In the Matter of Arbitration Between the	:	Case Number: OCS-2017-00675-0
	:	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AMERICAN FEDRATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 11, AFL-CIO,	:	Grievant: Jessica Doogan (Class Action)
Union	:	
and the	:	Date of Arbitration Hearing: August 1, 2017
	:	
STATE OF OHIO, DEPARTMENT OF ADMINISTRATIVE SERVICES, OFFICE OF COLLECTIVE BARGAINING,	:	Howard D. Silver, Esquire
Employer	:	Arbitrator

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union

Brian J. Eastman, Esquire\
General Counsel
Steven T. Cochrane, Esquire
Associate General Counsel
OCSEA, AFSCME, Local 11, AFL-CIO
390 Worthington Road, Suite A
Westerville, Ohio 43082-8331
BEastman@ocsea.org
TCochrane@ocsea.org

For: State of Ohio, Department of Administrative Services, Office of Collective Bargaining, Employer

Victor Dandridge, Assistant Manager
Labor Relations and Training
Cullen Jackson, Labor Relations Administrator
Office of Collective Bargaining
1602 West Broad Street
Columbus, Ohio 43223
Victor.Dandridge@das.ohio.gov
Cullen.Jackson@das.ohio.gov

TABLE OF CONTENTS

PROCEDURAL BACKGROUND

This matter came on for an arbitration hearing on August 1, 2017 at 9:00 a.m. within the offices of the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO at 390 Worthington Road, Westerville, Ohio 43082 in the Nelson Watkins Room, room 195. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded at 1:15 p.m. on August 1, 2017 and the evidentiary record was closed at that time.

Post-hearing briefs were submitted by both parties to the arbitrator by September 18, 2017 and the post-hearing briefs were exchanged between the parties by the arbitrator on September 19, 2017.

This matter proceeds under a collective bargaining agreement between the parties in effect from July 1, 2015 through February 28, 2018.

This matter is properly before the arbitrator for review and resolution.

JOINT ISSUE STATEMENT

Did the Employer violate the collective bargaining agreement by closing and refusing the Union's request to arbitrate the grievances filed on behalf of Darlene Ballard (DMR-2016-03502-4), Deborah Queen (DMR-2016-03323-4), and Jonathan Payne (DMR-2016-03324-4)?

If so, what should the remedy be?

JOINT STIPULATIONS OF FACT

1. OCSEA and OCB are parties to a collective bargaining agreement effective 2015-2018. The CBA appears on the record as Joint Exhibit 1.

2. The three grievants, Ms. Darlene Ballard, Ms. Deborah Queen, and Mr. Jonathan Payne, are represented for collective bargaining purposes by OCSEA.

3. Ms. Ballard began her employment with the State of Ohio on November 9, 1997. She was removed from her position as a Therapeutic Program Worker at the Youngstown Developmental Center on August 25, 2016.

4. On August 26, 2016, Union Steward and Chapter Vice-President Sean Murphy filed a grievance (DMR-2016-03502-4) contesting Ms. Ballard's removal. Ms. Ballard's removal and grievance chain appear on the record as Joint Exhibit 3.

5. A Step 2 Grievance hearing was held on Ms. Ballard's grievance on September 8, 2016, and the grievance was denied by the Employer on September 27, 2016.

6. On October 26, 2016, the Employer closed Ms. Ballard's grievance.

7. Ms. Queen began her employment with the State of Ohio on July 10, 2006. She was removed from her position as a Therapeutic Program Worker at the Gallipolis Developmental Center on August 10, 2016.

8. On August 16, 2016, a grievance (DMR-2016-03323-4) was filed contesting Ms. Queen's removal. Ms. Queen's removal and grievance chain appear on the record as Joint Exhibit 4.

9. A Step 2 Grievance hearing was held on Ms. Queen's grievance on September 19, 2016 and the grievance was denied by the Employer on September 26, 2016.

10. On October 25, 2016, the Employer closed Ms. Queen's grievance.

11. Mr. Payne began his employment on January 1, 2005. He was removed from his position as a Therapeutic Program Worker at the Gallipolis Developmental Center on August 11, 2016.

12. On August 16, 2016, a grievance (DMR-2016-03324-4) was filed contesting Mr. Payne's removal. Mr. Payne's removal and grievance chain appear on the record as Joint Exhibit 5.

13. A Step 2 Grievance hearing was held on Mr. Payne's grievance on September 19, 2016, and the grievance was denied by the Employer on September 26, 2016.

14. On October 25, 2016, the Employer closed Mr. Payne's grievance.

15. On February 2, 2017 and February 10, 2017, the Union sent requests by e-mail to Kristen Rankin, OCB Deputy Director, that the discharge grievances filed on behalf of Ms. Ballard, Ms. Queen, and Mr. Payne be advanced to Arbitration. The requests appear on the record as Joint Exhibit 6.

16. On February 15, 2017 the Office of Collective Bargaining denied the Union's request to arbitrate the discharge grievances filed on behalf of Ms. Ballard, Ms. Queen, and Mr. Payne. The denial appears on the record as Joint Exhibit 7.

17. In no case did the union press the appeal button on the electronic grievance system screen after a Step 2 response was issued.

JOINT EXHIBITS

1. Article 25 of the Collective Bargaining Agreement between the State of Ohio and OCSEA/AFSCME Local 11, effective July 1, 2015 through February 28, 2018.

2. Doogan Grievance Snapshot (OCS-2017-00675-0).

3. Ballard Grievance Snapshot filed by Sean Murphy (DMR-2016-03502-4).

4. Queen Grievance Snapshot (DMR-2016-03323-4).

5. Payne Grievance Snapshot (DMR-2016-03324-4).

6. Arbitration Requests dated February 2, 2017 and February 10, 2017 for Darlene Ballard (DMR-2016-03502-4), Deborah Queen (DMR-2016-03323-4), and Jonathan Payne (DMR-2016-03324-4).

7. E-mail from Kristen Rankin dated February 15, 2017 denying the Union's request to process the grievances to arbitration for Darlene Ballard (DMR-2016-03502-4), Deborah Queen (DMR-2016-03323-4), and Jonathan Payne (DMR-2016-03324-4).

8. List of discharge grievances appealed to ADR since 2015.

9. List of discharge grievances waived of mediation.

10. List of discharge grievances closed by the OH Grievance System.

11. Union Appeal prep sheet.

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter the Union, and the State of Ohio, Department of Administrative Services, Office of Collective Bargaining, hereinafter the Employer, are parties to a collective bargaining agreement in effect from July 1, 2015 through February 28, 2018. Within this Agreement is Article 25, Grievance Procedure.

The class action grievance that has given rise to this proceeding addresses three grievances that arose from discharges of bargaining unit members Darlene Ballard, Deborah Queen, and

Jonathan Payne. Ms. Ballard was removed effective August 25, 2016; Ms. Queen was removed effective August 10, 2016; Mr. Payne was removed effective August 11, 2016. In each case the Union filed a discharge grievance with the Employer by using the OH electronic grievance system within the time period allotted for the filing of such a grievance.

The grievances of the three discharged employees were filed at Step 2 and each grievance was denied through a Step 2 response from the Employer. Ms. Ballard's grievance's Step 2 denial was issued by the Employer on September 27, 2016; Ms. Queen's grievance's Step 2 denial was issued by the Employer on September 26, 2016; Mr. Payne's grievance's Step 2 denial was issued by the Employer on September 26, 2016.

The class action grievance herein does not consider the merits of the removals grieved by Ms. Ballard, Ms. Queen, and Mr. Payne. Whether each grievant can be proven to have engaged in misconduct that substantiates just cause for disciplinary action is not an issue in this proceeding. The class action grievance addressed by this proceeding considers how the three grievances were treated under the parties' contractual grievance procedure, whether the grievants and the Union received those rights guaranteed to them by the express language of the parties' 2015-2018 collective bargaining agreement, in particular whether the language of Article 25 was applied appropriately to each of the three discharge grievances.

The outcome of this arbitration proceeding will not determine whether the discharges of the grievants were for just cause or not. The outcome of this arbitration proceeding will declare whether the grievants received all of their contractual rights under Article 25 of the parties' collective bargaining agreement. If the grievants received all to which they were entitled under the parties' grievance procedure, this matter will conclude with a dismissal of the class action grievance and the absence of an order from the arbitrator that an arbitral review of the removals

be allowed. If the grievants did not receive all of their rights under the parties' contractual grievance procedure in reference to the processing and review of their discharge grievances, the class action grievance will be sustained and will result in an order from the arbitrator to restore those rights to which the grievants were entitled but had been withheld from them.

Both parties have carried out their respective obligations in moving this class action grievance forward through the parties' grievance procedure. The class action grievance addressed by this proceeding is properly before the arbitrator for review and resolution.

SUMMARY OF TESTIMONY

Kate Nicholson

Kate Nicholson has been employed by the State of Ohio's Office of Collective Bargaining for twelve years. Ms. Nicholson serves as Labor Relations Administrator over Alternate Dispute Resolution (ADR) and Training. Ms. Nicholson has spent the last eight years handling contractual grievance processes in which the State of Ohio participates.

Ms. Nicholson described the OH electronic grievance system as an electronic grievance processing and record-keeping system used by all of the five unions with which the State of Ohio has a collective bargaining agreement relationship.

Ms. Nicholson was referred to Joint Exhibit 1, Article 25 of the collective bargaining agreement in effect between the State of Ohio and OCSEA, AFSCME, Local 11, AFL-CIO from July 1, 2015 through February 28, 2018.

Ms. Nicholson was referred to the language within Article 25, section 25.02, Grievance Steps. A subsection of Article 25, section 25.02 is titled "Discharge Grievances" and Ms. Nicholson explained that this language is unique to the collective bargaining agreement between

the State of Ohio and OCSEA, AFSCME, Local 11, AFL-CIO. Ms. Nicholson confirmed that no other union with which the State of Ohio has a contractual relationship has within its collective bargaining agreement with the State of Ohio the language presented in Article 25, section 25.02, "Discharge Grievances" presented in the contract between the State of Ohio and OCSEA, AFSCME, Local 11, AFL-CIO.

Ms. Nicholson explained that the OH electronic grievance system provides reports of grievances filed under Article 25 and is capable of generating a chronological history for each grievance as to how the grievance has proceeded through the parties' contractual grievance procedure.

Ms. Nicholson identified Joint Exhibit 2 as a grievance summary, referred to as a "snapshot," of the class action grievance at issue in this case filed by Jessica Doogan, grievance number OCS-2017-00675-0. This grievance history snapshot presents the date the grievance arose, February 15, 2017, and the date the grievance was submitted to the Employer, February 21, 2017. The grievance's status is listed as open, and there is no date provided for last appeal date or closed date. This grievance snapshot describes the grievance as a class action grievance that includes grievants Deborah Queen, Jonathan Payne, and Darlene Ballard.

Ms. Nicholson identified Joint Exhibits 3, 4, and 5 as the grievance snapshots of, respectively, Darlene Ballard, Deborah Queen, and Jonathan Payne.

The grievance snapshot that addresses the grievance filed on behalf of Darlene Ballard, Joint Exhibit 3, shows the date the grievance arose, August 25, 2016; the date the grievance was submitted, August 26, 2016; the grievance's status is listed as closed at Step 2 and presents a closed date of October 26, 2016, with the closure reason presented as "Timed Out."

The grievance snapshot that addresses the grievance filed on behalf of Deborah Queen,

Joint Exhibit 4, shows the date the grievance arose, August 10, 2016; the date the grievance was submitted, August 16, 2016; the grievance's status is listed as closed at Step 2, presenting a closed date of October 25, 2016, with the closure reason presented as "Timed Out."

The grievance snapshot that addresses the grievance filed on behalf of Jonathan Payne, Joint Exhibit 5, shows the date the grievance arose, August 10, 2016; the date the grievance was submitted, August 16, 2016; the grievance's status is listed as closed at Step 2 and presents a closed date of October 25, 2016, with the closure reason presented as "Timed Out."

Ms. Nicholson explained that there is within the OH electronic grievance system a digital appeal button that may be electronically activated to move an unresolved grievance that has been denied by the Employer at Step 2 to the next level of grievance procedure review. Ms. Nicholson explained that to move the grievance to the next level of review the appeal button must be digitally engaged within thirty days of the beginning of an appeal period. Ms. Nicholson noted that in none of the cases of grievants Ballard, Queen, and Payne did anyone press the appeal button within the time period provided for such an action.

Ms. Nicholson recalled that she had received a telephone call from the Union requesting that the three grievances be re-opened. This request had been refused.

Ms. Nicholson was referred to Union Exhibit 1, an e-mail dated October 27, 2016 from Patty Rich of OCSEA, AFSCME, Local 11 directed to Ms. Nicholson at the Office of Collective Bargaining. This e-mail reads as follows:

> Kate –
>
> I need to request to have these 2 cases re-opened. Here is the issue, my steward has been trying to appeal them for 2 week and kept getting an error message. It wasn't until my rep talked to him they determined he was using the old URL, which is still not working correctly and not allowing people to file or appeal grievances. Even though it would be helpful if he would have called as soon as he started to get the

error message, he thought the system was being worked on, this is still a system issue. Can you please let me know if you guys will re-open? Thanks

DMR-2016-00324-4	8/16/2016	8/16/2016	10088042	Jonathan Payne
DMR-2016-03323-4	8/16/2016	8/16/2016	10012115	Deborah Queen

Ms. Nicholson was referred to Joint Exhibit 6, two separate e-mails from the Union's General Counsel, Brian Eastman, dated February 2, 2017 and February 10, 2017. The earlier e-mail was directed to Deputy Director Kristen Rankin of the Office of Collective Bargaining and was not directed to Ms. Nicholson. The latter e-mail from Mr. Eastman was directed to Deputy Director Rankin and was copied to Ms. Nicholson.

The February 2, 2017 e-mail from Mr. Eastman to Ms. Rankin reads as follows:

> We hereby request that the following three grievances be advanced to arbitration pursuant to Section 25.02 of the agreement which provides in part that with Discharge Grievances "The Union will propose arbitration of the grievance within sixty (60) days of the date of mediation, but no more than one hundred eighty (180) days from the filing of the grievance." Our previous requests for extensions and/or waivers to move these grievances to mediation have been denied. However, the language of section 25.02 providing that "The parties **SHALL** conduct a mediation within sixty (60) days of the due date of the Step 2 response" (Emphasis added) mandates that all Discharge Grievances proceed to mediation unless either party waives mediation under the language of section 25.02. The relevant language of Section 25.02 on waiver of mediation provides that "Nothing in this Section precludes either party from waiving mediation and proceeding directly to Arbitration." While it would be our preference to have an extensions (sic) to proceed to mediation on behalf of Ms. Queen and Ms. Ballard as a result of their unfair labor practice charges, we consider your previous denials to advance all of the grievances below to mediation as a waiver of mediation under section 25.02. Therefore, we are making this request to preserve our right to advance these grievances to Arbitration within one hundred eighty days (180) of their filing date as required by Section 25.02.
>
> | Grievance Numbers | Filed | Grievant |
> |---|---|---|
> | DMR-2016-03323-4 | 8/16/2016 | Deborah Queen |
> | DMR-2016-03324-4 | 8/16/2016 | Jonathan Payne |
> | DMR-2016- 03502-4 | 8/26/2016 | Sean Murphy (Darlene Ballard) |

Please do not hesitate to contact me if you have any questions, or if you need additional information.

Sincerely,

Brian J. Eastman
General Counsel

The February 10, 2017 e-mail from General Counsel Eastman to Deputy Director Rankin, found within Joint Exhibit 6, reads as follows:

Kristen,

I am forwarding this previous e-mail to you again, because of the time sensitive nature of our requests. I have also copied members of your staff to ensure receipt of the e-mail by the Office of Collective Bargaining prior to the 180 day filing deadline referenced in Section 25.02. I have also filed a request to withdraw unfair labor practice charge 2017-ULP-01-0013 related to the grievance filed on behalf of Darlene Ballard with the hope that we might be able to resolve the issues underlying the charge and the processing of the grievances listed below after a closer review of the clear language and intent of Section 25.02 is made. The language of Section 25.02 pertaining to Discharge Grievances was negotiated during the 2000-2003 negotiations and provides in part "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" (Emphasis Added). Further, the directions provided in the state's annotated contract in 2000-2003 provides that "Discharge grievances shall be AUTOMATICALLY mediated within 120 days of the date the grievance was filed. Either party may waive mediation" (Emphasis Added).

At the time this language was negotiated, the State's interest was to expedite the processing of removal grievances to minimize potential back-pay liability and the Union's interest was protection from Duty of Fair Representation Unfair Labor Practice Charges. The negotiated language achieved the intent of both parties, and the language for automatic processing of discharge grievances through mediation was a trade that the State made to achieve faster processing of removal grievances. I have confirmed this intent with the individuals who crafted the language from both sides of the table. Aside from the elimination of temporary language in the 2003-2006 negotiation, the language remained unchanged until Section 25.02 was revised in the 2015-2018 negotiations to adapt to the electronic grievance processing system. Revisions in the 2015-2018 negotiations also provide that "If the grievance is not resolved at Step Two or no Management response is received within fifty (50) days from submission or the date of the agreed upon extension, the grievance shall be automatically eligible for appeal." However, the underlying

purpose of Section 25.02 was not discussed nor changed in the 2015-2018 negotiations and the revised language still provides that "The parties **SHALL** conduct a mediation within sixty (60) days of the Step Two response. Nothing in this section precludes either party from waiving mediation and proceeding directly to arbitration" (emphasis added). For these reasons, continued processing of the grievances is proper under the clear language of the agreement.

After you have an opportunity to review the history of the language, I am hopeful that we will be able to proceed with the processing of these grievances and resolve the unfair labor practices filed by both Ms. Ballard and Ms. Queen as well. Finally, it is also my understanding that there is a fourth discharge grievance filed by Monica Austen #JFS-2016-04152-9 that closed out as well. However, we are reviewing the merits of the case this month at our internal arbitration review committee to make a determination as to whether we will make a formal request for arbitration under section 25.02.

I look forward to discussing these matters with you further. Please do not hesitate to contact me if you have any questions, or if you need additional information.

Sincerely,

Brian J. Eastman
General Counsel

Ms. Nicholson identified Joint Exhibit 7 as the February 15, 2017 e-mail from Deputy Director Rankin in response to Mr. Eastman's e-mails. Deputy Director Rankin responded as follows:

Brian –

The language in 25.02 pertaining to discharge grievances only requires mediation and arbitration if the grievance is properly appealed to mediation. A response or no response at 50 days only makes the grievance "eligible" for appeal. The proper steps must be followed in order to appeal to mediation. This language exists because the system does not advance a grievance to mediation without some action. It is also reiterated in 25.06 that grievances not appealed will close if no action is taken within 30 days of eligibility for appeal. Once appealed, the specific timelines for mediation/arbitration of discharge grievances would apply.

Since the grievances were properly closed under the contract language, they cannot be re-opened or scheduled for arbitration.

If you have any questions, please feel free to contact me.

Sincerely,
Kristen

Ms. Nicholson confirmed that Article 25, section 25.03 of the parties' collective bargaining agreement includes the following language: "Questions of arbitrability shall be decided by the arbitrator." Ms. Nicholson confirmed that the State of Ohio had refused to present to an arbitrator the issue of the arbitrability of the grievances filed by Ms. Ballard, Ms. Queen, and Mr. Payne.

Ms. Nicholson was referred to Joint Exhibit 9, page 2 that sets out the discharge grievances filed by OCSEA, AFSCME, Local 11 that had been closed through being determined "Timed Out." Five grievances are listed dated August 16, 2016; August 16, 2016; August 26, 2016; September 4, 2016, and October 7, 2016.

Ms. Nicholson recalled that the OH electronic grievance system had begun to be planned in 2013 and by the end of 2014 everyone was on board. Ms. Nicholson was asked whether the transition to the OH electronic grievance system had gone smoothly. Ms. Nicholson noted that under the OH electronic grievance system a meeting with a supervisor at Step 1 had been deleted and the grievance process that resulted had one less step than had previously been the case. Under the new system what had in prior contracts been referred to as Step 3 in the grievance procedure was changed to ADR in the parties' current Agreement, and what had been referred to as Step 5 in prior contracts was called Arbitration in the parties' current Agreement.

Ms. Nicholson recalled that the transition period used to initiate the implementation of the OH electronic grievance system lasted six months.

Ms. Nicholson was referred to Joint Exhibit 1, the language of Article 25, in particular the language in Article 25, section 25.02 under "Discharge Grievances." Ms. Nicholson confirmed

that there is in this language nothing that includes the words “must appeal” and there is no reference to ADR in this provision. Ms. Nicholson confirmed that there is in this language a reference to mediation.

Ms. Nicholson testified that if no appeal is filed within thirty days of the date upon which a grievant becomes eligible to file an appeal the grievance is closed. Ms. Nicholson testified that the “Discharge Grievances” language in Article 25, section 25.02 was intended to expedite procedures associated with processing discharge grievances.

Ms. Nicholson noted that Ms. Ballard had had her grievance denied at Step 2 by the Employer on September 27, 2016 and this grievance was closed out as “Timed Out” effective October 26, 2016.

Ms. Nicholson estimated that OCSEA, AFSCME, Local 11 generates about 4,000 grievances per year of which about 400 address an employee’s discharge.

Ms. Nicholson identified Joint Exhibit 8 as a listing of discharge grievances appealed to ADR since 2015. Ms. Nicholson noted that these terminations occurred under the OH electronic grievance system that has been in operation since 2014.

Under questioning by the State’s representative, Ms. Nicholson was referred to Union Exhibit 3, that portion of the Joint Annotated Contract between the State of Ohio and OCSEA, AFSCME, Local 11 in effect from 2000 through 2003 that addressed Article 25. At page three of this exhibit near the bottom of the page are “Instructions” that explain changes to the Contract’s language in Article 25 that read as follows:

> Discharge grievances shall be automatically mediated within 120 days of the date the grievance was filed. Either party may waive mediation.
>
> The Union must make a Request for Arbitration within 60 days after mediation, but no later than 180 days after the filing of the grievance. Grievances not appealed

to arbitration within this time frame shall be treated as withdrawn.

Ms. Nicholson was referred to Joint Exhibit 1, Article 25 within the parties' current collective bargaining agreement, in particular Article 25, section 25.06, Time Limits. The first paragraph of section 25.06 reads as follows:

> Grievances may be settled or withdrawn at any step of the grievance procedure. Grievances not appealed within the designated time limits will be treated as withdrawn grievances. Grievances not appealed within thirty (30) days of eligibility for appeal will close if no action is taken.

Ms. Nicholson identified Employer's Exhibit 1 as a diagram of the parties' grievance procedure described in Article 25, section 25.02 in the parties' current collective bargaining agreement. Within this diagram it is stated that if the grievance is unresolved at Step 2 the OCSEA Chapter representative or designee "must appeal the grievance to alternative dispute resolution (ADR) within fifteen (15) days of the Step 2 response due date." There is also language on this diagram that states that regardless of whether a response is submitted by the agency, the grievance will close if no action is taken by the Union within thirty days of attaining the eligibility to file an appeal.

Ms. Nicholson referred to Joint Stipulation of Fact 17 that states that the Union did not press the appeal button on the electronic grievance system's screen after a Step 2 response had been issued.

Ms. Nicholson testified that when no timely appeal is made the grievance is treated as if it had been withdrawn. Ms. Nicholson confirmed that extensions of time may occur but only by mutual agreement of the parties. Ms. Nicholson testified that there had been no extension of time agreed by the parties in the grievances at issue. Ms. Nicholson testified that the Union's inaction

resulted in the grievances being treated as having been withdrawn.

Ms. Nicholson testified that the OH electronic grievance system did not carve out a separate grievance path to be exclusively applied to OCSEA, AFSCME, Local 11 discharge grievances. Ms. Nicholson pointed out that the OH electronic grievance system does not move grievances forward in the grievance procedure in the absence of the engagement of the appeal button.

Michael Duco

Michael Duco is a Labor Relations Manager employed by the City of Columbus, Ohio and has served in this capacity since February, 2016. Mr. Duco has thirty years of experience as an employee of the State of Ohio's Office of Collective Bargaining and served as Deputy Director therein for eight years. Mr. Duco's experience includes negotiating collective bargaining agreements and overseeing grievance and mediation procedures.

Mr. Duco explained that the preparation of annotated collective bargaining agreements began in 1989 and were used to identify and explain changes to the language in the parties' collective bargaining agreement to be found in the parties' successor Agreement.

Mr. Duco was referred to Union Exhibit 3, the annotated 2000-2003 collective bargaining agreement between the State of Ohio and OCSEA, AFSCME, Local 11. On page three Mr. Duco noted that language as to discharge grievances was identified as new language that had been negotiated and agreed by the parties. Mr. Duco recalled that Herman Webber had negotiated on behalf of the Union. Mr. Duco testified that the new language that related to discharge grievances was intended to quicken the resolution of grievances, limit liability, and reduce back pay awards. Mr. Duco described mediation as automatic under this language.

Mr. Duco identified Union Exhibit 4 as an annotated contract for 2003-2006; identified Union Exhibit 5 as an annotated contract for 2006-2009; identified Union Exhibit 6 as an annotated

contract for 2009-2012, and identified Union Exhibit 7 as an annotated contract for 2012-2015. Mr. Duco noted that while language had changed from the 2003-2006 contract through the removal of language found in a prior contract, the language about automatic mediation within 120 days of the date of the filing of the grievance remained, and no change to this language occurred in the 2006-2009 contract, the 2009-2012 contract, or the 2012-2015 contract.

Mr. Duco identified Union Exhibit 9 as a Letter of Agreement between the State of Ohio, Department of Administrative Services, Office of Collective Bargaining and OCSEA, AFSCME, Local 11 that is titled "Letter of Agreement OHgrievance Electronic Filing System." This agreement was signed by Mr. Duco as Deputy Director for the Office of Collective Bargaining on April 9, 2014 and was signed by OCSEA, AFSCME, Local 11 representatives Patty Rich and Sandra Bell on April 9, 2014. The language of this Letter of Agreement provides that this agreement modifies provisions of Article 25 of the parties' collective bargaining agreement. This agreement remained in effect for the duration of the 2012-2015 collective bargaining agreement and the parties agreed that they may negotiate additional changes to this Letter of Agreement prior to incorporating it into the next collective bargaining agreement, at the expiration of the parties' current contract.

At page 2 of Union Exhibit 9, the Letter of Agreement that addresses the OH Electronic Grievance Filing System, there is the following language:

> Upon receipt of the response, the OCSEA chapter representative must appeal the grievance to the next step within fifteen (15) days of response.
>
> Regardless of how the Appeal button is activated (i.e., due to grievance denial or no Employer response), the Appeal button will deactivate and the grievance will close if no action is taken by the union within 30 days of activation.

Page three of the OHgrievance Electronic Filing System Agreement, Union Exhibit 9,

provides: "... Removals shall be arbitrated within 120 days of the mediation or date waived for mediation."

Mr. Duco testified that the State of Ohio had wanted one system for all five unions to use and Union Exhibit 9, the Letter of Agreement, had been considered a transitional document.

Kristen Rankin

Kristen Rankin served in the Office of Collective Bargaining for over fourteen years and participated in the negotiation of the current 2015-2018 collective bargaining agreement between the State of Ohio and OCSEA, AFSCME, Local 11.

Ms. Rankin testified that under the parties' present collective bargaining agreement an appeal is required to be affirmatively indicated to move a grievance forward in the grievance process. Ms. Rankin noted that this position was expressed in Deputy Director Rankin's February 15, 2017 e-mail in response to the Union's requests communicated by General Counsel Eastman that the grievances at issue be reopened.

Under questioning by the Union representative Ms. Rankin confirmed that the Ballard grievance had been denied effective September 27, 2016 and the grievance was closed out on October 26, 2016.

Ms. Rankin confirmed that Article 25, section 25.01(D) directs that in delineating a time period the first day is excluded and the last day is included.

Ms. Rankin confirmed that in Union Exhibit 9, the Letter of Agreement for the OHgrievance Electronic Filing System, there is no language that expressly refers to discharge grievances.

POSITIONS OF THE PARTIES

Position of the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union

The Union notes that in August, 2016 the Ohio Department of Developmental Disabilities removed three bargaining unit members and in each case a grievance was timely filed. Each of these grievances, for Deborah Queen, Darlene Ballard, and Jonathan Payne, was claimed by the Employer to have been untimely processed by the Union, and the Union's demands that the grievances of Ms. Queen, Ms. Ballard, and Mr. Payne be moved to arbitration were refused by the Employer, even though the parties' collective bargaining agreement provides in express language that questions of arbitrability are to be determined by an arbitrator.

The Union filed a class action grievance, the grievance addressed herein, complaining of the State of Ohio's refusal to arbitrate the three discharge grievances, alleging that the refusal to arbitrate in each case presented a violation of the language of the parties' collective bargaining agreement.

The Union refers to the Joint Issue Statement agreed by the parties that asks whether the Employer violated the parties' collective bargaining agreement by closing and refusing to open the discharge grievances filed on behalf of Ms. Ballard, Ms. Queen, and Mr. Payne.

The Union asserts that this case is not procedurally defective and is properly before the arbitrator for a decision on the merits of the class action grievance.

The Union believes the facts underlying this arbitration proceeding to be largely undisputed. The Union notes that the class action grievance filed in this case charges the State of Ohio with violating Article 25, section 25.02 of the parties' collective bargaining agreement by refusing to arbitrate the three discharge grievances.

Ms. Ballard, who worked as a Therapeutic Program Worker at Youngstown Developmental Center, was removed effective August 25, 2016 for alleged abuse of a resident and Union Steward Sean Murphy filed a grievance on behalf of Ms. Ballard as to her removal the next day, August 26, 2016.

The grievance filed on behalf of Ms. Ballard was filed at Step 2 and the matter was heard on September 8, 2016. The Union points out that because the Union anticipated a denial of the grievance by the Employer at Step 2, the Union had requested at Step 2 that: "The Union would ask this Grievance be moved to Step 3." See Joint Exhibit 3, the snapshot of the Ballard grievance, a grievance filed on Ms. Ballard's behalf by Union Steward Sean Murphy. The Ballard grievance was denied by the Employer at Step 2 on September 27, 2016 and the grievance was closed by the State of Ohio in the OH electronic grievance system on October 26, 2016.

The Union refers to the language in Article 25, section 25.01 (E) that provides: "Grievances shall be filed using the electronic grievance system." The Union notes that within this electronic grievance system buttons are provided which may be clicked to activate specific functions. One such button that appears on the screen after receipt of a Step 2 answer may be activated to appeal a grievance to the next Step, either mediation or, if mediation is waived, arbitration.

The Union confirms that the parties have stipulated that the Union did not push the appeal button after receiving the Employer's Step 2 answer. Twenty-nine (29) days later the Employer closed the Ballard grievance.

Grievant Deborah Queen worked as a Therapeutic Program Worker at Gallipolis Developmental Center and was removed on August 10, 2016 under an allegation of failing to report her co-worker's mistreatment of a resident. The Union timely filed a grievance as to Ms. Queen's removal by using the OH electronic grievance system, filing the grievance on August 16,

2016. The grievance involving Ms. Queen was heard at Step 2 on September 19, 2016 and a denial of the grievance was issued by the Employer on September 26, 2016. The Union concedes it did not push the appeal button on the Queen grievance, and on October 25, 2016 the Employer closed the grievance, twenty-nine (29) days after the Step 2 answer.

The third grievant, Jonathan Payne, worked as a Therapeutic Program Worker with Ms. Queen at the Gallipolis Developmental Center. Mr. Payne was removed on August 11, 2016 under an allegation of abuse of a resident and the Union filed a timely grievance as to the removal of Mr. Payne on August 16, 2016 using the OH electronic grievance system. The grievance involving Mr. Payne was heard at Step 2 on September 19, 2016 and the Payne grievance was denied at Step 2 on September 26, 2016 by the Employer and closed on October 25, 2016, twenty-nine (29) days after the Step 2 answer. The Union confirms that it did not push the appeal button in the OH electronic grievance system in the case of the Payne grievance.

The Union points out that nothing in the language in Article 25, section 25.02 requires that there be an appeal to move the grievance to mediation. As there was no mediation in any of the three grievances, the Union had 180 days from the filing of each grievance to advance the grievance to arbitration. The controlling language, argues the Union, appears under the heading "Discharge Grievances" on page 98 of the parties' Agreement and provides: "Nothing in this Section precludes either party from waiving mediation and proceeding directly to arbitration. The Union will propose arbitration of the grievance within sixty (60) days of the date of mediation, but no more than one hundred eighty (180) days from the filing of the grievance."

The Union refers to the February 2, 2017 e-mail from Union General Counsel Eastman to Deputy Director Rankin and describes this e-mail as an appeal of each of the three grievances at issue. This e-mail occurred 171 days from the date that the Queen and Payne grievances had been

filed and 161 days from the date the Ballard grievance had been filed.

When Mr. Eastman received no response to his February 2, 2017 e-mail he e-mailed Ms. Rankin again on February 10, 2017 advising Ms. Rankin that the Union was advancing the Ballard, Queen, and Payne grievances to arbitration. February 10, 2017, notes the Union, was respectively, 169, 179, and 179 days from the filing of the Ballard, Queen, and Payne grievances.

The February 15, 2017 response from Deputy Director Rankin directed to General Counsel Eastman, Joint Exhibit 7, stated that Article 25, section 25.02 "only requires mediation and arbitration if the grievance is properly appealed to mediation." Deputy Director Rankin stated in her February 15, 2017 e-mail to General Counsel Eastman that if the appeal button is not pressed within thirty days of an eligibility to appeal, the grievance is closed, treated as if it had been withdrawn. Deputy Director Rankin asserted in her February 15, 2017 e-mail that: "Once appealed, the specific timelines for mediation/arbitration of discharge grievances would apply."

The Union contends that Deputy Director Rankin's position as expressed in her February 15, 2017 e-mail to General Counsel Eastman is mistaken. The Union points to the express language of Article 25, section 25.02 which includes:

> ... The parties shall conduct a mediation within sixty (60) days of the due date of the Step Two response. Nothing in this Section precludes either party from waiving mediation and proceeding directly to arbitration. The Union will propose arbitration of the grievance within sixty (60) days of the date of the mediation, but no more than (180) days from the filing of the grievance...

The Union points out that there is no indication in the above-cited language that an appeal is a condition precedent to moving an unresolved discharge grievance at Step 2 to mediation. The language set out above, found in Article 25, section 25.02, "Discharge Grievances" clearly states that mediation is to follow an unresolved discharge grievance at Step 2, and such an unresolved

grievance may be by-passed and moved directly to arbitration.

The Union argues that the language cited above provides no indication that if the appeal button is not pressed the grievance will be closed. The Union notes there is no reference to an appeal button anywhere in the parties' collective bargaining agreement and the only language placing an obligation upon the Union to utilize the OH electronic grievance system appears in Article 25, section 25.01 (E) which provides: "Grievances shall be filed using the electronic grievance system." The Union points out that beyond filing a grievance using the electronic grievance system there is nothing in this language that requires the Union to use the OH electronic grievance system for any other aspect of the grievance procedure or prohibits the Union from advancing a grievance to arbitration via notice by e-mail. The Union notes that the parties aspired to use the system to handle grievances to the fullest extent possible but the collective bargaining agreement, in express terms, only requires that the Union use the system to file a grievance.

The Union points out that in contrast to what is required of the Union under the OH electronic grievance system, the OH electronic grievance system requires the Employer to enter Step 2 meeting dates and extensions into the system; the Employer must "enter the results of the ADR meeting into the electronic grievance system," and when time limits are extended by mutual agreement of the parties the Employer's Labor Relations Officer is to enter the extension into the system.

Because the State of Ohio was not willing to arbitrate the merits or the arbitrability of the three discharge grievances from Ms. Ballard, Ms. Queen, and Mr. Payne, a class action grievance was filed on their behalf on February 21, 2017. Although the State of Ohio's refusal to have an arbitrator determine the arbitrability of the three grievances is a clear violation of Article 25, section 25.03 of the parties' Agreement, the Union is only requesting the arbitrator in the case

herein to interpret the procedural arguments under Article 25, section 25.02 as they pertain to discharge grievances.

The Union puts forward a two-fold argument. First, the Union argues that the language of Article 25, section 25.02 unambiguously states that the Union has 180 days from the date the grievances were filed to advance the grievances to arbitration. Contrary to the Employer's assertions, the Union argues there are no other contractual prerequisites to arbitration of a discharge grievance. There is no language, for example, in Article 25, section 25.02 that requires the Union to activate an appeal button in the electronic grievance system. Since the meaning of the language of Article 25 can be ascertained from its text, there is no need to resort to extrinsic evidence to interpret this language in the parties' Agreement.

Second, even if the language of Article 25, section 25.02 of the parties' Agreement were determined to be ambiguous, the parties negotiated an entirely separate procedure for discharge grievances that did not require an appeal to mediation. The section on discharge grievances remained unchanged under the terms of the Letter of Agreement between the parties that implemented the OH electronic grievance system, and the Union argues that the language that addresses discharge grievances was not significantly changed in the 2015-2018 collective bargaining agreement under which the OH electronic grievance system was implemented. The Union reiterates that there is no language in either the Letter of Agreement or the language in Article 25, section 25.02 of the 2015-2018 collective bargaining agreement requiring an appeal of discharge grievances to ADR. The Union notes that ADR is not even mentioned in Article 25, section 25.02 under "Discharge Grievances."

The Union contends that it complied with the express language of the parties' Agreement that permits 180 days to advance a discharge grievance to arbitration.

The Union argues that there is no language in the parties' collective bargaining agreement supporting many of the Employer's arguments in this proceeding whereas the Union's position is rooted in express language in the parties' collective bargaining agreement.

The Union argues that the Employer's interpretation of the Agreement violates two fundamental principles of contract language interpretation. The Union points out that any reading of the collective bargaining agreement that would nullify or render any part of the Agreement meaningless is to be avoided. The Union also points out that specific terms are to control over general language. The Union argues that for the Employer to prevail in this proceeding the express language in the parties' Agreement about having 180 days to direct an unresolved grievance to arbitration must be contravened, as well as the two maxims of textual construction referenced above.

The Union points out that while Article 25 covers all types of grievances under a variety of circumstances, a subset of grievances, discharge grievances, is the subject of the language of Article 25, section 25.02, a provision unique to the OCSEA, AFSCME, Local 11 bargaining unit and only applicable to discharge grievances emanating from that bargaining unit.

The Union notes that the language of Article 25, section 25.02 that applies to discharge grievances calls for the following:

1. Discharge grievances are filed at Step 2.

2. Management must conduct a Step 2 meeting and respond to the union no more than 50 days after the grievance was filed.

3. The grievance is "automatically eligible for appeal" if:

   (a) the grievance is not resolved, or

   (b) management fails to respond within 50 days of filing.

4. Mediation *shall* occur within 60 days of the Step 2 response due date (i.e. 110 days from filing), provided that either party may waive mediation and proceed directly to arbitration (emphasis added).

5. If the union elects to arbitrate it must so notify management:

    (a) within 60 days of the mediation, or

    (b) within 180 days of filing if mediation was waived.

The Union argues that the above language controls over any contrary language in Article 25.

The Union understands the Employer's position in this case to rest on three arguments. First, the Union had no right to advance the grievances to arbitration because the Union did not appeal the grievances to mediation in the OH electronic grievance system; second, under Article 25, section 25.06 all grievances not appealed within thirty days of eligibility for an appeal will close and will be treated as withdrawn, and third, an appeal to arbitration may only be made via the electronic grievance system and may not be communicated through e-mail.

As to the language of Article 25, section 25.02 the Union notes that this language includes:

> ... The parties shall conduct a mediation within sixty (60) days of the due date of the Step 2 response. Nothing in this Section precludes either party from waiving mediation and proceeding directly to arbitration. The Union will propose arbitration of the grievance within sixty (60) days of mediation, but no more than one hundred eighty (180) days from the date of filing of the grievance.

The Union points out that there is nothing in the above-cited language that even implies a grievance may not be advanced to arbitration if the Union does not appeal the grievance to mediation. The Union contends the above-cited language says nearly the opposite – the Union is free to waive mediation and move directly to arbitration so long as the Union does not take more than one hundred eighty (180) days from the filing of the grievance to do so. The Union contends that the Employer's interpretation of the above-cited language would read the one hundred eighty

(180) day clause right out of the parties' Agreement.

As to the language in Article 25, section 25.06 that demands that all grievances be appealed within thirty (30) days of eligibility to appeal, the Union contends that this language runs contrary to the interpretive maxim that specific contract language controls over general contract language. Article 25, section 25.06 provides that a grievance will be closed if not appealed within thirty (30) days of becoming eligible for an appeal. In contrast, the language of Article 25, section 25.02 provides that a discharge grievance is automatically eligible for appeal if it is not resolved at Step 2 or no response is received within fifty (50) days from submission of the grievance or the date of the agreed upon extension. The Union notes that the language of Article 25, section 25.02 provides two deadlines for discharge grievance appeals – when the grievance is initially filed and when the unresolved grievance is proposed for arbitration. If mediation is to occur, it must occur within sixty (60) days of the due date of the Step 2 response. If the grievance is to be arbitrated the Union is to propose arbitration no more than one hundred eighty (180) days from the filing of the grievance. The Union contends it elected to move the Ballard, Queen, and Payne grievances to arbitration so the deadline of one hundred eighty (180) days applies. The Union notes that there is no penalty for the Union failing to advance a grievance to mediation and electing instead to go straight to arbitration.

The Union argues that it is impossible to apply both the Employer's interpretation of Article 25, section 25.02 and the language of Article 25, section 25.06 to the three grievances at issue in this class action grievance. The Union points out that each of these grievances is a discharge grievance and therefore each grievance is entitled to have the more specific language of Article 25, section 25.02 applied.

As to the Employer's contention that the grievances at issue herein cannot be advanced to

arbitration via e-mail, the Union claims that such an argument is not supported by language found in the parties' collective bargaining agreement. The language of Article 25 obligates the Union to propose, notify, or appeal a grievance to arbitration but there is no requirement that the Union do so via any specific method. The Union notes that the language of Article 25 requires the Employer to use the OH electronic grievance system at Step 2, after ADR, and upon closing a grievance. Thus, argues the Union, where the parties intended that a specific procedure apply, that specific procedure has been indicated in the express language of the parties' Agreement. The Union contends that there is no limitation presented on the means the Union is to employ in notifying the Employer of the Union's intention to arbitrate a matter and the Union argues that it may provide such notice through any reasonable means. The Union argues that the use of e-mail to provide the necessary notice is reasonable and the notice provided by the Union's General Counsel to the Employer's Deputy Director was at an appropriate level of authority on both sides for such notification to occur.

The Union claims that its position in this case relies on clear language in Article 25, section 25.02 that allows one hundred eighty (180) days from the filing of a grievance to propose the arbitration of the grievance, and the Union argues that it met that deadline in each case. The Union argues that the Employer relies on a torturous reading of the language in the parties' Agreement to nullify the 180-day clause contained in Article 25, section 25.02. The Union urges the arbitrator to find that the Union's construction of the language of the parties' collective bargaining agreement bearing on the issues in dispute between the parties in this proceeding should prevail.

The Union points out that there is no express language in the parties' Agreement that requires an appeal to mediation pursuant to Article 25, section 25.02 nor has such a requirement ever existed between the parties. The Union points out that the express language of Article 25,

section 25.02 includes: “The parties shall conduct the mediation within sixty (60) days of the due date of the Step 2 response ...” The three grievances at issue in this class action grievance were not mediated and therefore the Union was required to propose arbitration, if at all, within one hundred eighty (180) days of the filing of the grievance.

The Union contends that the only deadline that must be met under Article 25, section 25.02 is to propose arbitration within sixty (60) days after mediation but not later than one hundred eighty (180) days after the grievance was filed. The Union contends that this is consistent with language that existed in prior collective bargaining agreements between these parties and is borne out through prior annotated contracts between the parties dating from 2000 and thereafter.

The Union points out that although timeframes were changed in the “Discharge Grievances” paragraph in Article 25, section 25.02 as to when the parties are to conduct a mediation, changing it from one hundred twenty (120) days after the grievance was filed to sixty (60) days after the due date of the Step 2 response (110 days after the grievance was filed) the other language remained consistent with the prior three-year collective bargaining agreements in effect from 2000 through 2015. The Union emphasizes that the present collective bargaining agreement between the parties does <u>not</u> present language that requires an appeal to ADR from an unresolved discharge grievance at Step 2.

As to the April, 2014 Letter of Agreement that was entered into by the Union and the Employer, certain timeframes under Article 25, section 25.02 were addressed, as were transitional issues. The Union points out, however, that no specific changes to any of the language within Article 25, section 25.02 occurred. The language of the Letter of Agreement provides that this agreement is to modify the provisions of Article 25 in the parties’ collective bargaining agreement, and provisions not specifically modified by this Letter of Agreement are to remain as agreed by

the parties in their collective bargaining agreement. The Union points out that while the Letter of Agreement modified timeframes that were subsequently incorporated into the parties' current collective bargaining agreement, "Discharge Grievances" remained a separate section under Article 25, section 25.02, providing a separate procedure to be followed in the case of a grievance arising from a removal.

The Union argues that the language of the parties' current collective bargaining agreement does not require an appeal to mediation as no such precondition is presented in the express language of Article 25, section 25.02, Discharge Grievances. The language that does appear therein states that the parties "shall" conduct mediation within sixty (60) days of the due date of the Step 2 response.

The Union points out that the Employer's argument requires the application of Article 25, section 25.06 that provides that if a grievance is not appealed within thirty (30) days of its eligibility for appeal the grievance is to be closed. The language of Article 25, section 25.02 in express terms provides that if the grievance is not resolved at Step 2 the grievance shall be automatically eligible for appeal. The Union contends that there has never been an obligation to appeal to mediation under the language of Article 25, section25.02 nor does such language appear in the current language of the parties' collective bargaining agreement.

As to the language of Article 25, section 25.06 that provides that grievances not appealed within the designated time limits are to be treated as withdrawn, the Union points out that there are no designated time limits or a requirement to appeal to mediation under the language of Article 25, section 25.02 and there has never been a requirement between these parties to appeal discharge grievances to mediation. The Union argues that the three grievances at issue in this class action grievance cannot be considered withdrawn under Article 25, section 25.06 regardless of whether

the OH electronic grievance system closed them out because a button had not been pressed in that system.

The Union points out that the OH electronic grievance system closed the grievances twenty-nine (29) days rather than thirty (30) days from the purported eligibility to appeal date. The Union argues that even if the Union had been provided with an extra day to press the appeal button in the OH electronic grievance system after the Step 2 response from the Employer was issued, the question becomes whether the grievances were appealed in a timely manner to the next step in the grievance process. Because there is no express language that requires an appeal to mediation for discharge grievances, after the Step 2 response is issued by the Employer, the grievance cannot be considered withdrawn under Article 25, section 25.06. The Union points out that there is no designated timeframe to appeal to mediation under the "Discharge Grievances" language in Article 25, section 25.02 and contends it is improper to apply non-discharge grievance language when there is a separate, specific procedure to be followed for discharge grievances. The Union argues that the language of Article 25, section 25.02 requires only an appeal to arbitration, not mediation.

The Union points out that the Union and the Employer negotiated a separate procedure for discharge grievances that was unique to the bargaining unit represented by OCSEA, AFSCME, Local 11. No other bargaining unit has applied to it this specific language and the Union argues that to accept the arguments made by the Employer in this case would deprive the Union of what it bargained for – a process that includes an automatic processing of discharge grievances through mediation. The Union notes that there was no waiver of this language.

The Union contends that the Employer has ignored the express language of Article 25, section 25.02 as it relates to discharge grievances and also ignored the language of Article 25, section 25.03 that requires that questions of arbitrability be decided by an arbitrator. The Union

argues that the clear language of Article 25, section 25.02 allows the Union a maximum of one hundred eighty (180) days from the filing of a grievance to advance an unresolved discharge grievance to arbitration and argues that the language of Article 25, section 25.06 does not nullify the requirements expressed in Article 25, section 25.02. The Union contends that the clear, unambiguous language of Article 25 supports the Union's arguments in this regard.

For the above cited reasons, the Union urges the arbitrator to sustain the class action grievance and retain jurisdiction over this case for sixty (60) days.

Position of the State of Ohio, Department of Administrative Services, Office of Collective Bargaining, Employer

The Employer in this arbitration proceeding believes the facts underlying this case to be essentially undisputed. Three employees were discharged and grievances were filed on behalf of each discharged employee at Step 2, as called for by the language of Article 25, section 25.02. The Employer issued a Step 2 response for each grievance; the Employer contends that once the Step 2 response had been issued by the Employer, each grievance became eligible for appeal under the language of Article 25, section 25.02 under "Discharge Grievances" and under the language of Article 25, section 25.02 under "Step Two – Agency Head or Designee."

The Employer notes that appeal timeframes for Step 2 grievances are presented in Article 25, section 25.02 under "Step Two – Agency Head or Designee" and includes the following: "If the grievance is unresolved at Step Two, the OCSEA Chapter representative or designee must appeal the grievance to alternative dispute resolution (ADR) within fifteen (15) days of eligibility for appeal." Regardless of whether a response is submitted by the Agency, argues the Employer, the grievance will close if no action is taken by the Union within thirty (30) days of eligibility for appeal. The Employer points out that the Union's representatives did not appeal the three

grievances within fifteen (15) days of the Step 2 response nor did the Union appeal within thirty (30) days of the Step 2 response. The Employer points to the language of Article 25, section 25.06, Time Limits, that specifies: "Grievances not appealed in thirty (30) days of eligibility for appeal will close if no action is taken." The Employer contends that because this is the circumstance presented by the facts of this case, the three grievances at issue in this class action grievance were properly closed in the OH electronic grievance system.

The Employer points out that the Union bears the burden of proof in this proceeding and the Employer contends the Union has not presented a preponderance of evidence proving that the Employer violated the parties' collective bargaining agreement. The Employer points out that the Joint Stipulations of Fact make it plain that the Union failed to appeal the grievances beyond Step 2 as required by Article 25, section 25.02 of the parties' collective bargaining agreement, and because the grievances were not appealed, each grievance was properly and appropriately treated as a withdrawn grievance.

The Employer claims that the Union is attempting to rely on past contract language to support its claim that a single sentence in Article 25, section 25.02 absolves the Union of any obligation to appeal the grievance, a position that conflicts with mutually agreed language in the parties' Letter of Agreement and in the parties' current collective bargaining agreement. The Employer contends that the Union failed to produce any evidence in support of the assertion that under the express language of the parties' collective bargaining agreement in effect in 2016 the Union was not required to appeal a grievance to move the grievance forward in the grievance procedure.

The Employer contends that Article 25, section 25.03 is not material to this arbitration proceeding as the class action grievance before the arbitrator in this case addresses Article 25,

section 25.02.

The Employer asserts that the language of Article 25 must be read as a whole and such a perspective in interpreting the language of the Article comports with a long-standing principal of contract language interpretation. The Employer argues that sections of the parties' Agrement may not be isolated from the rest of the parties' Agreement, and the meaning of each paragraph and sentence is to be determined in relation to the collective bargaining agreement as a whole. The Employer contends that the Union has chosen to ignore all but a single sentence in Article 25, the sentence that reads: "The parties shall conduct a mediation within sixty (60) days of the due date of the Step Two response." The Employer argues that when this single sentence is read within the context of the remainder of the Article: "... it is clear that the specific discharge language speeds up timeframes for scheduling mediation and arbitration, but it does not absolve the Union from its obligation to appeal in order to advance the grievances forward." See Employer's post-hearing brief, page 2.

The Employer points out that the sentence immediately preceding the sentence relied on by the Union reads: "If the grievance is not resolved at Step 2 or no management response is received within fifty (50) days from submission or the date of the agreed upon extension, the grievance shall be automatically **eligible for appeal**." (Emphasis added.) The Employer contends that when the entire Article is read it is apparent that the parties had agreed that a grievance would be appealed as part of this process, and it is argued that the parties would not have negotiated a timeline connected to appeal eligibility if this were not the case. The Employer claims that other language within Article 25, in section 25.06 speaks specifically to time limits, namely that: "Grievances not appealed within thirty (30) days of eligibility for appeal will close if no action is taken." The Employer claims the parties would not have agreed to include this new contract

language in their current collective bargaining agreement if they had not intended that this language be given meaning and effect, and that meaning and effect addresses the Union's obligation to file an appeal to further the processing of an unresolved grievance.

The Employer claims that if Article 25 is not read as a whole it renders other language in the Article, including the language in Article 25, section 25.06 meaningless, a circumstance that could not have been intended by the parties when they agreed to the inclusion of this language in their most recent collective bargaining agreement. The Employer points out that when two interpretations of contract language are possible, the interpretation that would give effect to both provisions is favored.

The Employer recalls the testimony from Ms. Nicholson, the Labor Relations Administrator over Alternate Dispute Resolution and Training in the Office of Collective Bargaining wherein Ms. Nicholson was referred to express language in Article 25, section 25.02 under "Step Two – Agency Head or Designee," wherein it states that if a grievance is not resolved at Step 2 the OCSEA Chapter representative or designee must appeal the grievance to ADR within 15 days of eligibility for appeal.

The Employer recalls the testimony of Deputy Director Rankin when she was asked about the timelines for discharge grievances. Ms. Rankin testified that the initial filing timeline is the same and the timeframe for filing an initial response is the same. Once the grievance gets appealed, however, and moves to the mediation stage, the timeline moves faster. Ms. Rankin stated that other grievances are attempted to be scheduled within 240 days from the date of the ADR. Discharge grievances, once appealed, are placed on a faster track through ADR and arbitration.

At page 3 of its post-hearing brief the Employer contends that:

> ... If the Union wants to advance the grievance, the Union **must** appeal. Once

> appealed, the grievance moves on to be scheduled for mediation or arbitration. This process is the same for any grievance moving from Step 2 to ADR/mediation. What can differ based on the type of grievance is the timeline for scheduling. The parties have agreed that it is in their interest to move discharge grievances to mediation/arbitration more quickly than other grievances. However, an adjustment to the timeline, does not change the process and does not absolve the Union of the requirement to appeal to mediation.

The Employer recalls the testimony of Ms. Nicholson concerning the programming of the OH electronic grievance system. The Employer points out that Ms. Nicholson explained in her testimony that no special programming was required to address discharge grievances because the language of the parties' collective bargaining agreement makes clear that they are processed in the same manner as other Step 2 grievances. The Employer points out that Ms. Nicholson's testimony in this regard was unrebutted.

The Employer also refers to Joint Exhibit 8 which presents the grievances that have moved through the OH electronic grievance system since 2014, showing a history of the Union appealing discharge grievances. Ms. Nicholson noted in her testimony that the system does not have a separate, carved out path for discharge grievances. Ms. Nicholson stated that the program did not have a specific path carved out for OCSEA, AFSCME, Local 11 discharge grievances.

The Employer points to Joint Stipulation of Fact 17 that establishes by agreement of the parties that the Union did not press the appeal button on the OH electronic grievance system's screen after the Employer's Step 2 response for each grievance was issued. The Employer claims that this inaction by the Union caused the grievances to be treated as if they had been withdrawn and supported the subsequent closing of the grievances in the OH electronic grievance system under the language of the parties' collective bargaining agreement.

The Employer notes that the Union may argue that pressing the appeal button is not a mechanism required by the parties' collective bargaining agreement. The Employer claims,

however, that it is part of the agreed upon process that the Office of Collective Bargaining created with the Union's involvement. The Employer claims that it is the standard method through which all grievances at Step 2 are appealed. Prior to the OH electronic grievance system the Union used a demand for arbitration letter; with the advent of the OH electronic grievance system the Union was required to press an appeal button.

The Employer points out that the OH electronic grievance system was developed with the participation of the Union and in 2014 a Letter of Agreement about the use of the OH electronic grievance system was signed by both parties. The Employer notes that the Letter of Agreement specifically sets out the timeframe for the Union to appeal a Step 2 grievance to mediation. The Employer notes that the Union did not develop a separate path for its grievances and did not construct or request a separate path for its discharge grievances. The Employer notes that the Union has appealed discharge grievances through the OH electronic grievance system in the past but did not do so among the three grievances addressed by the class action grievance.

The Employer points out that the Letter of Agreement was signed in 2014 and the current collective bargaining agreement between the parties took effect July 1, 2015. The Employer claims that at no prior point in time did the Union allege that discrepancies existed between the OH electronic grievance system and language within the parties' current collective bargaining agreement. The Employer claims that Ms. Nicholson's testimony supports the Employer's position as to what the parties intended when they agreed to the language bearing on the appeal process in the parties' grievance procedure, and the Union failed to put forth any evidence reflecting a different intention or understanding between the parties.

The Employer recalled the testimony provided by Mike Duco, the former Deputy Director of the Office of Collective Bargaining but found the historical information provided by Mr. Duco

to be largely irrelevant to the issues raised by this class action grievance, once the parties had transitioned to the OH electronic grievance system, entered into the Letter of Agreement to implement that system, and modified through bargaining the language of Article 25.

The Employer notes that Mr. Duco testified that in the 2000-2003 collective bargaining agreement a new process for discharge grievances was established, allowing discharge grievances to be automatically appealed to mediation. Mr. Duco testified that this language did not change for the 2012-2015 collective bargaining agreement but noted that in 2014 the Letter of Agreement was signed by both parties, modifying the language of Article 25 of the parties' Agreement. Mr. Duco confirmed that the Letter of Agreement made changes, including grievances that had been automatically filed at Step 3 in the past would now be filed at Step 2 in the OH electronic grievance system; for grievances that included one-day suspensions, five-day suspensions, ten-day suspensions, and terminations of employment formerly filed at Step 3 would in the future be filed at Step 2. Mr. Duco testified that it was his recollection that Ms. Nicholson had been attempting to "... get a standardized process."

At page 8 of the Employer's post-hearing brief the following appears:

> ...What we learn from Mr. Duco's testimony is that the parties created an electronic grievance system and had it programmed in a way to create as much standardization in the process as possible. As a result, language in the CBA had to be altered in order to address some of the changes that come with creating a standardized process. That led to the parties entering into an LOA and then subsequently changing the language in the CBA in the 2015 round of negotiations. The language was designed to match the standardized process that was created in the electronic system. Therefore, the parties have contract language to rely on in determining whether grievances are properly processed, and unlike Mr. Eastman has asserted, the reliance is not on the programming.

The Employer argues that Mr. Duco's testimony concerning the Letter of Agreement and its effect on past language in Article 25 shows that changes were incorporated into the 2012-2015

collective bargaining agreement by means of the Letter of Agreement and therefore the intention of the parties in 2000 is irrelevant.

The Employer points out that subsequent to the 2014 Letter of Agreement the language of the parties' collective bargaining agreement changed in 2015. The Employer notes that language was added to Article 25, section 25.02 under "Discharge Grievances" that states when a discharge grievance becomes eligible for appeal. The Employer contends this change nullifies the Union's claim that the Union is not required to appeal discharge grievances because language in prior collective bargaining agreements did not require them to do so. The Employer argues that the prior language has been changed and notes that the changes were negotiated and agreed by both parties.

The Employer points out the Union asserts that the eligibility language does not require the Union to activate the appeal button but notes that no testimony was provided to support this assertion. In contrast, the Employer points to the testimony from Ms. Nicholson, Mr. Duco, and Ms. Rankin, each of whom testified that, like all Step 2 grievances, discharge grievances must be appealed.

The Employer recalls the testimony from Ms. Rankin who explained that grievances do not advance automatically within the OH electronic grievance system. Ms. Rankin testified that grievances become eligible for appeal and the Union must then indicate an appeal is intended as spelled out by the parties' collective bargaining agreement. The Employer argues that e-mail is not a proper vehicle under the parties' Agreement to lodge an appeal. At page 9 of the Employer's post-hearing brief the following appears:

> ... Even if the system closed the grievance on the 29th day, the grievance still had not been appealed within 15 days, and therefore, by operation of the CBA language, was withdrawn. By any means of counting, all three (3) grievances exceeded the fifteen (15) day time limit to appeal and the additional fifteen (15) days before closure and therefore are considered withdrawn pursuant to the language in the

2015-2018 CBA.

As to the Union's assertion that an appeal to mediation was not required and the Union's claim that its purported arbitration request directed to Deputy Director Rankin seeking to schedule each grievance for arbitration occurred within 180 days of the filing of each grievance, the Employer points to the language of Article 25, section 25.02 under "Discharge Grievances" that tells the parties when a discharge grievance becomes eligible for appeal. The Employer states that this language gives a timeline for mediation and a timeline for arbitration that differ from other Step 2 grievances.

The Employer argues that the Union's failure to appeal the grievances from Step 2 to ADR caused the grievances to be treated as if they had been withdrawn, and therefore these grievances were found not eligible for ADR or arbitration. As argued by the Employer at page 10 of its post-hearing brief:

> ... The problem with the Union's argument that the February 2, 2017 email is a timely appeal is that the grievances at that point in time were either withdrawn (for not being appealed within 15 days) or closed (for not being appealed within 30 days). Withdrawn and closed grievances do not advance through the grievance procedure.

The Employer emphasizes that in planning, programming, and implementing the OH electronic grievance system it had been the intention of the Employer that no separate path be carved out for discharge grievances. The Employer argues that this circumstance requires the appeal demanded by the Employer at Step 2 "... similar to every other Step 2 grievance." See Employer's post-hearing brief at page 11.

The Employer contends that the Union has not carried it burden of proof in this case and it is argued that a preponderance of evidence in the hearing record shows the Union was required to

appeal a discharge grievance from Step 2 to mediation following the implementation of the OH electronic grievance system in 2014, the signing of the Letter of Agreement in 2014, and the new language negotiated, agreed, and included within the parties' current collective bargaining agreement that modified the language of Article 25, section 25.02.

The Employer points out it is undisputed that the Union did not appeal any of the three grievances at issue within fifteen days of their eligibility for an appeal and therefore each grievance was treated as having been withdrawn, nor did the Union appeal any of the three grievances within thirty days of each grievance becoming eligible for appeal, leading the grievances to be closed within the OH electronic grievance system. The Employer notes that the parties had agreed that a grievance not appealed within the designated timeframe for such an appeal would be treated as if it had been withdrawn. A grievance that has been withdrawn is not arbitrable and does not require scheduling to the next step in the grievance procedure. Because each of the three grievances was treated properly as each was treated as if it had been withdrawn, the lack of further processing of these three grievances under the parties' collective bargaining agreement does not present a violation of the parties' Agreement.

For the above-cited reasons, the Employer urges the arbitrator to find that the Employer did not violate the parties' collective bargaining agreement on the facts of this case, and deny the Union's class action grievance in its entirety.

DISCUSSION

The class action grievance that is the subject of this arbitration proceeding considers three discharge grievances filed in August, 2016. The facts as to how these three discharge grievances encompassing Ms. Ballard, Ms. Queen, and Mr. Payne were processed under the parties'

contractual grievance procedure are, with few exceptions, undisputed. The parties' differences in this case arise from the application of express language in the parties' current collective bargaining agreement, Joint Exhibit 1, specifically the language within the parties' grievance procedure in Article 25 within the parties' current collective bargaining agreement in effect from July 1, 2015 through February 28, 2018. Whether the handling of the three discharge grievances complied with the terms of the parties' collective bargaining agreement is exactly the substance of the parties' Joint Issue Statement to be determined by the arbitrator in this case. As noted above in the Statement of the Case portion of this decision, the class action grievance herein does not consider the merits of the removals. The grievance herein considers process, not whether just cause was present for the discipline imposed.

The language of Article 25, section 25.03 sets out arbitration procedures and in the penultimate paragraph within this section the following language appears:

> ...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 expressed language of this Agreement.

The undersigned arbitrator's intention in this proceeding therefore is to give effect to the language in the parties' current collective bargaining agreement without changing or ignoring any of the language expressed within the parties' current collective bargaining agreement.

A preponderance of evidence in the hearing record indicates that there is language within the parties' collective bargaining agreement within the grievance procedure in Article 25 that is unique to the bargaining unit represented by OCSEA, AFSCME, Local 11. This unique language is found under the subheading "Discharge Grievances" within Article 25, section 25.02. The other subheadings in Article 25, section 25.02 – Grievance Steps are: Layoff, Non-Selection, Discipline

and Other Advance-Step Grievances; Informal Discussion of Grievance; Step One – Intermediate Administrator; Step Two – Agency Head or Designee; Alternate Dispute Resolution (ADR), and Arbitration. These subheadings contain language found in the other four collective bargaining agreements in effect between the State of Ohio and State of Ohio public employee unions. The language of "Discharge Grievances" however is exclusive to the OCSEA, AFSCME, Local 11 and State of Ohio collective bargaining agreement.

The hearing record contains the reasons that the unique language presented under "Discharge Grievances" was included in Article 25 of the parties' Agreement, Joint Exhibit 1. OCSEA, AFSCME, Local 11 is the largest public employees' union in the State of Ohio and both parties intended to limit through reasonable means the potential liability arising from discharge grievances within this large pool of organized public employees.

While the parties intended unique language exclusive to the bargaining unit represented by OCSEA, AFSCME, Local 11 in the parties' collective bargaining agreement under "Discharge Grievances" in Article 25, section 25.02, the OH electronic grievance system constructed by the State of Ohio with the participation of the Union was to remain a single system responsible for receiving, recording, and maintaining all grievances and capable of producing a chronology of events following the filing of each grievance. As confirmed by more than one witness at the arbitration hearing herein, no pathway specific to the language contained under "Discharge Grievances" in Article 25, section 25.02 was carved out of the OH electronic grievance system. The OH electronic grievance system was expected, for purposes of grievance processing, to handle all grievances from all five unions with which the State of Ohio had a contractual relationship, without any special configuration or features intended to address the unique language within the parties' current collective bargaining agreement under "Discharge Grievances."

The language in Article 25 of the parties' collective bargaining agreement that is not presented under "Discharge Grievances" in Article 25, section 25.02 is applicable to all grievances filed by OCSEA, AFSCME, Local 11 with the exception of discharge grievances. The subheading "Discharge Grievances," with some precision and directness, identifies the type of grievance to which this language is to be applied.

The Employer has urged the arbitrator in this case to consider all of Article 25 in the parties' collective bargaining agreement in determining whether a violation of the parties' Agreement has occurred. The Employer urges the arbitrator to find that all of the language appearing within Article 25 of the parties' Agreement is applicable to the OCSEA, AFSCME, Local 11 bargaining unit because all of the language of Article 25 is included in the collective bargaining agreement that covers this bargaining unit.

The arbitrator agrees with the Employer's contention that the entire Agreement between the parties should be considered in resolving the grievance at issue. Clearly there are many Articles in the parties' Agreement that are not applicable to the facts of this case as those Articles address issues not raised by the grievance at issue herein. As to the parties' contractual grievance procedure, however, the Employer's claim that all of the language of Article 25 should be considered is well-taken. Consideration of the grievance at issue does call for a consideration of all of the contractual language that is relevant to the issues raised by that grievance and the arbitrator finds that the various sections of Article 25 in the parties' collective bargaining agreement are to be read and considered in determining the outcome of this arbitration.

Although the arbitrator sides with the Employer as to the more expansive reading of Article 25 in resolving this class action grievance, the arbitrator is not persuaded that all of the language of Article 25 can be applied to the facts of this case.

A significant fact concerning the language of Article 25, section 25.02 is that it contains language that is not found in any other collective bargaining agreement to which the State of Ohio is a party, including any other collective bargaining agreement that calls for the filing of a grievance using the OH electronic grievance system. The collective bargaining agreement to be applied in this case at Article 25, section 25.01 (E) provides: "Grievances shall be filed using the electronic grievance system." The arbitrator finds that each of the grievances considered under the class action grievance to have been timely and appropriately filed using the OH electronic grievance system. This provision has never been put forward as a basis for disposing of the three discharge grievances addressed by the class action grievance.

While the grievances were filed as required by Article 25, section 25.01 (E) using the OH electronic grievance system, other activities associated with processing these three grievances did not occur, namely an appeal button was not activated by the Union in any of the three grievances. The Employer contends that the activation of the appeal button appearing on the screen of the OH electronic grievance system was the only method for registering an appeal of each of the grievances through the OH electronic grievance system, and it is the position of the Employer that only the activation of the appeal button is allowed under the language of the parties' collective bargaining agreement.

As noted above, the language of Article 25, section 25.01 (E) provides that grievances must be filed using the OH electronic grievance system. This mandatory language is specifically and expressly connected to the initial submittal of a grievance to the Employer. The Employer is entitled to reasonable notice of the intentions of the Union in regard to an unresolved grievance within timelines agreed by the parties. The arbitrator finds no express language in the parties' collective bargaining agreement however that would limit the Union in how reasonable, timely

notification may be provided so as to make the Employer aware of the Union's intention as it relates to an unresolved discharge grievance at Step 2.

In one case, the case of a grievance being filed on behalf of Ms. Ballard by Union Steward Sean Murphy, there is in the snapshot of Ms. Ballard's grievance, beginning at the bottom of the first page of Joint Exhibit 3, the following language:

> The Union would ask this Grievance be moved right to Step Three. The Union feels Ms. Ballard was removed unfairly and is seeking reinstatement to her position and be made whole with full compensation of time and wages.[1]

The above instructions from the Union appear within a snapshot generated by the OH electronic grievance system. The Employer argues, nonetheless, that without the activation of the appeal button the Union has failed to notify the Employer of the Union's intention to appeal the grievance of Ms. Ballard through a waiver of mediation and a move to arbitration. Similar language does not appear in the snapshots of the grievances filed by Ms. Queen and Mr. Payne.

The Union on February 2, 2017 and again on February 10, 2017 requested through e-mails to the Director of the Office of Collective Bargaining that the grievances of Ms. Queen, Ms. Ballard, and Mr. Payne be advanced to arbitration under the language of Article 25, section 25.02. The Employer has contended in this proceeding that the notice received through e-mail is not an acceptable method of notification of the Union's intention as to an unresolved discharge grievance. This assertion, however, subsequent to the filing of a discharge grievance using the OH electronic grievance system, is not found within the language of the parties' Agreement. The arbitrator is not authorized to add language to the parties' Agreement and therefore declines to find that the activation of the appeal button on the OH electronic grievance system is the only method through

[1] Regrettably, the arbitrator cannot discern from the Ballard grievance snapshot when this language was entered into the OH electronic grievance system.

which the Union may indicate to the Employer the Union's intentions as to unresolved grievances that were filed using the OH electronic grievance system.

The language of Article 25, section 25.02 within "Discharge Grievances" cannot be read, in all cases, to be in accord with all other provisions within Article 25. The language under "Discharge Grievances" in Article 25, section 25.02 refers to timelines to be applied to the processing of discharge grievances originating in the OCSEA, AFSCME, Local 11 bargaining unit, and provides other mandatory and permissive actions associated with the processing of discharge grievances emanating from that bargaining unit.

Because the language of "Discharge Grievances" is unique and because the parties clearly intended that discharge grievances under their Agreement be treated differently from other grievances to which Article 25 applies, including layoff, non-selection, or other forms of discipline, the language under "Discharge Grievances," in the case of a discharge grievance, is entitled to deference as a specific and express provision limited to a particular class of grievances, discharge grievances. Such specific language is intended to take precedence over other language in Article 25 that conflicts with the express language presented under "Discharge Grievances." To the extent that other language in Article 25 is in accordance with the language found in "Discharge Grievances" in Article 25, section 25.02, the overall effect is moot as the outcome is the same under either provision. However, when the language under "Discharge Grievances" within Article 25, section 25.02 conflicts with other language in Article 25, the language located outside of "Discharge Grievances" must give way to the more specific agreed language between the parties that is to be applied in the particular case of a discharge grievance.

The express language found under "Discharge Grievances" in Article 25, section 25.02 within the parties' current collective bargaining agreement begins with an obligation upon the

Employer to conduct a meeting and respond to the grievance at Step Two within fifty (50) days of the date upon which the grievance was filed. This language defines the Employer's Step Two response due date to be fifty (50) days from the date of the filing of the grievance.

The express language under "Discharge Grievances" in Article 25, section 25.02 provides that if the grievance remains unresolved at Step Two or if the Employer's Step Two response is not received within fifty (50) days from the grievance's submission or by the date of an agreed extension "... the grievance shall be automatically eligible for appeal." This language is key to the Employer's position in this class action grievance because of fifteen-day and thirty-day deadlines found elsewhere in Article 25 that depend upon an eligibility to appeal as a triggering event.

Each discharge grievance considered in this case was not resolved at Step Two. The facts of this proceeding show that the Employer did issue a Step Two response within the fifty days allotted for such a Step Two response. The Employer emphasizes that once the grievance remained unresolved at Step Two following the Employer's denial of the grievance at that level of grievance review, the grievance became "automatically eligible for appeal" and therefore subject to appeal deadlines expressed within Article 25, section 25.02 under "Step Two – Agency Head or Designee" providing a fifteen-day period in which to file an appeal to move the unresolved grievance to ADR, and Article 25, section 25.06, Time Limits which provides an appeal window of thirty days from the date the grievance became eligible for an appeal.

There is, however, other language presented under "Discharge Grievances" within Article 25, section 25.02 that reads: "The parties shall conduct a mediation within sixty (60) days of the due date of the Step Two response." This is a key provision underlying the Union's position in this proceeding. The Union's argument is that no appeal is required to be made in the case of a discharge grievance that remains unresolved at Step Two of the parties' current Agreement under

Article 25, section 25.02 because the agreed language under “Discharge Grievances” provides that a mediation “shall” be conducted within sixty (60) days of the Step Two response due date and does not indicate that the movement of the unresolved grievance to mediation depends upon an appeal being filed by the Union, as is the case when addressing non-discharge grievances under Article 25 of the parties’ current Agreement who “must appeal the grievance to alternative dispute resolution (ADR) within fifteen (15) days of the Step Two response due date.” This language appears in Article 25, section 25.02 under “Step Two – Agency Head or Designee” and clearly provides a procedure leading to mediation that is different than what is expressed in the agreed language under “Discharge Grievances” about the mandatory movement of an unresolved discharge grievance at Step Two to mediation.

The “Discharge Grievances” language in Article 25, section 25.02 presents language that describes an automatic movement from an unresolved grievance at Step Two to mediation (ADR) and sets a time limit for this to occur. The language under “Step Two – Agency Head or Designee” provides that the Union “must appeal” to ADR. To apply the language in “Step Two – Agency Head or Designee” to a discharge grievance, requiring an appeal to ADR, would nullify the language about moving to mediation as an automatic procedure as expressed in “Discharge Grievances.” The language that states that the parties shall conduct a mediation within sixty (60) days of the due date of the Step Two response cannot be given effect if the Union’s appeal is required within fifteen days or thirty days of the Step Two response. The express language of “Discharge Grievances” in Article 25, section 25.02 provides a Step Two response due date that is fifty days after the filing of the grievance, followed by mediation to occur within sixty days of the Step Two response due date, 110 days after the filing of the grievance. The agreed language to the effect that the parties “shall” conduct a mediation within 110 days of the filing of the grievance

if the grievance remains unresolved at Step Two conflicts with the contention that the lack of an active appeal truncates the guarantee of mediation after fifteen days or thirty days following the date of the Step Two response. The language under "Step Two – Agency Head or Designee" requiring an appeal in fifteen days to move the grievance to mediation, and the language of Article 25, section 25.06 requiring an appeal to mediation or arbitration within thirty days are not in accord with the mandatory language under "Discharge Grievances" that calls for the conduct of a mediation within sixty days of the Step Two response due date.

The witnesses at the hearing herein all spoke of the necessity of registering an appeal in the OH electronic grievance system following an unresolved grievance at Step Two because the OH electronic grievance system does not move a grievance forward except under the activation of the electronic grievant system's appeal button. The proceeding herein, however, is determined by the express, agreed language within the parties' current collective bargaining agreement, an Agreement in effect from July 1, 2015 through February 28, 2018. As pointed out by the Employer in its post-hearing arguments, the negotiated changes to the language of the parties' current Agreement in Article 25, section 25.02 have today outstripped the former transitional instructions in the April, 2014 Letter of Agreement and language in prior collective bargaining agreements. The class action grievance herein is to be determined by the language in the parties' current collective bargaining agreement and not on the operational necessities of the OH electronic grievance system. The grievances having been filed in a timely and appropriate manner using the OH electronic grievance system, as required by Article 25, section 25.01 (E), the grievances are found to have satisfied the language of the parties' Agreement in terms of what is required to initiate each grievance. There is no language in the parties' Agreement that requires an unresolved discharge grievance at Step Two under Article 25, section 25.02 be actively appealed to mediation.

The language agreed by the parties in Article 25, section 25.02 under "Discharge Grievances" guarantees to the Union the conduct of mediation within the 110 days extending from the filing of the grievance. To the extent that other time limits and appeal demands appear within Article 25, even in other subheadings in Article 25, section 25.02, the unique, express, agreed language presented under "Discharge Grievances" is entitled to application and enforcement as the more specific and particular expression of the parties' intentions as they relate to a specific subset of grievances, namely discharge grievances arising from the OCSEA, AFSCME, Local 11 bargaining unit.

The express language under "Discharge Grievances" in Article 25, section 25.02 also provides that: "The Union will propose arbitration of the grievance within sixty (60) days of the date of the mediation, but no more than one hundred eighty (180) days from the filing of the grievance." There was no mediation conducted among the three discharge grievances at issue under this class action grievance and there was no waiver of mediation from either party except to the extent that an undated waiver appears in the Ballard grievance snapshot, Joint Exhibit 3.

In any event, Article 25, section 25.02 under "Discharge Grievances" provides deadlines for filing an appeal to arbitration, namely either sixty (60) days after mediation or no more than 180 days from the filing of the grievance. The language in Article 25, section 25.02 under "Discharge Grievances" that refers to an unresolved grievance being eligible for appeal cannot be understood to nullify the express language in Article 25, section 25.02 under "Discharge Grievances" that allows an appeal to arbitration within sixty (60) days of mediation but in any event within 180 days of the filing of the grievance. The Employer's position urges an interpretation of an appeal right to mean that a mandatory mediation right and an express arbitration appeal right are extinguished. The arbitrator declines to endorse such an interpretation.

A discharge grievance at Step Two that has been denied by the Employer may be eligible for an appeal (to arbitration not to mediation because the language of "Discharge Grievances" in Article 25, section 25.02 calls for transition to mediation of an unresolved discharge grievance at Step Two through a mandatory process) but that appeal eligibility does not void the language under "Discharge Grievances" concerning timelines for mediation and appeals to arbitration.

The notice provided through e-mails from the Union's General Counsel to the Director of the Office of Collective Bargaining was within 180 days of the filing of each grievance, was at an appropriate level of authority for purposes of official notification on both sides, and provided reasonable notice of the Union's intentions regarding the three discharge grievances at issue. Having notified the Employer within the time limits agreed, the Union was entitled to have the three discharge grievances moved to arbitration and processed to conclusion under Article 25 of the parties' collective bargaining agreement.

Because the discharge grievances were refused arbitration by the Employer in violation of the language of the parties' collective bargaining agreement, the class action grievance is sustained and the Employer is ordered to move the three discharge grievances of Ms. Queen, Ms. Ballard, and Mr. Payne to arbitration under Article 25 of the parties' current collective bargaining agreement.

[The remainder of this page is blank.]

AWARD

1. The class action grievance at issue in this proceeding is arbitrable and properly before the arbitrator for review and disposition.

2. Under the parties' collective bargaining agreement, the Union is not required to activate an appeal button to move a discharge grievance that is unresolved at Step Two to mediation as this movement to mediation under the language of the parties' collective bargaining agreement is mandatory and automatic.

3. The Employer violated the parties' collective bargaining agreement by closing and refusing the Union's request to arbitrate the grievances filed on behalf of Darlene Ballard (DMR-2016-03502-4), Deborah Queen (DMR-2016-0323-4), and Jonathan Payne (DMR-2016-03324-4).

4. The class action grievance is sustained.

5. The Employer shall honor the Union's requests to move the three discharge grievances at issue under the class action grievance to arbitration under the parties' collective bargaining agreement in effect from July 1, 2015 through February 28, 2018.

6. The arbitrator will retain jurisdiction over this matter for sixty days.

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
500 City Park Avenue
Columbus, Ohio 43215
howard-silver@att.net

Columbus, Ohio
October 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that duplicate electronic originals of the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union, and the State of Ohio, Department of Administrative Services, Office of Collective Bargaining, Employer, case number: OCS-2017-00675-0, were served upon the following this 18th day of October, 2017:

Brian Eastman, Esquire
General Counsel
OCSEA, AFSCME, Local 11
390 Worthington Road, Suite A
Westerville, Ohio 43082-8331
BEastman@ocsea.org

Steven T. Cochrane, Esquire
Associate General Counsel
OCSEA, AFSCME, Local 11
390 Worthington Road, Suite A
Westerville, Ohio 43082-8331
TCochrane@ocsea.org

Victor Dandridge
Assistant Manager
Office of Collective Bargaining
1602 West Broad Street
Columbus, Ohio 43223
Victor.Dandridge@das.ohio.gov

Cullen Jackson
Labor Relations Administrator
Office of Collective Bargaining
1602 West Broad Street
Columbus, Ohio 43223
Cullen.Jackson@das.ohio.gov

Jessica Chester
Arbitration Services
OCSEA, AFSCME, Local 11
390 Worthington Road, Suite A
Westerville, Ohio 43082-8331
JChester@ocsea.org

Alicyn Carrel
Arbitration/Mediation Liaison
Office of Collective Bargaining
Department of Administrative Services
1602 West Broad Street
Columbus, Ohio 43223
Alicyn.Carrel@das.ohio.gov

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
500 City Park Avenue
Columbus, Ohio 43215
howard-silver@att.net

Columbus, Ohio
October 18, 2017