

**SUSAN GRODY RUBEN, Esq.**  
**Arbitrator and Mediator**  
**30799 Pinetree Road, No. 226**  
**Cleveland, OH 44124**

**IN ARBITRATION PROCEEDINGS PURSUANT TO**  
**COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES**

**In the Matter of**

**SEIU District 1199**

**and**

**State of Ohio**  
**Ohio Department of Mental Health**

**Grievant: Dr. Thomas Ference**

**Grievance # 23-07-20071227-0027-02-11**

**ARBITRATOR'S**

**OPINION AND AWARD**

**This Arbitration arises pursuant to the Collective Bargaining Agreement (“the Agreement”) between the Parties, SEIU DISTRICT 1199 (the “Union”) and OHIO DEPARTMENT OF MENTAL HEALTH (the “Employer”), under which SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her Award shall be final and binding pursuant to the Agreement.**

**Hearing was held November 12, 2009 in Columbus, Ohio. Both parties were afforded full opportunity for the examination and cross-examination of witnesses,**

as well as the introduction of exhibits. Post-hearing briefs were submitted by both Parties. The hearing was deemed closed on December 22, 2009.

#### **APPEARANCES:**

**On behalf of the Union:**

**Josh Norris, SEIU, 1395 Dublin Rd.,  
Columbus, OH 43215**

**On behalf of the Employer:**

**Pat Mogan, ODMH, 30 E. Broad St., 18<sup>th</sup> Fl.,  
Columbus, OH 43215**

#### **ISSUES<sup>1</sup>**

- 1. Did the Employer violate Article 7 of the Agreement by the manner in which it processed this grievance? If so, what is the appropriate remedy?**
- 2. Did the Employer violate Article 43.02 of the Agreement when it did not grant the Grievant a step increase in 2003? If so, what is the appropriate remedy?**

#### **RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT June 1, 2003 through May 31, 2006**

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#### **ARTICLE 7 – GRIEVANCE PROCEDURE**

##### **7.01 Purpose**

**The Employer and the Union recognize that in the interest of harmonious relations, a procedure is necessary whereby employees can be assured of prompt, impartial and fair processing of their grievance....**

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<sup>1</sup> At the hearing, the Employer made a timeliness argument and requested a bench decision. The Arbitrator ruled the grievance was timely, and therefore arbitrable, on a continuing violation theory.

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#### **7.05 Termination of the Issue**

When a decision has been accepted by the Employer and the Union at any step of this grievance procedure, or the Employer has granted the grievance, it shall be final and no further use of this grievance procedure in regard to that issue shall take place. It is understood that settlements below Step Three (3) are not precedent setting.

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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:

##### **Preliminary/Step 1**

A member having a complaint is encouraged to first attempt to resolve it informally with his/her immediate supervisor at the time the incident giving rise to the complaint occurs or as soon thereafter as is convenient.

At this meeting there may be a delegate present. If the member is not satisfied with the result of the informal meeting, if any, the member may pursue the formal steps which follow:

##### **Step 2 – Local or Agency Designee**

In the event the complaint is not resolved at the Preliminary/Step 1 of this procedure, or if it is the employee's decision not to discuss the complaint at the Preliminary/Step 1, the grievance shall be reduced to writing and presented to the local or agency designee within fifteen (15) days of the date on which the grievant knew or reasonably should have had knowledge of the event.

Grievances submitted beyond the fifteen (15) day limit will not be honored. The grievance at this step shall be submitted to the designee on the grievance form. The designee shall indicate the date and time of receipt of the form. Within seven (7) days of the receipt of the form the designee shall hold a meeting with the grievant to discuss the grievance. At such meeting, the grievant may bring with him/her the appropriate delegate. The designee shall respond to this grievance by writing the answer on the form or attaching it thereto, and by

returning a copy to the grievant and delegate within seven (7) days of the meeting. The answer shall be consistent with the terms of this Agreement. Once the grievance has been submitted at Step Two (2) of the grievance procedure, the grievance form may not be altered except by mutual written agreement of the parties. Meetings will ordinarily be held at the work site [insofar] as practical. Written reprimands may be grieved. The agency designee's decision shall be final. Verbal reprimands shall not be grievable. Employees shall sign indicating receipt of a verbal reprimand and the verbal reprimand shall be placed in the personnel file.

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### **Step 3 – Agency Head or Agency 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 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 writing a written appeal and a legible copy of the grievance form to the Deputy Director of the Office of Collective Bargaining requesting 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.

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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.

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#### **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....

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##### **F. Binding Decisions**

Arbitrators' decisions under this Agreement shall be final and binding.

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#### **7.11 Miscellaneous**

##### **A. Extensions and Mutual Agreement**

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Within Steps One (1) and Two (2), if the agency fails to respond to the grievance within the specified time limits, the grievance shall proceed to the next

step in the procedure as though the answer at the prior step had been given and was unsatisfactory.

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## **ARTICLE 43 – WAGES**

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### **43.02 Schedule of Wage Increases**

Effective the pay period including July 1, 2003, there shall be no non-probationary step movements, including any step movement provided for in agency specific agreements. Step movement shall resume on the pay period including July 1, 2005. No retroactive movement shall occur for the two (2) years that have been skipped. Freezing of step movements shall not affect the performance evaluation schedule.

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## **FACTS and PARTIES' POSITIONS**

The Grievant was hired effective August 13, 2001 as a Psychologist 1 at advance step 3 of pay range 14. Effective July 1, 2002, a class modification combined Psychologist 1 and 2 classifications into the single classification of Psychologist. Effective with the July 1, 2002 class modification, the Grievant went from step 4 of pay range 14 (\$27.56) to step 3 of pay range 15 (\$28.90).

On or about June 1, 2003, the Parties executed the Agreement, which was effective June 1, 2003 through May 31, 2006. In that Agreement, the Parties agreed to a temporary step freeze in "Schedule of Wage Increases" -- Article 43.02:

Effective the pay period including July 1, 2003, there shall be no non-probationary step movements, including any step movement provided for in agency specific agreements. Step movement shall

resume on the pay period including July 1, 2005. No retroactive movement shall occur for the two (2) years that have been skipped. Freezing of step movements shall not affect the performance evaluation schedule.

In an e-mail dated December 14, 2007, the CEO of the facility where the Grievant worked asked Human Resources for a "Compensation Review." That e-mail states in pertinent part:

I spoke with Dr. Ference recently and he advised me that he thinks his current compensation may not be correct. At some point anniversary dates were altered, which may have [a]ffected when step increments were granted.

Please have your staff do a compensation review going back 6 years, detailing steps, classification changes, pay raises or anything else that would [a]ffect his compensation. Please advise me if there is an error or not.

In an e-mail dated December 18, 2007, Human Resources responded in pertinent part:

I see nothing wrong with his steps or pay. His anniversary/hire date is 8/13/2001 and it has not been altered. In July/2002, there was a DAS class plan change. This class plan change moved him & all Psychologist[s] into the same pay grade/range. In July/2002, he moved from pay grade/range 14 to 15. This changed his step date from February to July. His step increases since then have all happened in July except for the 2 year wage freeze in which no one received a step increase.

On or about December 27, 2007, the Union filed a grievance on behalf of the Grievant stating in pertinent part:

I should have received an annual step increase in pay on or about June 24, 2003 but did not. Rather, I did not receive a step increase until July of 2005. In fact, I have been paid at a lower step then[sic] that to which I was entitled from June 2003 until the present.

The Step Two Response, dated January 16, 2008, was issued by Dr. Douglas Smith, Medical Director of the facility where the Grievant worked. The

Step Two Response states in pertinent part, “I support the basic concerns of the grievance.” In an attachment to the Step Two Response, Dr. Smith wrote in pertinent part:

**Step 2 Response  
Details**

Meeting held on 1/15/08 with Dr. Tom Ference, grievant, Dr. Michael Christie, 1199 representative, Dr. Kevin Smith, Director of Psychology, and myself, Medical Director.

**ISSUE:** Dr. Ference stated that during a conversation with another psychologist in December 2007 he realized that he had “missed” a step increase that had been due to him. With some research into his paystubs he discovered that he missed an earned step increase on or about 6/24/03. He should have advanced from step 3 to step 4. The end result is that he has been paid one step below his true “status” since that time, and has therefore been paid at the same rate as some psychologists who have much less seniority than himself.

**REMEDY:** To remedy the contract issue (not granted the step increase he earned) and fairness issue (loss of pay and being paid below other colleagues with similar seniority), Dr. Ference requests to be advanced to Step 7 as soon as possible AND back pay to make him whole for the actual monetary amount he should have earned from 6/24/03 to the date he receives step 7. He will then be on track to advance to Step 8 on his anniversary on or about 6/24/08.

**RESPONSE:** Based on the information provided verbally and substantiated in hard copy by Dr. Ference, it appears he should have been advanced from step 3 to 4 on 6/24/03 and therefore should already be at step 7 now. His desired remedy is fair and Human Resources/Payroll should proceed to act upon that.

In an e-mail dated January 23, 2008 from Human Resources to the Grievant, the Grievant was informed in pertinent part:

Your step has not been changed. Per HR for ODMH – Columbus, you are at the correct step. If you would like to continue your grievance to the next step, which would be heard by our Labor Relations Officer from Columbus, you need to file it at Step 3....



**In a letter dated January 24, 2008, the Grievant and his Union delegate wrote in pertinent part:**

**It is our position that under the terms of the contract grievance procedure, as set out in Article 7 of the Contract, Dr. Freence's[sic] acceptance of Dr. Smith's written response to the grievance resolved the grievance and Dr. Ference should be provided the remedy as recommended by Dr. Smith.**

**Specifically, the Contract, Article 7.06, at "Section 2-Local or Agency Designee," indicates that following the Step 2 hearing, "The designee (in this case, Dr. Smith) shall respond to the grievance by writing the answer on the form or attaching it thereto, and by returning a copy to the grievance and delegate within seven (7) days of the meeting." This was done and Dr. Ference accepted the response. This should resolve the grievance in Dr. Ference's favor.**

**Article 7.06, at Section "Step 3-Agency[sic] Head or Designee," provides that "Should the grievant not be satisfied with the written answer received in Step 2 (2)[sic], within seven (7) days after the receipt thereof, the grievant[sic] shall be filed with the agency head or designee." However, this section does not apply here, because Dr. Ference was satisfied with the designee's written response and he accepted it.**

**Nonetheless, although we maintain that Dr. Ference is entitled to the remedy as set out in Dr. Smith's written answer, we are timely filing an appeal. This appeal is in response to Ms. Ivory's e-mail communication indicating that ODMH will not provide the remedy requested and recommended.**

**The Step 3 Response provides in pertinent part:**

**The Meeting Officer finds no merit to this grievance. Per Ms. Maghes' explanation he has received all step increase[s] due to him in a timely manner. In fact, through the happy circumstance of the merger of the Psychologist 1 and Psychologist 2 classifications, the Grievant enjoyed a bump in his compensation when he moved from pay range 14 to pay range 15 retroactive to July 1, 2002.**

## **OPINION**

In addition to the timeliness issue addressed in a bench decision at the arbitration hearing, this case involves a procedural issue regarding Step Two of the grievance procedure – Article 7, as well as a merits issue regarding wages – Article 43.

### **Article 7 – Grievance Procedure**

The Union submits the grievance was resolved at Step Two, when the Union accepted the Step Two Response as terminating the grievance pursuant to Article 7.05. Subsequent to the Step Two Response, however, the Employer informed the Union the Grievant had not missed any step increases and therefore was not owed any money. The Employer informed the Union if it did not agree with that assessment, it could appeal the grievance to Step Three.

The Arbitrator notes the appropriate contractual procedure to enforce a Step Two Response under these circumstances would have been to newly file a separate grievance alleging a violation of Article 7. By advancing the grievance to Step Three, even with the limitations as the Union attempted to attach, the Step Two Response loses its finality under Article 7.05.

Human Resources, however, expressly advised the Union it could appeal the grievance to Step Three. Accordingly, the Arbitrator is reluctant to deprive the Union of the finality of a Step Two Response pursuant to Article 7.05 under these circumstances.

Article 7.05, however, is not the only part of Article 7 that controls the grievance. Article 7.06 provides in pertinent part:

**The [Step Two] answer shall be consistent with the terms of this Agreement.**

**To determine whether the Step Two Response was “consistent” with the Agreement, Article 43 must be analyzed.**

### **Article 43 – Wages**

**Article 43.02 – Schedule of Wage Increases – provides in pertinent part:**

**Effective the pay period including July 1, 2003, there shall be no non-probationary step movements, including any step movement provided for in agency specific agreements. Step movement shall resume on the pay period including July 1, 2005. No retroactive movement shall occur for the two (2) years that have been skipped....**

**It is undisputed in the record that effective July 1, 2002, the Ohio Department of Administrative Services instituted a class modification that combined Psychologist I and 2 classifications into the single classification of Psychologist. It also is undisputed in the record that this class modification gave the Grievant a step increase effective July 1, 2002.**

**Subsequently, the Parties negotiated Article 43.02, which expressly froze step movements effective the pay period including July 1, 2003 through the pay period before the pay period including July 1, 2005. Article 43.02 also expressly prohibited any “retroactive movement” for the two years of “skipped” step movements.**

**Applying Article 43.02 to the undisputed facts of this case leads to the inescapable conclusion the Grievant did not miss any step movements pursuant to the Agreement. I.e., due to the July 1, 2002 class modification – when the Grievant received a step increase -- July 1 would have been the Grievant’s step**

movement date in 2003. Pursuant to Article 43.02, however, the Grievant was not owed a step increase in 2003 or 2004. Moreover, it is worth noting also that pursuant to Article 43.02, the Grievant received a step increase effective July 1, 2005.<sup>2</sup>

### **Conclusion**

As shown in the analysis above, the Step Two Response was not consistent with the express, plain language terms of Article 43.02. Accordingly, pursuant to Article 7.06, the Step Two Response cannot stand.

This conclusion is not intended to provide a basis for the Employer to ignore Step Two Responses. Nor is this conclusion intended to provide a basis for the Employer to contend a Step Two Response is not “consistent” with the Agreement on the basis the Step Two Response is not consistent with the “spirit” of the Agreement, or some other implied contractual basis. This conclusion is limited to the situation presented here, where the Step Two Response is not consistent with express, plain language of the Agreement.

### **AWARD**

**For the reasons stated above, the grievance is denied in its entirety.**

**DATED: February 4, 2010**

*Susan Grody Ruben*  
**Susan Grody Ruben, Esq.**  
**Arbitrator**

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<sup>2</sup> The record indicates the instant grievance arose when the Grievant learned from a co-worker he was making less than the co-worker, despite the Grievant’s greater seniority. The mechanics of how that alleged disparity occurred is not before the Arbitrator. Rather, the merits issue presented by the instant grievance was whether the Grievant missed a step increase to which he was entitled. As set out above, he did not.