

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

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

In the Matter of

**SERVICE EMPLOYEES INTERNATIONAL
UNION/DISTRICT 1199**

and

**OHIO DEPARTMENT OF
YOUTH SERVICES**

Case No. 35-14-20090313-193-02-12

**ARBITRATOR'S
OPINION AND AWARD**

This Arbitration arises pursuant to the collective bargaining agreement (“the Agreement”) between the Parties, the SERVICE EMPLOYEES INTERNATIONAL UNION/DISTRICT 1199 (“the Union”) and the STATE OF OHIO (“the State” or “DYS”), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be final and binding pursuant to the Agreement.

The State raised an arbitrability argument at the August 16, 2010 oral hearing, to which the Union had full opportunity to respond. This Opinion and Award addresses arbitrability only.

APPEARANCES:

On behalf of the Union:

LEAH DAVIS, SEIU/1199 , Columbus, Ohio.

On behalf of the State:

JOAN OLIVIERI, ODYS, Columbus, Ohio.

PRELIMINARY ISSUE UNDER CONSIDERATION

Is the grievance arbitrable?

**RELEVANT PORTIONS OF THE PARTIES' COLLECTIVE BARGAINING
AGREEMENT**

March 1, 2006 – February 28, 2009

. . .

ARTICLE 2 – UNION RECOGNITION

...

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

. . .

ARTICLE 7 – GRIEVANCE PROCEDURE

...

7.04 Grievant

...Class grievances shall be filed by the Union within fifteen (15) days of the date on which the grievant(s) knew or reasonably could have known of the event giving rise to the Class Grievance....

...

. . .

ARTICLE 29 – LAYOFF AND RECALL

29.01 Notice

When the agency determines that a layoff is necessary, the agency shall notify the Union and inform them of the classification(s), the number of employee(s) and the work site(s) affected....

The agency will schedule a meeting with the Union to explain their reason for such action. The Union's comments and ideas given to avoid the layoff will be seriously considered before making a final decision.

If after this meeting the agency deems that the action is still necessary, the following procedure shall be adhered to.

Every effort will be made to place employees in comparable employment in the public or private sector. The agency shall notify all affected employees of the impending layoff at least forty-five (45) days prior to the effective date of any layoff, if the reason is for lack of funds, and ninety (90) days prior notice shall be given to affected employees for any other reason.

...

...

FACTS

In a memo to all DYS employees dated March 5, 2009,¹ DYS Director

Thomas J. Stickrath announced:

As you may recall from my February 2nd memo on the agency budget, the Parole services line reflects a \$2.4 million decrease in funding for the FY 2010 and FY 2011 budget. With the current economic situation, coupled with the decrease in the parole population, the decision has been made to abolish 33 positions, 11 of which are vacant. I recognize the significance of this announcement, and I have challenged the Division of Parole and Community Services to reengineer itself to continue to ensure a service delivery system that stakeholders have come to expect.

The positions impacted are as follows:

- . Psychologists
- . Security Guards
- . Human Service Program Consultants
- . Juvenile Parole Officers
- . Juvenile Parole Services Supervisors
- . Office Assistants

The decision to reduce the Parole table of organization was not taken lightly. Over the course of the next few weeks we will work closely with the bargaining unit and exempt staff impacted to answer questions and to help identify employment options. There is also an email address that can be used to send questions to:

Questions@dys.ohio.gov.

In the instant grievance dated March 13, Grievants Etta Miner, Teresa Fitts-Ardley, Gloria Brown, Jerry Glascock, and Lynn Williams – all Human Service Program Consultants (“HSPC”) -- stated:

Management abolished our position subsequent to filing a class action grievance² regarding elimination of our job duties that were

¹ All dates are 2009 unless otherwise indicated.

given to exempt employees. All of the grievants at the time of filing were age fifty and older; most were eligible for early or regular retirement, and worked for ODYS more than 20 or more years.

On March 20, the Union filed an Unfair Labor Practice (“ULP”) Charge with the State Employment Relations Board (“SERB”). The ULP Charge stated:

On or about 3/5/09 management of ODYS notified 1199 membership of an upcoming layoff affecting several classifications within SEIU District 1199’s bargaining unit. Management failed to notify 1199 of this announcement in accordance with Article 29 of our current CBA. Management unilaterally held meetings throughout the ODYS regions to convey the layoff notice to members, again with absolutely no regard for the contractual provisions outlined therein.

As a result of receiving the ULP Charge, the State met with the Union on March 24 and discussed the layoffs.

On March 25, the Parties held a Step Three meeting on the instant grievance. In its Step Three Response dated April 3, the State wrote in pertinent part, “the changes have not yet occurred and this Grievance is not ripe for discussion.”

In a letter dated April 15 to the Department of Administrative Services (“DAS”),³ Director Stickrath wrote in pertinent part:

Pursuant to Chapter 123:1-41 of the Ohio Administrative Code (OAC) and the respective labor agreements, the Ohio Department of Youth Services (DYS) is requesting to decrease the Table of Organization for their six Regional Offices by a total of 33 Full-Time Equivalent positions (FTEs). This will be accomplished by the abolishment of 12 vacant FTEs and the laying off of 22 employees (21 Ftes). This decrease consists of the elimination of two (2) entire classifications as well as a number of positions within other classifications.

...

...The layoff of employees will be effective July 17, 2009. The reductions are being conducted primarily due to reasons of economy.

...

² The five instant Grievants, plus Denise Cottonbrook, filed a class grievance on August 24, 2007; it was withdrawn without prejudice in mediation on January 9, 2008.

³ The Union received a timely copy of this letter.

The following classifications will be affected by the decrease in the table of organization:

- . Three Regional Psychologists....Duties will be assigned to the remaining three Regional Psychologists as needed.
- . Security Officers....[T]he need for a Security Officer classification is no longer needed and will be eliminated.
- . Human Services Program Consultant (HSPC) (1199) – The unique role of the Human Services Program Consultant has been declining during the last several years as the number of youth placed on parole has declined. Additionally, the Bureau of Parole’s focus on reentry has led to many overlapping job duties (providing case management, assisting in planning service delivery, coordinating referrals) being fulfilled by the Juvenile Parole Officer and therefore the HSPC classification is being eliminated.
- . Juvenile Parole Officers (1199) – The declining parole numbers necessitate the decrease of Jobs across the [S]tate. Duties and assignments will be absorbed by remaining parole officers.
- . Juvenile Parole Services Supervisors (Exempt) – The reduction in the number of parole officers has also decreased the need for parole supervisors. Each supervisor monitors a “unit” of parole officers. The reduction in the number of parole officer necessitates a decrease of supervisors at two (2) of our regional offices.
- . Office Assistants (OCSEA) – A decrease in the number of cases statewide and the placement of wireless laptop computers with each Juvenile Parole Officer has resulted in the decreased need for Office Assistant 3s statewide....

...

The projected salary and fringe cost for these positions is 2.7 million dollars each year of the upcoming 2010/2011 biennium....

...

In a letter dated April 29 to Director Stickrath from DAS, DYS was given the go-ahead for the layoffs:

The Human Resources Support Center (HRSC) is in receipt of The Department of Youth Services rationale for the proposed job abolishment/layoff in the Akron, Cincinnati, Cleveland, Columbus, Dayton & Toledo Regional Offices. After careful review of the information supplied in the 4/15/09 rationale,

DAS has determined that the documentation meets the legal requirements for a job abolishment for reasons of economy.

...The Department of Youth Services may proceed with the abolishment/layoff in accordance with Chapter 124 of the Ohio Revised Code and Chapter 123:1-41 of the Ohio Administrative Code. Please ensure that employees are appropriately notified of the abolishment/layoff pursuant to the requirements of the Ohio Administrative Code section 123:1-41-10. Additionally, HRD was informed that the rationale for a proposed layoff of bargaining unit staff at The Department of Youth Services was reviewed and approved by the Office of Collective Bargaining. As a result, please proceed. Please ensure that employees are appropriately notified of the abolishment in accordance with the requirements of the applicable bargaining unit contract.

...

PARTIES' POSITIONS⁴

State's Position

The grievance is not arbitrable because it is not ripe. The grievance filed on March 13 states the grievance arose on March 5 when “management abolished our position.” DYS did not abolish any positions on March 5. It merely announced then there would be layoffs within the parole regions; no effective date was mentioned. DYS met with the Union to discuss the draft layoff rationale on March 24. At the March 25 Step Three meeting, DYS objected to and then denied the grievance because the event had not yet occurred and therefore was not ripe. Based on discussions with the Union, the draft layoff rationale was changed. The final layoff rationale was submitted on April 15. The effective date of the layoffs was July 17 – four months after the grievance was filed.

Union's Position

The Grievants filed this action on March 13 after DYS held mandatory staff meetings in each parole region at which the elimination of positions was

⁴ Both Parties made multiple arguments regarding the arbitrability of the grievance; these need not be addressed in this Opinion and Award due to the dispositive nature of the State's ripeness

announced. On that date, the members of the instant class became aware of the event giving rise to the instant grievance. Accordingly, the issue was ripe and is arbitrable.

When the employer fails to object to a grievance on the basis of timeliness prior to arbitration, the argument is considered waived. Crestline Exempted Village Sch., 111 LA 114 (Goldberg, 1998). The State did not introduce any timeliness argument during the Second Step of the procedure; to the contrary, it conducted a Third Step hearing and proceeded to mediation. If the State believed the grievance was not ripe for mediation, or that a procedural error existed, it had the contractual right under Article 7.06 to waive mediation, which it did not do.

In Torrington Co., 13 LA 323, 325 (Stutz, Mottram & Sviridoff, 1949), the arbitration panel held a grievance filed seven days after receipt of a layoff notice was timely. The only timeliness argument raised in that case was the contractual grievance filing deadline of five days. The arbitration panel allowed two days for the notice to have reached the grievant. The panel did not argue the grievant was obligated to wait until the effective date of his layoff to file the grievance.

OPINION

Article 29.01 of the Agreement provides in pertinent part:

When the agency determines that a layoff is necessary, the agency shall notify the Union and inform them of the classification(s), the number of employee(s) and the work site(s) affected....

The agency will schedule a meeting with the Union to explain their reason for such action. The Union's comments and ideas given to avoid the layoff will be seriously considered before making a final decision.

If after this meeting the agency deems that the action is still necessary, the following procedure shall be adhered to.

Every effort will be made to place employees in comparable employment in the public or private sector. The agency shall notify all affected employees of the impending layoff at least forty-five (45) days prior to the effective date of any layoff, if the reason is for lack of funds, and ninety (90) days prior notice shall be given to affected employees for any other reason.

...

Thus, the Agreement provides the State is not permitted to make “a final decision” regarding a layoff until after meeting with the Union, explaining the State’s “reason” for the layoff, and “seriously consider[ing]” the Union’s “ideas to avoid the layoff.”

When the instant grievance was filed on March 13, the Article 29 meeting had not yet occurred. Indeed, the Union filed a ULP Charge with SERB on March 20 in part because there had been no Article 29 meeting between the Parties to discuss the layoff. Presumably in response to the filing of the ULP Charge, the State met with the Union on March 24 to discuss the layoff.

Given the Agreement prohibits the State from making a final decision regarding a layoff before an Article 29 meeting is held, and given the grievance was filed March 13, eleven days before the Parties met to discuss the layoff, the Arbitrator is constrained by Article 29 of the Agreement to acknowledge the grievance was not ripe at the time it was filed. Moreover, in its Step Three Response dated April 3, the State put the Union on notice of the State’s contention the grievance was premature and therefore, not arbitrable.⁵

AWARD

For the reasons set out above, the grievance is not arbitrable.

Dated: **September 1, 2010**

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator

⁵ The Arbitrator notes it would have been very difficult for the Union to prevail on the merits of the instant grievance, given the Article 2 provision prohibiting the State from “tak[ing] action for the sole purpose of eroding the bargaining units.” (Emphasis added.)