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#1072

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 DEPARTMENT OF YOUTH SERVICES

Case No. 35-20-20090205-0010-01-03
Grievant: Hal Harlow

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 June 30, 2010 in Franklin Furnace, Ohio. Both Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument.

APPEARANCES:

On behalf of the Union:

DAVE JUSTICE, Staff Representative, OCSEA, 390 Worthington Rd., Suite A, Westerville, OH 43082

On behalf of the State:

MELINDA M. HEPPER, Labor Relations Officer, ODYS, 51 N. High St., Suite 101, Columbus, OH 43215

ISSUES

1. Is the grievance arbitrable?

2. If the grievance is arbitrable, did the State violate the Agreement when it denied overtime opportunities to the Grievant during the period he was on No Youth Contact?

RELEVANT PORTIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT 2006-2009

. . .

Article 13.07 – Overtime

The Employer has the right to determine overtime opportunities as needed. Employees shall be canvassed according to agency policy. If no policy exists then, employees shall be canvassed quarterly as to whether they would like to be offered overtime opportunities. Employees who wish to be called back for overtime outside of their regular hours shall have a residence telephone and shall provide their phone number to their supervisor.

Insofar as practicable, overtime shall be equitably distributed on a rotating basis by seniority among those who normally perform the work....

...

Article 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 but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

...

An employee may be placed on administrative leave or reassigned while an investigation is being conducted except that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment.

...

Article 25.02 – Grievance Steps
...All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event....

...

Article 25.03 – Arbitration Procedures

...

Questions of arbitrability shall be decided by the arbitrator....

STIPULATED FACTS

1. The Grievant was hired by the State as a Youth Specialist on November 15, 2004.

2. The Grievant received a three-day fine on January 30, 2009, which was settled to a written reprimand on July 8, 2009.

3. The Grievant was on No Youth Contact status ("NYC") from June 9, 2008 to January 30, 2009, which is 236 days.

ADDITIONAL FACTS

The grievance filed February 3, 2009 states in pertinent part:

> On 6/9/2008 I was placed in a "no contact" post. This situation lasted until 1-30-2009. During this time I missed out on numerous overtime opportunities both voluntary and mandatory.
>
> I wish to be made whole for the above mentioned.

On or about February 1, 2008, the Parties agreed to a Letter of Clarification on the subjects of overtime mandation, no-contact posts, and local agreements. Relevant to this arbitration is the paragraph regarding no-contact posts:

> When an employee is placed on a no contact post, that employee shall not take the post of another employee. The employee will be

> considered an extra on the shift unless there are posts available following roll call that can be considered "no contact posts."

PARTIES' POSITIONS

State's Position

The Grievance was not timely filed and therefore is not arbitrable. Section 25.02 requires a grievance to be filed "not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event." The Grievant was reassigned to a no-youth-contact ("NYC") position from June 9, 2008 through January 30, 2009. During that time period, he was assigned no overtime, though he requested it on multiple occasions. He did not file the instant grievance until February 5, 2009.

The discipline giving rise to the NYC reassignment was issued January 30, 2009. The Union filed a grievance on the Grievant's behalf regarding that discipline. At no time during the processing of that grievance did the Union ask for payment for missed overtime opportunities due to the disciplinary reassignment.

Additionally, the Parties entered into a Letter of Clarification in late January 2008 that provided in pertinent part:

> When an employee is placed on a no contact post, that employee shall not take the post of another employee. The employee will be considered an extra on the shift unless there are posts available following roll call that can be considered "no contact posts."

Thus, the Union was aware of and in agreement with the NYC overtime practice at least four months before the Grievant's placement on NYC.

In State of Ohio, DOT v. OCSEA, Local 11, AFSCME, Denise DeVoe, (1991), Arbitrator Bittel found a grievance not arbitrable when it was untimely filed by two days at Step 3. In State of Ohio, DYS v. OCSEA, Local 11, AFSCME, Tanya Davis-Prysock, (2009), this Arbitrator ruled a continuing violation was not timely filed at

Step 1. These cases demonstrate the Parties strictly adhere to contractual deadlines.

The Union contends the State waived its right to a procedural objection on timeliness because it did not raise that objection until one week before the hearing. Elkouri and Elkouri wrote, "The right to contest arbitrability before the arbitrator is usually held not waived merely by failing to raise the issue of arbitrability until the arbitration hearing." (6th ed., p. 290.)

This matter is not properly before the Arbitrator. In the alternative, if the grievance is found timely, the State's liability should be limited to the ten working days prior to the filing of the grievance if the the Union prevails on the merits.

Union's Position

The timeliness issue was not raised by the State during the grievance process. A Step 1 response was issued February 5, 2009. A Step 2 response was issued February 17, 2009. A Step 3 hearing was held May 7, 2009. A letter from the Union requesting the grievance be taken to arbitration was issued June 22, 2009. A Step 3 response was issued July 1, 2009. The mediation was held November 19, 2009. The State had the opportunity on all these occasions to raise the issue of timeliness.

The State did not raise the timeliness issue until the advocates met on June 23, 2010, seven days before arbitration, to review the stipulations. The State clearly has slept on its rights.

It is an accepted practice to wait to include issues of alleged harm associated with a removal or suspension until the grievance is filed on the discipline imposed. The filing of a grievance on the harm suffered during the course of an investigation/discipline process would have been considered unripe.

The grievance on the harm, lost overtime opportunities, was filed February 3, 2009. The grievance on the discipline was filed February 9, 2009. It was not until then that the totality of the lost overtime opportunities became apparent to the Union. It is normally the case that when related grievances are filed, they are placed on hold and are later merged by agreement of the Parties. In this case, that did not happen. In fact, the two grievances became unassociated. The grievance on the discipline, a three-day suspension, was settled at NTA on July 8, 2009. The grievance on the lost overtime is now before the Arbitrator, almost one year after the discipline was settled.

The 2009-2012 collective bargaining agreement became effective April 15, 2009. It included Agency-specific language regarding NYC posts, as well as a provision to establish a No Contact Procedures Committee. None of these provisions provides for the removal of an employee from the voluntary overtime list. In any event, this all occurred almost four months after the grievance was filed. The Parties have agreed the instant issue is governed by the 2006-2009 Agreement.

The grievance should encompass the entire period the Grievant was denied overtime during the 236 days he was assigned to NYC. If the Arbitrator finds the grievance untimely, the State's failure to return the Grievant to eligible overtime status for 80 days after the investigation was closed should result in an award of overtime payments during those 80 days. If the Arbitrator finds only the ten days before the grievance filing are timely, lost overtime opportunities during that period should be awarded.

The Grievant should be paid for the loss of overtime opportunities he would have been entitled to work at the overtime rate, including any holiday pay appropriate.

OPINION

The State has challenged the arbitrability of the grievance and therefore has the burden of proving the grievance was not timely filed. Two threshold issues are clear: 1) The State did not waive its right to challenge arbitrability on the grounds of timeliness; and 2) The Parties strictly uphold contractual time limits.

The Grievant's lack of overtime opportunities from June 9, 2008 through January 30, 2009 flows directly from being placed on NYC. It is important to note the NYC itself was not grieved. Rather, the 3-day suspension was grieved (and settled to a written warning). The instant grievance filed February 3, 2009 relates only to missed overtime opportunities during the Grievant's NYC status:

> On 6/9/2008 I was placed in a "no contact" post. This situation lasted until 1-30-2009. During this time I missed out on numerous overtime opportunities both voluntary and mandatory.

Article 25.02 requires a grievance to be filed within 10 working days of when the Grievant became aware of the occurrence giving rise to the grievance, or reasonably should have become aware of the occurrence. Under no circumstances, though, is a grievance to be filed more than 30 days after the occurrence.

The record establishes the Grievant requested overtime early and often during his NYC status. The February 3, 2009 grievance was filed approximately 240 days after the beginning of the Grievant's NYC status. While the Union contends the State slept on its rights regarding challenging arbitrability, it actually is the Grievant who slept on his rights regarding the alleged missed overtime opportunities. The Grievant knew early on in his NYC status – which began June 9, 2008 -- the State was not assigning him overtime.

Article 25.02 not only requires a grievance to be filed within 10 days of when the Grievant became aware or should reasonably have become aware of the

occurrence giving rise to the grievance, it also requires a grievance to be filed in no event later than 30 days after the event. The Grievant knew in June 2008 he was not receiving overtime during his NYC status. His February 2009 grievance filing is well after both 10 days and 30 days after the event giving rise to the grievance.

At most, the instant grievance is timely for the 10 workdays preceding its filing. If the grievance is meritorious, the Grievant would be compensated for lost overtime opportunities only during that 10-workday period.

But the grievance is not meritorious. Section 2 of the late January 2008 Letter of Clarification between the Parties explains an employee on NYC status is considered overage:

> When an employee is placed on a no contact post, that employee shall not take the post of another employee. The employee will be considered an extra on the shift unless there are posts available following roll call that can be considered "no contact posts."

The record established there are very few no-contact posts at the facility. The record also established the few no-contact posts available on overtime were regularly picked by the most senior employees. This fact, combined with the Letter of Clarification showing employees placed on NYC status are considered "an extra on the shift" and "shall not take the post of another employee," results in the Grievant's lack of overtime opportunities during his NYC status not being a violation of the Agreement.

AWARD

For the reasons set out above, the grievance is denied in its entirety.

Dated: October 25, 2010

Susan Grody Ruben, Arbitrator