

#1753

In The Matter of the Arbitration

-between-

The State of Ohio  
Department of Youth Services

-and-

Ohio Civil Service Employees  
Association, AFSCME, Local 11

Arbitrator: John J. Murphy  
Cincinnati, Ohio

APPEARANCES:

FOR THE DEPARTMENT: Andrew Shuman  
State Advocate  
State of Ohio  
Office of Collective Bargaining  
100 East Broad Street, 18<sup>th</sup> Floor  
Columbus, Ohio 43215

Marvin Phillips  
Office of Collective Bargaining  
2<sup>nd</sup> Chair

Also present: Patrick McGory  
Administrator of Personnel and Payroll  
Centerville Juvenile Correctional Facility

Mary Tipton  
Labor Relations Officer  
Centerville Juvenile Correctional Facility

FOR THE UNION: Victor Dandridge  
Staff Representative  
OCSEA/AFSCME Local 11  
390 Worthington Road  
Westerville, Ohio 43082

Allison Vaughn  
Staff Counsel  
OCSEA/AFSCME Local 11  
2<sup>nd</sup> Chair

Also present: Elisha Earnest  
Grievant  
Annie Williams  
Chapter President  
Circleville Juvenile Correctional Facility

Brenda Latham  
Chief Steward  
Circleville Juvenile Correctional Facility

BACKGROUND:

The Grievant was injured on December 11, 1999 and qualified for workers compensation. He was removed from his position as Juvenile Correctional Officer at the Circleville Juvenile Correctional Facility on November 26, 2000, and reinstated by an arbitrator on May 25, 2001.

On July 23, 2001, the Grievant was placed on Involuntary Disability Separation retroactively to December 11, 1999, the date of his injury. He was given notice of this separation by letter from the facility's Administrator of Personnel. The letter stated in part:

In accordance with DAF Administrative Rule 123:1-33-03<sup>1/</sup> you are being placed on an Involuntary Disability Separation. According to our records, you last worked on or about December 11, 1999 and have received/applied for OIL (Occupational Injury Leave) and workers compensation benefits for this period of time.

You have until December 10, 2002 to request reinstatement to your former position. If you are unable to return to work on or before that date, you will be permanently separated from state service.<sup>2/</sup>

The next contact between the Grievant and the Administrator occurred on December 9, 2002. Both testified about this telephone

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<sup>1/</sup> Administrative Rule 123:1-33-03 refers to Voluntary Disability Separation. Presumably, the citation in the letter should have referred to the preceding administrative rule in Chapter 123:1-33 entitled "Sick Leave." The preceding rule 123:1-33-02 deals with Involuntary Disability Separation.

<sup>2/</sup> The Grievant testified that he did not see this letter dated June 23, 2001 until 2002. On the other hand, the evidence shows that the letter was directed to the Grievant's home and was signed for delivery by his daughter. In addition, the Grievant did in fact take steps to request reinstatement by December 10, 2002 as noted in the letter. Therefore, it is found as a fact from the evidence in the record that the Grievant received the July 23, 2001 letter directed to him by the administrator of personnel from the Circleville facility.

conversation with some differences. However, certain facts are undisputed. The administrator acknowledged receiving faxed information from the Grievant. In addition, the parties stipulated that: "On December 9, 2002, Pat McGory (the Administrator) did not tell the Grievant that the information submitted was insufficient." The Administrator testified that he did not believe that the question of the sufficiency or insufficiency of the information was raised during the conversation. The Grievant testified that the administrator not only told that he received the faxed information, but also the Grievant to "hold tight" because we are near Christmas, and "we're going to ask for an independent examination."

The faxed document consisted of a prescription pad note with a handwritten entry of the name of the Grievant and the date of December 9, 2002. The handwritten statement in the body of the note stated: "May return to work full time, unrestricted on 12/10/02." There then follows a signature about which the record contains no dispute as the signature of the physician whose printed name and address appeared on the top of the prescription pad.

The next contact between the Administrator and the Grievant was a letter dated December 20, 2002 directed to the Grievant that the Grievant claimed to have been received by him on January 3, 2003. The Administrator stated that this letter constituted his response to the faxed information received from the Grievant on December 9, 2002. This letter stated:

In accordance with DAF Administrative Rule 123: 1-33-03 (C), any new requests for reinstatement following a disability separation must be in writing and be accompanied with appropriate medical documentation establishing that the disabling illness, injury, or condition no longer exists. At this point you have not met either of these conditions.

In order to consider a reinstatement please put your request in writing and then submit (it) to this facility along with supporting medical documentation that shows that you have recovered sufficiently so as to be able to perform the duties of your position.

The letter continued with a third paragraph noting the attachment of the July 23, 2001 letter "which outlined for you the process for requesting reinstatement from our disability separation."

In response, the Grievant mailed a letter dated March 9, 2003 to the Administrator who acknowledged receipt. The letter contained two paragraphs as follows:

Per your letter of December 20, 2002, this is to request reinstatement to my job as a Youth Leader. I am requesting reinstatement now because I have recovered sufficiently so as to be able to perform the duties of Juvenile Corrections Officer. I have no physical or mental limitations from work.

Please see attached the certification from my treating physician, Dr. Emmart J. Hoy.

The Grievant acknowledged that he did not attach any additional certification from his physician.

This tangled skein of events was ended by the decision of the administrator to prepare correspondence from the superintendent of the Circleville Juvenile Correctional Facility that the Grievant's request for reinstatement was denied and he was removed. Such a letter was sent by the Superintendent to the Grievant on January 15, 2003. It stated the reasons for the rejection of his request for reinstatement.

In accordance with DAF's Administrative Code 123:1-33-03 (C), any request for reinstatement following a disability separation must be in writing, be accompanied with appropriate medical documentation, and be received within three years of a leave of absence following a disability separation. You last worked on or about December 11, 1999, and therefore, had until December 10, 2002 to submit a written request for reinstatement. On July 25, 2001, you received a certified letter that specifically addressed those requirements. Your written request for reinstatement is dated January 9, 2003 and received by this facility, via fax, on January 15, 2003.

Your request for reinstatement is denied.

It is my understanding that you will have the right to appeal this denial to the State Personnel Board of Review. We will inform you when this letter is filed with SPBR at which time, if you so choose, you may file a formal appeal.

On January 27, 2003 the Grievant did, indeed, file an appeal to the State Personnel Board of Review that led to a report and recommendation by an administrative law judge dated August 1, 2003, which report was adopted by the Board and mailed to the Grievant on September 19, 2003.

While there is a dispute between the parties with respect to the date of filing, the Union filed a grievance under the collective bargaining contract concerning the denial of the reinstatement of the Grievant after a disability separation. The grievance was heard at an arbitration hearing between the State and Union--the parties to the collective bargaining contract--on February 10, 2004.

STIPULATED ISSUE:

Was the Grievant improperly denied reinstatement from disability separation in accordance with Article 35 of the collective bargaining agreement? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS:

**ARTICLE 25 - GRIEVANCE PROCEDURE**

**25.01 - Process**

- A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances. No employee who has rights to final and binding arbitration of grievances, including disciplinary actions, may file any appeal with the State Personnel Board of Review nor may such Board receive any such appeal.

. . .

**25.02 - Grievance Steps**

. . .

**Step One (1) - Immediate Supervisor**

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. . . . All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event. . . .

. . .

**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. . . .

**Step Five (5) - Arbitration**

Grievances which have not been settled under the foregoing procedure may be appeals to arbitration by the Union

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. . .

**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 35 - DISABILITY BENEFITS

##### 35.01 - Eligibility

Eligibility shall be pursuant to current Ohio Law and the Administrative Rules of the Department of Administrative Services in effect as of July 1, 2000, including the following modifications and clarifications:

. . .

#### ARTICLE 44 - MISCELLANEOUS

. . .

##### 44.02 - Operations of Rules and Law

To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to State employees in areas where this Agreement is silent, such benefits shall be determined by those statutes, regulations, rules or directives.

#### POSITIONS OF THE PARTIES:

##### A.) State Position

The State made two separate arguments that the grievance was not arbitrable because of procedural failures in the grievance process. First, the grievance was not filed in a timely manner under Step One in Article 25.02. It was undisputed that the Grievant received the superintendent's notice of the denial of his

reinstatement on January 21, 2003. On that date, the Grievant became or reasonably should have become aware of the occurrence giving rise to the grievance. Therefore, under the contract the grievance must be presented no later than ten working days after January 21, 2003. "Mary Tipton, Labor Relations Officer, Circleville Juvenile Correctional Facility, testified that she had no record of the agency processing a grievance until May 15, 2003, almost four (4) months after the receipt of the superintendent's letter." (State post-hearing brief at 2). In addition, the State argued that no evidence was presented by the Union that this grievance was ever forwarded to Step Three.

The second procedural argument by the State centers on the failure to advance the grievance from Step Three to Step Four with the Office of Collective Bargaining within the contractual requirement of fifteen days. According to the Union, Step Three should have been held on February 8, 2003. From that date, the State had thirty-five days to issue a Step Three response--on or about April 4, 2003. Indeed, the Union references April 4 as the date for the State's response to Step Three in the Union's appeal to Step Four. Consequently, the appeal to Step Four was due within fifteen days of April 4, 2003, or April 19, 2003. However, the evidence shows that this appeal was clearly postmarked April 26, 2003 and received by the Office of Collective Bargaining on April 28, 2003.

Even in the absence of an employer response to Step Three, the Union had the right to appeal to Step Four within the requisite



time limits and did not do so. Therefore, the grievance is procedurally inarbitrable for two distinct reasons.

The State then turned to the decision by the State Personnel Board of Review. The State argued that "the Arbitrator must defer to the Board" and the standards that it used to dismiss Grievant's case as untimely.

Article 35 is silent on the issue of reinstatement after an Involuntary Disability Separation. Consequently, Section 44.02 of the collective bargaining agreement "should be interpreted to guide the exercise of arbitral discretion in this case. Because the contract is silent with respect to the matter of Involuntary Disability Separation, the 'benefit' of reinstatement following a period of disability separation is determined Rule 123:1-33-04, Administrative Code, and the interpretation of that Rule through the authority of PBR . . . (Personnel Board of Review)." (State post-hearing brief at 5-6). Therefore, the finding of PBR that the Grievant did not file a request for reinstatement in time was res adjudicata in the arbitration hearing.

The State noted that the Personnel Board of Review has recognized in the past that if a contract expressly includes provisions for Involuntary Disability Separation then the Board is precluded from taking jurisdiction. "However, in the instant case, PBR accepted jurisdiction because there is no language in this collective bargaining agreement that specifically pertains to Involuntary Disability Separations. Therefore, because the

agreement is silent, the Grievant is subject to 'all applicable State or local laws'." (State post-hearing brief at 5).<sup>3/</sup>

Lastly, should the arbitrator consider the grievance on the merits--despite its procedural defects and the contrary decision by the State Personnel Board of Review--the grievance should be dismissed because the Grievant did not file a request for reinstatement in the time required by the Rule 123:1-33-04 of the Administrative Code.

B.) Union Position

The Union maintained that it presented undisputed testimony that the grievance was in fact filed at the facility within ten days of the Union or the Grievant becoming aware of the contract violation as outlined in Step One of Section 25.02 of the contract. The chapter president attempted to file the grievance with the Grievant's immediate supervisor on January 27--just six days after the date on which he received the superintendent's letter denying his reinstatement.

With respect to the absence of a Step Three meeting, the Union maintained that "the State was attempting to stonewall the Union's attempt to follow the CBA (Collective Bargaining Agreement)." (Union post-hearing brief at 3). The position of the State was made clear by a letter sent to the Grievant and the Union by the

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<sup>3/</sup> The phrase "all applicable State or local laws" obviously refers to the third sentence of Section 4117.10 (A) of the Ohio Revised Code. This sentence states: "Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all State or local laws . . ."

labor relations officer of the Central Office of the Ohio Department of Youth Services. "The letter clearly states that the Agency/State believes that the matter would not be appropriately handled through the grievance process." (Id.) The Union argued that the State refused to hold the necessary third step meeting and interfered with the Union's ability to process the grievance.

Lastly, it is well settled that any objection to timeliness must be raised prior to an arbitration. The State failed to raise this issue at Step Three or Step Four of the process, thereby effectively waiving any issue of timeliness.

With respect to the decision by the State Personnel Board of Review, the State's argument constitutes a "second red herring." This case involves a failure by the State to comply with its contract with the Union, and the State is seeking "to confuse its failure . . . with a jurisdictional 'free for all'." (Union post-hearing brief at 4). The State argues that the issue of disability is outside of the contract with the Union, and if that fails, the State argues that the arbitrator must abide by the Board's decision rejecting the grievance claim on timeliness. The simple fact that "SPBR determined, based upon its evidentiary standards, that Mr. Earnest's appeal was not timely, does not preclude this Arbitrator from applying arbitral standards . . ." (Supra at 5).

With respect to the grievance on the merits, the Grievant provided proof that he was able to return to work and perform his duties without restriction. He provided that information on December 9, 2002. The physician provided a sworn statement dated the day before the arbitration hearing that states the physician

utilized the position description when he made his assessment of the Grievant on December 9, 2002. The State cannot challenge this since the State never gave any guidance on what format the medical evidence should take.

Lastly, "it is disingenuous for the (State) to claim that Mr. Earnest's information was untimely, when its request for additional information came after the date that it would have been timely." (Emphasis in text). (Supra at 7). The administrator of personnel requested additional information in his letter of December 20, 2002--days after the deadline for the Grievant's request for reinstatement.

OPINION:

The parties stipulated an issue which truly states the over-arching question in arbitration. However, for purposes of clarity of analysis four questions are raised that separately reflect the division between the parties in their arguments at the arbitration hearing and in their briefs. First, is the grievance procedurally arbitrable under the contract between the parties? Second, whether the arbitrator must defer to the decision of the State Personnel Board of Review and the standards the Board used to dismiss the Grievant's appeal to the Board as untimely? The third question assumes the matter is procedurally arbitrable and that the arbitrator is not precluded by the Board decision from further analysis. This question deals with the merits of the grievance under the contract between the parties. Was the Grievant's reinstatement request filed in a timely manner? The fourth and

final question assumes a timely request by the Grievant. What should the remedy be?

A.) The Matter of Procedural Arbitrability

There is a text in the record that forms the basis of understanding what happened during the grievance process of this case prior to arbitration. The text is in the form of a memorandum to the Grievant from the Labor Relations Officer at the Central Office of the Ohio Department of Youth Services, with a copy to the Union. The text is undated and clearly states that the position of the department. The department decided that it would not participate in the grievance process of this grievance because it believed that under Article 35 of the contract, under which the grievance was filed, the dispute set forth in the grievance was covered by State law and Rules of the Department of Administrative Services. The text stated:

Our office is in receipt of a request for a Step Three meeting regarding the above-mentioned grievance. However, such a request cannot be honored and must be denied. Your grievance deals with the denial of a reinstatement from disciplinary separation. Under article 35 of the current agreement between the State of Ohio and AFSCME, issues involving disability are covered by State law and rules of the Department of Administrative Services. As such, any claim(s) you may have involving the processing, payment, reinstatement, separation or other matters pertaining to disability would not appropriately be handled through the grievance process.

In closing, let me reiterate that our office considered this issue inappropriate for the grievance process and no Step Three meeting will be scheduled.

The sum and substance of the State's position with regard to procedural arbitrability is as follows: While the State,<sup>4/</sup> through the Department of Youth Services chose not to participate in the grievance process, it faults the Union for failing to follow the particular time schedule for proceeding from step to step in the grievance process.

This is fatal to any claim that the grievance is inarbitrable because it was not advanced to Step Four within fifteen days of the date on which the Department's response was due for the third step. According to the Department, its third step response was due on April 4, 2003; thereby making the appeal to the fourth step due on April 19, 2003. Since the appeal was postmarked April 26, 2003 and received by the Office of Collective Bargaining on April 28, 2003, the grievance, so argues the State is inarbitrable.

The State is arguing that the appeal by the Union to Step Four should be marked from a due date of the Department's response to Step Three in the grievance process--a process in which the Department unequivocally stated it would not participate. As the chapter president testified, she tried after April 4, 2003 "to get management to do a Step Three meeting, but management said this was not for the grievance process."

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<sup>4/</sup> Steps 1, 2 and 3 of the grievance process occur at the Department level; Step 4 moves to the Office of Collective Bargaining at the State level.

To rule this grievance unarbitrable would be to reward the Department for setting a trap to catch the Union in failing to follow the time procedures for the steps in the grievance process while the Department did not participate in the grievance process. The Union was forced to use the requisite forms in its appeal to the fourth step in order to win its opportunity for an arbitration hearing. Instead of participating in the grievance process, and raising its claim that the grievance was not subject to the grievance and arbitration procedure, the Department refused to participate in the grievance process.

The Department also claimed that the grievance was not filed in a timely manner at the first step--ten days from the date the Grievant became or reasonably should have become aware of the occurrence giving rise to the grievance. On January 21, 2003, the Grievant received notice that his reinstatement was denied; thereby, triggering the ten day period for filing the grievance. The Department's position is that it had no record of the grievance until May 15, 2003--the date that is inserted in the case number in this case.

The labor relations officer at the Centerville Youth Correctional facility testified that she first learned of the grievance on May 15, 2003, and at that point provided that date as the date of the filing of the grievance. This person later testified that she could not recall this grievance being discussed at the Step Three meeting in February 2003. She then stated that she discussed the grievance with the Labor Relations Officer from

the central office of the Department in March, and, therefore, became aware of the grievance in March. By contrast, the chapter president testified that the Union attempted to file the grievance in Step One with the Grievant's immediate supervisor on January 27, 2003. Indeed, that date appears in handwritten form at the top of the grievance form submitted in this arbitration.

Both arguments by the State that this grievance is procedurally inarbitrable are rejected because both are not supported by the evidence for which the State had the burden of proof.

B.) The Board of Review Decision

The State's brief claimed that the Personnel Board of Review "accepted jurisdiction because there is no language in this collective bargaining agreement that specifically pertains to Involuntary Disability Separations." The Administrative Law Judge's report adopted by the Board was made part of the record in this arbitration.<sup>5/</sup> It does not explicitly refer to the Board's jurisdiction in any way. The question, however, in this case is not whether the Board had jurisdiction; rather, the question is whether there is arbitral jurisdiction under this contract for this arbitration over this dispute. If so, then the question is whether the arbitrator is empowered to adopt the Board's decision through the doctrine of res adjudicata.

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<sup>5/</sup> According to the arbitral record, a final order of the Board dismissing Earnest's request for reconsideration was entered on the Board's Journal on October 2, 2003. The State suggested in its brief that Earnest has appealed the Board's Order to the Court of Common Pleas of Franklin County, and the appeal is currently pending. There is no arbitral finding however, on the current status of litigation concerning the Board's Order.



The contract defines what is the subject matter of arbitration under this contract. In Step Five of Article 25.02: "Grievances which have not been settled under the foregoing procedure (the four steps of the grievance process) may be appealed to arbitration by the Union . . ." Therefore, "grievances which have not been settled" are the subject matter of arbitration in this contract.

The contract then defines a "grievance." Under Section 25.01 (A), "a grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement." The State recognized in its brief that "if a collective bargaining agreement expressly includes provisions for Involuntary Disability Separation . . ." then arbitral jurisdiction would apply.<sup>6/</sup> A contract, however, can be more than what the State deems "express provisions." It may include as a provision of the contract the text of documents external to the contract that the parties agreed to adopt as part of a contract. The parties signal this decision to adopt these external documents by incorporating the documents by explicit reference in the contract.

This is the reason that arbitral authority over this grievance is found in this contract. Article 35.01 incorporates by reference

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<sup>6/</sup> The State cited a decision by the State Personnel Board of Review in 1996 wherein it determined it did not have jurisdiction in a case where the contract had an express provision for Involuntary Disability Separation and a final and binding arbitration clause. Hardy v. Ohio Department of Public Safety, Case No. 96-IDS-01-0013 (State Personnel Board of Review, 1996), aff'd. Case No. 96-CV-923, Stark Co. Common Pleas Ct.

the Administrative Rules of the Department of Administrative Services in effect as of July 1, 2000. The incorporation by reference to the contract of these Rules is stated in the contract to be for the purposes of determining all matters within the scope of "eligibility." Eligibility for what purpose is answered by the title of Article 35 "DISABILITY BENEFITS." The parties, therefore, had in mind and negotiated as part of the contract particular rules of the Department of Administrative Services, and those in effect as of a particular date.

The only question remaining is the scope of this incorporation by reference. The only indication in the contract of the scope of the incorporation is the choice of the word "eligibility." The difficulty is that there is no separate rule within Chapter 123:1-33 of the Administrative Rules that is entitled "Eligibility," and there is no such provision specifically captioned with the eligibility for the leave involved in this case--an involuntary disability separation.

Rule 123:1-33-02 governs involuntary disability separation. It sets forth the factors related to eligibility, the practice of considering these factors, and the termination of eligibility by reinstatement. Paragraph (D) of Rule 123:1-33-02 states: "The total continuous time of absence due to disabling illness, injury or condition shall not exceed three years for purposes of reinstatement rights under this chapter."

The logical answer to the question of the scope of the incorporation of the administrative rules into the contract is that the parties intended to adopt all those rules setting forth all of the employee rights with respect to disability leaves. All of these rights incident to disability leaves as a benefit to the employees are made part of the contract in this case. This would include the right to reinstatement incident to the three-year termination of eligibility for a leave under involuntary disability separation.

All of these rules incident to eligibility for leave under Involuntary Disability Separation are then viewed as part of the contract between the Union and the State. The grievance in this case states an issue and alleges a violation of Article 35 in that "E. Earnest was denied reinstatement after a disability separation." Since this is a dispute between "the Employer and the Union or an employee regarding the application, meaning, or interpretation of this Agreement," it is a "grievance under Section 25.01 (A) of the contract." Since this grievance has not been settled by the grievance process for the reasons stated above, it falls within the subject matter of arbitration in this contract by Article 25.02 - Step Five.

The contract in this case, therefore, is not silent about Involuntary Disability Separation. The contract incorporates by reference all of the rules of the Department of Administrative Services bearing on eligibility for leaves incident to such

separation. This includes the rules dealing with the termination of eligibility by reinstatement.

There is, therefore, arbitral jurisdiction under this contract over this grievance. The question now is whether the arbitrator is empowered to adopt the decision of the Personnel Board of Review under the doctrine of res adjudicata. The Board's decision was that: "Earnest's right to be reinstated to his position has lapsed since he did not request such reinstatement within the time period provided by law." The reference to the law refers to Rule 123:1-33-04 of the Ohio Administrative Code setting forth the process of ending eligibility for a disability separation by a request for reinstatement.

In this case the arbitrator does not have the authority to adopt the decision of the Board of Review. In this case, the contract has a provision for final and binding arbitration of grievances. Under Article 25.09 (F) arbitral decisions "will be final and binding." Arbitration set forth at Step Five in the contract in this case under Article 25.02 entitled "Grievance Steps." Under Chapter 4117.10 (A) of the Ohio Revised Code, "if the agreement provides for a final and binding arbitration of grievances, public employers, employees and employee organizations are subject solely to that grievance procedure . . ." For these reasons, the arbitrator is not at liberty in this case to adopt the decision by the Board of Review.

C.) The Merits

The Grievant's request for reinstatement was denied by the superintendent of the Circleville Juvenile Correctional facility. The denial was in a letter dated January 15, 2003--a letter quoted above in this opinion.

The first two sentences in the first paragraph state the twin requirements of appropriate medical documentation and a written request in writing. The second sentence noted that the Grievant had "until December 10, 2002 to submit a written request for reinstatement." The second paragraph of the letter denied the request for reinstatement, and the only reason stated in the letter is: "your written request for reinstatement is dated January 9, 2003 and was received by this facility, via fax, on January 15, 2003."

If there were nothing more in this arbitral record regarding the Grievant's request for reinstatement, the facts recited in the superintendent's letter would clearly establish an untimely request by the Grievant.

The arbitral record shows, however, a medical prescription note concerning the Grievant's return to work that was received by the administrator of personnel at the Circleville facility on December 9. The record also includes a letter by the administrator ten days later on December 20 directed to the Grievant (also quoted above). That letter states the following with respect to the

Grievant's request for reinstatement. "In order to consider a reinstatement please put your request in writing . . ." This is an invitation by the Circleville facility to the Grievant to place his request for reinstatement in writing and the invitation is being extended after the due date under Rule 123:1-33-04. This constitutes a waiver by implication of the facility's right to require the written request for reinstatement prior to December 12, 2002. A waiver constitutes a relinquishment of a known right by the person or entity who enjoys the benefit of that right. It is clear from the July 23, 2001 letter by the administrator of personnel at the Circleville facility that the administrator knew that December 10, 2002 was the deadline for the Grievant's written request for reinstatement. Therefore, the administrator's invitation to the Grievant to "put your request in writing and submit to this facility" is a knowledgeable relinquishment of the right by the Facility to demand timely submission of the request for reinstatement.

This waiver by the facility by implication of the time limits of the request for reinstatement induced action by the Grievant. The Grievant in response to the invitation for a written request for reinstatement provided same to the administrator by letter dated January 9, 2003 (also quoted above). Since the facility impliedly represented it would not stand on its right to a timely request for reinstatement, and since that representation induced action on behalf of the Grievant, the facility is estopped from now

asserting its right to a timely written request for reinstatement. Therefore, the superintendent's reason for denying the request for reinstatement is not established in this record.<sup>7/</sup>

D.) Remedy

For the reasons stated above, the Grievant did comply with the requirements of Rule 123:1-33-04. Because of the facility's

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<sup>7/</sup> The State also argued that the Grievant's written prescription pad notation by his physician did not constitute "substantial, credible medical evidence that the employee is once again capable of performing the essential portions of the employee's job duties" under Rule 123:1-33-04. The superintendent's letter denying the reinstatement, however, did distinguish between a written request for reinstatement and appropriate medical documentation. However, the only reason stated in the letter for the denial of the request for reinstatement was the untimely written request for reinstatement.

The Union was placed under particular difficulty in preparing this case for arbitration on the issue of the documentation of medical evidence that the Grievant could perform his job. The record shows that the Department refused to participate in the grievance process; consequently, the record also shows that the Union learned for the first time on February 6 (4 days before the arbitration hearing) that the State would claim a lack of medical documentation.

One day before the arbitration hearing, the Union obtained an affidavit from the Grievant's doctor explaining that he (the doctor) reviewed the position description and then certified that the Grievant would be able to complete these duties without restriction on the prescription pad dated December 9. This affidavit was made part of the record, and cannot be dismissed as totally self-serving or concocted on the eve of the arbitration to prepare or cover for the Union's failure to present evidence in the grievance process.

The above is set forth as background to the matter of sufficiency of medical documentation supplied by the Grievant. This question, however, is not an issue on the merits of this grievance because the superintendent's letter denying the reinstatement is based explicitly on the contention that the request for reinstatement was untimely.

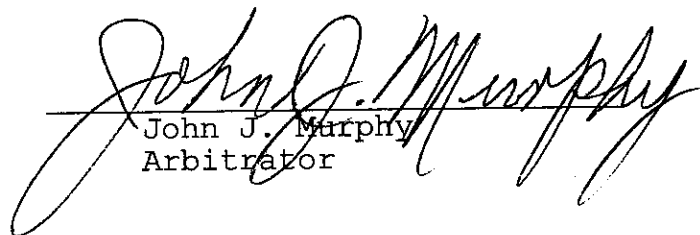
actions, the Grievant's written request for reinstatement is timely. Because the facility's denial of reinstatement was not based upon the absence of substantial, credible medical evidence, the evidence presented by the Grievant on December 9 is deemed consistent with the Rule.

The contractual failure by the facility in this case is its failure to act under Rule 123:1-33-04 (B). The facility was required under this provision to "either reinstate the employee or require the employee to submit to a medical or psychological examination . . ." For this contractual violation, the Grievant should be made whole until such time that the facility exercises its choice to reinstatement or require a medical examination.

AWARD:

The grievance is granted for the reasons stated above. The Grievant is to be made whole from the date of the denial of his reinstatement, January 15, 2003, to the date that the facility chooses between reinstatement or requiring the Grievant to submit to a medical examination under Rule 123:1-33-04.

Date: March 18, 2004

  
John J. Murphy  
Arbitrator