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IN THE MATTER OF THE ARBITRATION BETWEEN:	*
	*
State of Ohio, Ohio Veterans Home, Sandusky, Ohio	* Grievance No. 33-00-950503-0602-01-04
-AND-	*
	* Grievant:
OCSEA/AFSCME, Local 11	* **Danielle Hartman**

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the State:
Robert Day, Advocate
Heather Reese, Labor Relations Specialist, Office of Collective Bargaining

For the Union:
John Hall, Advocate
Vanessa Brown, President, Chapter 2200
Lynn Kemp, OCSEA Second Chair
William Kessler, Vice President

This case was brought to arbitration by OCSEA/AFSCME, Local 11 (the Union) to protest, as without just cause, the termination of Danielle Hartman (the Grievant) by the State of Ohio, Ohio Veterans Home, Sandusky, Ohio (the State/Employer) for patient abuse. At 5:45 p.m. on January 23, 1996, the Arbitrator and the aforesaid persons for both parties met at the facility to view the area where the alleged incident which gave rise to the subject disciple occurred. The lighting was adjusted to depict the conditions which each of the parties claims existed at the time of the incident. Both parties had an opportunity to describe how the area looked at the time and to explain any differences from the conditions viewed on the evening of January 23.

The following day, a Hearing was convened at 9:00 a.m. in Education and Training Room 1 at the facility. Both parties were represented. The State opened by challenging the arbitrability of this case on two procedural counts. First, the State asserted that the grievance is procedurally defective because it was not filed in accordance with Article 25, Section 25.02 Step 4 of the collective bargaining Agreement. The specific defect claimed is that " a legible copy of the grievance form" was not filed with the written appeal to Step 4 of the grievance procedures. Second, the State argued that, when the appeal was refiled

approximately eighteen days later, this appeal was then untimely. The Union asked that a bench decision be made on these challenges. After hearing both parties' evidence and testimony, the Arbitrator stated that she would not give a bench decision and ruled that the case should be bifurcated to enable her to carefully consider the record and to decide the threshold questions before proceeding to the merits.

ISSUE

Is the grievance arbitrable?

BACKGROUND

In support of its case, the State presented evidence introduced through the testimony of Heather Reese, Labor Relations Specialist (LRS) for the subject case. She testified that Bill O'Reilly opens and date stamps mail received by the Office of Collective Bargaining (OCB). She further stated that O'Reilly then forwards appeals to Eileen Marx, who creates a paper file which she forwards to the appropriate Labor Relations Specialist. According to Reese, both of these individuals are "very careful" about date stamping and handling such documents. She also gave unrebutted testimony that, even if a document was separated from an appeal when it was being processed, a safeguard exists because such 'miscellaneous' paperwork is sent forward through appropriate channels. Ms. Reese did not claim, however, that this system is flawless.

With respect to the instant grievance, there is no dispute that the Union's appeal to Step 4 was dated and sent, by certified mail, to the OCB on May 30, 1995. (UX-11) There is also no dispute that for this appeal to be timely, it had to be

filed with the OCB by June 2, 1995. State Exhibit 1 is date stamped as having been received by the OCB on June 2. The date on which Ms. Reese received this appeal is unknown. She testified that, when she received the appeal, there was no grievance form attached and, thus she made the notation, on SX-1, "Procedural error no grievance attached due June 2".

On June 15, 1995, Robert Thornton, Chief, OCB Contract Administration, wrote to the Grievant to advise her of the following: (1) the Step 4 appeal was being returned because no copy of the grievance was attached; (2) the Agreement, Section 25.02 requires that "a legible copy of the grievance form" be submitted with the Step 4 appeal; (3) "If you wish to appeal this grievance you must resubmit your appeal with a copy of the grievance"; and (4) "there is no provision in the agreement to extend filing privileges if a grievance was filed incorrectly". (SX-2) A copy of this letter was sent to both John Hall and William Kessler. The Union refiled the appeal, with a legible copy of the grievance form attached, on June 17, 1995. (SX-3) These documents are date stamped as having been received by the OCB on June 21, 1995.

Through Mr. Kessler's testimony, evidence was introduced which showed he had received various training on grievance handling per se, and on handling grievances at advanced levels in the procedure. (UX-1-7) "A Guide to the Grievance Procedures and the Working Out of Classification Procedures 1994-1997 Collective Bargaining Agreement" was also introduced. (UX-9) Inside the

front cover is a detailed "Chart of OCSEA Grievance Procedure and Stewards' Responsibilities" which Mr. Kessler said he "used all the time" and followed the procedures outlined there. He also pointed to the instructions on the "Appeal and Preparation Sheet" stating **"A COPY OF THE GRIEVANCE FORM MUST BE ATTACHED WITH A COPY OF THE STEP 3 DECISION"**. (UX-5) Mr. Kessler said he always sequentially followed each item in the instructions and, thus, could not have left the grievance form out of the subject appeal inadvertently. There are no witnesses who could testify to seeing what document(s) Mr. Kessler placed in the envelope he mailed to the OCB on May 30. The parties stipulated that if Martha Rush had testified, she would have said she saw Mr. Kessler make five piles of grievance documents for this case. Union Exhibit 10 was introduced to show that the copy of Mr. Thornton's letter to the Grievant was sent to Mr. Kessler at the wrong zip code. When he received this document, Mr. Kessler testified that he called the OCSEA/AFSCME "central office", asked for John Hall, who was not available, and was told "by a girl in the arbitration office" to refile the appeal with a cover letter. He followed these instructions and wrote in the cover letter, "I am sending to you this copy of the Step 3 response and grievance form and would like to <u>again</u> appeal the Step 3 response. I do not understand the mix-up as I followed the appeal form instructions in regards to sending the grievance on to have it appealed". (emphasis added)(SX-3)

These are the essential facts and circumstances upon which

the challenges to arbitrability are based.

POSITIONS OF THE PARTIES

STATE POSITION:

The State maintains the facts of this case support its position that the initial appeal was not properly filed, in accordance with Section 25.02 of the Agreement and, when the second appeal was filed, it was untimely. While the State does not claim its mail reception and transmission processes are infalible, it asserts there is other evidence which corroborates its position that the appeal to Step 4 was fatally flawed through no fault of its own.

In particular, the State challenged the weight that can be given to Mr. Kessler's testimony, and the related evidence, about the training he received in grievance and advanced grievance handling, and the various informational and instructional guidelines he follows. Through its cross-examination of Mr. Kessler, the State introduced its Exhibit 5, which is the original grievance form in the instant case. The State asks the Arbitrator to take judicious note that this form was not dated nor was the remedy sought indicated. It asserts that these errors are indication that, despite the training, information, and instruction, Mr. Kessler does make mistakes in completing paperwork on grievances.

To buttress this fact and, more importantly, to show the instant case was not unique in defects at the Step 4 stage, the State introduced its Exhibits 7-9 on cross-examination of Mr.

Kessler. Based upon Exhibits 7 and 8, the State points out that Mr. Kessler again omitted the remedy sought in filing a grievance in the Moss case. Its Exhibit 9, also pertaining to Moss, is, the State emphasizes, identical to the letter Mr. Thornton wrote to the Grievant here, informing her that "a legible copy of the grievance form" had not been submitted with the appeal to Step 4 and providing all the same advice and guidance she (and the Union) received. The State again asks the Arbitrator to take judicious note that both Mr. Thornton's letters were written on the same date; June 15, 1995.

Even though the credible evidence is circumstantial, the State argues this evidence clearly supports its position that the procedural defects in this case are fatal, rendering the instant grievance not arbitrable on its merits. It offered a previous award of this Arbitrator, in the Charles Jones case, and citations from Elkouri and Elkouri, 4th edition, and from Fairweather, 3rd., edition as final argument that its position should prevail.

Union Position:

It is the Union's position that Mr. Kessler is a well trained, experienced representative, who follows the letter of the collective bargaining Agreement and of all instructional and informational guidelines for properly processing grievances. Given these facts, the Union contends it is unreasonable to believe that he did not include a legible copy of the grievance form with his appeal to Step 4 in the instant case.

In support of this contention, the Union stresses the language contained in Mr. Kessler's response to Mr. Thornton's letter of June 15, wherein he stated he "would like to again appeal the Step 3 response". (emphasis added) The Union claims this language is clear and unambiguous proof Mr. Kessler included the grievance form with the appeal mailed on May 30, and that he was putting management on notice of this fact by his use of the word "again". Nevertheless, the Union asserts, the State ignored this notice and did nothing to determine whether the absence of the grievance form was the result of an in-house mistake at the OCB.

Furthermore, the Union argues an adverse ruling would mean it and its representatives were being held accountable for conditions which are beyond their control. The Union postulates that the grievance form was either lost in the mail or lost, once it reached the OCB, in the mail room or during the transmission process. Since there is no direct evidence, the Union argues that these explanations are as plausible as the one the State offers that Mr. Kessler neglected to attach the grievance form to the Step 4 appeal. It therefore maintains that the merits of this case are properly before this Arbitrator and should be heard.

ANALYSIS

In reaching a decision, the Arbitrator carefully considered all the evidence and testimony of record. She also recognizes that arbitrators can be reluctant to find a case not arbitrable,

especially when the merits involve just cause for termination. Given the facts and circumstances of the instant case, however, the Arbitrator has had to make a hard decision in finding this case to be not arbitrable.

Section 25.02 of the collective bargaining Agreement sets forth obligations which the Union must comply with in order for a grievance to be arbitrable. The dispute here involves whether or not the Union complied with these obligations and, if it appears not, is there a credible explanation. Mr. Kessler testified that he had substantial training and experience in both grievance and advanced grievance handling, and that he always followed the instructions on the appeal form and in Union Exhibit 9. While the Arbitrator did not doubt his training and experience, she began to be concerned about his application of same when the State pointed out that he failed to enter both a date and a remedy sought on the initial grievance form in the instant case. This concern was heightened by the fact that State Exhibit 8, a grievance form involving employee Clifton Moss, was filed proximately to that of Hartman by Mr. Kessler with the same, or similar omissions. These are fundamental errors which even a person who has received elemental training in grievance handling is told to avoid.

This Arbitrator well understands the problems associated with cases that depend largely upon circumstantial evidence. She considered that Mr. Kessler claims he mailed the grievance form with the Step 4 appeal and that there were no witnesses to what

he placed in the envelope. She also gave weight to Ms. Reese's unrebutted testimony that, while the OCB was not infallible, Mr. O'Reilly and Ms. Marx are "very careful" with the processing of documents and that there is a safeguard system in place in the event a document is separated when the mail is processed. The Union provided no evidence or testimony to show that at times, or at all, the recordation and transmission of mail at the OCB fell prey to helter skelter treatment.

The Union's contention of lack of control because the Postal Service could have lost the document was given no weight. If the Union's contention is true, and the grievance form was included with the appeal, then this Arbitrator is at a loss to understand how the appeal form arrived at the OCB, but the grievance form did not? This is an especially salient question for two reasons. First, State Exhibit 1 contains a xerox copy of the envelope in which the appeal arrived at the OCB and no damage to it is apparent. Second, there is no Postal Service wrapping indicating that the envelope had been torn open and whatever contents could be recovered enclosed.

Nevertheless, the Arbitrator reconsidered the possibility that the OCB misplaced the subject document. If the instant case was unique, then the Arbitrator might have agreed with the Union that it should not be held culpable for the mishap. The record does not support such a conclusion, however. What the record does show is that Mr. Kessler not only made errors in filling out the grievance forms in both the Hartman and Moss cases, which

were filed proximately, but also that Ms. Reese made credible claims that the OCB did not receive such grievance forms with either of these Step 4 appeals.

Even so, note was taken of Mr. Kessler's response to Mr. Thornton's letter that he was "again" filing an appeal from the Step 3 response and that he did not "understand the mix-up". Given the credible evidence and testimony of record, this Arbitrator can only conclude that this language was self-serving, based upon proximity in time and circumstance of a second similarly situated case. To rule otherwise, this Arbitrator would have had to overcome obstacles, discussed above, which are insurmountable based upon the record.

AWARD

This dispute is not arbitrable.

Date: January 29, 1996 Mollie H. Bowers
Mollie H. Bowers, Arbitrator