#1417

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO CIVIL RIGHTS COMMISSION

AND

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/

AFSCME LOCAL 11-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 06-02-990519-0001-01-14
George Motley, Grievant

Advocate(s) for the UNION:

Mike Muenchen, Field Staff Representative

OCSEA Local 11, AFSCME, AFL-CIO
1680 Watermark Dr.
Columbus OH 43215

Advocate(s) for the EMPLOYER:

Beth A. Lewis, Esq., Advocate
Lou Kitchen, Advocate
Office of Collective Bargaining
107 N. High St., 7th Floor
Columbus OH 43215

INTRODUCTION

A hearing on the above referenced matter was held on November 19, 1999, in Columbus, Ohio. The Employer raised an issue of procedural arbitrability and the Union raised the threshold issue of procedural due process. After these issues were heard, and as a matter of efficiency, the parties agreed to proceed with the merits of the case as a matter of efficiency. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted closing arguments in lieu of written briefs. The hearing was closed on November 19, 1999. The Arbitrator's decision is to be issued within forty-five (45) calendar days or no later than January 3, 2000. In order of priority, the Arbitrator will first address the procedural issues in this case.

ISSUE

There are two threshold issues:

(1) Is the grievance properly before the Arbitrator?

(2) Did the Employer violate the due process rights of the Grievant? If so what should the remedy be?

The parties agreed upon the following definition of the issue regarding the merits:

Was the Grievant, George Motley, discharged for just cause?
If not, what should the remedy be?

RELEVANT CONTRACT LANGUAGE
(Listed for reference, see Agreement for language)

THRESHOLD ISSUES:

ARTICLE 25.02 GRIEVANCE STEPS

ARTICLE 24.05 IMPOSITION OF DISCIPLINE

MERITS:

ARTICLE 24 DISCIPLINE

BACKGROUND

The issue in dispute in this matter involves the termination of George Motley, a Civil Rights Investigator 2, employed in the Dayton Region of the Ohio Civil Rights Commission (hereinafter referred to as "Employer" or "Commission"). At the time of his termination, May 10, 1999, Mr. Motley had some 14 years of service with the Commission. Mr. Motley was terminated for violations of Work Rules: 9-Falsification of Official Document; 1A, 1J-Neglect of Duty and Neglect of Duty-Carelessness with the Mail.

The Commission is established by the Ohio Revised Code, Section 4112. The Ohio Revised Code requires the Commission to receive, investigate, and pass upon written charges made under oath of unlawful discriminatory practices (ORC 4112.04 (6)).

The Grievant's charges stem from his investigation and administration of the case of Dwanna Frost v. Dayton Speedometer Service Inc. Ms. Frost's case began when she went to the Commission on May 20, 1998 and reported that she had been unlawfully terminated because of her race. In support of her claim Ms. Frost identified two witnesses. The case was assigned to the Grievant. The Employer claims that the Grievant improperly handled Ms. Frost's case by neglecting to interview her witnesses, making false statements about the witnesses' lack of cooperation, and being negligent in subsequently handling of a letter sent by Ms. Frost to have her case reconsidered. The Employer claims that the Grievant's actions resulted in denying Ms. Frost due process of her claim. The Employer held three pre-discipline meetings, the last meeting was held April 30, 1999. On May 10, 1999, the Employer terminated the Grievant.

Mr. Motley disagreed with the Employer's actions and filed a grievance on May 14, 1999.

THRESHOLD ISSUES:

Arbitrability

After his grievance was denied at the Agency level, Mr. Motley filed a written appeal for mediation to the Office of Collective Bargaining. The Employer claims that Article 25.02 specifically identifies the Union as the only proper party to file appeals for mediation. The Office of Collective Bargaining returned Mr. Motley's appeal to him in the mail. The Office of Collective Bargaining did not notify the Union of its actions (See

Mogan's testimony). Neither the Grievant nor the Union was then able to re-appeal the grievance to mediation within the fifteen (15) day timeline called for in Article 25.02.

Due Process/Merits

The Employer held its first pre-discipline meeting on March 12, 1999 and its last pre-discipline meeting on April 30, 1999. Article 24.05 of the Agreement calls for discipline to be issued no later than forty-five (45) days following the conclusion of the pre-discipline meeting. The Union claims that March 12, 1999 is the date from which the Commission had forty-five (45) days to issue discipline. According to the Union, the Employer had a deadline of April 26, 1999. Mr. Motley was terminated on May 10, 1999.

EMPLOYER'S POSITION

Arbitrability

The Employer cites Article 25.02 as being violated by the Grievant in this matter. It states in pertinent part:

> *"If the grievance is not resolved at Step Three (3)... 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 if no answer was given, whichever is earlier." [emphasis added]*

The Employer asserts that the language of Article 25.02 clearly states that only the Union may appeal grievances. In the instant matter, Mr. Motley, and not the Union, appealed his grievance to mediation. The Employer contends that in terms of the requirements contained in this Article, Mr. Motley cannot be considered to be the Union.

The Employer also points out that it would be an unfair labor practice to engage in direct dealing with members of the bargaining unit, and that is why it is important to have the Union and not individual employees process grievance appeals.

Therefore, the Employer requests that the grievance be ruled to be procedurally defective and not arbitrable.

Due Process/Merits

The Employer rejects the Union's claim that it violated Article 24.05. The Employer argues that it held three pre-discipline meetings in an effort to properly charge the Grievant. The forty-five day time limit did not begin until after the conclusion of the last pre-discipline meeting on April 30, 1999, argues the Employer.

UNION'S POSITION

Arbitrability

The Union strongly disagrees with the Employer's contention that only the Union can appeal a grievance to mediation. Mr. Muenchen testified that he talked with the Grievant and told him to file his written appeal to OCB and that the Union was in full support of Mr. Motley's appeal. The Union also points out that the Employer waived Step 4 (mediation). The Union also contends that it was never informed by OCB that it was in possession of an improperly filed appeal of a grievance to mediation. The Union asserts that a "sign-off" by the Union has never been required for an appeal of a grievance.

Due Process/Merits

The Union cites Article 24.05 in support of its argument that the Agreement was violated and Mr. Motley was denied his due process rights. Article 24.05 reads in pertinent part:

> *"The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting..." [emphasis added]*

The Union argues that the first Pre-disciplinary meeting is the first day of the forty-five (45) day period and by waiting until May 10th, the Employer violated the Agreement and the due process rights of the Grievant. In demonstrating the importance that the parties have placed on timely discipline, the Union points to Article 24.02, which states in pertinent part:

> *"...An arbitrator deciding s discipline grievance must consider the timeliness of the Employer's decision to begin the discipline process"*

Based upon the above, the Union requests the grievance be granted.

DISCUSSION

Arbitrability

A positive and productive labor relationship is marked by mutual trust, a problem solving approach to bargaining, a willingness to experiment and innovate with joint activities to meet mutual needs, and constant communication between the parties (Crane & Jedel, *"Mature Collective Bargaining Relationships,"* Proceedings of the 41st Annual

Meeting of NAA, 357-363 (BNA Books, 1989). It is also a relationship that is unencumbered by legal maneuvering and game playing. The bellwether of good faith dealing is the parties' grievance procedure.

By the same token, when the parties to a collective agreement find themselves in a situation where the bargaining unit contains numerous classifications that are organized under a variety of autonomous employers' groups, there is a need for order. The challenge for labor and management in situations like these is to create a set of orderly procedures of good faith dealing that do not undermine the mutual trust that the parties have created over the years. I find the Union and the Employer have, for the most part, a productive relationship that is organizationally complex. It faces the challenge of balancing good faith dealing against a need for procedural order.

Within the context of the Agreement and its express intent, I find the Employer's argument that the instant grievance is not procedurally arbitrable to be inconsistent with the contractual intent of the parties. The parties have stated in Article 1 PREAMBLE, that the Collective Bargaining Agreement has as its purpose *"...the promotion of harmonious relations between the Employer and the Union; the establishment of an equitable and peaceful procedure for the resolution of differences..."* Furthermore, Article 25.01 GREVANCE PROCEDURE states that *"The grievance procedure is the exclusive method of resolving grievances."* Notwithstanding the many independent divisions of the Employer and the diversity of the bargaining unit, reason would dictate that the parties intended for the grievance procedure to be workable and to not be overly cumbersome.

The Employer claims that the grievance was improperly filed by the Grievant and

not the Union and based upon the fact that only the Union can appeal a grievance to Step 4 of the grievance procedure. However, in reviewing Article 25.01 Process, the parties have specifically stated in Section D:

> *"When different work locations are involved, transmittal of grievance appeals and responses shall be by U.S. mail. The mailing of the grievance form shall constitute a timely appeal if it is postmarked within the appeal period..." [emphasis added]*

Notably absent from this clear commitment by the parties is that the appeal must be sent only by the Union. The Employer cites Step 4 of the grievance procedure, which states in pertinent part:

> *"...the Union may appeal the grievance to Step Four (4) requesting a meeting by filing a written appeal..."*

I fail to see the significance of who mails the grievance, be it the Union, the Union President, the Union steward, the Grievant, or for that matter a clerical employee of the Union. The Agreement is also silent on what forms are to be used to appeal a grievance.

The intent of the parties is very clear. If a grievance is mailed in a timely fashion in accordance with Article 25.01 D. it *"...constitutes a timely appeal."* If the Employer receives a timely appeal, it is not appropriate for the Employer to judge whether the Union is appealing the grievance. Whether the grievance should have been appealed, withdrawn, or settled based upon the Employer's last step in the grievance procedure is the Union's business. There must be an assumption that if the Employer receives a grievance that was properly appealed, the Union will be responsible for its processing.

Therefore, I find no basis for dismissing this case on the basis of procedural

arbitrability.

Due Process/Merits

I find that the Employer violated Articles 24.02 and 24.05 in its imposition of discipline in this matter. These violations were not diminimus in nature, but represented a serious breach of the parties' contractual commitment to issue discipline in a specified timeframe.

The Union argues that the Employer violated Article 24.5 Imposition of Discipline. The pertinent language of this provision reads as follows:

> *"The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as possible but no more than forty-five (45) days after the conclusion of the prediscipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after dispostion of the criminal charges..."* *[emphasis added]*
>
> The Union also cited in Article 24.02 that states in pertinent part:
>
> *"...An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process..."*

The Employer held three pre-discipline meetings, March 12, 1999, April 8, 1999, and April 30, 1999. The Union argues that the forty-five (45) day time period began following the first pre-discipline meeting on March 12, 1999. The Employer argues that it began following the last pre-discipline meeting held on April 30, 1999 (JX 3). In the March 12th pre-discipline meeting the Grievant was charged with violating Work Rule

#1A, Neglect of Duty. Hearing Officer, Lovoyce Huggins, found that the facts supported the recommended discipline. At the second pre-discipline meeting, the Grievant faced one charge, a violation of Work Rule # 4B, Dishonesty. Once again, Hearing Officer, Lovoyce Huggins was presiding, but in this case she did not find that the facts supported this charge.

In the third pre-discipline meeting, the Grievant was again charged with violating Work Rule # 1A, and additionally was charged with violating Work Rules 1J Neglect of Duty-Carelessness with the Mail, and Work Rule #9 Falsification of Official Documentation. Mr. Motley was not charged with a violation of Work Rule # 4B Dishonesty. The presiding Hearing Office in this meeting was Nancy Stir. Ms. Stir found that there was sufficient evidence to support the recommendation for discipline.

As stated in the opening paragraph of this section, the Employer committed procedural contract violations in the manner it handled this case. The parties in Article 24.02 bargained language that states:

> *"Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article." [emphasis added]*

The other pertinent provision is the forty-five (45) day time limit that the parties have committed themselves in Article 4.05. It is clear and unequivocal in its intent. Discipline shall be imposed *"...no more than forty-five (45) days after the conclusion of the prediscipline meeting."* It is significant to note that the parties specifically expressed only one exception to this timeline. When they bargained language that immediately follows the sentence containing the forty-five (45) day time limit. It states:

"At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur..." [emphasis added]

There is no evidence to suggest that the parties intended that there are any other exceptions to the forty-five (45) day rule. In addition to the fact that the parties identified this single exception, it is noted that the language refers to the forty-five (45) day period as a "requirement." This arbitrator can only conclude that when the parties imposed this contractual limitation upon themselves it was intend to be followed "to the letter." This interpretation is consistent with the manner in which the parties treat deadlines in other parts of the Agreement. For example, in Article 25 Grievance Procedure, the parties must carefully follow the imposed deadlines to file and process grievances. The arbitral history of the parties confirm the significance of adhering to timelines, and there have been several cases dismissed by arbitrators who found that a grievance was untimely filed or processed (See example, Union Exhibit 15). The parties have a history of taking timelines seriously and it's only reasonable to conclude they can adversely affect either party.

I find that the Employer was required to impose discipline within forty-five (45) days from the conclusion of the first pre-disciplinary meeting held March 12, 1999. The Employer exceeded this timeframe when it made its final decision on May 6, 1999. I also find that the entire process of having three (3) pre-discipline meetings that essentially covered the same evidence, adversely impacted the Grievant's due process rights. The two basic tenets of procedural fairness are notice and an opportunity to respond to charges (See General Chem. Corp., 90-2 ARB 8480 at 5428 (Doepkin 1990). The Grievant was faced with a different notice of charges in each meeting. In addition, the

Employer had two different hearing officers preside over the equivalent circumstances. The Grievant was placed in the position of having to respond to different sets of charges at each pre-disciplinary meeting that were based upon the same set of facts. Arguably, the faulty notice may be somewhat mitigated by the fact that the Grievant was aware of the facts upon which he was being investigated. On its own the faulty notice may not have been fatal to the Employer's case. However when it is combined with the contractual timeline violations contained in Article 24, it helps to determine the outcome.

There was no evidence to indicate that the Employer had good cause to hold three separate pre-discipline meetings. No new or undiscovered evidence was uncovered subsequent to the first pre-discipline meeting (See testimony of Ms. Mitchell). In addition, the Employer also did not demonstrate that it attempted to comply with the "spirit" of the procedural requirements contained in Article 24.02 and 24.05. For example, the discovery of new evidence or witnesses that is not part of a pre-discipline meeting may cause an employer to conclude a first pre-discipline meeting, take (or not take) specific action and then hold a second pre-discipline meeting on a separate set of facts. In the instant case, the Employer had information regarding the Grievant's handling of a letter from a client and it was not included in the pre-discipline notice. The evidence appears to indicate it was part of the Employer's investigation and should have been included in the first pre-discipline meeting. The issue became mute when the Hearing Officer found the charge to be inappropriate and the charge was dropped.

The Employer in this case kept attempting to find the correct charges that most appropriately fit the same evidence. The third pre-discipline meeting covered the same ground that the first two pre-discipline meetings addressed. It is clear from the evidence

in this case that the Employer thought the charges brought forward in the first two pre-discipline meetings were insufficient and wanted a different outcome. In doing so, the Employer violated provisions 24.02 and 24.05 of the Agreement and the Grievant's due process rights.

I cannot fault the Employer's motive in this case. This is an Agency that must employ people who are highly principled and who vigorously enforce the civil rights laws of Ohio. In this matter the Commission was pursuing a serious situation that affected the integrity of the entire Agency. Executive Director Mitchell made a very compelling witness who forcefully and passionately articulated the reasons the Commission was resolutely pursing this matter. The Grievant benefited by the procedural error committed by the Employer, but it does not diminish the importance of the principle the Employer was protecting. It is hoped Mr. Motley will be mindful of what happened here and his obligations as an Investigator.

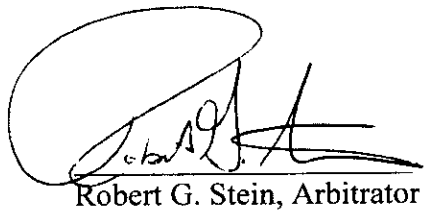
However, the parties have committed themselves to follow a set of procedures and required timelines in order to ensure that the due process rights of employees who are properly charged with violations of work rules are followed. I find the errors in procedure and the contract violations preclude this Arbitrator from addressing the merits of the case.

AWARD

The Grievant shall be returned to his position of Civil Rights Investigator 2 and shall be made whole for any loss of seniority, wage increases, back pay, and benefits. Any and all records of his termination, and the basis thereof shall be removed from his personnel file. The Grievant's return to full time employment shall occur within thirty (30) calendar days from the date of this Award.

The Arbitrator shall retain jurisdiction over the implementation of this Award for a period of sixty (60) calendar days in order to assist the parties in its implementation.

Respectfully submitted this 3rd day of January 2000.



Robert G. Stein, Arbitrator