ARBITRATION DECISION NO.:
187

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Hazardous Waste Facilities Board

DATE OF ARBITRATION:
February 17, 1989 and
March 29, 1989

DATE OF DECISION:
July 8, 1989

GRIEVANT:
Michael Lepp

OCB GRIEVANCE NO.:
G-87-2931

ARBITRATOR:
Frank A. Keenan

FOR THE UNION:
Daniel S. Smith

FOR THE EMPLOYER:
Egdillio J. Morales

KEY WORDS:
25.01(D)
25.02
Timeliness,
    Arbitration Demand Letter
    Notice By Mail
Burden Of Proof

ARTICLES:
Article 25 - Grievance Procedure
    §25.01-Process
    §25.02-Steps
    §25.03-Arbitration Procedures

§25.05-Time Limits
Article 43 - Duration
§43.03-Work Rules

FACTS:

The Union's files contain an arbitration demand letter dated 4-7-88, and a "batch log" entry from 4-8-88 indicating the letter was sent out with several other letters. OCB's files contain no arbitration demand letter from the union.

The Union had a system for generating, sending, and recording arbitration demand letters. Bruce Wyngaard reviewed step 4 answers and forwarded them to Donna Dixon who logged the grievance into the computer and forwarded the step 4 answer to secretary Tammy Quinlan. Ms. Quinlan then prepared the arbitration demand letters, and filled out a "batch log" entry recording all arbitration demand letters which were being sent at the same time to OCB. Ms. Quinlan then put a copy of the batch log and the demand letters into envelope, affixed postage, and placed them in the outgoing mail basket. Office Manager Jim Manning then took the mail to the post office and physically mailed it. OCB was expected to initial and return the batch log.

In this case, the batch log was not initialled and returned by OCB. Failure to initial and return the batch log had previously occurred on a number of occasions. Six of the letters listed on the batch log were not attached to it. OCB's files for some of the grievances listed on the batch log did not contain arbitration demand letters. Those that did contained different dates. The union's explanation was that it often sent more than one letter at a time. The employer challenged the arbitrability of the grievance on the grounds that the appeal was not timely.

MANAGEMENT'S POSITION

The grievance is not arbitrable since OCB did not receive a timely request to arbitrate the grievance. Section 25.05 of the contract requires that grievances not appealed within the designated time limits are to be treated as having been withdrawn.

The language of Article 25.01, i.e. an appeal is timely if postmarked by the deadline, does not apply to appeals to arbitration but only applies to appeals which involve the grievance form. Even if it did apply to appeals to arbitration, the Union has not proved that the demand for arbitration was mailed and postmarked as Section 25.01 requires.

The testimony of Union employees, that they mailed the letters is not credible since it is self serving, and should be discounted because of the large number of arbitration requests which are handled by these employees.

Finally, the inconsistencies between the batch log and OCB's files, the fact that not all letters were attached to the batch log, and the Union's failure to respond when OCB did not return an initialed batch log, all suggest that the batch log should not be accepted as valid documentation.

UNION'S POSITION:

The Union argues that the grievance is arbitrable since the appeal was timely. The union need not prove actual receipt of the arbitration demand letter. Creation and mailing of an arbitration demand letter meets the contractual requirement under section 25.02 of "providing written notice."

The definition of a timely appeal of a grievance in Article 25.01 (D) as one which is postmarked within the appeal period does not mean that the appeal is untimely merely because neither party can produce a postmarked envelope. The parties contemplated and trusted the efficient operation of the U.S. Postal Service.

25.01 applies to the appeal to arbitration as well as to earlier appeals in the grievance process. The appeal to arbitration is a part of the grievance process. This is clear from section 25.02 which labels the appeal to arbitration as "step five" of the grievance procedure.

Arbitrators, including panel arbitrator Rivera, have recognized that the use of the mail system is a reasonable means of communication and the actual receipt of notice need not be proved unless the contract so requires.

Black's Law Dictionary states that "a person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably be required to inform the other in the ordinary course whether or not such other actually comes to know of it."

The arbitral principle of the abhorrence of a forfeiture requires that "...where reasonable doubts as to arbitrability exist, they should be resolved in favor of arbitrability." Public policy and law favor having work place disputes settled.

ARBITRATOR'S OPINION:

25.01(D) does not apply to the appeal to arbitration since it refers expressly to the "grievance appeal form." Thus, the reference in 25.01(D) to the requirement that an appeal be postmarked by the deadline is irrelevant.

25.02 provides that a grievance may be appealed to arbitration "by providing written notice to the Director [of OCB]." The manner of providing such notice is not spelled out. Nor does the contract include a definition of proper notice.

Arbitrator Rivera's observations about notice find strong support in arbitral and legal decisions. Where the contract does not specify otherwise, proof of receipt of "written notice" is not required; proof of mailing is sufficient.

The Union has the burden of proving by a preponderance of the evidence that it mailed the demand. It satisfied this burden by presenting the testimony of its staff who indicated, without contradiction, that they followed their customary routines for generating and mailing demands for arbitration. The inconsistencies presented by management were not sufficient to undermine the inference of normalcy. Common experience teaches that we are creatures of habit and adhere to established routines, especially ones as long established and mechanistic as the routines involved here.

The only basis for finding otherwise would be to suppose that the batch log and attached letters were all fabricated. Such action would involve fraud, perjury, and moral turpitude. Such matters would have to be proven beyond a reasonable doubt. The evidence presented is not sufficient to prove such wrongdoing, even under the lesser standard of the preponderance of the evidence.

ARBITRATOR'S AWARD:

The grievance was found to be arbitrable.

TEXT OF THE OPINION:

ARBITRATION
BETWEEN

STATE OF OHIO, HAZARDOUS WASTE FACILITIES BOARD

and

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL-CIO

OCB Case #:
G87-2931

APPEARANCES:

For the Agency:
Egdillio J. Morales,
Management Advocate
Office of Collective Bargaining
Columbus, Ohio

For the Union:
Daniel S. Smith, General Counsel
OCSEA/AFSCME, Local 11
Columbus, Ohio

OPINION AND AWARD
OF THE ARBITRATOR

FRANK A. KEENAN
ARBITRATOR

I. BACKGROUND:

This case was heard in Columbus, Ohio on February 17 and March 29, 1989. The Agency observed, but did not participate in the hearing of March 29, 1989. Briefs from both parties were received by June 9, 1989, and the hearing declared closed as of that date. The Union provided a reply brief to the Union's brief under cover letter dated June 21, 1989. No provision for same was mutually agreed to and said brief has not been considered.

II. THE CONTRACT:

Relevant contract provisions are excerpted at Appendix I.

III. STATEMENT OF THE CASE:

The Grievant was issued a 10 day disciplinary suspension on December 21, 1987, which he served the last week of December 1987. On December 31, 1987, he grieved the imposition of this discipline. The office of Collective Bargaining issued a Step 4 response denying the grievance on March 31, 1988. OCB's files contain no arbitration demand letter from the Union. The Union's files contain an arbitration demand letter dated April 7, 1988, and a “batch log" of April 8, 1988 indicating that it, and several other arbitration demand letters, were sent to OCB.

At the time in question, April, 1988, the batch log system of forwarding arbitration demand letters invoking arbitration, Step 5 of the grievance procedure, was in effect, and had been for quite some time. Under this system Step 4 answers were reviewed by Bruce Wyngaard, OCSEA's Director of Arbitration, and then forwarded to Donna Dixon. Ms. Dixon logged the grievances into

the computer and delivered Step 4 answers to secretary Tammy Quinlan. Ms. Quinlan generated an arbitration demand letter, gleaning the necessary information from the Step 4 answer. Quinlan also prepared a “batch log” which listed all the arbitration demands that were mailed at the same time to the OCB. Quinlan placed the arbitration demands into an envelope and carried the envelope to the mail room where she weighed the envelope for postage, affixed postage, and placed the envelope in the outgoing mail basket. Office Manager Jim Manning daily takes OCSEA's mail to the main post office and physically mails the mail.[1] Under this batch system OCB was expected to initial and/or comment on the batch log and return same to OCSEA. The batch log created by Quinlan was not so initialed and returned to OCSEA. The failure to initial and return the batch log had previously occurred on a number of occasions. It appears that no complaint about this fact was registered by the Union at the times involved.

OCB's Director of Arbitration Wagner testified that he’d reviewed the OCB files of all the names listed on the batch log of 4/8/88 and found that only five contained arbitration demand letters, namely, Zenn (received 4/25/88); Gore (received 3/30/88); Geist (received 3/30/88); Posey (received 3/3/88); and Walter (received 10/20/87). The Union explained that often more than one request was sent. Additionally, no demand letters were attached to the 4/8/88 batch log for six Grievants listed thereon, namely, Dominek, Lowe, King, Zenn, Myers, and Ferryman. The Union offered no explanation for this circumstance.

IV. <u>THE UNION'S POSITION</u>:

The Union takes the position that it filed a timely demand to arbitrate and that the grievance is therefore arbitrable.

It is the Union's position that “the critical issue is whether or not the Union must prove the Employer's actual receipt of the arbitration demand before the grievance may be considered arbitrable.” It is the Union's contention that such proof is unnecessary. In support of its position the Union asserts that "....Section 25.02, Step 5 of the collective bargaining agreement provides that the Union may appeal grievances to arbitration “by providing written notice”. A perusal of the standard dictionaries reveals that the word “provide” does not have a meaning so technical or specific as to require proof of actual receipt. Black's Law Dictionary, 5th Edition, at p. 1102 defines “provide” as “to make, procure or furnish for future use, prepare. To supply; to afford; to contribute.” In other words, absent other specific contractual language, the creation and mailing of an arbitration demand can meet the requirement of “providing written notice.” Actual receipt cannot reasonably be inferred as a requirement.

Other contractual provisions support the conclusion that proof of actual receipt is not a precondition for arbitrability. Section 25.01(D) of the agreement provides that “the mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period.” This clause indicates that the date of receipt was not to be used to mark compliance or noncompliance with the contractual time limits. The date of mailing is the operative factor. The clause’s reference to the postmark in this case is irrelevant. The parties contemplated and trusted the efficient operation of the United States Postal Service. The fact that neither party has an envelope with a postmark does not diminish the fact that the Union presented convincing and uncontroverted testimony that the arbitration demand letter for Michael Lepp's ten day suspension grievance was timely mailed to the Employer.

Section 25.01(D) clearly applies to the appeal to arbitration. The appeal to arbitration is not separated in the agreement from the lower steps of the grievance procedure. All appear in Section 25.02. The appeal to arbitration is labeled "step five” of the grievance procedure. The agreement is not susceptible of a reasonable interpretation which makes the appeal to arbitration

a procedure separate from the grievance procedure. Similarly, the arbitration appeal letter is no less a form than the grievance form. The arbitration appeal letter is a "form" letter. It does not vary from grievance to grievance and is merely a separate document for matters of administrative and it supports the Union's position in this matter."

By way of elaboration the Union points out that arbitrators, including Panel Arbitrator Rivera, have recognized that use of the mail system is a reasonable means of communication and that actual receipt of notice need not be proved unless the contract so requires. Jefferson Chemical Co., Inc., 72 LA 892 (Goodstein, 1979); Gardner Motors, Inc., 64 LA 428 (Lightner, 1973); Huron Valley Public Schools, 63 LA 49 (Watkins, 1974) Greyhound Lines West, 61 LA 44 (Block, 1973); Ohio Department of Health & OCSEA Local 11, AFSCME, AFL-CIO (Gr #G-86-0597, July 6, 1988, Rivera). Thus Panel Arbitrator Rivera has found that the term "notified" and the notice requirement in Section 43.03 (the Union shall be notified prior to the implementation of any new work rules....) was satisfied by a timely mailed letter, since "well known and long standing rules of contract interpretation have held that 'notification' only requires that a notice be properly posted. Receipt is not an element of notification unless so specified." As the Union put it in its brief, these "cases find that the .... testimony as to timely mailing of the appeal was sufficient. The Unions were not required to present some sort of proof from an independent source that the appeal was placed in the mail." Additionally, the Union points to Black's Law Dictionary, 5th Edition, at page 958, wherein it is stated that: "a person 'notifies' or 'gives' a notice or notification to another by taking such steps as may reasonably be required to inform the other in the ordinary course whether or not such other actually comes to know of it."

Still further support for its position is to be found in the arbitral principle of the abhorrence of a forfeiture, argues the Union, and that "....where reasonable doubts as to arbitrability exist, they should be resolved in favor of arbitrability. Public policy and law favor having work place disputes resolved on their merits."

So it is that the Union urges that the grievance be found to be arbitrable.

V. THE AGENCY'S POSITION:

The Agency takes the position that the grievance is not arbitrable because "OCB did not receive a timely request to arbitrate the grievance. .....(T)he last day for appealing this grievance to arbitration within the timelines provided in Section 25.02 was May 2, 1988. No arbitration request for this grievance was received by OCB during this time period". Under Section 25.05 "grievances not appealed within the designated time limits are to be treated as withdrawn grievances."

The Agency contends that the Union's reliance on Section 25.01(D), coupled with its assertion that it mailed an arbitration demand to OCB in a timely fashion, is misplaced. Thus it is the Agency's contention that "Section 25.01(D) does not apply to demands to arbitrate. ....(T)he procedures for demanding and holding arbitration hearings are distinct from advancing grievances to the foregoing steps. Those steps require that the grievance form be submitted. The requirement for requesting arbitration is to send written notice to the Director of OCB." In support of its position the Agency asserts that whereas the pre-arbitration steps refer to the grievance form and its submittal, "....Section 25.02, Step 5 - Arbitration does not contain similar language on the submittal of the written grievance. Rather it states:

"Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by providing written notice to the Director of the Office of Collective Bargaining (Emphasis added by the Agency)

Additionally, the Agency contends that "the structure of...Article 25 supports Management's

position. While the procedures for advancing through the first four steps are outlined in Section 25.02, the procedures for arbitration are spelled out in their own section, Section 25.03 - Arbitration Procedures. In addition, a review of the grievance appeal form substantiates Management's position. The structure of the form obviously reveals that it is submitted only through Step Four. There is a space for disposition and a listing of the contractual timelines for each step through Step Four only. Demands to arbitrate, however, are submitted by the Union through correspondence from the Union's Director of Arbitration to the Deputy Director of OCB."

In the alternative, the Agency asserts that even if Section 25.01(D) did apply to demands to arbitrate, "the Union has not met the requirements of that section to prove the filing of a timely appeal. Thus the Agency contends that" for the sake of argument, even if 25.01(D) did apply to arbitration requests, in this case the Union has not met the requirements of that section to document the mailing of a timely appeal. The language of that section states, 'the mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period.' The mere production of a copy of a request is not enough. Proof of mailing is required. The Union has not presented any evidence demonstrating that the arbitration request for G87-2931 was postmarked within the appeal period.

Of course, when a grievance form is mailed to the next step for review, the Employer would possess the post marked envelope. However, in a case where the Employer denies receipt of the form, the burden must fall to the Union to document its filing within the timelines of the Agreement. Otherwise, the integrity of the grievance process would be destroyed and the timelines at all steps for which 25.01(D) applies would be rendered meaningless." (Emphasis supplied by the Agency).

It is the Agency's contention that what it characterizes as the Union's "two forms of evidence attempting to establish that the grievance was timely filed to arbitration" fails to do so. Pointing to the testimony of Quinlan and Manning, the Agency asserts that "they presented clearly self-serving testimony that the arbitration request was mailed." Moreover, "Quinlan is not the individual responsible for actually mailing arbitration requests," and Manning, who did mail the Union's mail did not testify that there was no doubt that he mailed the grievance arbitration demand in question here. Furthermore, asserts the Agency, Quinlan's testimony to the effect that she placed the grievance arbitration demand in the mail room on April 8th should "be discounted considering the amount of grievances filed for arbitration. Given the large number of arbitration requests, it is not realistic to contend that a clerical employee could possibly remember each arbitration request she prepared or each batch log she allegedly delivered to the Union's mail room. Ms. Quinlan's testimony was that of a Union employee defending her performance. It was self-serving and not credible. The Employer contends that it should be given very little weight."

Pointing to the Union's other evidence, namely, the batch log for April 8, 1988, and to the fact that this batch log was not initialled by OCB, contrary to the practice calling for it to do so, the Agency contends that "working within the system in place, if the Union had actually sent a batch....as they contend, the proper course of action would have been to contact OCB immediately and inquire into the status of the batch. At that point, another batch could have been prepared or they may have located the original batch. A review of the events indicates that the alleged April 8th mailing would have been early enough for another batch to have been prepared and sent within the timelines of the Agreement. The Union did not present a scintilla of evidence to document any such inquiry." Additionally the Agency would impugn the efficiency of the purported April 8th batch log by pointing to alleged inconsistencies within the document itself. Thus the Agency contends that the April 8th "batch log lists grievances for which there are no corresponding letters.... There are no letters for Donald Dominck, Julia Lowe, Wiley King, Richard Zenn, Homer Myers or Edward Ferryman. Thus, the batch log is not an accurate listing of the batch allegedly prepared on April 8th. Also, Tim Wagner testified that he researched the files listed on the batch log and found that

only five had been appealed to arbitration. Of these, none of the arbitration requests were received on or around April 8, 1988. Rather, a request for Richard Zenn was received April 25, 1988; a request for Denise Gore on March 30, 1988; for Ken Geist on March 30, 1988; for Robert Posey on March 3, 1988; and for Mary Walter on October 20, 1987. Overall, Management contends that the batch log is littered with inconsistencies and should not be accepted as valid documentation for the proper filing of any arbitration request."

So it is that the Agency urges that the grievance be found to be non-arbitrable.

VI. DISCUSSION & OPINION:

First to be discussed is the analytical framework under which the case must be analyzed. In this regard the Union argues, among other matters, that Section 25.01(D) applies to appeals to arbitration, whereas the Agency contends it does not. Close scrutiny of Article 25 in its entirety, and 25.01(D) in particular, persuades me that 25.01(D) is not applicable to the appeal to arbitration step. This conclusion is based upon the express language utilized by the parties. Thus 25.01(D) refers expressly to "the grievance appeal form", which is again alluded to in 25.01(E) as something to be "mutually agreed upon," and as it turns out, the mutually agreed to grievance appeal form does not encompass the appeal to Step 5 - arbitration. Rather this form ceases to address itself beyond Step 4 i.e. it ends with Step 4. Section 25.01(D) clearly refers to the official mutually agreed to form and not to a unilateral Union promulgated "form" letter for arbitration demands as the Union suggests.[2] Moreover, although the Union characterizes the reference in 25.01 to a post mark as irrelevant, I'm bound by the presumption that the parties would not have referenced it if it were simply irrelevant. Rather, in my judgment, the parties use of the conditional phrase "if it is post marked within the appeal period" betrays an intent to have 25.01(D) settle those disputes where there existed a post marked envelope, and in the absence of same, as here, Section 25.01(D) is of no help. The focus therefore must be on 25.02 Step 5 - Arbitration, wherein it is provided that grievances "may be appealed to arbitration .... by providing written notice to the Director of the Office of Collective Bargaining....," within a certain time frame, here, on or before May 2, 1988. Significantly, the manner of providing such notice is not apelled out. But the parties do have a contractual definition of what constitutes contractually proper notice. The concept of notice and how it is established has been, quite properly, spelled out for the parties by Arbitrator Rivera, as noted above. Her appropriate observation finds strong support in arbitral (and legal) consensus on the point, as the cases cited by the Union demonstrate. Actual receipt of the "written notice" is not required; proof of mailing will suffice to establish the presumption that the written notice was received, notwithstanding the inability of the recipient to produce it.

Whether a timely demand letter was mailed thereby creating the presumption of receipt, is a question of fact on which, as the Agency correctly observes, the Union has the burden of proof. In this regard it is incumbent upon the Union to establish that it mailed a timely arbitration demand letter by a preponderance of the evidence.

To meet its burden the Union relied on the testimony of its staff personnel who participate in the chain of custody from receipt of a Step 4 denial which necessitates a decision on whether to go to arbitration and starts the clock running on the time within which to do so, up through the actual physical mailing of the daily outgoing mail. These personnel indicated without contradiction that in early April 1988 they followed their customary routines and procedures vis a vis generating arbitration demands and/or mailing duties. As has been seen the Agency seeks to undermine the Union's approach on this matter in four ways:

(1) many of the Grievants listed on the 4/8/88 batch log reflecting Grievant Lepp's arbitration demand letter, have no demand letter in their OCB file; (2) other Grievants listed on the batch log have a demand letter, but of dates differing from the letters attached to the 2/8/88 batch log; (3) the staff personnel's testimony is self-serving and hence unworthy of credit; and (4) some of the Grievants listed on the batch log have no independent demand letter attached.

As to the first of the Agency's contentions, such simply begs the issue at hand, for the lack of such letters is consistent, as is the lack of a letter in Lepp's situation, with a loss/misplacing at OCB.

With respect to the Agency's second contention, the Union explained that there are instances where more than one demand letter is sent, and in any event, except for Posey, a document, such as a Step 4 grievance denial, existed for each such employee which would normally trigger arbitration demand letter and did trigger an arbitration demand letter of 4/8/88.

With respect to the self serving nature of the Union's witnesses testimony, the very nature of the issue here makes such inevitable. The circumstances here simply require reliance on the sanctity of the oath taken, and the demeanor of the witnesses, which latter failed to indicate any untruthfulness. Moreover, common experience teaches that we are creatures of habit and adhere to established routines, especially ones as long established and mechanistic as the routines involved here.

With respect to the fourth contention, frankly this is somewhat disconcerting, since it went unexplained by the Union. In my judgment it suggests two possibilities: one, that the secretary veered from her routine after all, and didn't prepare several letters either by distraction or oversight, or alternatively misplaced them, and two, no letters were prepared and all attached to the 4/8/88 batch log, and the batch log, were fabricated after the fact and for the arbitration hearing. This latter theorem of course would involve: fraud and perjury, matters involving moral turpitude, and to be established therefore beyond a reasonable doubt. Suffice it to say the evidence here falls woefully short of such a standard of proof, and indeed would not even establish by a preponderance such a conclusion. Concerning the first suggestion, that the secretary veered from her routine with respect to those employees for whom no letter exists notwithstanding their being reflected on the batch log, while such may well be fatal in their cases, the fact remains here that a demand letter was generated for Grievant Lepps, and there is simply not a sufficient basis to conclude that it, along with the many others that were created and attached to the batch log, was not passed on through the mailing system. While it may arguably be inferred that the secretary lapsed in her duty to generate some demand letters, she did not fail to generate a demand letter for Grievant Lepp (and many many others) and hence it simply does not follow, as the Agency implicitly contends, that she additionally failed to follow through and place into the mail system the very considerable amount of work that she did do. Assuming a break in routine in failing to generate some demand letters, it was not a failure-to-place-in-the-mail system type break in routine, and hence is simply insufficient in weight to undermine the inference of normalcy, and adherence to the mailing routine, alluded to above.

In this manner then it must be found that the Union has established by a preponderance of the evidence that Grievant Lepp's 4/7/88 arbitration demand letter was mailed to OCB under cover of the 4/8/88 batch log, and therefore in a timely fashion, thereby giving rise to the presumption of receipt at OCB, and accordingly in compliance with the 25.02 Step 5 prerequisites for providing written notice to the Director of OCB. This being so, the grievance is found to be arbitrable.

VII. AWARD:

For the reasons more fully set forth above, the grievance is found to be arbitrable.

July 8, 1989

Frank A. Keenan
Arbitrator

APPENDIX I
ARTICLE 25 - GRIEVANCE PROCEDURE
§25.01 - Process

A. A Grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving Grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

Those employees in their initial probationary period as of the effective date of this Agreement shall retain their current rights of review by the State Personnel Board of Review for the duration of their initial probationary period.

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. If a verbal reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal reprimand.

§25.02 - Grievance Steps
Step 1 - Immediate Supervisor

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. 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. If being on approved paid leave prevents a grievant from having knowledge of an occurrence, then the time lines shall be extended by the number of days the employee was on such leave except that in no case will the extension exceed sixty (60) days after the event. The immediate supervisor shall render an oral response to the grievance within three (3) working days after the grievance is presented. If the oral grievance is not resolved at Step One, the immediate supervisor shall prepare and sign a written statement acknowledging discussion of the grievance, and provide a copy to the Union and the grievant.

Step 2 - Intermediate Administrator

In the event the grievance is not resolved at Step One, it shall be presented in writing by the Union to the intermediate administrator or his/her designee within five (5) days of the receipt of the answer or the date such answer was due, whichever is earlier. The written grievance shall contain a statement of the grievant's complaint, the section(s) of the Agreement allegedly violated, if applicable, the date of the alleged violation and the relief sought. The form shall be signed and dated by the grievant. Within seven (7) days after the grievance is presented at Step Two, the intermediate administrator shall discuss the grievance with the Union and the grievant. The intermediate administrator shall render a written answer to the grievance within eight (8) days after such a discussion is held and provide a copy of such answer to the Union and the grievant.

Step 3 - Agency Head or Designee

If the grievance is still unresolved, it shall be presented by the Union to the Agency Head or designee in writing within ten (10) days after receipt of the Step Two response or after the date such response was due, whichever is earlier. Within fifteen (15) days after the receipt of the written grievance, the parties shall meet in an attempt to resolve the grievance unless the parties mutually agree otherwise.

The Agency Head or designee shall give his/her written response within fifteen (15) days following the meeting.

If no meeting is held, the Agency Head or his/her designee shall respond in writing to the grievance within ten (10) days of receipt of the grievance.

Step 4 - Office of Collective Bargaining Review

If the grievance is not settled at Step Three, the Union may appeal the grievance in writing to the Director of The Office bf Collective Bargaining by written notice to the Employer, within ten (10) days after the receipt of the Step Three answer, or after such answer was due, whichever is earlier.

The Director of The Office of Collective Bargaining or his/her designee shall notify the Executive Director of the Union in writing of his/her decision within twenty-one (21) days of the appeal. The Director of the Office of Collective Bargaining may reverse, modify or uphold the answer at the previous step or request a meeting to discuss resolution of the grievance.

A request to discuss resolution of the grievance shall not extend the thirty (30) days in which the Union has to appeal to arbitration as set forth in Step Five.

Step 5 - Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Director of The Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given, in Step Four.

§25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. 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.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

.....

§25.05 - Time Limits

Grievances may be withdrawn at any step of the grievance procedure. Grievances not appeared within the designated time limits will be treated as withdrawn grievances.

The time limits at any step may be extended by mutual agreement of the parties involved at that particular step.

The Employer's failure to respond within the time limits shall automatically advance the grievance to the next step.

§43.03 - Work Rules

After the effective date of this Agreement,. agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

APPENDIX II

From the testimony of:

Bruce Wyngaard:

Q. And are you aware of the practices in effect at OCSEA to make a demand for arbitration in April of '88?

A. Yes.

Q. At that time, can you describe what your function was particularly in the process? First of all, do you know where the step four responses were sent to initially?

A. Step four responses are received by Russ Murray, executive director of the union. He will review them and forward them to me directly. I will look at them as it concerns their content, matters that might be of particular concern to me. And then I immediately forward them to Donna Dixon of our office who prepares those grievances and logs them on our computer.

Q. And once Donna logs them on the computer, do you have any additional knowledge of what happens to the grievances after that?

A. Well, after Donna Dixon logs them on the computer, it's her responsibility to make copies and to log specifically from step four response that type of information that we could glean from the grievance itself, nature of the dispute, the agency, the OCB grievance number, the -- she will try to identify the staff representative assigned to that grievance and other characteristics about the grievance that are important to us for tracking.

MR. MORALES: At this point, if I may interrupt for just a moment --

MR. SMITH: Is there an objection?

MR. MORALES: Yes, there is an objection. And it's an objection concerning the best evidence. My understanding is that Mr. Smith intends to call Miss Dixon, so what is the purpose of having Mr. Wyngaard describe Miss Dixon's function?

ARBITRATOR KEENAN: Well, he's giving us an overview.

MR. SMITH: Thank you.

MR. MORALES: I just wanted to speed things up.

Q. Bruce, I was fishing for documents. When you were finishing your answer, you talked about some of the responsibilities that Donna provides. We've had previous conversations with regard to batch control logs. After you send the initial step four responses to Donna, is there a time where you review or see that batch control log?

A. Yes. After the batch control log is prepared, I request a copy of it as I want to look over, first of all, the number of grievances that were forwarded from our office, also look at it as it concerns whether certain grievances have OCB grievance numbers assigned to them, and I also like to look at the names of the individuals that have been forwarded to the Office of Collective Bargaining.

Q. Now, when this -- the state raised this issue of arbitraibility, did you do some research to gather documents to substantiate or claim that it was arbitrable?

A. Yes. What we did is we reviewed our batch control log going back to April of 1988 and also looked at the copies, pulled from the files the respective demands for arbitration made for the grievances reflected on the log.

MR. SMITH: I'll mark this as Union Exhibit No. 1.
(EXHIBIT MARKED FOR IDENTIFICATION.)

MR. SMITH: Mr. Arbitrator, I'm fishing for my third copy so I'm going to ask for the moment that I put that here.

Q. And, Bruce, I ask you to identify -- leaf through the document and identify this for me. First of all, let's flip to the third page of the document and ask you if you can identify the third and second

page. Third and 4th page, rather, I'm sorry.

A. This is the batch control log reflecting the grievances that were forwarded to the Office of Collective Bargaining as demands for arbitration. It reflects the name, the grievance number assigned to that grievance, and it also has other notations concerning the status of those grievances. Attached to the batch log or stapled are the demands for arbitration that were made for the same grievances that were reflected on the batch control log, and we also have attached some other documents reflecting the current status of those grievances, including some that went to our arbitration committee for further action.

Q. So your research indicated that there was in the files a copy for each and every grievance on the batch log a letter demanding arbitration?

A. That's correct.

Q. Now, the batch log is not initialed as some of the state's documents were. Can you explain what was happening at that time that may have resulted in this?

A. Well, in a number of instances, we had forwarded a batch control log to the Office of Collective Bargaining and had not received a return copy indicating various comments on this batch log as we had in previous copies.
Q. So there were other occasions where we would not received return batch logs?

A. That's correct.

Q. And Mr. Wagner testified previously about some of the practice, and I asked him some questions about the delivery system with the courier and then the switchover to direct mail. Can you describe what your policy was while you were director of arbitration concerning forwarding demand for arbitration letters during this period of time?

A. During this period of time, we sent the batch control log with the respective demands reflected on the log to the Office of Collective Bargaining using regular mail. We compiled the log based on the number of grievances that had come into the office. We grouped them basically in the order which they've come in, and we would send the batch control log out prior to the time periods expiring for those grievances.

ARBITRATOR KEENAN: Now, the attachment which was a letter requesting arbitration per specific case, right, was that the first time that letter was forwarded to OCB?

THE WITNESS: Well, there may have been several letters sent individually to OCB, which may have been a grievance that we were recently notified of, concerned with its timeliness, so we wouldn't wait to place it in a log that might be mailed two weeks further on. Some grievances we would mail immediately upon their coming into the office because we recognized that we did not want to jeopardize their timeliness.
Donna Dixon:

By Mr. Smith:

Q. Can you state your name for the record, please, and spell your last name?

A. Donna Dixon, D-I-X-O-N.

Q. And, Donna, can you state where you currently are employed?

A. OCSEA.

Q. And what is your position there?

A. Grievance coordinator.

Q. And how long have you held that position?

A. Two years.

Q. So did you hold that position in April of '88?

A. Yes, I did.

Q. And can you describe generally what your responsibilities are as grievance coordinator?

A. As grievance coordinator, I am a keeper of the records. I log the information into the computer. I keep a paper trail, as well as computer trail, of the grievances. And I coordinate the paperwork between staff and grievant.

Q. And what is your responsibility specifically with regard to processing demands for arbitrations?
A. Request for demands to arbitration, they're given to me from Bruce Wyngaard, which is my supervisor.

Q. And I'm talking about the process back in April of '88.

A. In April of '88, he would have given them to me to make demands for arbitration. At that particular time, I review what he's given me. I log each grievance onto the computer. Then I log it onto a log sheet. At that particular time, I forward the letters on to the secretary with my information for her to demand arbitration.

Tammy Lynn Quinlan:

Q. And so were you secretary in April of -- secretary to the director of arbitration in April of '88?

A. Yes, I was.

Q. And at that time, can you describe what your responsibilities were with regard to processing demands for arbitration?

A. My responsibility was to get the letters prepared and sent to OCB.

Q. And how would you know there were letters to be prepared?

A. Donna Dixon would give me the stack or bundle of what had to be done.

Q. Would she give those to you personally?

A. Yes.
Q. And then what was your responsibility after -- describe to the arbitrator step by step what your functions were, what your work was in processing letters to request arbitration after they were delivered to you by - after the step four responses were delivered to you by Donna.

A. Okay. It's a timely process, and what I would do is print out the form letter from the word processor and copy that letter onto letterhead for each grievant that needed a demand for arbitration, manually type in the grievant's name and number and CC the respective representative. After that's done, I would create the batch log from the letters typed, and then copy all the letters and the batch log to send those to the CC'd people and to mail the batch log, the original batch log and original letters, to OCB.

Q. We've already marked this as I think Union Exhibit No. 1. Is this the batch log?

A. Yes, it is.

Q. And just so that I'm clear, the batch log is sent -- is created after the letters are printed?

A. After the letters are manually typed.

Q. Now, if I get this right, and it appears from the nature of the letters you print out a form letter, correct?

A. Yes.

Q. And then you type in the relevant information?
A. Yes.
Q. And that relevant information is the grievance number?

A. Yes.

Q. And the grievant?

A. Yes.

Q. And then who the staff representative is?

A. Correct.

Q. And then the originals are -- from the stack of letters, you create the batch log?

A. Right.

Q. Then you put it together and the originals are put in an envelope?

A. Yes.

Q. And when you say you mail them, what is your responsibility with regards to preparing them for mailing?

A. I weigh it, then put the postage on it, run it through the meter and put it in the outgoing mail box.

Q. And after it's in the mail box, then we've had Mr. Manning testify it's his responsibility?

A. At that point, it releases my responsibility of the letters.

Q. Now, looking at these letters, Donna testified that she gave the step four responses to you on April 4th, correct?
A. Um-hum (nods head).

Q. And these letters are dated April 7th and then the batch log is dated April 8th, okay? Can you explain what your process was with regard to these specific letters?

ARBITRATOR KEENAN: When you say these, what exhibit?

MR. SMITH: Union No. 1.

ARBITRATOR KEENAN: All right.

A. I can't remember the time of day that Donna had handed me the letters. It's a timely process, and I like to do it from start to finish. I don't like to stop in the middle of doing it. The letter is printed, as I said, from the word processor. The date is already in there. What I do is change the date. On that particular date of the 8th, I probably just went on ahead and printed the letter without changing the date first. But the letters were done on the 8th because that's the date that is typed or handwritten on the top of the log as to the date it is mailed.

Q. And that is your handwriting at the top of the batch log?

A. Yes, it is.

Q. And that date indicates the date that they were mailed?

A. Yes.

Q. Is there any doubt in your mind that these letters were placed in the mail room on April 8th?

A. I'm certain they were placed in the mail.
James Manning:

By Mr. Smith:

Q. Can you state your name for the record, please, and spell your last name?

A. James Manning, M-A-N-N-I-N-G.

Q. And I'm going to call you Jim, if you don't mind. Jim, where are you currently employed?

A. Ohio Civil Service Employees Association.

Q. What is your position?

A. Office manager.

Q. And how long have you held that position?

A. I've held that position for six years.

Q. And so you were the office manager in April of '88?

A. Yes.

Q. Are you responsible in any way for mail?

A. Yes.

Q. And can you describe to the arbitrator what the mail system is at OCSEA?

A. Mail is dealt with twice a day. In the morning I go into the mail room or office. There's a box there that has the outgoing mail. I bundle it, present it the postman when he comes to deliver the mail in the morning. That's usually between 10 and 11 o'clock in the morning. Then again in the afternoon, I go back to the mail room, bundle all the mail from the day, bag it and take that over to the post office.

Q. And which post office do you go to?

A. The one on Twin Rivers Drive.

Q. Is that the main post office?

A. Yes, I believe it is.

Q. And do you personally deliver it?

A. Yes.

Q. And where do you deliver the mail to?

A. I take that to the back dock.

Q. And the back dock, is there an appropriate place to put the mail there?

A. That's a first class meter shoot there, and I just put it right down into the shoot.

Q. And the mail room, there's a specific place to put outgoing mail?

A. Yes.

Q. What is it again?

A. It's an out basket is what we use.

Q. And in your experience at OCSEA, has there ever been a time where mail placed in the mail room has been complained of turning up missing?

A. Not to my knowledge, no.

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[1] Excerpts from the testimony of these OCSEA Staff personnel upon which these conclusions are based is set forth in Appendix II.

[2] It is noted at this juncture that at the March 29th hearing Union negotiator King indicated that the mutually agreed to forms to implement the grievance procedure were to be developed after the contract was negotiated, “....and in my own mind, any way,” testified King, "the forms would include an agreed upon form for an appeal to arbitration." Such did not transpire, however, and significantly King did not indicate he articulated this expectation at the bargaining table. The clear language does not comport with King's expectation.