#1483

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Department of Youth Services—Maumee Youth Center
-AND-
OCSEA

Appearing for DYS
Barry Braverman, DYS/Central Office/LRO
Twania L. Harbour, Executive Secretary
Erma J. Johnson, Social Work Supervisor
Beth A. Lewis, Team Leader-OCB
Gordon D. Mills, Fiscal Specialist
James Ray, DYS Maumee/LRO
Jolene Thomas, DYS Casework Supervisor
Jeff Wilson, LRS-OCB

Appearing for OCSEA
Robert Bibbee, DYS Parole Officer
Matt Mahoney, Administrative Organizer SEIU
Hasani Ngozi, SEIU Delegate
Ella R. Williams, DYS Parole Officer
Sandra Williams, Grievant

CASE-SPECIFIC DATA
Grievance # No. 3517-(00010)001-02-12)
Hearing held: January 17, 2001
Case Decided: April 10, 2001
Subject
Removal—Insubordination/Abusive Language
Procedural Arbitrability

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

Holding
Grievance Denied as Nonarbitrable

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I. The Facts

The Department of Youth Service (DYS or the Employer) and SEIU/District 1199 (the Union) are the parties to this dispute.[1] The primary mission of DYS is to rehabilitate troubled youths, thereby enhancing the public welfare, by: teaching youths responsibility, holding them accountable for their actions, and affording them some of the skills needed to become productive citizens.

Ms. Sandra Williams (the Grievant) was a Parol Officer for DYS until she was discharged, on December 12, 1999, for violation of DYS Directive B-19, Rule 6-B—Wilful disobedience of a direct order by supervisor and Rule 16—Verbal or written abuse of others: using insulting, malicious, threatening, or intimidating language.[2] DYS terminated the Grievant after approximately 38 months (two years and two months) of employment. When she was discharged, the Grievant had no active discipline.

Operation "Tighten-Up" (Operation "Tighten-Up" or "the Program") is a three-year-old DYS pilot program intended to enhance youths' sense of responsibility and to keep them off the streets. Operation "Tighten-Up" entails evening classes that focus on subjects such as competency, employability, and anger management.

At some point during the Program, two vacancies developed for parol officers. On May 20, 1999, a Regional Administrator, Ms. Erma Johnson,[3] distributed a memorandum and a sign-up form to parol officers in DYS, soliciting them to volunteer for the vacant positions.[4] Her unsuccessful efforts at recruitment obliged Ms. Johnson to draft the two least senior parole officers, in DYS, to fill the vacancies. As one of the least senior parole officers, the Grievant was assigned to Operation "Tighten-Up." on June 18, 1999.[5] The Grievant was assigned against her wishes and manifested her displeasure, almost from the beginning of that assignment.

1 Collectively referred to as the Parties.
2 Joint Exhibit No. 2C at 1.
3 Although Ms. Johnson was subsequently demoted to the position of Social Worker Supervisor, she was a Regional Administrator during the relevant period for the instant dispute.
4 Joint Exhibit No. 2E at 3-5.
5 Joint Exhibit No. 2E at 6.

Because some of the youths, in Operation "Tighten-Up," occasionally embrace violence, service in that Program can entail hazardous duty, a trait that has drawn considerable attention during the relatively short existence of Operation "Tighten-Up." Understandably, the potentially hazardous duty in Operation "Tighten-Up" figured prominently in the Grievant's hierarchy if concerns. Accordingly, of the eight grievances she filed, on or about June 21, 1999, three addressed allegedly risky working conditions with which the Grievant felt she was obliged to handle; The remaining grievances complained about other situations related to the Grievant's assignment to Operation "Tighten-Up."[6]

Others also recognized the inherent hazardous potential of the Program. For example, even before the implementation of Operation "Tighten-Up," the Chief Organizer for the Union, Ms. Lisa Hetrick, expressed concerns to Ms. Erma Johnson about the Program's safety. The Employer sought to address those concerns, and the arbitral record does not show that Ms. Hetrick voiced further

[6]

GRIEVANT'S GRIEVANCES

GRIEVANCE NO.	*DATE*	*CONTENT*
3577 (9906222) 011-02-10	6/21/99	Protesting least-senior status
3577 (9906222) 012-02-10	6/21/99	Alleging noncontractual work-schedule change
3577 (9906222) 013-02-10	6/21/99	Alleging failure fo pay overtime
3577 (9906222) 014-02-10	6/21/99	Allegedly forced into Operation "Tighten-Up" without consideration of her desires
3577 (9906222) 015-02-10	6/21/99	Allegedly forced to perform duties without her job description
3577 (9906222) 016-02-10	6/21/99	Allegedly forced to perform hazardous duty without proper training
3577 (9906222) 017-02-10	6/21/99	Allegedly forced to work in dangerous abnormal conditions
3577 (9906222) 018-02-10	6/21/99	Allegedly forced to work in dangerous areas without proper backup

The Grievant also filed approximately 23 overtime requests from July 13, 1999 to December 14, 1999, which were granted. Therefore, these requests cannot reasonably be viewed as a reflection of the Grievant's distaste for Operation "Tighten-Up."

safety-related concerns about Operation "Tighten-Up."

Also, on June 14, 1999, the Grievant's immediate supervisor, Ms. Jolene Thomas, sent a memorandum to Ms. Johnson, voicing concerns about the link between a likelihood of injuries and adequate staffing in Operation "Tighten-Up."[7] Presumably, Ms. Johnson's memorandum, of July 15, 1999, addressed at least some of those concerns.[8] Finally, on August 10, 1999, the Grievant and Mr. Ngozi submitted a memorandum to Ms. Thomas, inquiring about the possibility of being penalized for refusing to engage in

[7] Joint Exhibit No. 2I at 7.

June 14, 1999

TO: Erma Johnson, Regional Administrator

From: Jolene Thomas, Casework Supervisor
SUBJECT: OPERATION TIGHTEN-UP

It is my understanding that there will not be an extra staff member from, Family connections present from 3:30 - 8:30 pm this week.

* * * *

As you know, the lack of another staff member being present the entire shift means there will be times when the two DYS employees are here with youth by themselves. This occurred last Tuesday, when Nawoka and I were here by ourselves, with no providers from 5:15 - 6:30 PM.

It is my belief that someone will be injured eventually. There is no one who is trained as a Security Officer working this program. When there are only two staff present, it is difficult to check on one another, when, for example, a parole officer/supervisor has a group of kids at the restroom, and another group is in the conference room.

JT: mlw

[8] Joint Exhibit No. 2E at 1-2, providing in relevant part.
In response to the security concerns of Operation Tighten-Up. We have put the following safeguards in place.

1. Staffing Patterns - There will be two DYS staff, One Surveillance Officer, and one security Guard (to function in the role of Correction Officer) and Three to four Vendor Staff at any given time. This is a total of 7-8 staff on duty during the time the program is scheduled (3:30-8:00 p.m.) This is approximately 2.3 youth to 1 staff person. We have 17 youth in the program. The youth will be divided into two groups 8 to 9 youth per group. Each group will have 3 to 4 staff with the security person in the reception area near the phones.

[9]

August 10, 1999

hazardous duty as parole officers, forced to serve in Operation "Tighten-Up."[9]

On the other hand, any potential hazards in Operation "Tighten-Up" exist against a backdrop of inherent risk normally associated with the duties of parole officers. Some evidence of this inherent risk is found in the job description for a Social Worker II, which provides in relevant part: Unusual Working Conditions

> *Potentially violent* patients; may require unusual work schedules or arrangements; may be exposed to unusual noises, odors or contagious diseases; may require travel to community site under contract with department of mental health.[10]

For purposes of this dispute, the Grievant's problems really began, on September 8, 1999, when Ms. Thomas published a memorandum that addressed staffing, in Operation "Tighten-Up."[11] The memorandum stated in relevant part: "at least one staff member working the . . . [Operation "Tighten-Up"] program is to be in the room with the youth and vendors at all times. This can be done on

To: Jolene Thomas, Social Worker Supervisor

From: Sandra Williams, Social Worker II
Hasani Ngozi Social Worker II

Subject: Operation Tighten Up

Is it now or will it ever be a mandatory part of a Social Worker II duties in the operation tighten up program to ride with the Toledo Gang Task Force? Is there or will there ever be a *penalty* for not performing task which are considered to be *hazardous, dangerous,* and *life threatening* but which are required as forced participants in the operation tighten up program? If there are penalties please outline.

* * *

Given the fact that the duties of a Social Worker II in the operation Tighten up program are different than the duties of a Social Worker II not assigned to the operation tighten up program, will you please specify what other related duties are included in 413 of the parole officer duties from Erma Johnson's 6118/99.
We await your response!

Cc: Enna Johnson Mafflyn Young
Ed PencUeton

[10] Joint Exhibit No. 2H.

[11] Although the Grievant and Ms. Johnson initially clashed, on August 18, 1999, that event was not a part of the charges that ultimately led to the Grievant's removal and, thus is irrelevant to the instant dispute.

a rotating basis throughout the evening. . . ."[12]

At approximately 4:20 p.m., on September 9, 1999, Ms. Thomas observed the Grievant sitting in a chair outside a conference or classroom. Inside the classroom were approximately eight youths, a security officer, a surveillance officer, and three staff members from the vendors.[13] However, there was no parole officer inside the classroom. Prior to Ms. Thomas' September 8 memorandum, the Grievant had always sat just outside the classroom door.

Upon observing the Grievant sitting outside the door, Ms. Thomas reminded the Grievant that she must sit inside the classroom, pursuant to the September 8 memorandum. The Grievant refused to do so, stating that she felt unsafe inside the room with the youths. Ms. Thomas then verbally ordered the Grievant to sit inside the classroom and the Grievant again refused, restating her concern for her safety inside the classroom. Then Ms. Thomas asked the Grievant if she would rather that Ms. Thomas issued a direct order to sit within the classroom, and the Grievant said something equivalent to "do what you must."[14] Ms. Thomas then left the area, found a Mr. Gordon Mills, Fiscal Specialists 1, to accompany her back to the classroom. There, in the presence of Mr. Mills, and standing no more than three feet away from the Grievant, Ms. Thomas verbally ordered the Grievant to sit inside of the classroom. The Grievant, again, refused to obey the verbal order. This time, however, the Grievant claimed she could not hear Ms. Thomas and asked Ms. Thomas to reduce the order to writing.[15] Shortly thereafter, the Grievant was sitting in her cubicle, when Ms. Thomas and Ms. Twania Harbour, an Executive Secretary, approached. Ms. Thomas attempted to give the Grievant the following written, direct order:

> At or about 4:20 p.m. on September 9, 1999, you were told to sit in the conference room with the youth, vendors, security officer and surveillance officer. You said you didn't feel comfortable in the room with them. I therefore, gave you a direct order to sit in the room, and you still refused.

[12] Employer Exhibit No. 7.
[13] Joint Exhibit No. 2C at 24.
[14] *Id* at 23.
[15] *Id.*

> Please be informed that this memo serves as written documentation of a **Direct Order** to sit in the conference room today, Wednesday, September 9, 1999 and every day that you are working the Operation Tighten-Up Program.
>
> Failure to follow this direct order will result in disciplinary action.

The Grievant again declined to accept the order, saying that she was on break and did not wish to be disturbed. When Ms. Thomas said the Grievant had taken her break, the Grievant replied, "You don't know where the hell I've been."[16] Approximately ten minutes later, the Grievant and Mr. Ngozi entered Ms. Thomas' office and found Ms. Thomas and Ms. Harbour there. Mr. Ngozi was acting as the Grievant's union representative. The Grievant then accepted the written order, and asked Mr. Ngozi what should she do, given the existence of an issue of safety. Mr. Ngozi said she could leave but conceded that he actually had to review the rules to be sure. The Grievant and Mr. Ngozi left Ms. Thomas' office. Mr. Ngozi returned to the classroom and the Grievant returned to her cubicle. Later that evening the Grievant offered to relieve Mr. Ngozi but he declined.[17]

On September 10, 1999, Ms. Johnson discussed the September 9 incident with the Grievant and Mr. Ngozi and later that day sent the following memorandum to them:

> This is in follow-up to our discussion meeting today, Friday, September 10, 1999 regarding your attitude and your refusal to follow ODYS procedures and supervisor's directions, which lead to you being given a written direct order. As stated during this meeting, your behavior continues to be unprofessional, disruptive to the office as well as non-therapeutic to the youth we are serving.
>
> We cannot allow this to continue, therefore, the Direct Order given to you by Ms. Thomas, immediate supervisor, remain in effect. Failure to

[16] Joint Exhibit No. 2C at 23 and 26. Ms. Thomas and Ms. Harbour's respective statements.
[17] Joint Exhibit No. 2C at 11.
[18] Joint Exhibit No. 2C at 6.

continue to follow this direct order, will result in disciplinary action which will be a suspension up to and including a removal.[18]

On October 7, 1999, Ms. Johnson accused the Grievant of behaving rudely toward her on August 18, 1999 and with refusing a direct order from Ms. Thomas on September 9, 1999.[19] According to Ms. Thomas, this alleged misconduct violated:

> DYS Directive B-19, Rule # 1, Neglect of Duty: Failure to follow procedures and/or instructions and/or perform the duties/assigned task of the position which the employee holds. Rule # 6(a), Insubordination: Refusal to carry out work assignment. Rule # 6(b), Insubordination: Willful disobedience of a direct order by a supervisor. Rule # 16, Verbal or Written Abuse of Others: Using insulting, malicious, threatening, or intimidating language.[20]

The memorandum also advised the Grievant that her pre-disciplinary hearing in this matter had been scheduled for October 13, 1999, at 10:30 p.m.[21] The pre-disciplinary hearing was held as scheduled and, on October 30, 1999, the Hearing Officer recommended disciplinary action against the Grievant.[22] On November 4, 1999, Ms. Johnson notified the Grievant of her proposed suspension and/or removal for violating Rules 1, 6(a), 6(b), and 16.[23] On December 21, 1999, the DYS Discipline Committee approved Ms. Johnson's proposal to terminate the Grievant.[24] And, on December 21, 1999,

[18] Joint Exhibit No. 2C at 6.
[19] Joint Exhibit No. 2C at 16.
[20] *Id.*
[21] *id.*
[22] Joint Exhibit No. 2C at 8-9.
[23] Joint Exhibit No. 2C at 5 and 7.
[24] Joint Exhibit No. 2C at 2.
[25] Joint Exhibit No. 2C at 1. *See* Joint Exhibit No. 2C at 1, stating in relevant part:

> On or about *September 9, 1999*, you refused both verbal and written orders to perform certain job duties assigned to you. While refusing the direct order, your actions toward your supervisor were abusive.
>
> Your actions are in violation of DYS Directive B-19, Rule 6(b). Willful disobedience of a direct order by a supervisor and Rule 16, Verbal or Written Abuse of others: using insulting, malicious, threatening, or intimidating language.

the Grievant was removed for violating Rules 6(b) and 16.[25]

On December 28, 1999, the Union filed Grievance No. 3517-(00010)001-02-12) (or the "Grievance"), characterizing and protesting the Grievant's removal as unjust.[26] The Parties held a Step-Three Meeting on January 28, 2000.[27] The Employer's Step-3 response was due no later than February 11, 2000, or 14 days after the Step-3 meeting.[28] However, as of March 2, 2000, the Union had not received the Step-3 response. Consequently, the Union drafted a letter of intent to arbitrate ("Letter") on March 2, 2000, which was incomplete.[29] A corrected Letter was drafted on March 6, 2000. Finally, on March 15, 2000, the Parties agreed to consolidate two cases involving the Grievant. As a part of that settlement, the Employer reserved its right to raise issues involving procedural arbitrability.[30]

II. Relevant Contractual Language—Procedural Arbitrability

Article 7.06 Grievance Steps

* * * *

Step 3—Agency Head or Agency Designee

* * * *

At the Step Three (3) meeting, the grievance may be granted, settled or withdrawn, or a response shall be prepared and issued by the Agency head or designee, within fourteen (14) days of the meeting. . . .

* * * *

Step 4 - Arbitration/Mediation/Office of Collective Bargaining

* * * *

If the grievance is not resolved at Step Three (3) or not answered timely the Union may demand arbitration by serving written notice of its desire to do so by U.S. Mail, presented to the Deputy Director of the Office-of Collective Bargaining with a copy to the agency head or designee, within fifteen (15) days after receipt of the decision at Step Three (3) *or date such answer was due*. OCB shall have sole management authority to grant, modify or deny the grievance.

III. Summaries of the Parties' Arguments

> For your actions, you are hereby removed from your position of Social Worker 2 at Northwest Regional Office/Toledo, effective 12/27/99.

(emphasis added).

[26] Joint Exhibit No. 2B at 1.

[27] Joint Exhibit No. 2B at 5.

[28] *See* Article 7.06, Step 3.

[29] *Id.*

[30] Joint Exhibit No. 2B at 4.

A. The Employer's Arguments—Procedural Arbitrability

1. The Grievance is procedurally defective and, therefore, is not properly before the Arbitrator and not within his jurisdiction.

B. The Union's Arguments—Procedural Arbitrability

1. The Employer waived any procedural objections it might have had by waiting until January 16, 2001 to raise those objections even though the Employer was aware of them on March 15, 2000.
2. Any procedural error was harmless and therefore does not deprive the Arbitrator of jurisdiction of this dispute or otherwise bar the arbitration of the Grievance.

IV. The Issue

Was the Grievant, Sandra Williams, removed for just cause? If not, what shall the remedy be?

V. Discussion and Analysis—Procedural Arbitrability

A. Existence of Procedural Error

Step 4 of Article 7.06 provides: "If the grievance is not . . . answered timely the Union may demand arbitration by serving written notice of its desire to do so by U.S. Mail, presented to the Deputy Director of the Office-of Collective Bargaining . . . within *fifteen (15) days* after receipt of the decision at Step Three (3) *or date such answer was due. . . .*"[31]

The Parties held a Step-3 Meeting on January 28, 2000.[32] The foregoing passage requires the Employer to issue its Step-3 decision within 14 days of the Step-3 Meeting.[33] The record shows that the Employer prepared its Step-3 response on February 1, 2000, approximately five days after the Step-Three meeting.[34] Under Article 7.06, Step 3, the Employer had until February 11, 2000 to submit its Step-3 response. As of March 1, 2000—approximately thirty-two days later—the Union had not received the Employer's Step-3 response and on that date drafted an intent to arbitrate, which the Employer received on or about March 4, 2000.[35] This letter of intent was, however, defective and the

[31] (Emphasis added).
[32] Joint Exhibit No. 2B at 2.
[33] "At the Step Three (3) meeting . . . a response shall be prepared and issued by the Agency head or designee, *within fourteen (14) days* of the meeting. . . ." (emphasis added).
[34] Joint Exhibit No. 2B at 2.
[35] Joint Exhibit No. 2b at 5.

Union apparently cured that defect in a second Letter delivered on March 6, 2000.

Step-4 of Article 7.06 requires the Union to express an intent to arbitrate within 15 days of the date the Employer actually submits or is supposed to submit its Step-3 response, irrespective of whether the Employer actually submits a timely response.[36] In the instant case, the Employer did not submit a timely Step-3 response, and the Union's initial Letter was *dated* March 1, 2001, approximately 21 days after February 11, 2000, the Employer's deadline for submitting its Step-3 response.[37] To comply with the 15-day deadline of Article 7.06, Step 3, the Union should have delivered its Letter no later than February 26, 2000, which was 15 days after the Employer's February 11 deadline for submitting its Step-Three response. Therefore, the Union's initial Letter was *six days* late, and its corrected Letter, which was dated March 6, 1999 and delivered March 7, 1999, was approximately nine days late, under Article 7.06, Step 3.

B. The Parties' Procedural Arguments

1. Constructive Waiver

While essentially conceding that both Letters were tardy, the Union argues first that DYS constructively waived its right to assert a procedural arbitrability defense by waiting approximately seven days after receiving the tardy Letter—March 15, 1999—to raise and reserve the right to argue the issue of procedural arbitrability in the upcoming arbitration. On the other hand, DYS insists that waiting until March 15, 1999 to reserve the right to argue procedural arbitrability did not constructively waive

[36] Step 4 specifically states:

> If the grievance is not resolved at Step Three (3) or not answered timely the Union may demand arbitration by serving written notice of its desire to do so by U.S. Mail, presented to the Deputy Director of the Office-of Collective Bargaining with a copy to the agency head or designee, within fifteen (15) days after receipt of the decision at Step Three (3) *or date such answer was due*. OCB shall have sole management authority to grant, modify or deny the grievance.

(emphasis added).

[37] Joint Exhibit No. 2B at 6.

that right.

Although the Union offers no precedential support for its position, DYS offers a passage from "How Arbitration Works,"[38] declaring, "The right to contest arbitrability before the arbitrator is not waived merely by failing to raise the issue of arbitrability until the arbitration hearing."[39]

While broadly addressing the issue of dilatory challenges to procedural issues, the explicit language of the passage is problematic. Other matters equal, one does not *necessarily* constructively waive the right to challenge a procedural defect by raising it for the first time at an arbitral hearing. However, the passage is silent regarding exceptions to this position.

Arbitrators embrace either of two schools of thought about waiver of the right to challenge procedural errors about which parties in error had either actual or constructive knowledge. One school apparently embraces the position of strictly shielding *explicit* time limitations in Collective Bargaining Agreements. Fairweather seems to capture the essence of this position: "In general arbitrators will *strictly construe* contract provisions setting forth time limits for processing grievances through various procedure steps and to arbitration, and will dismiss grievances where there has been a *failure* to observe such limits."[40]

Apparently, this school neither contemplates nor tolerates procedural tardiness—however surrounding, compelling the extenuating circumstances—if the contractual language sets forth explicit time limits for processing grievances. The rationale is that where parties duly negotiate and adopt explicit time limits in their contracts, arbitrators, as creatures of those contracts, lack authority either to modify those explicit time limits. The obvious strength of this position is the weight it accords explicit contractual language.

[38] Frank Elkouri and Edna Asper Elkouri, How Arbitration Works, (Marlin M. Voltz & Edward P. Groggin, Co-editors 5th ed., 1985).

[39] *Id.* at 311.

[40] Fairweather's practice and procedure in labor arbitration, 88 (ray a. schoonhoven, ed., 3rd ed. 1991)(emphasis added).

Yet, given the complexity of human affairs in general and of collective-bargaining disputes in particular, the rules or rights without exceptions are highly ill-advised; There are no absolute rights or rules. Rules that ignore this fundamental truth are destined to crumble under the cumulative weight of the virtually infinite variety of facts and circumstances that inevitably press upon them. The only inflexible, *enduring* rule is that there is no inflexible, enduring rule.

Ironically, the rigidity of the first school of thought regarding waiver of procedural errors ultimately spawns the second school of thought, the essence of which Fairweather also captures: "[A]rbitrators have demonstrated reluctance to bar a grievance for untimely processing through the grievance procedure and to arbitration where other *surrounding circumstances* are such that requiring strict compliance with the time limits would be unreasonable."[41] In this respect, Fairweather goes on to point out: "[S]ome arbitrators have held that the failure to raise a timeliness objection at the *earliest point* in the grievance procedure constitutes a waiver of any procedural challenges to arbitrability on the basis

[41] *Id.* at 89

[42] *Id. See also* In Re Palm beach County C. T. A. and Palm beach County School Board August 8, 2000. WL 1481884 (Richard, Arb.) (Stating, "[T]he vast majority of Arbitrators treat issues of procedural arbitrability as courts treat affirmative defenses, deeming them to have been waived if not asserted at the first opportunity. . . ."): *See* also, International Paper Augusta, Georgia v. ACE, Local 1803, 2000 WL 33122220 (9/17/00, Nolan, Arb.) (Stating, "Although the grievance came long after the 10-day limit provided in the Agreement, the Company did not assert a timeliness objection until the first day of the arbitration hearing. Similarly, although the Union's demand for arbitration also seems to have [been] delayed, the Company did not object until the hearing. I therefore ruled . . . that by failing to complain earlier, the Company waived its procedural arbitrability objections"): compare In Re Ohio Patrolmen's Benevolent Assoc. and City of East Cleveland Ohio, 2000 WL 1878578 (November 3, 2000 Richard, Arb.) (Stating, [W]hile either party has the right to rely upon, and to obtain enforcement of, the procedural requirements of the contract, Arbitrators generally view issues of procedural arbitrability as affirmative defenses which must be raised at the first opportunity or be deemed to have been waived by the party later asserting them. . . . In this case . . . the employer . . . never raised this issue specifically until the arbitration hearing. The Arbitrator therefore finds that it waived its rights as to these issues.It is axiomatic that a party seeking equitable relief must have clean hands. Where a party has frustrated the grievance process, or has disregarded it, it cannot later seek to have that process enforced. Nor can an employer deprive a grievant of due process and then use the grievant's failure to exhaust that process as the basis for a declaration of non-arbitrability.

of untimeliness."[42] Furthermore, under the proper circumstances, arbitrators who subscribe to this school of thought will uphold waivers to procedural errors even where the Collective Bargaining Agreement contains explicit time limits.

Finally, the second school of thought embraces a forceful rationale.[43] First, with respect to issues of procedural arbitrability first raised at the arbitral hearing, Arbitrator Hoh aptly observes, "[A]rbitral rejection of an untimeliness argument first made at the arbitration stage . . . encourages the parties to *address grievances meaningfully at lower grievance procedure steps*."[44] Second, as a general proposition, parties who "sleep" on their rights risk waiving them. Third, failure to raise procedural issues at the first opportunity effectively nullifies much of the purpose of having a multi-step grievance procedure. Fourth, there is an indelible element of inequity in allowing either party to remain tight-lipped about procedural defects in the opponent's case, process the grievance through the grievance procedure, and then spring the procedural defect on the opponent at the arbitral hearing. Such could not have been the purpose for placing time limits and other procedural limitations in a grievance procedure in the first instance and, thus, should hardly be tolerated at the arbitral level. The Undersigned obviously subscribes to the second school of thought.

> Neither can one party secretly rely on deficiencies in the performance of the other, process the grievance without regard to such deficiencies, and then "ambush" the other party at the arbitration hearing with arguments or motions based upon them);

In Re Palm Beach Cnty. and Palm Beach Cnty. School Bd., W. L., 2000 WL 1481884 (August 8, 2000 Richard, Arb.) (Stating,

> [T]he vast majority of Arbitrators treat issues of procedural arbitrability as courts treat affirmative defenses, deeming them to have been waived if not asserted at the first opportunity, held that the employer had waived its right to rely on the time limits of Article VII. During testimony, however, The Board's Employee Relations Director testified, without contradiction or refutation, that the grievance was filed at the second step and that she had raised the issue of timeliness at the second step grievance meeting. Based on this testimony, the Arbitrator finds that the employer did not waive its right to enforcement . . . [under the Collective Bargaining Agreement]").

[43] *Id.*

[44] In Re United Can Company and Teamsters Local 1999 WL 1008447 (April 24, 1999 HOH, Arb.).

Having established that issues of procedural arbitrability may be constructively waived, despite explicit contractual time limits, the Arbitrator now addresses the nature of the traditional standard employed to determine whether waiver is appropriate in a given case. *In Re United Can Company and Teamsters Local 748*,[45] states the traditional standard here: "Unambiguous contractual time limits are normally enforced unless the opposing party's waiver is *clearly established.* Most arbitrators will find such a waiver to exist where the employer *did nothing* to apprise the union of its procedural objection until the arbitration hearing. . . ."[46]

2. Application of the Second School of Thought

DYS did not waive its right to argue procedural error before the Undersigned. On March 15, 1999, approximately eight days after receiving the Union's Letter, DYS reserved its right to raise the issue of procedural arbitrability, though evidence, in the record does not establish whether this was the earliest opportunity for the Employer to raise the issue.[47] Requiring the Employer to raise the issue of procedural arbitrability early in the grievance procedure alerts the Union that the Employer intends to assert that issue. In this case, however, the Union must have been duly alerted when the Employer clearly indicated its intent, on March 15, 1999, to reserve the right to argue procedural arbitrability.[48] Consequently, the Union must have had ample time to prepare a response to the procedural challenge because the actual arbitral hearing was held approximately 20 months later, on January 17, 2001.

C. The Parties' Procedural Arguments—Harmless Error

The Union's second argument regarding procedural arbitrability is based on the doctrine of harmless error. Here the Union argues that, even if the issue of procedural arbitrability is properly before

[45] 1999 WL 1008447 (April 24, 1999 HOH, Arb.).

[46] *Id.* (emphasis added) (citations omitted).

[47] Ideally, the Employer might have raised the procedural issue on or about March 7, 1999, when it received the Union's amended Letter, but the record does not show that the Employer actually had an opportunity to broach the procedural issue at that time.

[48] *See* Joint Exhibit No. 2B at 4, stating in relevant part, "DYS reserves the right to argue procedural arbitrability."

the Arbitrator, the tardy Letters constituted harmless procedural error. Therefore, the Arbitrator is not barred from considering the merits of the dispute.

The doctrine of harmless error is intended to guard against the inequity and inefficiency of deciding cases on technicalities. In some circumstances, procedural errors are considered to be technical or harmless if they do not adversely impact opponents' rights or jeopardize the process. However, Arbitrator Dennis Nolan aptly described a major exception to this position and one that is applicable to the instant case:

> [Where] the breached provision creates an *important substantive right* a violation may well bar the erring party from proceeding. When the parties *expressly* establish a 'statute of limitations' on a certain action, for example, a violation *'harms' that bargain* even if it does not cause *secondary* problems for the party. Thus, time and time again, arbitrators have found . . . grievances filed *beyond the contractual limits* [to be nonarbitrable], even though the tardiness does not materially hurt the employer.[49]

Article 7.06, Steps 4 obliges the Union to submit a letter no more than 15 days after receiving the Employer's Step-3 response. If the Employer fails to issue a timely response—within 14 days of the Step-3 meeting—Article 7.06, Step 3 obliges the Union to deliver its Letter to OCB within 15 days of the contractual (14-day) due date for the Employer's Step-3 response. In the instant case, the Parties held a Step-3 meeting on January 28, 2000. Therefore, under Article 7.06, Step 3, the Employer's Step-3 response was due 14 days later, on February 11, 2000. Under Article 7.06, Step 4, the Union's Letter to OCB was, therefore, due by February 26, 2000, or 15 days after the contractual due date for the Employer's Step-3 response. The record shows that the Union's initial and corrective Letters were dated March 1, 2000 and March 6, 2000, respectively.[50]

Under these circumstances, the Arbitrator is contractually obliged to declare the Grievance

[49] United Telephone, Southeast v. Communications Workers of America, Local 3871, 101 LA (BNA) 316 (1993 Nolan, Arb.).

[50] Joint Exhibit No. 2B at 5 and 6 respectively.

nonarbitrable because he lacks jurisdiction to hear it. Article 7.06, Steps 3 and 4 are explicit, and the Union's Letters were clearly tardy. The vast majority of arbitrators, including the Undersigned, decline to modify a contractual provision to the extent required here. In short, the Undersigned simply lacks *authority* to modify Article 7.06, Steps 3 and 4 and, therefore, lacks *jurisdiction* to hear the merits in this dispute.

VI. The Award

For all of the foregoing reasons, the Grievance is hereby DENIED in its entirety due to a lack of procedural arbitrability.