ARBITRATION AWARD SUMMARY

OCB Award Number: 277

OCB Grievance Number: 24-10-880523-0038-04-01

Union: FOP II

Ronald Schorling

Department: MR/DD

Arbitrator: Harry Graham

Management Advocate: Tim Wagner

Union Advocate: Paul Cox

Arbitration Date: 5-1-89

Decision Date: 5-9-89

Decision: Arbitrable

In the Matter of Arbitration Between Fraternal Order of Police - Ohio Labor Council and The State of Ohio, Department of Mental Retardation and Developmental Disabilities	Case No.: 24-10-880523-0038-04-01

Appearances: For FOP-OLC:

Paul Cox
General Counsel
Fraternal Order of Police-Ohio Labor Council
3360 East Livingston Ave.
Columbus, OH. 43227

For The State of Ohio:

Tim Wagner, Chief
Arbitration Services
Office of Collective Bargaining
65 East State St.
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties this matter came for hearing in Columbus, OH. before Harry Graham on May 1, 1989. At the hearing both parties were provided complete opportunity to present testimony and evidence. No post hearing briefs were filed in this dispute and the record was declared closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

> Is the Grievance, Case No. 24-10-880523-0038-04-01 arbitrable under Article 20 of the Contract?

Background: No dispute exists concerning the events that give rise to this controversy. The Employer had in its employ the Grievant, Ronald Schorling. At the time of the events that produced this dispute he was employed at the Northwest Ohio Developmental Center in Toledo, OH. On May 18, 1988 Mr. Schorling was terminated by the Department of Mental Retardation and Developmental Disabilities (MRDD). A grievance protesting that discharge was filed. It was processed through the procedure of the parties without incident until completion of Step 4, the Step in the procedure prior to arbitration. At the conclusion of Step 4 of the procedure the parties did not reach agreement to resolve the dispute over Mr. Schorling's discharge. A letter to that effect was mailed on August 31, 1988 to the Grievant, Mr. Schorling. That letter was sent certified mail, return receipt requested. On the same date copies of that letter were sent by regular mail to the Union's Staff Representative, Ed Baker, at the Union office in Columbus, OH. and to John Beattie, Labor Relations Coordinator for MRDD at its Columbus, OH. office. Nothing further was heard by the Office of Collective Bargaining about this matter until Mr. Dick Daubenmire of the Office of Collective Bargaining received a letter from the Union referring the dispute to arbitration. That letter was dated October 20, 1988 and postmarked October 21, 1988. Some time later, on December 19, 1988 Tim Wagner, Chief of Arbitration Services, replied to

the Union's letter of October 20, 1988. In his letter to the Union he declined to refer the controversy over Mr. Schorling's discharge to arbitration. He was of the view that the Agreement at Article 20 established time limits for processing of grievances at various stages of the procedure. By referring the Schorling discharge to arbitration on October 20, 1988 the State felt the Union had not complied with the terms of Article 20 of the Agreement which provide that the Union has fifteen (15) days from receipt of the Step 4 answer to advance the grievance to arbitration. The Union took approximately seven weeks to refer the Schorling discharge to arbitration, well beyond the 15 days specified in the Agreement in the opinion of the State. The Union protested this interpretation of the Contract by the Office of Collective Bargaining given the facts of this case. The parties agree that the question concerning the arbitrability of Ronald Schorling's discharge is properly before the arbitrator.

Position of the Union: The Union insists that it acted in timely fashion in this situation. In making that assertion it points to the facts surrounding the mailing of the letter rejecting Mr. Schorling's step 4 appeal on August 31, 1989. The letter to Mr. Schorling was sent via certified United States mail, return receipt requested. There is no record that the Employer received the return receipt. It was never produced for the Union in discussions prior to the

arbitration hearing. It was not introduced into evidence at the arbitration proceeding on May 1, 1989. The Union views the lack of the return receipt as evidence that the State never received it. That indicates to the Union that Mr. Schorling cannot be said to have received the Step 4 reply mailed by the Office of Collective Bargaining on August 31, 1988. Similarly, the Union Staff Representative, Ed Baker, testified at the hearing that the copy of the letter addressed to him at the Union office in Columbus was not received. Had it been received, some action would have been taken to deal with Mr. Schorling's grievance. In fact, in order to follow up what the Union regarded as unseemly delay in receipt of the Step 4 answer from the State, Mr. Baker inquired of the Office of Collective Bargaining on October 13, 1988 concerning the status of the Step 4 answer. It was then he learned of the existence of the August 31, 1988 letter to Mr. Schorling rejecting his appeal. On October 19, 1988 he went to the MRDD office in Columbus to secure a copy. On October 21, 1988 the Union advanced the grievance to arbitration. Clearly the filing for arbitration on October 21, 1988 is within the 15 day period prescribed by the Agreement to refer a dispute to arbitration. As soon as it knew the State had rejected the Step 4 appeal the Union acted.

As the Union views the record there is no indication that the State actually mailed the letter to either Mr.

Schorling, the Grievant or Mr. Baker, the Staff Representative. Evidence to indicate the letters were mailed is lacking. As that is the case, the Union urges that the time limits have been complied with in this instance and that the question concerning Mr. Schorling's discharge should be heard on its merits.

Position of the Employer: The State is of the view that the appeal to arbitration involved in this dispute is untimely. The Agreement permits the Union to appeal to arbitration within fifteen (15) days of receipt of the Step 4 answer. Obviously that did not occur in this case. The Step 4 letter was mailed on August 21, 1988. The Union did not file for arbitration until October 21, 1988, well beyond the fifteen days set forth in the Agreement.

Employer Exhibit 2 is the copy of the August 31, 1988 letter, the Step 4 response, mailed to the Labor Relations Coordinator for MRDD. It is stamped as received on September 1, 1988 at 3:23PM. If it is shown that MRDD received the letter it must be presumed that the other parties, the Grievant and the Union, did as well. Furthermore, it is well accepted in labor arbitration that service by mail is taken as accomplished in the absence of a showing delivery did not occur in the State's view. It must be presumed that the letters sent to Baker and Schorling were delivered the State urges.

The parties put the time limits in the grievance

procedure to ensure expeditious handling of grievances. That did not occur in this instance but the fault lies with the Union, not the State it insists. No extension of the time limits was agreed upon for processing this grievance. There is no history of laxity with respect to time limits. To the contrary, the State has scrupulously observed them it indicates. Should the Union be permitted a hearing on the merits of this case the door would be opened for a multitude of disputes concerning time limits, a situation the State has attempted to avoid.

The parties have provided in their Agreement for the normal restrictions on the authority of an arbitrator. Found at Article 20.07, the Agreement prohibits the arbitrator from adding to, subtracting from, or modifying the terms of the Agreement. If a finding is made for the Union in this case that is precisely what will occur according to the State. The strict time limits bargained for by the parties will have been nullified.

The State has in place a system for making a record in Step 4 answers. That system was followed. As that is the case and the Union attempted to advance Mr. Schorling's grievance to arbitration beyond the 15 day period provided for in the Agreement the case should be declared to be untimely according to the State.

Discussion: The documentary record and testimony received at the hearing indicates that the State has in place an

excellent procedure for notifying people involved at Step 4 of the grievance procedure of the outcome of the Step 4 meeting. A Certified letter with a return receipt is mailed to the grievant. Copies are sent to the Union and appropriate departmental labor relations official. A paper trail is created to substantiate a subsequent claim that a letter has been sent and delivery made. In this case, for whatever reason, the paper trail that should exist is lacking. It should be easy for the State to produce the return receipt from Mr. Schorling. It did not do so. There is nothing on the record to indicate that delivery was attempted or made. That evidence should be readily available. Its absence is telling.

Mr. Baker, the Union Staff Representative, testified that he never received the August 31, 1988 letter. No reason exists to doubt his testimony. Similarly, there is no reason to doubt that the State prepared the letter as indicated by its principal witness, David Norris. What is open to question is whether or not the letter was actually mailed to either the Grievant or the Union or, if mailed, was delivered. The paper trail that should exist to substantiate the claim of the State is absent. The evidence the system is designed to generate to support the State in situations such as this is not there. That must prompt a conclusion that neither the Grievant nor the Union were properly notified of the rejection of the Step 4 appeal.

When the Union learned of the outcome of the Step 4

meeting it acted promptly. The record indicates its Staff Representative went to the MRDD office in Columbus and secured a copy of the August 31, 1988 letter. It is farfetched to think he did so to substantiate a subsequent claim that the Union had not received notice of the outcome of Step 4.

This case is decided strictly upon the fact situation placed before the Arbitrator. No inference should be had from the decision that time limits are not to be strictly construed. To the contrary, this Arbitrator like others, has held grievances to be not arbitrable when either party has failed to comply with the procedure set forth in the Agreement. The facts presented in this situation present sufficient reason to doubt that delivery of the August 31, 1988 letter to either Mr. Schorling or the Union occurred. As the Union acted promptly when it learned of the rejection of the Step 4 appeal it must be determined that it is in compliance with the time limits set forth in the Agreement.

Award: Based upon the preceding discussion the grievance is sustained. The question of whether or not the discharge of Ronald Schorling is arbitrable is answered affirmatively. The parties are to proceed to arbitration of his discharge on the merits.

Signed and dated this 9th day of May, 1989 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator