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#1068

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

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, AFSCME Local 11
AFL-CIO

and

OHIO VETERAN'S HOME AGENCY

Case No. 33-00-20091202-0128-01-05
Grievant: Donnia Pearson

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SEP 22 2010

DCSEA-OFFICE OF
GENERAL COUNSEL

ARBITRATOR'S
OPINION AND AWARD

This Arbitration arises pursuant to collective bargaining agreement ("the Agreement") between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ("the Union") and the STATE OF OHIO ("the State"), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator, whose decision shall be final and binding pursuant to the Agreement.

Hearing was held July 7 and 19, 2010. The Parties' representatives had full opportunity to present evidence and make oral argument.

APPEARANCES:

On behalf of the Union:

**DEBORAH BAILEY, Staff Representative, OCSEA, 390
Worthington Road, Westerville, Ohio 43082.**

On behalf of the State:

**JESSIE KEYES, Labor Relations Specialist, OCB, 100
East Broad Street, 14th Floor, Columbus, Ohio 43215.**

ISSUES

- 1. Is the grievance arbitrable?**
- 2. If the grievance is arbitrable, was the removal of the Grievant for just cause?**

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

April 15, 2009 – February 29, 2012

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ARTICLE 24 – DISCIPLINE

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action....

...

24.05 – Pre-Discipline

An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following notification to the employee....

...

24.06 – Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting....

...

...

ARTICLE 25 – GRIEVANCE PROCEDURE

25.02 – Grievance Steps

Layoff, Non-Selection, Discipline and Other Advance-Step Grievances

...A grievance involving a layoff, non-selection or a discipline shall be initiated at Step Three of the grievance procedure within fourteen (14) days of notification of such action.

...

...;

FACTS REGARDING ARBITRABILITY

The Grievant is a custodian in the Housekeeping Department of the Ohio Veterans' Home in Sandusky. She has been employed there approximately eleven years.

On October 20, 2009, at approximately 7:30am, the Grievant's supervisor saw the Grievant in the on-site Union office on the second floor of the Sherman building. This was not part of the Grievant's assigned work area. The Grievant's supervisor addressed the Grievant by name; the Grievant responded she was on approved Union release time.

On or about November 3, 2009, the Grievant's supervisor asked the Grievant to submit a written statement regarding her whereabouts during her shift on October 20, 2009. In an Employee's Statement dated November 3, 2009, the Grievant wrote:

On the day in question I was told that Vanessa Brown wanted to see me in her office. When I got there Vanessa told me she had called Bill Mayo & that I needed to go to Nursing Services. I got a pen & and note pad from Vanessa. On my way out I ran into Denise Griffaw. I told her that Bill already knew I was there & that I was going to Nursing Services. I also asked Denise this morning if I could fill this paper out & bring it back & she said yes.

More Harassment I guess!

On November 18, 2009, the Grievant's supervisor conducted an investigatory interview of the Grievant regarding her whereabouts during her October 20, 2009 shift. On or about December 2, 2009, the State gave written notice to the Grievant of a December 8, 2009 Pre-Disciplinary Meeting for the Grievant's alleged violation of Corrective Action Standard A-06 -- Extending Lunch or Break Periods, or Being Out of the Work Area Without Supervisor Permission.

On December 2, 2009, the Union filed Grievance No. 33-00-20091202-0128-01-05 on behalf of the Grievant. Articles 24.05 and 24.06 were identified as having been violated. The Statement of Facts provides:

Employee was charged with extending lunch break or break periods or being out of the work area without supervisor[']s permission. This is without just cause.

The Grievance Type checked was both Removal and Suspension. The remedy sought was "for discipline to be re[s]cinded, to be made whole. Record evidence includes Page 2 of the Grievance Form, where Donna Green, the Agency Labor Relations Officer, as Agency Designee, signed the Step 3 receipt on December 2, 2009. At the time of this grievance filing, the Grievant had not been removed or suspended.

On December 3, 2009, the Agency LRO e-mailed the Union Staff Representative in pertinent part:

Subject: Donnia's grievance

She's grieving an action that hasn't even taken place yet, fyi.

...

On December 8, 2009, a Pre-Disciplinary Meeting was held regarding the Grievant's whereabouts during her shifts on October 13, October 20, October 29, and November 6, 2009. Among those present at the Pre-Disciplinary Meeting were the Grievant's supervisor, the Grievant, and her Union representative.

In a letter dated December 22, 2009, the Agency Superintendent sent the Grievant a removal letter which stated in pertinent part:

On December 8, 2009 a pre-disciplinary meeting was scheduled in accord with OCSEA/AFSCME Article 24.05. You had [sic] alleged to have violated Ohio Veterans['] Home Corrective Action Standard(s) A-06; Extending Lunch or Break Periods, or Being Out of the Work Area without Supervisors Permission.

The pre-disciplinary officer assigned to your case found you to be in violation of this infraction. This letter is to inform you that because this is your fourth corrective action at the level of fine or suspension, your employment at the Ohio Veterans['] Home is terminated effective December 5, 2009 upon the receipt of this notice.

On February 4, 2010, Arbitrator Dwight Washington conducted the Non-Traditional Arbitration ("NTA") of Grievance Nos. 33-00-20090827-0089-01-05 and 33-00-20090908-0096-01-05, involving the Grievant's alleged violations of AN-04 and AD-01. In the Bench Decision and Award, Arbitrator Washington stated the Issue as:

Was the grievant's five (5) day working "paper" suspension for Just Cause? If not, what shall the Remedy be?

His Award provides:

The Grievant was discipline[d] for Just Cause in violation of AN-04; but just cause did not exist for a violation of AD-01 in that the facts fail[] to support that her conduct was insubordinate given the circumstances surrounding this matter. Discipline reduced to a 3 day paper suspension.

The Step Three Response in Case No. 33-00-20091202-0128-01-05, dated February 26, 2010, denied the grievance on its merits, and made no mention of the Grievant's December 5, 2010 removal. Rather, the Step Three Response referred to the:

UNION POSITION AS WRITTEN ON GRIEVANCE STATEMENT:

Employee was charged with extending lunch break periods or being out of the work area without supervisor's permission. This is without just cause.

REMEDY SOUGHT AS WRITTEN ON GRIEVANCE [sic] STATEMENT

For discipline to be rescinded, to be made whole.

...

FINDINGS

...

Based on the information and documentation provided the grievant violated the Ohio Veterans['] Home Corrective Action Standard A-06; Extending Lunch or Break Periods, or Being Out of the Work Area Without Supervisor Permission.

The grievance is denied in its entirety.

By letter dated March 8, 2010, which states it was e-mailed, the Union Grievance Manager wrote to the OCB Deputy Director in pertinent part:

RE: Donnia Pearson (Removal) 33-00-20091202-0128-01-05
Grievance No.: (OVH)

Dear Mr. Duco:

Please be advised that the OCSEA AFSCME, Local 11 is waiving mediation for the above referenced case. OCSEA is requesting that the case be scheduled for arbitration as soon as possible.

...

By e-mail dated March 11, 2010, the assigned Union Staff Representative asked the Agency LRO:

I need clarification on grievance numbers for Donnia Pearson. Is the attached grievance #3300-090908-0096-01-05? If so, please forward a copy of the Step 3 response.

Also, do your records indicate Pearson's actual termination grievance as #3300-091202-0128-01-05?

In a responding e-mail dated March 11, 2010, the Agency LRO wrote to the Union Staff Representative:

Ok here's the scoop – 33-00-20090827-0089-01-05 and 33-00-20090908-0096-01-05 were combined during the last round of mediations with Washington so those grievances are now closed. The termination grievance number is 33-00-20091202-0128-01-05.

**By letter dated May 6, 2010, the Union General Counsel wrote to the OCB
Deputy Director in pertinent part:**

**Re: Donnia Pearson
33-00- (09-12-02) - 0128-01-05
Veterans Home**

Dear Mr. Duco:

This letter is to inform you that OCSEA/AFSCME Local 11 requests that the above-referenced grievance be taken to arbitration pursuant to Section 25.02 of the contract with the State of Ohio.

...

The arbitration was scheduled by the Parties for July 7, 2010. On June 30, 2010, when the Parties were exchanging their lists of arbitration hearing witnesses, the State raised the arbitrability issue on the basis of timeliness. At the July 7, 2010 hearing, the State formally alleged the grievance was not arbitrable because it had been filed on December 2, 2009, before the Grievant had been notified by letter dated December 22, 2009 that she was discharged effective December 5, 2009. The Union asked for a break, which the Arbitrator granted. Approximately one half hour later, the Union returned to the hearing room and presented an un-numbered single-page grievance hand-dated December 23, 2009 that reads in pertinent part:

The grievant was terminated for alleged violation of CAS-A-06. The grievant is being single[d] out and harassed for attempting to represent another bargain[ing] unit employee. The grievant is being disciplined for release time for the administration of the contract that was requested in the appropriate manner.

The Grievance Type was identified as "Removal."

The State informed the Arbitrator it had never seen this second grievance. After off-the-record discussion, the Parties agreed to suspend the hearing until July 19, 2010 to give the Parties the opportunity to look for corroborating evidence regarding the filing of the second grievance.

The hearing resumed on July 19, 2010. Record evidence was presented on both arbitrability and the merits. Union witnesses testified the second grievance had been consolidated with the first grievance by the Agency LRO. The Agency LRO testified there had been no such consolidation, all filed grievances receive a number, and she had never seen the second grievance.

PARTIES' POSITIONS ON ARBITRABILITY

State's Position on Arbitrability

The first grievance is not arbitrable because it was filed before the Grievant was terminated. The second grievance was never filed, as evidenced by its lack of a grievance number. The first time the State saw the purported second grievance was on the first day of hearing, July 7, 2010. If there had been a consolidation of two grievances, there would be documentation of that; there is no such documentation.

Union's Position on Arbitrability

Through the steps of the grievance process, the State treated the first grievance as a proper termination grievance. The State cannot at this late date claim it was not a proper termination grievance. The second grievance was consolidated with the first grievance at Step 3, which is why the second grievance does not have a grievance number. The second grievance was timely filed after the Grievant was notified by letter dated December 22, 2009 of her removal.

OPINION ON ARBITRABILITY

The "First" Grievance

The first grievance was filed December 2, 2009 upon receipt by the Grievant of the pre-disciplinary packet. The Grievant was notified by letter dated December

22, 2009 of her removal. Accordingly, the first grievance is not arbitrable because it is unripe – i.e., the first grievance grieves the fact the Grievant was “charged” with being out of her work area; it did not grieve the Grievant’s removal. Indeed the December 2, 2009 grievance could not grieve the Grievant’s removal because the removal had not yet taken place; the Pre-Disciplinary Meeting had not even yet taken place. As set out by Elkouri, How Arbitration Works, 6th Edition, p. 224:

The occurrence of the event, which gives rise to the right to file a grievance, is a condition precedent to the commencement of the running of the time limitation for filing a grievance.

The Union contends the State has no right to prevail on its arbitrability argument because it did not raise it until the arbitration hearing. The State, however, did inform the Union by e-mail on December 3, 2009, that the grievance was premature. The Agency LRO e-mailed the Union Staff Representative in pertinent part:


Subject: Donnia’s grievance

She’s grieving an action that hasn’t even taken place yet, fyi.

The State also informed the Union on June 30, 2010 of the State’s position the grievance was untimely.

The “Second” Grievance

The grievance dated December 23, 2010 would have been timely filed if indeed it had been filed. The record shows, however, it was not filed. The Union could offer no explanation why the second grievance did not have a grievance number, other than it had been consolidated at Step Three with the first grievance. The Agency LRO credibly testified, however, she had never seen the second grievance until the first day of the arbitration hearing; there had been no consolidation of any second grievance at Step Three.


The Union was unable to offer any evidence, other than the hand-dated second grievance itself, to demonstrate it had been filed. The second grievance did not have a second page, as did the first grievance. The second page of a grievance form shows, among other information, the State-signed receipt of a grievance at Step Three. The second page of the first grievance had the Agency LRO's signature of receipt at Step Three.

The Union could not show any documentary evidence the second grievance had been consolidated with the first grievance. Moreover, the timing of the Union's presentation of the second grievance – after a break early on the first day of hearing immediately after the State alleged the non-arbitrability of the first grievance – is suspect.

AWARD

For the reasons set out above, the grievance is denied on the basis it is not arbitrable. The first grievance was filed before the removal took place. The second grievance was not filed.

The grievance being non-arbitrable, the Arbitrator does not have jurisdiction to address the merits of the grievance.

Dated: September 20, 2010

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator