

ARBITRATION PROCEEDINGS

IN THE MATTER OF ARBITRATION BETWEEN

THE STATE OF OHIO, DEPARTMENT OF	:	CASE NO. 27-07-(5/17/94)/
REHABILITATION AND CORRECTION	:	300-06-10
and	:	Grievance of Jeffrey S.
	:	Fortunato
STATE COUNCIL OF PROFESSIONAL	:	<u>DECISION AND AWARD</u>
EDUCATORS (SCOPE/OEA/NEA)	:	

This matter was heard on June 14, 1996 in Columbus, Ohio.

Appearances for the Association: Henry L. Stevens, OEA/SCOPE/NEA; and Jeffrey S. Fortunato, Grievant.

Appearances for the Employer: Patrick Mayer, Labor Relations Officer; Georgia Brokaw, OCB - Second Chair; and Deborah Birdsong, Personnel Officer.

I. INTRODUCTION AND BACKGROUND

The State of Ohio ("Employer") and the State Council of Professional Educators ("Scope/OEA/NEA") are parties to a Collective Bargaining Agreement for the years 1994 through 1997. Article 5 of the Agreement contains a multi-step grievance procedure leading to arbitration. Section 5.05 A. Step 1 requires that:

"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.

The supervisor must respond to the employee in writing within seven (7) days after the employee has notified the supervisor of the grievance. If the employee is not

satisfied with the results of this informal step, the employee may pursue the formal steps."

Section B. Step 2 requires the employee to file the grievance with the next level supervisor within ten (10) days after receipt of the supervisor's written response to the informal notification set forth in Step 1. Thereafter, a meeting is held between the employee/grievant, an Association representative, if requested by the grievant, and the next level supervisor.

The grievance history in this case is as follows: A written grievance was filed by Jeffrey S. Fortunato, the grievant, on April 28, 1994. The grievance alleges that the grievant was not receiving proper credit for previous years of professional teaching experience; and, as a result, he was placed on the incorrect index on the salary schedule, thereby being underpaid in accordance with the terms of the Collective Bargaining Agreement. The grievance seeks to remedy this contractual violation by receiving his proper credit and by having his pay properly adjusted.

An agreement was reached between the SCOPE site representative, Glen Walker, and management representative, Lisa Crider on May 5, 1994 to waive Step 1 of the grievance procedure due to the fact that the grievance could not be resolved at this informal step. On the same date, May 5, 1994, the same parties agreed in writing to waive Step 2 of the grievance procedure, thereby avoiding the meeting between the grievant and the next level supervisor. The grievance was then appealed to Step 3 on May 12, 1994. This was done within the required ten (10) day period after Step 2 was disposed of. The grievance was then filed with

the agency head/director or designee, Mr. Joseph Shaver, Labor Relations, Department of Rehabilitation and Correction. A Step 3 meeting was held on July 27, 1994. During that hearing, the hearing officer, Charles R. Adams, in his written report dated September 27, 1994, addressed the merits of the subject grievance, but also raised the issue of whether or not the grievance was timely filed under the terms and conditions of the Collective Bargaining Agreement. The Step 3 report finds that the grievant was interviewed for his position on September 27, 1993, and was subsequently appointed to the position on October 25, 1993. He received the personnel action denying his request for a pay increase which was signed by the director of the Department of Administrative Services on November 24, 1993. The grievance was not filed until April 28, 1994, which was longer than the fifteen (15) day period or thirty (30) day period of limitations set forth in Step 1. The Step 3 reports finds that the grievance was untimely filed, and went on to find that the grievance was without merit.

The issue to be resolved at this stage of the arbitration proceedings is whether or not the grievance was timely filed under the terms and conditions of the Collective Bargaining Agreement. If this arbitrator finds in the grievant's favor, this matter will be rescheduled for another hearing in order to determine the merits of the grievance.

## II. POSITION OF THE ASSOCIATION

The grievant accepted his employment position on September 29, 1993. Thereafter, for a three (3) week period, he attended the

Corrections Training Academy, in which he was indoctrinated as to the terms and conditions of his employment. The grievant, however, was not able to resolve his salary claim, based upon his prior teaching experience, during this period of time. He met with his supervisor, Ms. Ann Fornal, who was present during his initial employment interview. Ms. Fornal apparently had a similar claim for increased compensation based upon out-of-state teaching experience. Ms. Fornal informed the grievant that the Central Office had approved the salary adjustments for both the grievant and Ms. Fornal on December 22, 1993; however, the grievant was informed by Ms. Fornal on January 20, 1994 that her salary had been adjusted and increased on her January 7th paycheck. According to the grievant, Ms. Fornal advised the grievant that he should not file a grievance over his salary issue until he completed his probationary period.

The Association argues, therefore, based on this factual scenario that the grievance should be considered filed on a timely basis for the following reasons:

- (1) The grievance is a recurring, continuing grievance;
- (2) The grievant, who was a new employee, followed the advice and instructions of his supervisor, Ms. Fornal, to wait until the expiration of his probationary period before filing a grievance;
- (3) The employer waived its rights to complain about the timeliness of the grievance; and

- (4) The employer's conduct during the processing of the grievance violated the terms and conditions of the agreement and, therefore, any violation by the grievant should be overlooked.

The Association argues that the grievant complied with Step 1 by taking the matter up with his immediate supervisor on an informal basis on December 7, 8, 10, 14, 17, and 22, 1993, and on January 7, 20, 21, and 24, 1994. Ms. Fornal, his supervisor, however, failed to respond to the grievant in writing after he took the matter up with her, as required by the language in Step 1. The failure of Ms. Fornal to respond to the grievance in writing under Step 1 should exonerate the grievant from any procedural deficiencies which thereafter occurred on his part. Moreover, the employer inexcusably delayed the processing of the grievance. Step 3 requires that a meeting be held and a decision must be issued within forty-five (45) days after the receipt of the grievance. In this case, the Step 3 appeal was dated May 12, 1994. The grievance was received by the department on May 17, 1994. A Step 3 hearing was not held, however, until July 27th and a decision was not issued until September 27th. The employer's failure to process the grievance in a timely manner should exonerate the grievant from any timing deficiency on his part.

### III. POSITION OF THE EMPLOYER

The grievant was required to attempt to resolve his dispute with his immediate supervisor within fifteen (15) working days of the date on which he knew or reasonably could have known the event

giving rise to his grievance, but no longer than thirty (30) days after the event. The event in question here is the notification to the grievant that his request for a salary adjustment was being denied. Ms. Birdsong, the Personnel Officer, testified that she notified the grievant in early December that his request for a salary adjustment was being denied by the Department of Administrative Services. The grievant confirmed this testimony when he testified that Ms. Birdsong advised him on December 7, 1993 in a telephone conversation that she thought his request had been denied, although she did not have the formal denial as yet in writing. The grievant, however, admitted that Ms. Birdsong contacted him on December 8th and notified him that his request for a salary adjustment had been denied. This was confirmed by the examination of the grievant's paychecks which did not contain his requested adjustment. Therefore, the date upon which the grievant knew or should have known the event giving rise to his grievance was December 8, 1993. He was required to take the matter up with his supervisor on an informal basis within fifteen (15) working days, or a maximum of thirty (30) working days, after December 8, 1993. The grievant, however, according to his own testimony, did not meet with his immediate supervisor until January 20, 1994, after the Step 1 time period had expired. The grievant did not obtain a mutual time extension in writing or a written mutual consent waiver as required under Section 5.07 A.

Management did not act in any way to cause the grievant to ignore his filing requirements. The grievant was in constant

communication with his Association representative, and he was otherwise fully aware of his contractual responsibilities relative to the filing of a grievance. The grievant places heavy reliance upon his testimony that his supervisor, Ms. Fornal, advised him to wait until the expiration of his probationary period before filing a grievance. The grievant testified that he relied upon this advice to his detriment, and therefore any delay which came about must be excused. The evidence, however, clearly establishes the fact that the advice which was given to the grievant by Ms. Fornal on January 20th occurred after the time for filing a grievance had already expired. The grievant should have filed within fifteen (15) days after he was notified on December 8th that he would not be receiving a salary adjustment, or by December 27, 1993. Even if the thirty (30) day period applies, the grievant should have filed by January 7, 1994. The discussion with Ms. Fornal did not take place until January 20th, after the time for filing had expired.

This type of grievance is not a continuing grievance of the type which permits recurrent filings. The grievant was clearly advised on December 8th that his salary would be fixed at a certain level from that point forward, thereby triggering the running of the filing period. The grievant knew at that time that he would not be receiving additional compensation, and therefore the clock began running.

The arguments of the Association that the Employer waived its rights to contest the timeliness of the grievance are without merit. The Employer raised the timeliness issue during the Step 3

hearing which was its earliest opportunity. The earlier grievance steps had been mutually waived in writing by the parties pursuant to the terms and conditions of the Collective Bargaining Agreement.

#### IV. DISCUSSION

This is not a continuing type of grievance which permits an employee to ignore the time filing requirements. An example of a continuing type grievance would be the improper maintenance by the Employer of a non-authorized personnel file during the term of a Collective Bargaining Agreement. Any employee at any time during the Collective Bargaining Agreement term may complain about this practice in order to stop its existence, although a remedy would not be obtained for a violation which occurred in the past before the practice was officially complained of. In this case, however, the issue of the grievant's compensation is a focused matter which is to be resolved between the parties. If the grievant is entitled to past service credit, his compensation will be reflected from that point forward. If he is not so entitled, his compensation will be adjusted without the credit being taken into consideration. Once the grievant is advised of the Employer's decision, his grievant rights are triggered.

Section 6.05 of the Agreement places substantial limitations on the arbitrator's authority to resolve disputes under the Collective Bargaining Agreement. That section states:

"The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement."



This arbitrator, therefore, is jurisdictionally required to hold the parties to their agreed upon language, including the periods of limitation for filing grievances, notwithstanding the arbitrator's personal views as to whether or not such requirements are reasonable.

The focus for consideration in this case is whether or not the grievant attempted to resolve the issue with his immediate supervisor within fifteen (15) working days of the date on which he knew or reasonably could have known of the event, but no later than thirty (30) days after the event occurred. If the grievant did not meet these requirements, an examination must be made as to whether the Employer or any of its representatives, through their actions, prevented the grievant from reasonably complying with his filing requirements.

The grievant received a telephone call from Ms. Birdsong on December 7th at 3:35 p.m. Ms. Birdsong stated that she thought the grievant's request for a salary increase was denied, but she did not have formal paperwork in her hand to that effect. The grievant called the Department of Administrative Services the following day on December 8th. He was told that they could not find his file. He later spoke to Ms. Birdsong that same day. Ms. Birdsong was angry with the grievant because he had called DAS. During that conversation, he was advised by Ms. Birdsong that his request had been denied in writing.

Thereafter, according to the testimony of the grievant, he discussed the denial of his claim with his supervisor, Ms. Fornal

on December 14, 1993. She had also complained that she had not properly received credit for out-of-state service for purposes of computing her compensation. There is evidence, therefore, that the grievant discussed the matter with his supervisor, Ms. Fornal, in the next fifteen (15) or thirty (30) day period after December 8th, when he was told his request was denied in writing. There is a factual issue as to whether the grievant's discussions with his supervisor about this issue was for the purpose of raising a Step 1 grievance. It could be argued that the grievant was merely engaging in general conversation with his supervisor without any intention of filing a grievance. Based upon the grievant's testimony, however, and without considering the after the fact memorandum by Ms. Fornal which was presented by the grievant at the hearing, there is no question in this arbitrator's mind that Ms. Fornal was aware that the grievant was complaining that his salary was improperly stated, and that he was not given proper credit for his out-of-state teaching service. Thereafter, both the grievant and Ms. Fornal let time elapse. The grievant was informed by Ms. Fornal on January 20th that she had received her salary adjustment on January 7th, and that her claim for out-of-state teaching service had been accepted. I accept the grievant's testimony that his claim was acknowledged by Ms. Fornal, but that he was advised by her not to file a formal grievance until his probationary period had expired, in order that the grievant could protect his job security. There is no other evidence in the record to reflect this testimony.

The language negotiated between the parties set forth in Step 1 of the grievance procedure is clear and straightforward. The grievant, in order to initiate a grievance, is required to do nothing more than take the matter up with his immediate supervisor on an informal basis within fifteen (15) or thirty (30) days after the event giving rise to his grievance, which, in this case, is December 8, 1993. I find, based upon the evidence presented, that the grievant did in fact bring the issue to the attention of his immediate supervisor within that period of time. According to the testimony of the grievant, which was unrefuted in any respect, he and Ms. Fornal discussed the fact that he was being denied his out-of-state teaching service credit during the relevant time period. The grievant was advised by Ms. Fornal that she was experiencing the same problem. There is no testimony in the record from Ms. Fornal that she was not considering the complaints of the grievant as the registering of a Step 1 grievance. Moreover, there is no explanation as to why a formal response was never prepared by Ms. Fornal and delivered to the grievant. The formal grievance processing begins with the requirement that the immediate supervisor respond in writing to the employee within seven (7) days after the employee notifies the supervisor of the facts giving rise to the grievance. The only credible evidence in the record concerning these circumstances is the testimony of the grievant that he was complaining about his denial for out-of-state service credit to Ms. Fornal. Ms. Birdsong even testified that this subject was part of an ongoing debate.

In order for this arbitrator to find for the Employer that the grievance was not filed in a timely manner, it would have to be found from the evidence that the grievant did not take the matter up with his immediate supervisor until after the expiration of fifteen (15) days or thirty (30) days after December 8th. The evidence does not support such a conclusion. Ms. Fornal could have triggered the formal processing of the grievance by filing her written response, but she did not. Instead, she continued to discuss the subject with the grievant until after her similar issue had been resolved. She then advised the grievant to file a formal grievance after the expiration of his probationary period. Therefore, for purposes of determining the timeliness issue, the focus should not be on the date when the grievant formally filed his grievance on April 28, 1994, but the date when he first attempted to take the matter up with his immediate supervisor after December 8, 1993 when his request for a salary adjustment was officially denied.

The purpose of the fifteen (15)/thirty (30) day rule is to put the Employer on notice of a problem in order that the problem may be addressed immediately when the facts and evidence are still fresh in everyone's mind. This objective was accomplished in this case when the grievant engaged in continuous discussions with his immediate supervisor about the fact that he was improperly being paid because he was not receiving his out-of-state teaching service credit. Management therefore became aware of the issue in due course through its supervisor, and management could have addressed

the issue at that point in time. Management could have confronted the issue immediately by issuing a supervisor response letter as required in Step 1. Instead, management chose to delay its response until the grievant filed his written grievance on April 28, 1994. When all is said and done, it must be found, based upon the evidence presented, that the grievant complied with his obligation as required by the Step 1 language; and, therefore the grievance was initiated on a timely basis.

V. AWARD

The grievance is sustained in part. The grievance was filed on a timely basis and this matter should be rescheduled for a hearing on the merits.

SO ORDERED.

Date: July 31, 1996

Mitchell B. Goldberg  
Mitchell B. Goldberg,  
Arbitrator

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