

ARBITRATION DECISION

September 5, 2005

#903

In the Matter of:

State of Ohio, Department of Rehabilitation )  
And Correction, Ohio State Penitentiary )

and )

Ohio Civil Service Employees Association, )  
AFSCME Local 11 )

Case No. 35-03-20030902-0053-01-05  
Joe Demarco, Grievant

APPEARANCES

For the State:

Chris Lambert, Advocate, ODRC  
Steve Little, Office of Collective Bargaining  
Teri Decker, Chief, Bureau of Labor Relations  
Todd Ishee, Former Warden  
Janet L. Thomas, Personnel Officer 3  
Carolyn Nowak, Business Administrator 3  
Sybil C. Cencarik, Former Personnel Officer 3

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OCSEA-OFFICE OF  
GENERAL COUNSEL

For the Union:

George L. Yerkes, Advocate, Staff Representative  
William T. Rager, President  
Joe Demarco, Grievant  
Christopher P. George, Chief Steward  
Ronnie Morton, Former President  
Alan L. Boles, Former Quartermaster  
Alberta Colyar, Laundry Coordinator  
Stephen Savnik, Quartermaster  
Mary Rose Morely, Laundry Coordinator  
James Lendi, Warehouse Supervisor  
Terrence Miles, Records Department

Arbitrator:

Nels E. Nelson

## BACKGROUND

The grievant is Joe Demarco. He was hired by the Department of Rehabilitation and Correction on July 5, 1998, as a correction officer at the Ohio State Penitentiary. In December of 2000 he bid on a storekeeper 1 position, which became vacant when Terrence Miles was promoted to another position. The posting for the job indicated the job duties included making receiving reports, supervising inmates assigned to the storeroom, seeing that orders are delivered to the correct destinations, maintaining records of items on hand and used, disposing of items turned in for salvage, and performing related duties and security functions.

The grievant was notified by Sybil Cencarik, the personnel director, on February 14, 2001, that he would be demoted and transferred to the storekeeper 1 position. She informed him that he would assume his new position on March 25, 2001, and that he would be required to serve a trial period as provided for in Article 17, Section 17.04, of the collective bargaining agreement. The grievant signed the necessary form accepting the demotion to storekeeper 1 and was issued the uniforms he would be wearing in his new job. However, because of a budget crisis the central office did not approve the personnel action that was necessary for the grievant to assume his new job.

On March 12, 2001, in response to the budget crisis, Cencarik prepared a list for the central office of positions that would remain vacant or be deleted. Since the storekeeper 1 position was one of the jobs that was to remain vacant, Cencarik told the grievant that the storekeeper job 1 was on hold. The grievant testified that he was initially told that the freeze would last 30 days, later informed that it would last three months, and finally told that he would be informed when the freeze was lifted.

The fate of the storekeeper 1 position is revealed in the Position Control Rosters and the Tables of Organization for the institution. The position was listed in the monthly Position Control Rosters as vacant from February 2, 2001, until November 16, 2001, when it "fell off" the roster. The job appeared on the February 2, 2002, Table of Organization as a vacant position but it did not appear on the February 24, 2003 Table of Organization.

On August 25, 2003, the union filed a grievance alleging that the state violated Article 1, Section 1.05, and Article 7, Section 7.01, of the contract. It charged that the state had refused to fill the storekeeper 1 position. The union also claimed that James Lendi, the warehouse supervisor, was performing the duties of the job and that, as of August 18, 2003, Dennis Thomas, a locksmith, was also sharing in the job duties. It requested that the grievant be placed in the storekeeper 1 position or that the position be reposted.

The next day a step two response was provided by Carolyn Nowak, a business administrator 3. She stated that the job had been removed from the Position Control Roster and that it was no longer part of the Table of Organization. The union claims that this was the first time that it learned that the storekeeper 1 position had been abolished.

At the step three meeting on October 22, 2003, William Rager, the chapter president, amended the grievance. He charged that the state violated Article 17, Section 17.07(C), and Article 18 by removing the storekeeper 1 position from the Position Control Roster and the Table of Organization without notifying the union and by abolishing the job without providing a rationale.

On December 8, 2003, the union appealed the grievance to arbitration. At the hearing on June 15, 2005, the state argued that the grievance was not filed within the contractual time limits and was not arbitrable. The Arbitrator reserved judgment on the issue and proceeded to hear the merits of the dispute. Written closing statements were received on August 1, 2005.

### RELEVANT CONTRACT PROVISIONS

Article 1, Section 1.05; Article 7, Section 7.01; Article 17, Sections 17.05(A)(4) and 17.07(C); Article 18; and Article 25, Sections 25.02 and 25.08.

### ISSUES

The issues as seen by the union are:

- 1) Was the grievant denied a demotion to Storekeeper 1, PCN 4004, in violation of his collective bargaining rights under Article 17?
- 2) Did the State abolish the Storekeeper 1, PCN 4004, position? If so, did the State provide sufficient rationale in accordance with Article 18 and ORC 124.321?
- 3) Did the State erode the bargaining unit by not filling the position, and transferring the duties to the supervisor and other bargaining unit employees in contravention of Article 1.05?

The issue as seen by the state is:

Is the grievance properly before the arbitrator? If so, did management violate Article 17 by not filling the storekeeper 1 position?

### ARBITRABILITY

State Position - The state argues that the grievance is not properly before the Arbitrator. It points out that the grievant was informed in February or March of 2001 that the storekeeper 1 position was not going to be filled because the position was frozen due

to a statewide budget crisis. The state stresses that the grievance was not received at step one until August 25, 2003 – two and one-half years later.

The state contends that the grievance was not filed within the contractual time limits. It observes that Section 25.02 requires a grievance to be filed within 30 days. The state emphasizes that the two and one-half years the grievant waited to grieve is “nowhere close to the 30-day maximum articulated in the Contract.” (State Procedural Issue, page 2)

The state maintains that the testimony of the union’s witnesses regarding the alleged violation of Section 1.05 bolstered its claim that the grievance was untimely. It indicates that Lendi; Mary Rose Morton, a laundry coordinator; Alan Boler, a former quartermaster; Albert Colyar, a laundry coordinator; and Ronnie Morton, a former chapter president, testified that Lendi performed more bargaining unit work after Miles vacated the storekeeper 1 position in December 2000. The state suggests that if Lendi began doing more bargaining unit work at that time, “the union should have acted upon the alleged violation of Section 1.05 and not sat on their right for two and one-half years.” (State Written Closing Statement, pages 2-3)

The state asserts that the same is true for the alleged violation of Section 7.01. It charges that if employees were improperly utilized in the warehouse in violation of this provision, it would have occurred when Miles vacated the storekeeper 1 position. The state claims that “the union stretches the bounds of reasonableness by asserting that actions associated with an Article 7 violation were invisible in 2001.” (State Written Closing Statement, page 3)

The state argues that the triggering event for the grievance could not have occurred later than December 2002, eight months prior to the filing the grievance. It points out that Cencarik testified that she was reassigned shortly after she told the grievant that the storekeeper 1 position was on hold and did not speak to him after her reassignment. The state reports that Janet Thomas, who became the personnel director in December 2002, testified that “neither she nor her staff had specific conversations with the grievant regarding the status of the demotion.” (State Written Closing Statement, page 3)

The state contends that the decision of Arbitrator Rhonda Rivera in OCSEA, Local 11, AFL-CIO and State of Ohio; Case No. 24-06-(91-03-14)-0273-01-04; Stephen A. Holt, Grievant; September 10, 1991, which was cited by the union, is not relevant. It claims that Arbitrator Rivera’s decision “was predicated on a fact pattern indicative of the grievant maintaining continuous communication with management in regards to his employment status.” (State Written Closing Statement, page 3) The state asserts that in the instant case the “communication was either singular in nature or ended early in 2001” or, “giving the grievant the benefit of the doubt, it ended in December 2002.” (State Written Closing Statement, pages 3-4)

The state maintains that the union’s attempt to modify the grievance on October 22, 2003, based on the alleged after-the-fact notice does not alter the fact that the grievance was untimely. It points out that the grievance filed on August 25, 2003, did not specify a violation of Article 18. The state notes that the first reference to “abolishment” was made during a labor-management meeting on September 25, 2003, more than a month after the grievance was filed. It states that if the claim that the comment at the

September 25, 2003, meeting regarding the abolishment of the job was “official notice” and was the triggering event for the grievance, it would mean that the grievance was filed before the triggering event.

The state charges that the union’s attempt to modify the grievance was improper. It points out that the union’s alleged violation of Article 17 and/or Article 18 is advance step grievance that must be filed at step three. The state notes that Teri Decker, the chief of the Bureau of Labor Relations, testified that the modification of an advance step grievance must be done in conjunction with someone from the Bureau of Labor Relations. It insists that “the instant grievance was not properly modified to include the article necessary to address layoff/abolishment and, as a result, the issue is not properly before the arbitrator.” (State Written Closing Statement, page 5)

The state asks the Arbitrator to find the grievance untimely and procedurally arbitrable.

Union Position - The union argues that the state did not meet its burden of proving that the grievance was untimely. It acknowledges that the grievant was supposed to be placed in the storekeeper 1 job on March 25, 2001, and no grievance was filed until August 25, 2003, but it indicates that the passage of time is not the only factor that must be considered. It stresses that under Section 25.02 the time limits do not start to run until it becomes aware of a contract violation or reasonably should have become aware of the violation.

The union contends that there is no evidence that the grievant or the union received notice of the disposition of the storekeeper 1 position. It maintains that the grievant was led to believe that it was only a matter of time before he would be placed in

the job. The union points out that Morton and Chris George, former chapter presidents, testified that they were never told about the decision to abolish the storekeeper 1 position. It charges that “this charade was perpetrated by the deceptive answers and promises from the State.” (Union Written Closing Statement, page 6)

The union objects to the testimony of Todd Ishee, the former warden, regarding his decision to abolish the storekeeper 1 position. It states that prior to the arbitration hearing it officially and specifically inquired who made the decision to eliminate the job, when it was made, and why it was made. The union complains that the state’s response to all three questions was “not known.”

The union challenges the state’s claim that it did not have to furnish the requested information. It states that by the nature of the questions it was clear that it was seeking a potential witness. The union rejects the state’s argument that “if it wasn’t on paper, then they don’t have [to] provide it.” (Union Written Closing Statement, page 7) It suggests that concealing the requested information was contrary to the broad discovery powers intended by Section 25.08.

The union cites the decision of Arbitrator Rhonda Rivera in OCSEA/AFSCME, Local 11, AFL-CIO and Ohio Department of Transportation; Case No. G87-0205; Ralph Bambino, Grievant; October 8, 1987. It points out that in that decision Arbitrator Rivera stated that “since the purpose of the Arbitrator is to determine whether that decision was made with ‘just cause,’ any information used to arrive at that decision is ‘relevant to that grievance’ for the purpose of discovery.” (Union Written Closing Statement, page 7)

The union complains that it was not informed that the storekeeper 1 position was abolished. It claims that Ishee testified that in late 2000 he was directed to develop a list



of positions to be abolished but was instructed not to speak to the union about it. The union states that in late 2001 he again was instructed not to converse with the union.

The union argues that the state did not provide actual notice that the storekeeper 1 position was abolished. It points out that Black's Law Dictionary defines actual notice as "notice expressly and actually given, and brought home to the party." The union asserts that "the unrebutted testimony is that the Union simply was not 'aware' and would not have been 'reasonably aware' given the State's grave misrepresentation of the facts." (Union Written Closing Statement, page 7)

The union relies on the decision of Arbitrator Rivera in OCSEA, Local 11 AFSCME, AFL-CIO and State of Ohio; Case No. 24-06-(91-03-14)-0273-01-04; Stephen A Holt, Grievant; September 10, 1991, in support of its contention that "the state cannot just allow a period of time to go by without giving notice that would become the triggering event." (Union Written Closing Statement, page 8) It reports that she stated:

... the State did not communicate a final clear statement to the Grievant of the denial of reinstatement. Evidence adduced at the hearing produced no fixed date from which to measure the grievance time. Since that lack of fixed date is a direct result of the State's continuing failure to deal clearly with the grievant, the State cannot be heard (is estopped) to assert §25.02 as a defense. In addition, the Union had no formal notice of these events and the evidence leads to an assumption that the Union acted promptly when it had reason to know of a probable contract violation ... (Union Written Closing Statement, page 8)

The union contends that in the instant case there was no triggering event until August 18, 2003. It indicates that on that date it observed the locksmith performing the duties of the storekeeper 1 position. The union states that the minutes for the labor-management committee meeting on September 25, 2003, support this timeline.

The union disputes the state's argument that the grievance is untimely because grievances relating to layoffs should be filed at step three. It acknowledges that Decker testified that "layoff" and "job abolishment" are used interchangeably but claims that she made a critical error. The union observes, however, that Section 17.07 refers to a "layoff or job abolishment;" that Section 25.02 specifically lists "layoff" and not "abolishment;" and that there is no indication that it ever requested or agreed to advance step filing on the job abolishment issue.

The union insists that the state should be held to the clear and unambiguous language that indicates that layoff and job abolishment are distinctly different. It observes that in Ohio Civil Service Employees Association/AFSCME, Local 11 and State of Ohio, Department of Rehabilitation and Correction, Cross Shift Relief Matter, Grievance; June 23, 2002, Arbitrator John Murphy stated that "it is perhaps sufficient to declare that the portions of the document entitled Addendum to Pick-A-Post parameters dated October 30, 2000 that deal with relief are clear and unambiguous." (Union Written Closing Statement, page 9) The union maintains that this Arbitrator should not "buy" the state's argument that the language at issue is unclear just like Arbitrator Murphy "did not buy it" in the case before him.

The union contends that, notwithstanding this argument, the demotion grievance was not untimely. It states that the issue is not "non selection" but the enforcement of the selection. The union indicates that the advance step language applies to those who were not selected for a position so the grievance does not fall into the "non selection" or "advance step realm."

The union insists that the grievance was properly amended at step three on October 22, 2003. It points out that Rager's testimony that the grievance was amended at step three was unrefuted. The union notes that there is no step three answer or testimony from any of the state's witnesses that the amendment of the grievance was ever challenged.

The union concludes that the state "is reticent to engage in an honest discussion on all of the issues" and "is sticking its head in the proverbial sand, and hoping the others just go away." (Union Written Closing Statement, page 10) It asks the Arbitrator to find that the grievance is timely.

Analysis – The initial issue is the timeliness of the grievance. The state argues that the grievance is untimely because the events giving rise to the dispute occurred in February or March of 2001 but no grievance was filed until August 25, 2003, which is well beyond the time limits for filing a grievance under the contract. The union responds that it did not become aware of the contract violations until August 18, 2003, and filed its grievance seven days later, clearly within the contractual time limits.

The Arbitrator believes that there are two distinct aspects to the timeliness issue. First, the grievance filed on August 25, 2003, challenges the state's failure to place the grievant in the storekeeper 1 position and charges that Lendi and others were improperly doing the storekeeper 1 job. Second, in the amendment to the grievance on October 22, 2003, the union accuses the state of violating the contract by abolishing the storekeeper 1 position without notifying it or supplying a rationale.

The grievance is clearly untimely with respect to the charges raised in the initial grievance. The failure of the state to place the grievant in the storekeeper 1 job was

immediately apparent. If the union felt that the state acted in violation of the contract, it was obligated to grieve in compliance with the contractual time limits.

In a similar vein, when Miles left the storekeeper 1 position, the work he had been doing did not disappear. If the union believed that the work was being done by others in violation of the collective bargaining agreement, it would have been obvious at that time and it could not wait two and one-half years to file a grievance.

The second aspect of the grievance, which charged that the storekeeper 1 job was abolished in violation of the contract, is a different matter. In February or March 2001 the storekeeper 1 position still existed and the grievant and the union would have had no reason to believe that it was not going to continue to exist. They were aware of the budget crisis in the state and the personnel department had informed the grievant that once the crisis was over he would be placed in the job he sought. However, the grievant and union could not wait two and one-half years to grieve. Once the freeze was lifted and other positions were filled, they should have questioned why the grievant was not placed in the job he had been told on February 14, 2001, that he had secured.

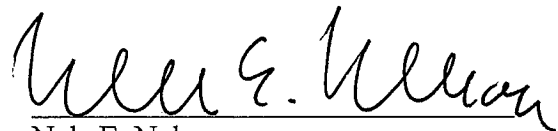
The grievant and the union had every reason to be concerned about the status of the storekeeper 1 job. Decker and Thomas testified that there was a long-standing practice that vacant jobs remained on the Position Control Roster for twelve months and then "fall off" the roster, i.e., no longer exist, unless the institution makes a specific request that the job remain on the roster. Decker stated that with this in mind, the union routinely inquires about the status of vacant jobs. Given this unrebutted testimony, the union was obligated to challenge the state's actions long before it sought to amend the grievance on October 22, 2003.

The Arbitrator must reject the union's argument that the state failed to give notice of the storekeeper 1 job being abolished as required by Article 18, Section 18.03. As indicated above, the case involved a job "falling off" the roster rather than a layoff or job abolishment. If the union wished to challenge the process by which the storekeeper 1 job was eliminated, it could not wait one and one-half years to do so.

Based upon the above analysis, the Arbitrator must conclude that the grievance is untimely making it unnecessary to address the merits of the dispute.

### AWARD

The grievance is untimely and must be denied on that basis.



Nels E. Nelson  
Arbitrator

September 5, 2005  
Russell Township  
Geauga County, Ohio