#1293A

**ARBITRATION**

**BETWEEN**

**STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTIONS LEBANON CORRECTIONAL INSTITUTION**

**- AND -**

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 11, AFL-CIO**

**CASE NOS.: 27-11(97-07-09)-0684-01-03, Nick Fulkerson;**
**27-11(97-07-09)-0685-01-03, Mary C. Powers;**
**27-11-(97-07-09)-0686-01-03, James Jones;**
**27-11-(97-07-09)-0687-01-03, Anthony J. Dvarga;**
**27-11-(97-07-09)-0688-01-03, Thomas Shuttlesworth;**
**27-11-(97-07-09)-0689-01-03, Mitchell Turner;**
**27-11-(97-07-09)-0690-01-03, Ellen D. Freeman;**
**27-11-(97-07-09)-0697-01-03, Donald R. Straight;**
**27-11-(97-07-09)-0698-01-03, Margaret Lawson;**
**27-11-(97-07-09)-0702-01-03, Keith Profitt**

**APPEARANCES:**

For the O.C.B.: Colleen Ryan
Operations Team Leader
O.C.B., D.A.S.
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For the Union: Herman S. Whilter, Esq.
Assistant Director, Disputes Resolution
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**OPINION AND AWARD OF THE ARBITRATOR**

Frank A. Keenan
Arbitrator

**STATEMENT OF THE CASE:**

After reviewing the prodigious volume of documentary evidence submitted by the parties, and the testimony of record, what follows is a synopsis of this record evidence and the parties' respective positions.

All the grievances under consideration here, except that of Grievant Margaret Lawson, involve a five day suspension for alleged participation in an incident at the Department of Rehabilitation and Corrections institution known as the Lebanon Correctional Institution on May 7, 1997. Grievant Lawson received a ten day suspension because she allegedly withheld information and failed to cooperate in an official investigation of the May 7th incident, in addition to participating in said incident. The record also reflects that fellow Corrections Officer Ronnie McDaniel was purportedly involved in the incident of May 7th and indeed, purportedly instigated the incident. A thirty day suspension was imposed upon him. His grievance was challenged as procedurally defective for advancement to Step 4 and not arbitrable because allegedly his appeal failed to enclose a legible copy of the grievance form. In a bench decision rendered April 21, 1998, the Undersigned determined that McDaniel's grievance was arbitrable.

The instant grievances were deemed by O.C.B. to be untimely advanced to Step 4 in that they were not advanced to Step 4 within 15 days of the due date of the employing Agency's answer, as per Section 25.02, and consequently they are not arbitrable; indeed, pursuant to Section 25.05 should be treated as withdrawn grievances, asserts O.C.B.

Union witness Parsons, a Staff Representative these past six years for OCSEA, indicated that she serviced several D.R.&C. Facilities. She testified that these facilities were

very frequently late with their third step responses to grievances. According to Parsons, she would move grievances to Step 4 after an untimely response at the third step, and hence not within 15 days of the due date of the Step 3 Answer, and these grievances would nevertheless be processed. When it came to D.R.&C., asserted Parsons, the time for advancing a grievance to Step 4 did not commence to run until receipt of the Step 3 response. Parsons related as to how in November of 1996, she received two letters from O.C.B. challenging two grievances she sought to advance on procedural grounds, including a challenge as to timeliness of one of them. Parsons indicated that she contacted O.C.B. and objected to the letters because the grievances were out of D.R.&C., whereupon she was told not to worry about it. These grievances were further processed.

Staff Representative Mike Hill testified along the lines of Ms. Parsons. The Union's witnesses indicated that early in the party's relationship, a Gentlemen's Agreement was arrived at when it became apparent that D.R.&C. Institutions, due to the volume of grievances, were unable to get out their 3rd step response in 35 days, whereby the Union would not be required to move a grievance to Step 4 until after receipt of a "late" Step 3 answer. As Union witness Hill put it: "We've made our own time lines at D.R.&C." It was Hill's testimony that the parties practice is that timeliness issues are not raised where D.R.&C. Grievances are not moved to Step 4 until receipt of the 3rd Step answer, even if that answer is well beyond 35 days from the 3rd Step answer. It was Hill's testimony that in the early 90's the parties experimented with ending the practice for a couple of months, and then reinstated it. According to Hill, it's still the practice that you can wait until you get an answer before the time begins to run on moving it on to Step 4.

Anissia Goodwin has worked for OCSEA for eight years. Early in her first year of employment she became a secretary, where one of her duties was to serve as back-up "grievance coordinator." She currently serves as OCSEA's's grievance coordinator in their Dispute Resolutions Department. Goodwin deals with grievances going to O.C.B., and in that capacity, she deals with clerical employee Eileen Marx at O.C.B.

Goodwin explained that early in her capacity as a back-up grievance coordinator, she received a grievance from a D.R.&C. Institution that appeared to be out of time for advancement to O.C.B. and so she contacted OCSEA Staff Representative Butch Wylie, who told her to go ahead and process the matter, that they don't uphold the time lines vis a vis D.R.&C. Grievances. Goodwin indicated that she's had conversations with other Staff Representatives who have told her D.R.&C. does not have a problem if the Union wants to go ahead and move a grievance forward, but if they choose to wait on a 3rd Step response, then nobody argues time lines. Most of Ms. Goodwin's dealings with O.C.B. are with Eileen Marx. Goodwin testified that she and Marx have discussed as to how D.R.&C. Grievances aren't held to the timeliness of Step 4. Goodwin testified without contradiction that approximately 75% of the grievances coming out of D.R.&C. and headed for 4th Step are untimely. Goodwin testified without contradiction that with respect to Agencies other than D.R.&C., if a grievance is moved to the 4th Step more than 15 days from the date the 3rd Step answer was due, she gets a letter from O.C.B. to the effect that the grievance is untimely and time barred from Step 4. It was Goodwin's testimony that untimely D.R.&C. Grievances just get scheduled for the next mediation session. Goodwin testified that until recently O.C.B. has not argued timeliness where a D.R.&C. grievance was moved in a

contractually untimely fashion from third step to fourth step. O.C.B. correspondence is routed through Ms. Goodwin. Management witnesses from O.C.B., Operations Team Leader Mogan and Assistant Director Thornton, testified they had no awareness of any such Gentlemen's Agreement as alluded to by the Union and that as far as they knew, it was non-existent. Nor were they aware of any past practice of O.C.B. overlooking grievances untimely processed to the fourth step; stating that such a past practice was non-existent. Thornton testified that O.C.B. had never authorized anyone to sanction the advancements from third step to fourth of an otherwise untimely processed grievance. Thornton also testified that O.C.B. personnel cannot always be aware of what extensions for a third step answer have been agreed to when the grievance arrives at O.C.B. for processing through the fourth step; so that O.C.B. personnel may not initially be aware of whether it is untimely or not, because O.C.B. is not clear when it should have been responded to. Thornton also testified that D.R.&C. Personnel could not bind O.C.B. personnel vis a vis any understandings as might be reached with respect to Step 4.

Following the hearing, both parties submitted post-hearing briefs. It is noted at this juncture that the parties came prepared for the hearing with the expectation that the undersigned would accept their invitation to render a bench decision. While I did so in the companion case of Ronnie McDaniel, I was unwilling to do so vis a vis the instant grievances given the complexity and multiplicity of the issues raised by the parties. Each party enclosed evidentiary matters with their post-hearing briefs. In this regard, I note the Elkouris' observation in How Arbitration Works (4th Edition) at page 319, concerning "evidence submitted after hearing," as follows (footnote omitted):

" While ordinarily no new data or evidence may be presented after the hearing, in briefs or otherwise, there are exceptions. Sometimes discussion at the hearing indicates need for additional data which are not quickly available, and if the parties desire not to recess or otherwise delay the hearing, they may agree to the submission of the data to the arbitrator after the hearing has been completed. Likewise, the arbitrator during or after the hearing has been completed may request post-hearing data or information.

Then, too, important evidence sometimes is discovered or first becomes available after the hearing.

Such post-hearing data often will be jointly prepared and submitted by the parties. If the data are individually prepared each party ordinarily must be furnished a copy of the other party's data so that comment may be made thereon or so that a further hearing can be requested in case of gross discrepancies."

By and large, none of the exceptions alluded to by the Elkouris come into play here. The evidentiary matters submitted were enclosed with the briefs when the undersigned exchanged briefs. Given the fact that neither party has objected to the submission of the other parties' post-hearing evidentiary materials, and given the fact that the parties came to the hearing anticipating a bench decision, I find that these post-hearing evidentiary materials are properly considered by the undersigned, and that each party has, in failing to protest, effectively waived objection to their consideration.

The Employer's post-hearing brief included excerpts from prior Contracts - Article 25, which were noted at the hearing to be forthcoming. But, also included were letters from O.C.B. to OCSEA raising untimeliness issues of grievances sought to be advanced from third step to fourth step. More particularly, there were letters involving two (2)

grievances in 1994; one (1) in March of 1996; eight ((8) in June, 1996; one (1) in December, 1996; four (4) in January, 1997; one (1) in March, 1997; two (2) in June, 1997; one (1) in December, 1997; twelve (12) in March, 1998; and, thirty-four (34) in April, 1998. This many and other letters were also submitted noting procedural defects such as: no legible copy of the grievance enclosed with the appeal to Step 4.

The Union in turn, submitted a computer print-out run 4-30-98, and hence after the hearing herein which was held on 4-24-98. This print-out reflects the grievances by name and by number and designates a Step 4 "due" date and a Step 4 "received" date. This print-out is forty-six and one-half (46 ½ ) pages long. It deals with Corrections Department grievances from May 1, 1994 to April, 1998. Suffice it to say it appears to essentially corroborate Ms. Goodwin's testimony that approximately 75% of D.R.&C. grievances were untimely vis a vis the contractual time lines for advancement of the grievance to Step 4.

Finally, it is noted that the Union did not present documentary evidence of grievances that were untimely brought to Step 4, yet mediated successfully or not; or brought up to arbitration, and the Employer did not present documentary evidence of grievances finally disposed of on the grounds of being untimely advanced to Step 4, other than arguably the letters enclosed with its post-hearing brief, referenced above. It's unclear whether these letters were merely notice of O.C.B.'s position or whether they were O.C.B.'s final disposition of the grievance referenced in said letters.

Relevant Contract provisions are excerpted in Appendix I.

**THE UNION'S POSITION:**

The Union take the position that while it is undisputed that the instant grievances were not advanced to Step 4 in a timely manner pursuant to Article 25.02, pursuant to a Gentlemen's Agreement, the State has been lax in enforcement of Step 4 timeliness in cases, Department-wide, involving the D.R.&C. The Union points to the testimony of Staff Representatives Hill, Jones, and Parsons for the proposition that lax enforcement was the order of the day in D.R.&C., where time lines were waived. The Union asserts that O.C.B. knew about the Gentlemen's Agreement between the Union and D.R.&C. and acquiesced to the long-term practice. The O.C.B. Labor Relations Specialist, for the most part adhered to the practice, asserts the Union. So too, asserts the Union, did O.C.B.'s clerical case processor. The Union contends that the Gentlemen's Agreement was spawned by the high volume of grievances to be processed at D.R.&C. (almost 50% of all grievances filed under the State of Ohio/OCSEA Contract), and hence D.R.&C.'s inability to timely respond to them.

The Union asserts that it's well established in arbitral common law that there are exceptions to contractual time limitations that will arise where it would be "unreasonable" to require strict compliance with the time limits specified by the Agreement. How Arbitration Works, Elkouri & Elkouri (4th Edition) p. 194. Even if time limits are clear, late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the Agreement. *Kent County Michigan, 75 LA 948, 951 (Kruger, 1980); Tennessee Dressed Beef Co., 74 LA 1229 (Hardin, 1980); Quality Beer Distribution, 73 LA 670, 671 (1979), Ziskind);*

and Eberle Tanning Co., *71 LA 302 (Sloane, 1978).* The Union argues that the circumstances in the instant cases are such that it would be unreasonable to require strict time limits compliance because the bargaining unit members would have unjustly lost their right to present their grievances on the merits.

The Union further argues that if both parties have been lax as to observing time limits in the past, an arbitrator will hesitate to enforce them strictly until prior notice has been given by a party of intent to demand strict adherence to the contractual requirements. CBS, Inc., *75 LA 789, 792;* Peru Foundry Co., *73 LA 959, 960 (Sembower, 1979);* Collis Company, *50 LA 1157, 1158 (Doyle, 1968);* and National Distillers Products Co., *42 LA 884, 888.* Prior to O.C.B. challenging these grievances on arbitrability, no clear notice or rather no clear consistent notice was given to the Union about O.C.B.'s requirement of strict future compliance, asserts the Union. However, it is now on notice, states the Union.

The Union contends that all Union witnesses indicated that O.C.B. knew about the agreement and condoned the practice. In other words, O.C.B. acquiesced. Even if the higher-ups at O.C.B. did not know about the agreement, O.C.B.'s foot soldiers, Labor Relations Specialists assigned to D.R.&C., and Ms. Goodwin's counterpart, knew about the agreement, and this knowledge is imputed to higher-ups at O.C.B. Laxity in enforcement of time limitations were so numerous that O.C.B. should have known of it. Lax enforcement of rules may lead employees reasonably to believe that the conduct in question is sanctioned by Management. Hall, et al. v. Gus Construction Co., Inc., et al., *45 FCP Cases 573 (CA 8, 1988).*

It is the Union's contention that O.C.B. is properly charged to be knowledgeable because the facts in question were open to discovery and it was O.C.B.'s duty to inform itself as to it. How Arbitration Works, Elkouri & Elkouri, (5th Edition) p. 933.

The Union take the position that when parties have been very informal in the past in the handling of grievances, clear notice must be given if a party intends to insist on strict future compliance with the previously ignored procedural requirements. *Whiteway Stamping Co., 41 LA 966, 968 (Kates, 1963).* Because the Union and the Grievants relied on the Gentlemen's Agreement to their detriment in the instant grievances, and because O.C.B. knew about the agreement, O.C.B. must be estopped from denying the Grievants a hearing on the merits.

So it is, that the Union urges that the grievances be found arbitrable and advanced to arbitration on the merits.

**THE EMPLOYER'S POSITION:**

The Employer takes the position that the grievances are untimely appealed to Step Four (4), mediation, and, as such, are not arbitrable. The Employer points out that the Union stipulated to their untimeliness. It is the Employer's perception that the Union contends that there is a past practice with the D.R.&C. Agency, of which, via some sort of osmosis, the Office of Collective Bargaining was aware, and thus, creating a relaxation of the Collective Bargaining Agreement's time lines to appeal to Step Four of the grievance procedure.

To the contrary, argues the Employer, the language of 25.02 is clear and

unambiguous and hence the testimony of the Union's witnesses should be excluded.

Secondly, argues the Employer, O.R.C. 4117 and Articles 25, 43, and 44 of the Collective Bargaining Agreement set forth legal and contractual requirements for modifying the terms of the Collective Bargaining Agreement and those requirements are not met here.

Thirdly, the Employer argues that the Union's evidence of the alleged "Gentlemen's Agreement" allowing for a relaxation of the Step Four time lines is hearsay and not therefore the "best evidence" of said agreement, with the consequence that said testimony should be excluded.

Fourthly, the O.C.B. is not aware of any agreement whether directly or indirectly, to relax the Step Four time lines, and therefore knowledge may not be assumed by osmosis.

Fifthly, the Employer asserts that there did not exist a past practice of either the issuance of letters or of relaxing time lines. In the alternative, should a past practice be found to exist, the Employer takes the position that it is not required to place the Union on notice in order to end a past practice when cessation of such practice results in the application of contractual terms.

By way of elaboration on these contentions, the Employer asserts that it is axiomatic in arbitration that the plain meaning of clear and unambiguous language such as is in Section 25.02, should be applied. *Armstrong Rubber Co., 17 LA 741, 744 (Gorder, 1972).* In clear and unambiguous terms, Section 25.02 unambiguously provides that a grievance may be appealed to O.C.B. for mediation or a Step Four hearing "by filing .... within fifteen (15) days of the receipt .... of the answer .... or the due date of the answer." Thus, when a

Step Three hearing is held,, the agency has thirty-five days to respond and at the end of thirty-five days, whether an answer is received or not, the Union ... has fifteen (15) days to appeal to Step Four. Given the clarity of this provision, testimonials of Union Staff Representatives Hill, Jones, and Parsons, and Ms. Goodwin should be excluded as parol evidence. Plain and unambiguous language clearly shows the intentions of the parties and hence parol evidence to establish a custom or past practice is not relevant. How Arbitration Works, Elkouri & Elkouri (5th Edition) p. 651.

Pointing to O.R.C. 4117.10(D); Article 43, Section 43.01 and 43.03, the Employer contends that these provisions in effect provide that absent a written agreement, signed by appropriate parties, there is no enforceable modification of contractual language. And while Section 25.05 allows for extensions of time lines, such an extension must be in writing and be a mutual agreement. The language clarifies that the time may only be extended by the parties involved "at that particular step." As the O.C.B. has "sole management authority" at the Step at issue, Step Four, any time extension must be given by the O.C.B. Discussions or alleged agreements with an Agency are not a proper means for extending Step Four time lines.

With respect to what the Union styles as the parties' "Gentlemen's Agreement," none of the Union witnesses testifying about it were present at the meetings in which the alleged agreement was made in 1986 and allegedly reconfirmed in 1991. Their testimony is hearsay, therefore, and should be given little to no weight. Those who were present, such as Butch Wylie, were not called by the Union as witnesses. The Union's failure to provide its own employee to testify as to the terms and conditions of the "Gentlemen's

Agreement" is a fatal deficiency in the Union's argument that such an agreement even exists. In any event, the alleged "Gentlemen's Agreement" was made between OCSEA representatives and D.R.&C. representatives, not O.C.B. representatives. The Union failed to establish that O.C.B. was ever a party to the alleged "Gentlemen's Agreement." And none of the Union's witnesses could name an agent of O.C.B. who might have direct or indirect knowledge of the existence of such an agreement. Ms. Goodwin did make reference to one O.C.B. employee, Eileen Marx, a word processing specialist. It can hardly be the argument of the Union that a clerical support staff has the authority to act as an agent of the Office. (See, *Billie Shafer, O.C.B. ARB Award #1067).* The Union made an unsupported allegation that O.C.B. had knowledge of the Gentlemen's Agreement, but failed to name an individual who had such knowledge. Furthermore, argues the Employer, individuals at O.C.B. who do have apparent or actual powers to act as an agent on behalf of O.C.B. do not have the authority or the apparent or actual authority and power to modify the terms of the Collective Bargaining Agreement outside the mechanisms sets forth in Article 25, 43, and 44.

In order for an agent's actions, whether uttered or by silence, to have the effect of modifying the written terms of an agreement, those actions must be "ratified" or "affirmed" by the principal. Ratification of an agreement, outside of a written agreement, comes from some manifestation or action by the principal. *Restatement Second of Agency, Section 83 (1958).* There is no evidence of affirmation of the "Gentlemen's Agreement" in this case. Any agreement as may have existed, existed between D.R.&C. and OCSEA at an agency level and did not have binding power over O.C.B. The Union did not offer any evidence to

establish that the O.C.B. acted in any manner inconsistent with the written agreement between the parties.

The Employer notes that "the Union also attempted to establish a past practice of the 'relaxation' of the application of the terms and conditions of processing a grievance as it relates to the Department of Rehabilitation and Correction and appealing grievances to the fourth step of the process. The Union attempted to argue that by not raising the issue of arbitrability in every case, the O.C.B. is estopped from raising the issue in any case. This argument is illogical. It could be the case that the O.C.B. has not discovered procedural defects in grievances processed to O.C.B. It could be the case that, according to the testimony of Mr. Thornton, grievances with procedural defects are settled on the merits. It could be that the Union withdraws grievances with procedural defects before reaching arbitration. The issue of arbitrability may be raised at any time during the grievance process, including at the level of arbitration. (See, *James Trotter, O.C.B. Award #911.)*"

With respect to the Union's contention regarding the existence of a past practice, the Employer contends that there must be evidence in the record that the practice was "the understood and accepted way of doing things over an extended period of time," there must be a "mutual" understanding. *Centel Business Sys., 88 LA 1301, 1303 (Nelson, 1987).* The practice "must be of sufficient generality and duration to imply acceptance of it as an authentic construction of the contract." Elkouri & Elkouri, How Arbitration Works, 5th Edition at p. 650. The testimony of Pat Mogan and Robert Thornton establish that there was not an understood and accepted way of doing things, other than the terms of the collective bargaining agreement. The only "mutual" understanding for the processing of

grievances was that which was duly negotiated between the parties. Furthermore, the Union's own witnesses testified that if there was any type of past practice, any "mutual understanding" or accepted way of conducting business, it lays with the Department of Rehabilitation and Correction up to the Step Three (3) level. However, that did not mean such a practice automatically bled into the Step Four (4) level at O.C.B. The Employer asserts that its witness, Mogan, testified that the OCSEA Chapter at the Lebanon Correctional Institution was confirmed regarding Step Four appeals, and that recently three arbitrations had been decided based on the issue of procedural defects at Step Four. Additionally, some twenty (20) grievances were withdrawn after O.C.B. informed the Chapter of procedural deficiencies in settlement discussion. This alone is enough to show there is not a past practice. To the opposite end, the Union failed to place in the record any grievances that established this practice as part of the O.C.B.'s means of conducting business.

To prove a past practice in this instance, the Union must show a negative. It had to place in the record grievances which were appealed to Step Four (4) improperly. The Union then had to show that O.C.B. had knowledge of the procedural flaw and failed to take any action regarding the issue. Failure to take action does not mean failure to take the grievance to arbitration or to raise the issue at arbitration. One instance does not constitute a practice. Elkouri & Elkouri, How Arbitration Works, 5th Edition, at p. 650. The Union had to show that the O.C.B. agent had the ability and authority to raise the issue and did not raise it due to the "Gentlemen's Agreement."

Throughout the entire day, the Union failed to place in the record a grievance that

was ever improperly filed. Absent the showing that a similar event occurred, there is no way in which a practice could be established. There is no "understood and accepted way of doing things" if the issue has never before been raised.

In the event that the Arbitrator finds a past practice existed, the Employer placed the Union on notice regarding the cessation of the practice in Section 44.03 of the Collective Bargaining Agreement. Section 44.03 clearly puts the Union on notice that "after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement." Absent the Union's ability to produce a written document, any verbal agreements or practices that existed have no binding authority after the effective date of the latest Agreement.

An established practice, no matter how well entrenched, may not modify clear language. "Where a conflict exists between the clear and unambiguous language of the contract and a longstanding past practice, the Arbitrator is required to follow the language of the contract." Elkouri & Elkouri, How Arbitration Works, 5th Edition, at p. 652.

In addition, the Employer offers the SERB opinion in *Defiance*. According to *Defiance City School District Board of Education, Case No. 96-ULP-09-0544, SERB Opinion No. 97-016,* "it is well established that an employer's 'past practice' refers to an activity which has been satisfactorily established by practice or custom." Id. At 3-4. In that case, the Union filed an unfair labor practice charge due to the employer's unilateral changing of work schedules and workload. The Union claimed the Employer had an obligation to bargain the issue with the Union as it was ending a 17-year-old past practice. The past practice was clearly more generous than the contractual provisions of the Collective

Bargaining Agreement that covered the issues of schedules and assignments. The employer unilaterally ceased its practice and implemented the more rigid provisions of the agreement. SERB found that the employer did not commit an unfair labor practice and that the employer had no obligation to notify the union of the discontinuation of the past practice. "Where an employer has engaged in a practice exceeding the minimum set forth in the Collective Bargaining Agreement, the Employer is not precluded from exercising its contractual rights, even to impose the minimum set forth in the contract. The mere fact that an Employer has not chosen to enforce its contractual rights in the past does not mean that it is forever precluded from doing so." Id. at 8. In the event that the Union established the existence of a past practice with the O.C.B., the O.C.B. has the right to unilaterally cease the practice or relaxation of the timeliness and implement the time lines set forth in the Agreement. It is the position of the Employer that the grievances were untimely appealed to Step Four (4)/mediation. As such, the language of Section 25.05 applies that grievances that are untimely appealed are to be considered withdrawn grievances. To rule in any other manner flies in the face of the language negotiated by the parties.

It is the Employer's contention that this is a case of the Union arguing out of both sides of its mouth. On the one side, it negotiated language that contained time lines for filing and appealing grievances. On the other side, due to some unfortunate incidents out of a local chapter, it is facing an unfair labor practice charge for failure to represent its employees because the local chapter failed to live up to the requirements of the language. Therefore, the Union is alleging that it is the fault of the O.C.B. that these time lines were not met. It alleges that years ago, three people got together and created this "Gentlemen's

Agreement." Nobody can quite testify to the exact terms of the Agreement. Yet, all the Union's witnesses knew that it resulted from problems the agency was having in response to answering grievances at a lower step. Not one witness testified that there were difficulties with the Step Four (4) level of the grievance process. No union witness could exactly understand that the role of Step Four (4) changed in 1986, 1991 and 1994. Nor did they understand that any agreements with the agency, while never binding on the O.C.B., had less affect as the language in the contract changed. The contract negotiations changed the triggering events for appealing to Step Four (4) and the O.C.B.'s role in the grievance procedure.

The Employer asserts that if the Union desires to follow its argument to a logical conclusion, a huge chilling effect will result in the settlement of cases. The Employer is more than willing to take every procedurally defective grievance to arbitration on the issue of arbitrability. It has the resources to enable the Union's argument to come to fruition. If the Union wishes that the Employer no longer resolve issues based on merit and settle grievances before arbitration, that wish may be granted. The Union's argument in this case punishes the Employer for engaging in settlements which it believed promoted labor-management discussions and relationships. The Union's quarrel here may now become its albatross.

Based upon the clear and unambiguous language in the Collective Bargaining Agreement and the stipulation that the grievances were appealed untimely to Step Four (4), and for all the reasons and arguments set forth above, the Employer respectfully requests the grievances be found not arbitrable.

**DISCUSSION & OPINION:**

Directly to the point (albeit not on the basis of all of the rationales advanced by the Employer), I'm constrained to agree with the Employer's contentions to the effect that any "Gentlemen's Agreement" or past practice cannot serve to defeat the clear and unambiguous time lines for advancement of a grievance to Step 4 set forth in Section 25.02 of the parties' Agreement. Suffice it to say that, as the Employer contends, the Contract's provisions which necessitated the Gentlemen's Agreement and the practices in conformance therewith, as well as the role to be played by the O.C.B., have changed. But, it is well established in arbitration that where the underlying circumstances upon which an informal agreement and/or practice have changed, the binding nature of said agreement and/or practice no longer obtains. As Arbitrator Clair V. Duff put it in *Dravo Corporation, 76 LA 903 (1981)*, at page 908:

> "A past practice is necessarily based upon a set of underlying circumstances. ... [I]t always depends upon the factual circumstances which gave birth to the practice. No ... practice, even if definitely established for a considerable length of time, would survive after the underlying circumstances have been changed."

The focus of the case therefore is whether or not the Union's reliance on the arbitral principle to the effect that if the parties have been lax in observing time limits, an arbitrator will hesitate to enforce them strictly until prior notice has been given by a party of intent to demand strict adherence, and whether the Union's reliance on the arbitral principle to the effect that even if time limits are clear, lateness will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with

the time limits specified by the Agreement, is warranted. How Arbitration Works, Elkouri & Elkouri (5th Edition) at p. 277. To be kept in mind in reaching a determination on these issues is the overarching principle with respect to untimeliness and inarbitrability claims, namely, that "doubts as to the interpretation of contractual time limits ... should be resolved against forfeiture of the right to process the grievance." How Arbitration Works, supra, at p. 227. As Arbitrator Ted Tsukiyama noted in *Dillingham Shipyards, 86 LA 811, 814 (1986)*:

> "Federal labor policy as enunciated by the U.S. Supreme Court in the Steelworkers Trilogy cases favors arbitration as a means of resolving labor management disputes and declares a presumption in favor of coverage in cases of doubt. This policy favoring arbitrability places a burden upon the party challenging arbitrability to overcome the presumption of coverage, and strongly implies that disputes in the labor management sector should be resolved on the merits rather than extinguished on the basis of technicalities."

With respect to the arbitral principle concerning laxness, that principle was well articulated by Arbitrator James A. Doyle in *Collis Company, 50 LA 1157, 1158 (1968)*, who, in a case where it was the Company who was untimely, observed as follows:

> "Although the time limitations set forth above are specific, and the disposition to be made of the grievance for untimeliness on the part of either party is defined, the evidence clearly establishes that the parties have not considered time as of the essence in processing past grievances. In numerous cases grievances have been processed without objection despite the failure of the Union to adhere to the time limitations in the Contract. Delays in proceeding with grievances have been substantial in some instances. In view of the prior history of the mutual administration of these provisions, it would be unfair to invoke strict adherence without prior notice

> of such an intention to depart from accustomed practices. In this case the course of mutual dealings has been such that the Union has waived its right to enforce the specific time limitation in this case. Its prior course of action has been such as to lead the Company to believe that time was not considered of the essence and, therefore, the Union should be estopped to assert such a claim in the absence of ample prior notice of an intention to exact strict adherence to the contract provisions in the future. .... This determination finds support in other arbitration cases. *Consolidated Western Steel Divisions of United Steel Corporation, 62-1 Arb. Par. 8255; Morsco Mfg. Co., 67-2 Arb. Par. 8716."* (Emphasis added.)

As the undersigned noted to the parties at the hearing herein, the informal "Gentlemen's Agreement"and the "past practice" contentions of the Union, while akin to the laxness arbitral principle under consideration here, are nonetheless not the same. This is made manifest by the emphasized language in the quote from Arbitrator Doyle. As Arbitrator Doyle indicates when he invokes the concept of "estoppel," the laxness theory is grounded in "equity," whereas past practice and informal agreements are grounded in the "law" as it were; they are grounded on the proposition that the parties by their conduct have demonstrated a certain mutual intent. Variances, at least beyond a mere one or two, from the "practice" argued for, typically result in a finding of a "mixed" practice, which in turn serves to make the practice non-binding and in essence vitiates "the practice" as a practical matter. But, under the equitable estoppel theory under scrutiny here, "numerous" instances suffice. Thus, as applied to the facts here, the Employer-furnished letters calling the Union on its untimeliness in advancing a grievance form Step three to Step four arguably would suffice to create a "mixed" practice, but they are insufficient to infer and

conclude that there were not "numerous" instances where O.C.B. did not call the Union on the latter's untimeliness. I find unpersuasive the Employer's contention to the effect that because "it could be the case that the O.C.B. has not discovered procedural defects in grievances processed to O.C.B.,"that the laxness principle ought not to apply. To the contrary, this principle is often applied in just such circumstances. This is so because the focus of the principle is on the inequity that would obtain in the face of the Union's reliance on the numerous instances where it was not called on timeliness matters. A lulling into a sense of security based on the Employer's inaction constitutes the essence of this borrowed-from-equity concept. So far as the record made before me indicates, there was a very high volume of grievances that were untimely advanced to the fourth step, and in proportion thereto, a very low volume of instances where O.C.B. called the Union on its untimeliness. This fully supports the inference that "in numerous cases grievances were processed without objection despite the failure of the Union to adhere to the time limitations in the Contract," as indeed was so testified to, without contradiction, by Union witness Parsons. Then too, the record shows that because of the parties' ability to adjust their meeting on a grievance at Step 3, O.C.B. concedely at least initially could not ascertain what the "due date" for the 3rd Step answer was, and in turn could not be certain as to whether the appeal to Step 4 was timely or not. Given the high volume of cases to come out of D.R.&C., and the high volume of those cases which were untimely, and the low volume of letters noting the Union's untimeliness, the inference is that, understandably, not only initially, but subsequently, O.C.B. did not ascertain that numerous appeals to Step 4 were untimely. In sum, therefore, I find that the Union has, by a preponderance of the

record evidence and the reasonable inferences to be drawn therefrom, established that application of the laxness principle referenced above is warranted here. Thus, the grievances must be found to be arbitrable.

Alternatively and independently, it must also be found that the circumstances here fall within the arbitral principle also noted hereinabove to the effect that untimely processing of a grievance will not result in its dismissal, even if, as here, the time limits are clear, if it would be unreasonable to require strict compliance with the time limits specified by the Agreement. In this regard, Arbitrator Tsukiyama in *Dillingham Shipyards*, supra, cogently noted that an appropriate and persuasive consideration in determining whether it would be unreasonable to require strict compliance with time limits was to look at whether the issue was of momentous significance and import to both parties. Here, I believe that the matter at hand, especially in light of the allegations underlying the rationale for the discipline the Grievants received, does have momentous significance and import to both parties. This being so, as Arbitrator Tsukiyama put it, "the issue ... should be resolved on its merits without being bound by the time limitations applicable to and designed for the adjustment of normal, day-by-day grievances." Furthermore, it has already been determined that the merits of the case against McDaniel, perceived by Management to be the instigator of the conduct triggering the discipline imposed on all of the Grievants, shall be heard in arbitration. It would therefore be an anomaly, and therefore patently unreasonable, for McDaniel, the alleged instigator, to have his day in arbitration on the merits, and the potential for exoneration, while at the same time holding that those who followed McDaniel's purported lead are not to have their day in arbitration on the merits.

It would therefore be unreasonable to require strict adherence to the Step 4 time limits here.

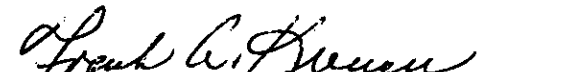
On the basis of all the foregoing, I find that the grievances are arbitrable.

Finally, as the Union appears to recognize, this proceeding serves to put the Union on notice that, in the future, the State will strictly enforce the time lines the Contract sets forth for the advancement of a grievance from the 3rd step to the 4th step.

**AWARD:**

For the reasons more fully noted above, I find that the grievances are arbitrable.

Dated: June 1, 1998



FRANK A. KEENAN
Arbitrator

APPENDIX E

# ARTICLE 25 - GRIEVANCE PROCEDURE

## 25.02 - Grievance Steps

**Step Three (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 (2) 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. By mutual agreement of the parties, agencies may schedule Step Three (3) meetings on a monthly basis, by geographic areas, so that all grievances that have been newly filed, that have been advanced to Step Three (3) or that have been continued since the previous month, can be heard on a regular basis.

At the Step Three (3) meeting the grievance may be settled or withdrawn, or a response shall be prepared and issued by the Agency Head or designee, within thirty-five (35) days of the meeting. The response will include a description of the events giving rise to the grievance, the rationale upon which the decision is rendered. The Agency may grant, modify or deny the remedy requested by the Union. Any grievances resolved at Step Three (3) or at earlier steps shall not be precedent setting at other institutions or agencies unless otherwise agreed to in the settlement.

**Step Four (4) - Mediation/Office of Collective Bargaining**

If the Agency is untimely with its response to the grievance at Step Three (3), absent a mutually agreed to time extension, the Union may appeal the grievance to Step Four (4) requesting a meeting by filing a written appeal and a legible copy of the grievance form to the Deputy Director of the Office of Collective Bargaining within fifteen (15) days of the date of the due date of the Step Three (3) answer. Upon receipt of a grievance, as a result of a failure to meet time limits by the agency, OCB shall schedule a meeting with the Staff representative and a Chapter representative within thirty (30) days of receipt of the grievance appeal in an attempt to resolve the grievance unless the parties mutually agree otherwise. Within thirty-five (35) days of the OCB meeting, OCB shall provide a written response which may grant, modify or deny the remedy being sought by the Union. The response will include the rationale upon which the decision is rendered and will be forwarded to the grievant, the Union's Step Three (3) representative(s) who attend the meeting and the OCSEA Central Office. (NOTE: This was previously the second paragraph.)

If the grievance is not resolved at Step Three (3), or if the Agency is untimely with its response to the grievance at Step Three (3), absent any mutually agreed to time extension, the Union may appeal the grievance to mediation by filing a written appeal and a legible copy of the grievance form to the Deputy Director of the Office of Collective Bargaining within fifteen (15) days of the receipt of the answer at Step Three (3) or the due date of the answer if no answer was given, whichever is earlier. OCB shall have sole management authority to grant, modify or deny the grievance.

**Step Five (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 Deputy Director of the Office of Collective Bargaining within sixty (60) days of the mediation meeting or the postmarked date of the mediation waiver.

**25.03 - Arbitration Procedures**

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

The Union and/or Employer may make requests for specific documents, books, papers or witnesses reasonably available from the other party and relevant to the grievance under consideration. Such requests will not be unreasonably denied.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Such requests shall be made no later than three work days prior to the start of the arbitration hearing, except under unusual circumstances where the Union or the Employer has been unaware of the need for subpoena of such witnesses or documents, in which case the request shall be made as soon as practicable. 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.

**25.05 - Time Limits**

Grievances may be withdrawn at any step of the grievance procedure. Grievances not appealed within the designated time limits will be treated as withdrawn grievances.

The time limits at any step may be extended by mutual agreement of the parties involved at that particular step. Such extension(s) shall be in writing.

In the absence of such extensions at any step where a grievance response of the Employer has not been received by the grievant and the Union representative within the specified time limits, the grievant may file the grievance to the next successive step in the grievance procedure.

## ARTICLE 43 - DURATION

**43.01 - Duration of Agreement**

This Agreement shall continue in full force and effect for the period March 1, 1997 through February 29, 2000, and shall constitute the entire Agreement between the parties. All rights and duties of both parties are specifically expressed in this Agreement. This Agreement concludes the collective bargaining for its term, subject only to a desire by both parties to agree mutually to amend or supplement it at any time. No verbal statements shall supersede any provisions of this Agreement.

**43.03 - Mid-Term Contractual Changes**

The Employer and the Union have the power and authority to enter into amendments of this Agreement during its term constituting an addition, deletion, substitution or modification of this Agreement. Any amendment providing for an addition, deletion, substitution or modification of this Agreement must be in writing and executed by the Executive Director of the Union and the Director of the Department of Administrative Services or designee. Upon its execution, such amendment shall supersede any existing provision of this Agreement in accordance with its terms and shall continue in full force and effect for the duration of this Agreement. All other provisions of this Agreement not affected by the amendment shall continue in full force and effect for the term of this Agreement.

## ARTICLE 44 - MISCELLANEOUS

**44.03 - Work Rules**

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.