

VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTIONS

- AND -

SERVICE EMPLOYEES INTERNATIONAL UNION, DISTRICT 1199, SEIU

GRIEVANT: BETH MEEKISON

GRIEVANCE NO.: 2703(070718)17980211

ARBITRATOR'S OPINION AND AWARD

ARBITRATOR: DAVID M. PINCUS

DATE: MARCH 17, 2009

Appearances

For the Employer

William Steinhoff
Chris Lambert
Todd Snyder
Adam Primm
Ryan Sarni
Bobby Johnson
Stacie Saunders

Director SOP
Witness
Inmate
Observer
Second Chair
Advocate
Management Analyst

For the Union

Beth Meekison
Arville Duty
Mary Jo Ivan
Kevin Muhammad
Catherine J. Harshman

Grievant
ACA
Witness
State Organizer
Advocate

INTRODUCTION

This is a proceeding under Article 7 - Grievance Procedure, Section 7.07 - Arbitration of the Agreement between the State of Ohio, Ohio Department of Rehabilitation and Corrections, hereinafter referred to as the Employer, and District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO, hereinafter referred to as the Union, for June 1, 2006 - May 31, 2009 (Joint Exhibit 1).

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. Both parties indicated they would submit briefs and complied with the submission guidelines agreed to at the hearing.

STIPULATED ISSUE

Is the grievance properly before the Arbitrator? If not, what shall the remedy be? If so, was the Grievant removed for just cause?

PERTINENT CONTRACT PROVISIONS

ARTICLE 7 - GRIEVANCE PROCEDURE

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7.06 Grievance Steps

The parties intend that every effort shall be made to share all relevant and pertinent records, papers, data and names of witnesses to facilitate the resolution of grievances at the lowest possible level to the extent that the Health Insurance Portability and Privacy Act ("HIPPA") allows. By mutual agreement, the Union and the agency may waive Steps 1, 2, or 3 of this procedure.

The following are the implementation steps and procedures for handling a member's grievance:

Step 2 - Local or Agency Designee

Suspension, Fine, Discharge and Other Advance-Step Grievances

Certain issues which by their nature cannot be settled at a preliminary step of the grievance procedure or which would become moot due to the length of time necessary to exhaust the grievance steps may, by mutual agreement, be filed at the appropriate advance step where the action giving rise to the grievance was initiated. A grievance involving a suspension, a fine, a reduction in pay and/or position or a discharge shall be initiated at Step Three (3) of the grievance procedure within fifteen (15) days of the notification of such action. Grievances filed as a result of non-selection for promotions must be filed directly at Step Three (3) with the agency where the vacancy was posted.

Discharge Grievances

The Agency shall forward a copy of the discharge grievance with the grievance number to the Office of Collective Bargaining at the time the grievance is filed at Step Three (3). The Agency shall conduct a meeting and respond within sixty (60) days of the date the grievance was filed at Step Three (3). If the grievance is not resolved at Step Three (3) the parties shall conduct a mediation within sixty (60) days of the due date of the Step Three (3) response. Nothing in this section precludes either party from waiving mediation and proceeding directly to arbitration. The Union may request arbitration of the grievance within sixty (60) days of the date of mediation, but no more than one hundred eighty (180) days of the filing of the grievance. The parties shall conduct an arbitration within sixty (60) days of the date of the arbitration request. The parties agree that there shall be no more than one (1) thirty (30) day continuance requested for arbitration. If a cancellation is initiated by an arbitrator, the arbitration shall be conducted within (30) days of the cancellation.

However, grievances involving criminal charges of on-duty actions of the employee, grievant unable to attend due to a disability, or grievances involving an unfair labor practice charge may exceed the time limits prescribed herein. Employees who are terminated and subsequently returned to work without any discipline through arbitration, shall have the termination entry on their Employee History on Computer (EHOC) stricken.

Step 3 - Agency Head or Designee

Should the grievant not be satisfied with the written answer received in Step Two (2), within seven (7) days after the receipt thereof, the grievance shall be filed with the agency head or designee. When different work locations are involved, transmittal of grievance appeals and responses shall be by U.S. Mail. The mailing of the grievance appeal form shall constitute a timely appeal, if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response, if it is postmarked within the answer period. Upon receipt of the grievance, the agency head or designee shall hold a meeting within thirty (30) days after the receipt of the grievance. 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. Any grievances resolved at Step Three (3) or at an earlier step of the grievance procedure shall not be precedent setting at other institutions or agencies unless otherwise specifically agreed to in the settlement. The grievant may be accompanied at this meeting by a delegate and/or an organizer. The inability of a delegate or organizer to be present at such meeting after reasonable attempts to schedule will permit the agency head or designee to render a decision based on documents only.

Step 4 - Arbitration/Mediation/Office of Collective Bargaining

If the Agency is untimely with its response to the grievance at Step Three (3), absent any mutually agreed to time extension, the Union may appeal the grievance to the Office of Collective Bargaining by filing a written appeal and a legible copy of the grievance form to the Deputy Director of the Office of Collective Bargaining requested that a Step Three (3) meeting be held. The appeal shall be filed within fifteen (15) days of the due date of such answer. 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.

When the Union demands arbitration such notice shall also serve as a request for mediation unless otherwise designated by the Union. A meeting between the Union and the Office of Collective Bargaining will be held within thirty (30) days of the receipt of the arbitration demand for the purpose of scheduling mediation.

If the Union appeals, at its option, a grievance that is a result of a failure to meet time limits by the agency, OCB shall schedule a meeting with the delegate and/or the organizer within thirty (30) days of the receipt of the grievance appeal in an attempt to resolve the grievance unless the parties mutually agree otherwise. Within twenty-five (25) days of the OCB meeting, OCB shall provide a written response which may grant, modify, or deny the remedy being sought by the Union. The response will include the rationale upon which the decision is rendered and will be forwarded to the grievant, the Union's Step Three (3) representative(s) who attend the meeting and the Union central office. If the Union is not satisfied with this response, the Union may appeal the grievance to arbitration, pursuant to the provisions previously set forth in this Article, unless mutually agreed otherwise. Unless mutually agreed otherwise, if a grievance is scheduled for mediation and no Step 3 response has been issued, the grievance will go forward at mediation.

Either the Office of Collective Bargaining or the Union may advance a grievance directly from Step Three (3) to arbitration if that party believes that mediation would not be useful in resolving the dispute.

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(Joint Exhibit 1, Pgs. 15-21)

7.07 Arbitration

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E. Arbitrator Limitations

1. Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this Agreement. Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

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(Joint Exhibit 1, Pgs. 21-22)

CASE HISTORY

Beth Meekison, the Grievant, was employed as a Psychological Assistant II at the Chillicothe Correctional Institution (CCI) in the Sex Offender Program at the time of her removal on July 24, 2007. She initially worked for the Department of Mental Health at the Old Penitentiary. She subsequently realized employment with the Employer in October of 1994 as an Outpatient Psychology Assistant II. Prior to her removal, the Grievant taught sex offenders the Mandatory Deniers Sex Offender Program curriculum.

On April 3, 2007, the Grievant's supervisor filed an incident report. It indicated the Grievant may have revealed unauthorized information to Inmate Snyder (Joint Exhibit 3). An investigation was initiated which led to the finding that an unauthorized relationship had taken place. Reliance was placed on personal information known by Inmate Snyder about the Grievant.

On June 27, 2007, the Grievant was removed from her Psychology Assistant II position. The Notice of Disciplinary Action cited the following infractions:

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Through the course of an investigation it was found that you developed an unauthorized relationship with Inmate Snyder A262-474. By your own admission you exchanged personal information with the inmate to the point the inmate knew that you had received discipline and what the fine amount was and the effective date for the fine. You also went to isolation to visit the inmate when it was not required of you to do so. During this investigation, you also failed to cooperate in the investigation by not directly answering questions that were asked.

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(Joint Exhibit 3)

Her actions were viewed as violations of Rule 24 and 46(A) of the Employees Standards of Conduct.

On July 17, 2007, the Grievant challenged the above-mentioned disciplinary action. The Statement of Grievance states in pertinent part:

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Was removed from current job based on inadequate evidence and not just cause for that removal...

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(Joint Exhibit 2)

The grievance, itself, and a letter (Joint Exhibit 2) announcing the Union's intent to arbitrate the matter was sent to the Employer's Central Office on July 24, 2007 via UPS (Union Exhibit 2). It should be noted an identical intent letter to arbitrate was also sent to the Office of Collective Bargaining.

On September 25, 2007, the contested grievance was scheduled and heard at Step 4 of the grievance process, which is the mediation stage. Chris Lambert, the Employer's representative at this stage, raised a procedural objection contesting the proper filing of the grievance. As such, the Arbitrator is obligated to initially determine whether the matter is properly before the Arbitrator.

THE ARBITRABILITY ARGUMENTS

The Employer's Position

The Employer opined the disputed grievance was not properly before the Arbitrator because it was procedurally defective. The discharge grievance in question should have been initiated at Step 3, the agency step, in accordance with Section 7.06. Rather, the Union filed the grievance directly to the Office of Collective Bargaining in the form of a demand for arbitration letter (Joint Exhibit 2).

This contractual requirement was never waived by the Employer. The Union never presented any mitigating circumstances in support of any mitigation argument.

The Union's actions indicate it never intended to file the grievance at Step 3. Chris Lambert, a Labor Relations Officer 3, testified he held monthly Step 3 hearings at Chillicothe Correctional Institution (CCI).

The disputed grievance was never scheduled for hearing during August of 2007, nor any subsequent Step 3 hearing date. If the Union had intended to comply with the contractual requirement, it would have taken some action to rectify the situation.

In fact, the Union never appealed the right to a Step 3 meeting by filing an appeal per Section 7.06, Step 4. This appeal to OCB normally deals with an alleged untimely response to a Step 3 filing.

There is no doubt the Union knew what to do with the grievance but failed to do so. Ken Muhammad, a State Organizer, corroborated the Employer's Step 3 interpretation. An email (Employer Exhibit 4) from a local delegate to Muhammad further confirmed the Union's intent to file the grievance at Step 3.

Portions of Article 7.06 distinguish between mutually agreed to advanced step filing versus steps that can be unilaterally advanced. Article 7.06 does not allow the Union to unilaterally advance Step 3 grievances.

Chris Lambert's testimony credibly confirmed the parties' practice regarding Step 3 filings. He has consistently held Step 3 meetings at CCI and required the Union to file grievances at the appropriate step of the grievance procedure.

The Employer made a timely procedural objection regarding arbitrability. The issue, itself, was originally raised prior to arbitration at the mediation stage of the process. As such, the Union should not be granted an opportunity to raise a surprise objection.

The Union's Position

The Union opined that it complied with the terms of the collective bargaining agreement regarding pertinent grievance requirements. As such, the grievance is properly before the Arbitrator.

Step 2 and Step 3 fail to designate any particular individuals that are engaged in the grievance processing of disciplinary grievances. Nothing in the Agreement requires the mailing of the grievance to any particular management representative, nor does the Agreement identify any particular union representative as the designated person to file a grievance in any of these steps.

The record clearly established that the grievance was filed in a timely fashion. The Employer received the grievance within fifteen (15) days at the Employer's central office.

The intent to arbitrate letter sent to the Employer always has attached a copy of the disputed grievance. Mary Jo Ivan, Assistant to the President, testified, as a practice, an intent to arbitrate letter is sent to the Office of Collective Bargaining (OCB) and to the Employer with the grievance attached. This practice was complied with in this instance.

The filing of the Step 3 grievance in dispute might not have complied with the Employer's preferred process, but still, it was procedurally proper. The Agency Head received the grievance within fifteen (15) days.

The Office of Collective Bargaining (OCB) would never have scheduled a mediation hearing for a non-existing grievance. In fact, the Employer violated the Agreement by failing to schedule a Step 3 hearing once placed on notice regarding any disciplinary grievance.

Step 4 of the grievance procedure does not require the Union to formally contest an untimely response by the Agency. It has the option of requesting that a Step 3 hearing be held, but is not required to do so. As such, there is no procedural defect involving the Union's failure to initiate an appeal.

THE ARBITRATOR'S OPINION AND AWARD REGARDING THE ARBITRABILITY DISPUTE

From the evidence and testimony adduced at the hearing, a complete and impartial review of the record including pertinent contract provisions and the parties' briefs, it is this Arbitrator's opinion that the grievance is not arbitrable. The grievance is procedurally defective barring a review on the merits. To have the merits heard would cause the Arbitrator to exceed the scope of his authority as articulated in Section 7.07(E).

Section 7.06, Step 2 states in clearly articulated terms that a grievance involving a discharge shall (Arbitrator's emphasis) be initiated at Step Three (3) of the grievance procedure. This proviso, however, allows - by mutual agreement (Arbitrator's emphasis) - an advance step filing.

Here, the grievance was never filed at Step Three (3), nor does the record indicate any expression by the Union to seek mutual agreement to have the matter moved directly to the arbitration stage of the process.

Additional negotiated language supports this conclusion and emphasizes the importance of a Step 3 filing. The Discharge Grievances section of the Agreement specifies conducting a Step Three (3) hearing by the Agency once the Union files its grievance at Step Three (3). Here, either party may waive mediation, the next step of the process, and proceed directly to arbitration. Again, waiving mediation never played a role in the dispute because the matter was never filed at Step Three (3).

Step Three (3), itself, requires “the grievance shall be filed with the agency head or designee.” Again, without mutual agreement to advance step filing this step cannot be skipped by the Union. Here, Chris Lambert, the Agency’s designee never received the discharge grievance at Step Three (3), causing a procedural defect.

Again, Step Four (4) references Step Three (3) to underscore the importance placed on this step by the parties. The Union may appeal to the Office of Collective Bargaining if the Agency is untimely with its response to the grievance at Step Three (3). An appeal, therefore, requires as a precondition a proper filing by the Union.

A demand for arbitration with the Office of Collective Bargaining can only take place if the matter is not resolved at Step Three (3) or not resolved. Without a proper filing by the Union, any subsequent demand lacks proper standing.

A demand for arbitration letter (Joint Exhibit 2) filed directly to the Office of Collective Bargaining, and concurrently with the Agency in question, does not fulfill the expressed Step Three (3) obligations articulated above. This conclusion is especially reinforced by admissions made by the Union's own witness and documents. Kevin Muhammad, a State Organizer, offered testimony confirming the Arbitrator's interpretation. He stated in pertinent part:

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Q: How is a discipline grievance different from a regular grievance?

A: A discipline grievance is filed to Step 3.

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Q: And who does that need to be filed with at Step 3?

A: That goes to the Labor Relations Officer at Central Office.

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(Transcript Pgs. 33-34)

Muhammad, moreover, was directed to file the grievance at Step Three (3). On July 17, 2008, Mary Jackson, sent an e-mail to Bobby Johnson informing him about an e-mail she had sent to Muhammad informing him the "need to send the grievance to Step 3."

The record, in no uncertain terms, clearly exposes the Union's responsibilities regarding filing a discharge grievance at Step 3. Muhammad acknowledged he failed to properly file the grievance even though he knew such a requirement exists.

The Union could have exercised a number of enumerated advanced step options articulated in Section 7.06. Most of these options, however, require a Step Three (3) filing which did not take place.

The filing of a demand for arbitration letter does not cure the previously articulated defects, Step Four (4) sets up similar hurdles regarding the necessity for Step Three filings. Step Four (4) states in pertinent part:

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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...

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By not filing the grievance at Step Three (3), it could not be resolved nor answered. As such, any demand for arbitration would lack proper standing.

Another portion of Step Four (4) discusses advancing the grievance to arbitration and bypassing the mediation step. It states in pertinent part:

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Either the Office of Collective Bargaining or the Union may advance a grievance directly from Step three (3) to arbitration if that party believes that mediation would not be useful in resolving the dispute.

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The importance of Step Three (3) filing by the Union is again underscored. "From Step Three (3)" requires a filing at Step Three (3) of all discharge grievances before either party may advance the grievance to the arbitration stage of the process.

The previous review and interpretation require a Step Three (3) filing of all discharge grievances; and emphasize the import placed on the Union for such a filing. Virtually all subsequent grievance filing procedures require this filing at Step Three (3) because it serves as a required condition precedent.

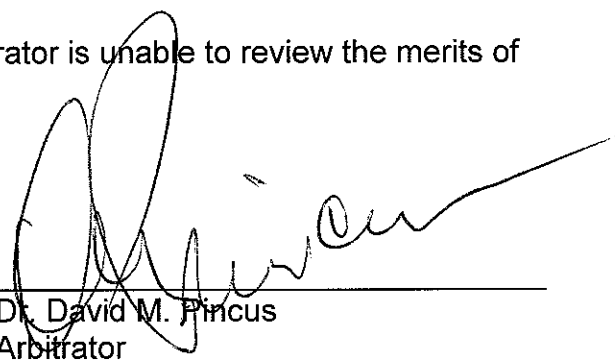
The parties, through mutually agreed to contract language, place a great deal of emphasis on this "agency step." Failure to properly file at this stage precludes both the Agency and the Union of an opportunity to settle the disputed matter or discover valuable evidence and testimony to be used at subsequent stages of the grievance procedure. It would, more specifically, chill the entire grievance processing and settlement paradigm.

In conclusion, a ruling in the Union's favor would cause a violation of Section 7.07(E). It would cause the Arbitrator to subtract or modify Section 7.06 - Step Three (3), an unauthorized outcome unanticipated by the parties nor sanctioned by the Arbitrator.

AWARD

The disputed grievance lacks standing due to a procedural defect, and thus, is not arbitrable. As such, the Arbitrator is unable to review the merits of the disputed grievance.

March 17, 2009
Chagrin Falls, Ohio



Dr. David M. Pincus
Arbitrator