

#1443 ex

BENCH DECISION AND AWARD

ARBITRATOR: Robert Brookins	HEARING DATE: 6/27/80 35-12-181217-0060-01-03
GRIEVANT: Nathaniel O. Hatwell	GRIEVANCE #: Nathaniel O. Hatwell
DEPARTMENT: DYS	UNION: OCSEA
MANAGEMENT ADVOCATE: Brad Rahr	UNION ADVOCATE: Victor Dandridge

ISSUE

Procedural Arbitrability of Grievance

AWARD

See attached sheets

ISSUED AT:
DATE:ARBITRATOR'S
SIGNATURE:

The Facts

The Ohio Department of Youth Services (the Employer) employed the Grievant until approximately November 23, 1998 when he was dismissed for failure to return to work after being on approved medical leave. The Grievant went on approved medical leave approximately in or about October 1997, as evidenced by his receiving workers compensation benefits for that month.

On August 1, 1998, the Employer began the first of several attempts to communicate with the Grievant. In fact, on that day, the Employer sent a certified, registered letter to the Grievant's home address, in Columbus, Ohio, informing him that his approved medical leave had expired and ordering him to return to work. The letter was returned unclaimed. Also, on August 1, 1998, the Employer sent the Grievant a letter through regular mail, containing the same information, which was not returned to the Employer as undeliverable. After receiving no response from the Grievant, the Employer sent a second certified letter, on August 28, 1998, again notifying the Grievant that his approved leave had expired and that he must return to work. Still, the Grievant gave no response. On September 15, 1998, the Employer sent the Grievant a third certified letter, notifying him that unless he returned to work immediately, disciplinary action would ensue. Again, the Grievant failed to respond. On October 1, 1998, the Employer sent a fourth certified letter notifying the Grievant that the Employer had initiated disciplinary action against the Grievant and that a pre-disciplinary hearing had been scheduled. After receiving no response from the Grievant, the Employer sent him a fifth certified letter, notifying him that he had been terminated and notified OCSEA (the Union) of its decision. At some point between August 1, 1998, and November 23, 1998 (the relevant period), the Employer also attempted to telephone the Grievant at his home in Columbus, Ohio, only to discover that the Grievant's telephone had been disconnected. Finally, like the Employer, the Union also had been unable to contact the Grievant.

Apparently, while on leave, the Grievant's medical problems caused him to temporarily live with his mother and father in Toledo, Ohio. The Union stated that during the relevant period the Grievant's injuries prevented him from returning home to Columbus to check his mail. In contrast, the Grievant stated that he did return home approximately once every three weeks during the relevant period but did not find in his mailbox either the Employer's letter sent through regular mail or even one of the several receipts or notices from the certified letters.

Despite being unable to contact the Grievant, the Union attempted to defend him. Accordingly, the Union drafted an initial (or Step 1) grievance on December 5, 1998. However, the Employer did not receive that grievance until December 17, 1998. Consequently, the Grievance was approximately one day late under the parties' contractual procedures (Section 5.02). Then, pursuant to Section 5.02 the parties agreed to move the Union's grievance to the step 3 level and agreed to meet and discuss the grievance on January 27, 1999. However, the Union still could not locate the Grievant, he did not attend that Step 3 meeting, and the parties orally agreed to reschedule it for February 10, 1999. The Employer either explicitly or implicitly denied the Step 3 grievance, and the Union, still unable to contact the Grievant, appealed that decision approximately 13 days after the contractual deadline for filing Step 3 appeals.

Parties' Arguments

The Employer argues that it made every reasonable effort to notify the Grievant that: (1) his approved leave had expired and to return to work, (2) disciplinary action would ensue if he did not promptly return to work, and (3) he had been terminated for failing to return to work as directed. The Employer also argues that the Grievant had a duty to inform the Employer of the Grievant's location or mailing address while he was on approved leave. The Employer denies that it had any duty to use any emergency telephone number that it might have had on file for the Grievant.

The Union argues that the Employer's efforts to contact the Grievant were unreasonable because the Employer did not attempt to

contact the Grievant at his emergency telephone number, which the Employer had on file. According to the Union, the need to contact the Grievant under the circumstances of the instant case constituted an "emergency" and justifies use of the emergency number. The Union also questions whether the Employer actually sent a letter through regular mail. Finally, the Union argues that it had a sixty-day extension for filing the Step 3 or Step 4 grievance under Section 5.02. The rationale here is that being on approved paid leave prevented the Grievant from having knowledge that the Employer wanted him to return to work or that he had been fired for failing to return timely to work. Moreover, according to the Union, had the Grievant known of the Employer's concerns, he would have contacted the Employer and the Union. The bottom line, according to the Union, is that the Grievant's being on paid leave fully accounts for and justifies his failure to be aware of the numerous efforts to contact or correspond with during the relevant period.

Discussion

This dispute distills down to two basic issues. First, whether the Employer had some duty to make additional efforts to contact the Grievant by using any emergency telephone number it had on file for the Grievant. Second, whether the Grievant had some duty to inform the Employer, if not the Union, of his whereabouts during the relevant period. Given the Employer's repeated efforts to notify the Grievant of the need to return to work or risk discipline, the Arbitrator holds that the Employer's efforts were reasonable and that the Employer is in no way responsible for its inability to contact the Grievant.

However, the record does not show that the Grievant made a reasonable effort, under the circumstances, to apprise the Employer (or the Union) of his location during the relevant period. The Grievant claims that he returned home and checked his mail approximately once every three weeks during the relevant period. If so, then surely he should have discovered at least one receipt from one of the Employer's many certified letters (if not the regular letter). On the other hand, if, as the Union claims, the Grievant's being on paid leave prevented him from returning to Columbus during the relevant period, then, in the Arbitrator's view, the Grievant should and could have found some means to have his mail collected within the approximately three-month relevant period. Nothing in the record justifies this "head-in-the-sand" behavior. The Grievant knew he was on paid leave and that either the Employer or the Union, or both, very well might wish to communicate with him during that period. Based on the record before this Arbitrator, the Grievant's unexplained failure to remain available for communication foiled the Employer's and the Union's attempts to contact him and played a pivotal role in any tardiness by the Union in filing either the Step 1 or Step 3 grievances.

A final observation is indicated here. Although the Arbitrator is reluctant to dispose of disputes involving terminations on purely procedural grounds, the fact remains that the parties placed procedural rules in their Collective-Bargaining Agreement for a purpose. And when those rules are clearly and substantially violated, the Arbitrator has no choice but to dismiss the grievance.

Award

For all of the foregoing reasons, those grievances were fatally tardy under the parties' Collective-Bargaining Agreement.