**OCB AWARD NUMBER:**

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| **SUBJECT:** | **ARB SUMMARY # 2099** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **KRISTEN RANKIN** |
| **OCB GRIEVANCE NUMBER:** | **35-20-20090205-0010-01-03** |
| **DEPARTMENT:** | Ohio Department of Youth Services |
| **UNION:** | Ohio Civil Service Employees Association |
| **ARBITRATOR:** | Susan Grody Ruben |
| **GRIEVANT NAME:** | Hal Harlow |
| **MANAGEMENT ADVOCATE:** | Melinda M. Hepper  |
| **2ND CHAIR:** | Victor Dandridge |
| **UNION ADVOCATE:** | David Justice |
| **ARBITRATION DATE:** | June 30, 2010 |
| **DECISION DATE:** | October 25, 2010 |
| **DECISION:** | Denied |
| **CONTRACT SECTIONS:** | Article 13.07—Overtime, Article 24.06—Imposition of Discipline |
| **OCB RESEARCH CODES:** | 93.01—Grievance Procedure, 94.09—Arbitrability—Procedural, 115.501—Overtime-In General  |
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**HOLDING: Grievance DENIED. The Arbitrator found that the grievance was untimely filed and that the Employer did not waive its right to challenge arbitrability.**

The Grievant was hired by the State as a Youth Specialist in 2004. The Grievant received a three-day fine on January 30, 2009, which was settled to a written reprimand on July 8, 2009. The Grievant was on No Youth Contact (NYC) status from June 9, 2008 to January 30, 2009, which was 236 days. This grievance was filed on February 3, 2009 stating that the Grievant missed out on numerous overtime opportunities both voluntary and mandatory because of NYC status. The parties agreed to a Letter of Clarification on or about February 1, 2008 stating that when an employee is placed on a no-contact post, that employee shall not take the post of another employee. The employee will be considered an extra on the shift unless there are posts available following roll call that can be considered “no-contact posts.”

The Employer objected to the arbitrability of the grievance. The Employer arguedthat the grievance was not timely filed and therefore was not arbitrable. Section 25.02 requires a grievance to be filed “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.” During the period that Grievant was on NYC, he was assigned no overtime, though he requested it on multiple occasions. He did not file the instant grievance until February 5, 2009. The discipline giving rise to the NYC reassignment was issued January 30, 2009. At no time during the processing of that grievance did the Union ask for payment for missed overtime opportunities due to the disciplinary reassignment. The parties entered into a Letter of Clarification about NYC employees in late January of 2008 or early February of 2008 and thus the Union was aware of and in agreement with the NYC overtime practice at least four months before the Grievant’s placement on NYC. The right to contest arbitrability before the arbitrator is usually held not waived merely by failing to raise the issue of arbitrability until the arbitration hearing. The matter is not properly before the Arbitrator. In the alternative, if found to be timely, the State’s liability should be limited to the ten (10) working days prior to the filing of the grievance if the Union prevails on the merits.

The Union arguedthat the Employer waived its right to argue timeliness because the Employer did not raise the issue during the grievance process. The Employer had opportunities to raise the timeliness issue during the first three steps of the grievance procedure and did not raise it. The Employer clearly slept on its rights. The grievance on the discipline was filed February 9, 2009, and it was not until then that the totality of the lost overtime opportunities became apparent to the Union. The grievance should encompass the entire period the Grievant was denied overtime during the 236 days he was assigned to NYC. In alternative, the Union argued if the Arbitrator found the grievance untimely, the Employer’s failure to return the Grievant to eligible overtime status for 80 days after the investigation was closed should result in an award of overtime payments during those 80 days. If the Arbitrator found only the ten days before the grievance filing are timely, lost overtime opportunities during that period should be awarded. The Grievant should be paid for the loss of overtime opportunities he would have been entitled to work at the overtime rate, including any appropriate holiday pay.

The Arbitrator foundthat the Employer did not waive its right to challenge arbitrability on the grounds of timeliness and the parties strictly uphold contractual time limits. The Grievant’s lack of overtime opportunities from June 9, 2008 through January 30, 2009 flows directly from being placed on NYC. The NYC itself was not grieved. Under no circumstances, though, is a grievance to be filed more than 30 days after the occurrence. The Grievant slept on his rights regarding the alleged missed overtime opportunities. The Grievant knew early on in his NYC status—which began June 9, 2008—the Employer was not assigning him overtime. The Grievant’s filing is well after both 10 days and 30 days after the event giving rise to the grievance. Therefore, the grievance was denied in its entirety as untimely filed.