	*	
State Council of Professional Educators OEA/NEA	*	Grievant David Bernat
	*	

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

FOR THE EMPLOYER:

Bruce Rahr, DYS, Advocate
Barry Braverman, DYS Labor Relations Specialist
Georgia Brokaw, OCB, Second Chair
Lou Kitchen, OCB
John Bragg, Human Relations Manager, DYS Central Office

FOR THE ASSOCIATION:

Henry L. Stevens, SCOPE/OEA/NEA
Natalie Otey, DYS, SCOPE Secretary, witness
William E. Walker, DYS Site Representative, Indian River

Mr. David Bernat (hereinafter, "the Grievant") and the State Council of Professional Educators (hereinafter, "the Association") filed a grievance alleging that the Department of Youth Services, State of Ohio (hereinafter, "the Employer") improperly, and in violation of the parties collective bargaining agreement, conducted a reduction-in-force (RIF) adversely affecting the Grievant. The Employer, prior to arbitration, raised procedural challenges to the arbitrability of the instant case. The parties agreed to bifurcate the case so that the questions of timeliness and of procedural error could be resolved before any consideration is given to the merits of the case. The Hearing was held on October 10, 1995, at the Office of Collective Bargaining, Room 703, Columbus, Ohio, beginning at 9:00 a.m. Both parties had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the parties requested and were granted the opportunity to submit post-Hearing briefs. Subsequently, the Arbitrator was advised, in writing, by both parties that post-Hearing briefs would not be filed.

ISSUE

Did the Grievant/Association commit procedural errors when submitting this Grievance under the terms of the parties' collective bargaining agreement? If so, do these errors render the dispute not arbitrable?

PERTINENT CONTRACT CLAUSES

ARTICLE 5 - GRIEVANCE PROCEDURE
Section 5.02 Definitions

C. Day - refers to calendar day except where otherwise specified. Times shall be computed by excluding the first and including the last day, except that when the last day falls on a Saturday, a Sunday or a legal holiday, the act may be done on the next succeeding day which is not a Saturday, Sunday or legal holiday. "Work Days" refers to Monday through Friday, excluding legal holidays.

Section 5.05

The following procedure applies to the processing of grievances:

A. Step 1: Immediate Supervisor
An employee having a grievance shall first attempt to resolve it informally with his/her immediate supervisor within fifteen (15) working days of the date on which the employee knows or reasonably could have had knowledge of the event giving rise to the grievance, but no later than thirty (30) days after the event. . . .

Section 5.09 - Reduction in Force Grievance

Grievances which arise under Article 18 shall be filed simultaneously with the Agency at Step 3 of the Grievance Procedures as outlined in Section 5.05, and the Office of Collective Bargaining at Step 4 of the Grievance Procedure as stipulated in Sections 18.01 and 18.13 . . .

ARTICLE 18 - REDUCTION IN THE WORKFORCE
SECTION 18.01

C. Should the Association disagree with the Employer's rationale to effect a reduction in force, it may grieve the final decision for a determination of its substantive validity or any procedural errors regarding this Article, directly to Steps 3 and 4 in accordance with Section 5.09. Such a grievance shall be

filed by the Association with the Office of Collective Bargaining and the Agency at Steps 3 and 4 of the Grievance Procedure within fifteen (15) work days of the date the Association received the final decision from the employing agency.

Section 18.13 - Reduction in Force or Displacement Appeal

An employee, who has been reduced in force or displaced, with the approval of the Association, may file a grievance as outlined in Section 5.09 of the Agreement, within ten (10) days of receipt of the notification of reduction in force, displacement or recall.

EXHIBITS

JX - 1	Collective Bargaining Agreement, covering the period 1994-1997.
JX - 2	Grievance Package.
EX - 1	Article 18 SCOPE/OEA Grievance Paths.
EX - 2	March, 1993, Grievance Package of a Borys Ostrowskyj.
EX - 3	Ohio Revised Code,Section 4117.10, Scope of agreement, grievances, implementation, rejection by legislative body, office of collective bargaining.
EX - 4	AFSCME Contract, Article 18.01.
EX - 5	Letter from Director of Youth Services to Ohio Educational Association, dated December 17, 1993.
EX - 6	Letter from Labor Relations Officer, Department of Youth Services to OEA Association President, dated November 19, 1993.
EX - 7	Copy of 1993 Calendar.
EX - 8	Letter from Labor Relations Officer, Department of Youth Services to OEA Labor Relations Consultant, dated April 11, 1995.
AX - 1	Fax message from OEA to Employer, dated April 14, 1995.
AX - 2	Letter to Labor Relations Consultant, OEA from Labor Relations Officer, DYS, dated April 21, 1995.
AX - 3	Memorandum from Thomas Dannis, Administrator, to Brad Rahr, dated November 19, 1993.

JOINT STIPULATIONS

The parties stipulated that the language in Article 18 is the same as in successor agreement.

The parties stipulated that the language of Article 5, Section 5.09 is the same as in successor agreement.

FACTS

A review of the evidence and testimony submitted at the Hearing reveals that, on November 19, 1993, the Employer notified the Association, in writing, that it was planning a "one person" RIF affecting the Grievant. In this letter, the Employer advised the Association it had until November 29, 1993, to challenge and/or to discuss the RIF (EX-6). This was done in accordance with Section 18.01 of the Agreement between the parties (JX-1).

The evidence also shows that the Grievant was aware of his impending displacement as early as December 6, 1993, and notified the Employer that he wished to give "official notice" that he wanted to exercise his displacement rights (EX-4, p.4).

It is undisputed that, on December 17, 1993, the Association was notified, in writing, by the Employer that it was confirming finalization of the RIF notice of November 19, 1993 (EX-5). Contemporaneous with this notification, the Grievant was personally informed, in writing, that he would be affected by the RIF. He acknowledged receipt of this information by signing the document on December 23, 1993 (ibid, p.2).

The evidence shows that, on January 28, 1994, the Employer's agent received a grievance (JX-2), dated January 10, 1994, signed by the Grievant and the Association, asserting that the action taken to RIF the Grievant was contrary to Articles 18, Article 5, section 5.01, Article 39.02 and .03, "and any other articles and/or state laws which may be affected." As a remedy, the Grievant and the Association asked that the RIF be rescinded and that the Grievant be made whole.

The matter was the subject of a Step 3 Grievance meeting. On March 18, 1993, the Association requested arbitration of this grievance under Article 5, Section 5.05 (D) of the Agreement (JX-2, p.6). By letter of April 11, 1994, the Employer notified the Association that it believed procedural errors in filing and timeliness existed that made the grievance not arbitrable (EX-8). The threshold question of arbitrability is now before this Arbitrator for decision.

EMPLOYER POSITION

The Employer asserts that any grievance arising from its actions in affecting a reduction-in-force are controlled by the language contained in Article 18 of the parties' Agreement. This language, the Employer contends, permits grievances to be filed by the Association, under Article 18, Section 18.01 or by an employee, under Section 18.13. The Employer acknowledges that Article 5, Section 5.03 provides that the Association may file a grievance involving more than one affected employee as a class action by using the term, "et al." in the grievance filing.

The Employer calls to the Arbitrator's attention to the fact that, under Article 18, the parties have provided for different standards, different filing methods, and different time frames, dependant upon the type of RIF grievance (EX-1). According to the Employer, the instant grievance is a conglomerate of all the above cited procedures in that the Grievant in this matter is identified variously as: (1) the Grievant; (2) the Grievant, et. al.; and (3) the Grievant and the Association. The Employer

asserts, however, that the narrative portion of the grievance outlining the cause of action indicates a grievance by the Association only, citing only procedural errors. None of the areas required to identify this as an employee grievance are mentioned. It is the Employer's position that this ambiguity in filing RIF grievances recently has been decided in its favor by Arbitrator David Pincus. His 1995, award was introduced in support of the Employer's contentions on this subject.

According to the Employer, the subject grievances is also defective because the Association failed to file its grievance simultaneously at Steps 3 and 4 as required by the Agreement. It further claims that the Association forwarded the grievance to a specific individual rather than to the office specified in the Agreement, thereby delaying its filing.

In addition to these procedural errors, the Employer argues that, regardless of how the grievance is characterized, it is untimely. The Employer maintains that an individual grievance must be filed within 10 days of the employee's notice of a reduction-in-force. It is clear and unrefuted, the Employer contends, that the Grievant had specific notice of the impending RIF on December 23, 1993. Consistent with the Agreement, the Employer asserts that the Grievant's ten day window of opportunity to file a complaint expired on January 2, 1994.

In the alternative, the Employer maintains that, if this is to be considered an Association grievance, then the Association had fifteen work days to file a complaint. According to the

Employer, the Association's window of opportunity, using the date of December 17, 1995, and adding three days for mail delivery, expired on January 12, 1994. The Employer points out that the grievance was not received until January 28, 1994, (EX-7); twelve work days too late for the grievance to be timely.

For all the aforesaid reasons, the Employer asks that the Arbitrator find that the subject grievance was improperly and untimely filed and, thus, that the merits of this dispute are not arbitrable.

ASSOCIATION POSITION

The Association offers five reasons which it maintains make this grievance arbitrable. First, it claims that the Employer tried to "confuse or mislead" the Association concerning the initial date of the notice of reduction-in-force (Association Opening Statement, p.3). As support for this assertion, the Association points to a letter of November 19, 1993, sent to the Employer's Labor Relations Representative by the Administrator, Basic Academic and Chapter 1 Programs, containing no mention of any reduction in staff (AX-3). This, the Association claims is inconsistent with the Employer's notice to the Association, of the same date, of a RIF affecting the Grievant.

Second, the Association maintains it was not given an opportunity to meet with the Employer forty-five days prior to the effective date of the reduction-in-force. Third, the Association asserts that the Employer participated in and responded to each step of the grievance procedure (AX's 1-2).

without raising any procedural objection(s). Fourth, the Association argues, without explanation, that the parties agreed to alter some procedures. Fifth, the Association contends that the Employer did not raise the issue of arbitrability until after the Association filed for arbitration.

In further response to the Employer's challenge to the arbitrability of this case, the Association stresses that, in its letter of January 7, 1994, (JX-2, p.2) the Employer was notified that receipt of the December 17, 1993, letter was not accomplished until January 3, 1994, because the Association offices had been closed for two weeks. Therefore, the Association argues that the tolling of time should not have been initiated until after the reception date and should not, therefore, be considered untimely until after January 24, 1994. In support of this position, the Association stresses that the grievance reached Mr. Rahr by that date and, although he was not the appropriate recipient, the Employer still received timely notice that a grievance was being filed to protest the subject RIF.

As a result of these considerations, the Association asks that the grievance be found to be devoid of procedural defects and that the arbitration on the merits of this case be directed to proceed.

DECISION

After careful consideration of the evidence and testimony presented on the threshold question, the Arbitrator determined

that this grievance is procedurally defective because it was filed improperly and untimely .

The first basis for this conclusion was determination of exactly what type of grievance is involved in the instant case. Is it an employee grievance with approval of the Association, a class action grievance with Association approval, or an Association grievance? In reaching a resolution, the Arbitrator considered that it is a well established principle of labor arbitration that specific contract language takes precedence over general language. Article 18 of the Agreement specifically addresses the type of grievance involved in the case at bar and the manner in which such grievances are to be handled. Application of the language of this Article to the facts of this case persuaded this Arbitrator that, although the Grievant's name appears at the top of the grievance form, in conjunction with the Association's, the narrative portion relating the events being grieved clearly establishes this complaint as an Association grievance. This ruling is further supported by the facts that neither the grievance form nor any other evidence submitted in the course of this proceeding, list the specific claims that an individual employee must allege for this to be deemed an employee grievance. Thus, the Arbitrator holds that this is a Association grievance and that the contractual requirements for this type of grievance are controlling in the instant case.

Accordingly, the Employer's allegation that the grievance is procedurally defective is found to be valid. The contractual

language pertaining to a RIF grievance clearly and unambiguously states that a grievance initiated by the Association must be filed simultaneously at Step 3 and Step 4. Step 3 requires filing with the Agency Director or his/her designee, while Step 4 requires that a request for arbitration be made to the Director, Office of Collective Bargaining, with a courtesy copy to the Agency Director (JX-1, pp.16-17). The evidence of record is uncontroverted that these requirements were not complied with by the Association in the instant case. In fact, the Association's request for arbitration was not made until March 18, 1994, and then it erroneously indicated that the grievance was being submitted under Article 5, Section 5.05 (D) of the Agreement, rather than under the specific, applicable Section of Article 18. Section 5.05 (D) permits an arbitration request only in situations where the answer to an individual grievance at Step 3, is unsatisfactory. While the Association notes, in its letter requesting arbitration, that it had received no response from the Employer at Step 3, it ignores the Employer's claim that the Association had agreed to waive the time limits on a Step 3 answer until March 31, 1994 (JX-2, p.4); eight work days after the request was sent. This improper mixing of procedures and obfuscation of facts cannot overcome the reality that the subject grievance is procedurally defective.

Finally, as to the question of timeliness, again, the evidence is clear that the filing of the instant grievance occurred outside the contractually required time frame. No

weight was given to the Association's claim that its offices were closed for two weeks during the Christmas holidays and, thus, that the tolling of time for filing a grievance was stayed. This ruling is based upon the facts that no evidence was presented that the Employer was notified, either formally or informally, that the Association's offices would be closed during this period or, in the alternative, that the Association sought (much less received) a waiver of time limits for the period in question. Since it was evident from the record that the Association's office closing was a pre-planned event, it is incumbent upon the Association to make whatever arrangements are necessary for meeting its obligations under the Agreement in the interim. The record is devoid of any indication whatsoever that the Association made such an endeavor. Thus, the Association's claim of consideration by virtue of its office closing does not constitute an affirmative defense.

Based upon the foregoing analysis of factors critical to determining the threshold question in this case, the Arbitrator finds that the grievance was untimely filed. Even assuming, arguendo, that the instant grievance had been deemed to be an individual employee grievance, filed with the Association's approval, it would still be untimely. This conclusion is based upon the unrefuted fact that the Grievant knew, at the latest on December 23, 1993, that he was to be RIFfed as evidenced by his signature on a dated document to that effect. Since he only had ten days under the Agreement to file a grievance, the January

filing date is clearly untimely.

AWARD

The grievance is found to be procedurally defective and, therefore, is not arbitrable.

DATE: November 12, 1995

Mollie H. Bowers

Mollie H. Bowers, Arbitrator