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Arbitrator and Mediator
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IN ARBITRATION PROCEEDINGS PURSUANT TO

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME

and

STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES

Case No. 35-01-20071128-0076-01-03

Grievant: Tanya Davis-Prysock

ARBITRATOR'S

OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME ("the Union") and STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES ("the Employer"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her decision shall be final and binding pursuant to the Agreement.

Hearing was held February 20, 2009 The Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Both Parties submitted written Closing Arguments.

APPEARANCES:

On behalf of the Union:

WILLIAM A. ANTHONY, JR., OCSEA Staff Representative, 390 Worthington Rd., Westerville, OH 43082.

On behalf of the Employer:

JOAN W. OLIVIERI, Bureau Chief of Employee Relations, Ohio Department of Youth Services, 51 N. High St., Suite 101, Columbus, OH 43215.

ISSUES

1. **Is the grievance timely?**

2. **If the grievance is timely, did the Employer violate Article 1.05 when it assigned Criminal Justice Policy Specialist duties to non-bargaining unit employees? If so, what is the appropriate remedy?**

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT
March 1, 2006 - February 28, 2009

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ARTICLE 1 - RECOGNITION

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1.05 Supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

Supervisors shall only perform bargaining work to the extent that they have previously performed such work. During the life of this Agreement, the amount of bargaining unit work done by supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

In addition, supervisory employees shall only do bargaining unit work under the following circumstances: in cases of emergency; when necessary to provide break and/or lunch relief; to instruct or train employees; to demonstrate the proper method of accomplishing the tasks assigned; to avoid mandatory overtime; to allow the release of employees for union or other approved activities; to provide coverage for no shows or when the classification specification provides that the supervisor does, as a part of his/her job, some of the same duties as bargaining unit employees.

Except in emergency circumstances, overtime opportunities for work normally performed by bargaining unit employees shall first be offered to those unit employees who normally perform the work before it may be offered to non-bargaining unit employees.

The Employer recognizes the integrity of the bargaining units and will not take action for the purpose of eroding the bargaining units.

. . .

ARTICLE 5 - MANAGEMENT RIGHTS

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: ...6) determine the work assignments of its employees....

. . .

ARTICLE 25 - GRIEVANCE PROCEDURE

...

25.02 - Grievance Steps

...

Step One (1) - Immediate Supervisor

...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....

...

. . .

FACTS REGARDING ARBITRABILITY

Heath McCoy vacated the Criminal Justice Policy Specialist ("CJPS") position -- a bargaining unit position -- on October 29, 2006. Hannah Phillips was hired as an Administrative Assistant 3 -- a non-bargaining unit position -- on December 11, 2006. The CJPS position was eliminated on December 13,

2006. The grievance was filed November 28, 2007. It stated:

> DYS Administration, Subsidy and Grants, [is] in violation of all of article 1 of the contract between the State of Ohio and OCSEA. In particular, the Division of Subsidy and Grants continue[s] to erode the Bargain[ing] unit by allowing the supervisors (Hannah Phillips and Kristi Oden) in that division to do bargain[ing] unit work of Criminal Justice Specialist. The local Chapter 2598 is asking DYS Administration to cease and desist in their practice.

The Step 3 Response states in pertinent part:

> After reviewing the documentation and facts of this grievance, I find that management is not violating the contract. The Division of Subsidy and Grants appropriately classified the positions in within[sic] their division in 2006. In the fall of 2006, as part of the process to appropriately classify the positions, a bargaining unit position was created to perform the bargaining unit work that was being completed by the criminal justice specialist. The bargaining unit did not lose a position. There is a procedural issue with this grievance. This action took place in 2006 and this grievance was filed on November 26, 2007. This grievance was not filed within the specified timelines of article 25 of the current collective bargaining agreement. This grievance is denied in its entirety.

POSITIONS OF THE PARTIES ON ARBITRABILITY

Employer Position on Arbitrability

The grievance is untimely. The Union will contend the Article 25.02 time limits do not start to run until it becomes aware of a contract

violation or reasonably should have become aware of the violation. But the Union was aware of the instant situation well before it filed the instant grievance.

DYS held a DMC (Disproportionate Minority Contact) Institute on August 29, 2007. The Grievant and other bargaining unit members were assigned to work the registration table. Accordingly, the Union was aware Ms. Phillips was a part of the DMC initiative at least by this time. The Union also was aware the second DMC Institute was held September 14, 2007.

The Agreement explicitly restricts the authority of the Arbitrator and precludes deviation from express contractual provisions. Therefore, the time constraints in this case should not be nullified or ignored by the Arbitrator.

Union Position on Arbitrability

The grievance is timely. The occurrences that gave rise to the grievance still exist today as they did back in 2006.

The Grievant, the Union President, did not become aware of the violation until November 19, 2007. The Grievant did not find out Ms. Phillip was doing the bargaining unit work until November 19, 2007, when the Grievant was asked to type a letter that identified Ms. Phillip as the DMC Coordinator.

Up until November 19, 2007, the Union leadership was led by management to believe the DMC bargaining unit work had been distributed to other bargaining unit employees.

OPINION ON ARBITRABILITY

The arbitrability question is based on whether the grievance was filed in a timely manner pursuant to Article 25.02(Step One), which provides in pertinent part:

> **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.**

Here, the Union knew or should have known as of December 13, 2006 that the CJPS position had been eliminated, thereby putting the Union on notice of that position's duties being distributed to other employees. Even if there is an argument the Union could not have known in December 2006, the Union knew or should have known as of August 2007, when the DMC Institute was held.

As held by Arbitrator Nelson:

> **...when M... left the storekeeper 1 position, the work he had been doing did not disappear. If the union believed that the work was being done by others in violation of the collective bargaining agreement, it**

> would have been obvious at that time and it could not wait two and one-half years to file a grievance.

OCSEA, Local 11 and State of Ohio Department of Rehabilitation and Correction, Case No. 27-33-20030902-1040-01-03 (2005), at p. 11.

Arbitrator Russell Smith set out the basis for a waiver of timeliness:

> [T]he obligation to [dismiss a claim for lack of timeliness] is inescapable unless special circumstances, such as a practice of disregard of such limitations, indicate a proper basis for invoking the doctrines of waiver or estoppel, or some basis, both under the contract and in view of the facts, for holding that the claim actually arose at a point falling within the applicable time limitation.

"Arbitrators and Arbitrability," in Proceedings of the Sixteenth Annual Meeting National Academy of Arbitrators (BNA Books, 1963), at p. 85.

The Union makes a waiver argument based on detrimental reliance. The Union contends it relied on a discussion between the Grievant and Labor Relations Officer Mark Tackett in 2006 wherein it was told the CJPS duties would be distributed to bargaining unit members. Between that 2006 discussion, however, and the grievance filing in November 2007, it was ascertainable well before the grievance filing – months even – whether this was indeed what occurred.

An untimely filing deprives an arbitrator of authority to hear the grievance. As Arbitrator Pincus explained:

> **The parties, themselves, have limited the cases which they agree to arbitrate to the term of the Agreement[ ]. As such, this Arbitrator lacks authority to hear untimely grievances.**
>
> **...the event giving rise to the...grievance took place when the Union and/or bargaining unit members knew or should have known of the actual awarding of the Pathway contracts, and the potential negative consequences placed on relevant bargaining unit members. At that point in time...the Union was obliged to file a grievance....**

SEIU 1199 and State of Ohio Rehabilitation Services Commission, Case No. 29-02(12-14-94)408-02-12 (1996), at pp. 12-13. Arbitrator Marvin F. Hill, Jr. concurs:

> **Timeliness is a jurisdictional issue...."When a grievance has not been filed within the time limits set forth in the collective bargaining agreement, the arbitrator generally will dismiss the grievance as non arbitrable unless the opposing party has waived this procedural defect."**

"Time Limits and Arbitrability" in "Remedies in Arbitration," in The Common Law of the Workplace, The View of Arbitrators, 2d ed. (BNA Books, 2005), at p. 364, quoting Triangle Construction & Maintenance, 120 LA 559, 566 (Sergent, 2004), quoting Fairweather, Practice and Procedure in Labor Arbitration, 2d ed. (1982).

And despite Arbitrator Anna DuVal Smith's recognition of a "continuing-violation case,"[1] she nevertheless held:

> **[The grievant] sat on her rights for months...This decision not only runs counter to Section 25.02's mandate that grievances be presented within ten working days of the employee's awareness but also the parties' stated goal of resolving grievances "at the earliest possible time" (Section 25.01,F).**

OSCEA, Local 11 and Ohio Department of Public Safety, Case No. 15-02-060518-123-01-09 (2007), at p. 5.[2]

Conclusion

The record establishes the grievance was not timely filed pursuant to Article 25.02(Step One). That being the case, the Arbitrator is without authority to hear the merits of the grievance.

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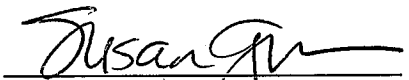
[1] The viability of the "continuing violation" theory in a context such as this is in doubt since the U.S. Supreme Court decision in Ledbetter v. Goodyear Tire & Rubber, 550 U.S. 618 (2007), which held the limitations period for an Equal Pay Act claim begins to run with the first allegedly discriminatory paycheck, rather than treating each paycheck as a "continuing violation" that restarts the clock. Though the Ledbetter Fair Pay Act ("LFPA") legislatively reversed that holding in January 2009, a number of district courts have held LFPA is limited to allegations of discriminatory pay. See Richards v. Johnson & Johnson, (D.N.J. 2009), 05-CV-3663; Rowland v. CertainTeed Corp., (E.D. Pa. 2009), U.S. District LEXIS 43706; Leach v. Baylor College of Medicine, (S.D. Tex. 2009), U.S. District LEXIS 11845; and Vuong v. New York Life Insurance Co., (S.D.N.Y. 2009), WL 306391). But see, Gilmore v. Macy's Retail Holdings, (D.N.J. 2009), 06-Civ.-3020; Rehman v. State University of New York, 596 F. Supp. 2d 643 (E.D.N.Y. 2009); and Bush v. Orange County Corrections Department, (M.D. Fl. 2009), 07-CV-588, which read LFPA more expansively.

[2] The Union also submitted OCSEA and Ohio Department of Natural Resources, Case No. 25-11-20060706-0004-01-13 (Brookins, 2008) for the proposition of an agency waiving its right to contest timeliness. The waiver in that case, however, was based on the timeliness objection not being raised by the agency until the arbitration hearing. In the instant grievance, the Employer raised its timeliness objection during the pre-arbitration steps, which eliminates any consideration of a waiver defense.

AWARD

For the reasons set out above, the grievance is denied on the basis it is not arbitrable because it was not timely filed.

DATED: July 1, 2009



Susan Grody Ruben, Esq.
Arbitrator