

IN THE MATTER OF THE ARBITRATION BETWEEN

SERVICE EMPLOYEES HEALTHCARE)	FEDERAL MEDIATION AND
MINNESOTA, LOCAL 113)	CONCILIATION SERVICE
OF THE SERVICE EMPLOYEES)	CASE NO. 09-55967
INTERNATIONAL UNION,)	
)	
)	
Union,)	
)	
and)	
)	
)	
ROBBINSDALE REHABILITATION)	DECISION AND AWARD
AND CARE CENTER, INC.,)	OF
)	ARBITRATOR
Employer.)	

APPEARANCES

For the Union:

David Blanchard
Director of Legal Affairs
Service Employees Healthcare
Minnesota
Suite 100
345 Randolph Avenue
St. Paul, MN 55102-3610

For the Employer:

Noah G. Lipschultz
Littler Mendelson, P.C.
Attorneys at Law
1300 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2136

On June 12, 2009, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, Mark A. Dischinger.

At the start of the hearing, the Employer moved for its bifurcation, asking that during its first part evidence be presented only if relevant to issues raised by the Employer's objection that the Union failed to comply with the procedural requirements established by the labor agreement for processing grievances (hereafter, the "procedural objection"). The Union opposed the motion to bifurcate. I informed counsel for the parties that the usual criterion I apply when ruling on such a motion is one of efficiency -- to determine, based upon the representations of counsel, whether bifurcation has a reasonable prospect of avoiding unnecessary use of time and expense that would result from an extended hearing. Based upon the representations of counsel, I granted the motion to bifurcate and indicated that, if at the end of the first part of the hearing I were to overrule the Employer's procedural objection, the hearing would continue with the presentation of evidence relevant to substantive issues presented by the grievance.

The presentation of evidence relating to the procedural objection occupied the entire day that had been reserved for the hearing, and at the conclusion of that day, the parties agreed to present post-hearing written memoranda relating to the procedural objection. The last of post-hearing materials was received by me on July 10, 2009.

FACTS

The Employer operates a facility in Robbinsdale, Minnesota, a suburb of Minneapolis, in which it provides care and rehabilitation services to vulnerable adults ("residents")

suffering from poor mental health or from drug abuse. The Union is the collective bargaining representative of employees of the Employer who hold classifications such as Nursing Assistant, Housekeeper and Cook.

The grievant was hired by the Employer to work as a Nursing Assistant in May of 1979, and he was discharged in the spring of 2008. The evidence that relates to the date of his discharge and subsequent grievance processing is in substantial conflict, as I describe hereafter.

Article XVI of the labor agreement that was in effect at the time of the grievant's discharge states its duration -- "from October 1, 2005 through and including September 30, 2008" and that the agreement is to remain in full force and effect from year to year thereafter unless one of the parties notifies the other of "its intention to change, modify or terminate" the agreement. Because the parties have presented no evidence indicating that they have changed provisions of that labor agreement, my decision in this case applies its provisions, notwithstanding that some of the events relevant to the issues raised by the procedural objection occurred after September 30, 2008, the nominal expiration date of that agreement -- which I refer to hereafter merely as "the labor agreement."

Article II of the labor agreement establishes a procedure for processing grievances, thus:

A. Definition of a Grievance

For the purpose of this Agreement, a grievance is defined as any dispute between the Employer, Union or any employee relating to the interpretation of, or adherence to the

terms and provisions of this Agreement and shall be handled as follows.

B. Step 1

Any claim of any employee arising out of the interpretation of or the adherence to the terms or provisions of this Agreement shall first be taken up with the department head for adjustment and if not then satisfactorily settled, taken up with the Employer or his/her representative and if not then satisfactorily settled, it shall constitute a grievance and shall be submitted for settlement under the grievance procedure herein provided. With respect to any such grievance and with respect to any other dispute arising out of the interpretation of or adherence to the terms or provisions of this Agreement, the aggrieved party shall promptly give written notice of his or her grievance to the other party setting forth the grievance in detail and requesting submission of the grievance for immediate settlement.

C. Step 2

In no case shall there be any consideration given to any grievance unless such notice is submitted by the aggrieved party to the other party within twenty (20) days after the occurrence of the grievance (except that as to [a] grievance over wages, hours, vacation, and days off provisions of this Agreement, such notice shall be timely if given within thirty (30) days after the regular pay day for the period in which the violation occurred). Failure to give such notice shall constitute a permanent waiver and bar of such grievance.

D. Mediation Option

In case no settlement can be arrived at between the parties in Step 1 or 2 above, the matter in dispute may be submitted to the Federal Mediation and Conciliation Service for resolution. Both parties must mutually agree to this non-binding mediation procedure. The utilization of Step 3 does not prevent either party from utilizing the Arbitration Procedure in Step 4.

E. Arbitration Procedure

1. Arbitration -- Any grievance alleging a violation of an express provision of this Agreement that has been properly and timely processed through the grievance procedure set forth in Article II of this Agreement and has not been settled at the conclusion thereof, may be appealed to arbitration by the Union serving the Employer with written notice of its intent to appeal twenty (20) days after the Employer has denied

the grievance at Step 2 or Step 3 if the mediation procedure is used.

2. Not later than twenty (20) calendar days after the Union serves the Employer with written notice of intent to appeal a grievance to arbitration, the Employer and the Union shall jointly request the Federal Mediation and Conciliation Service to furnish to the Employer and the Union, a list of seven (7) qualified and impartial arbitrators. Within ten (10) calendar days after receipt of that list by the Employer, the Employer and the Union shall alternately strike names from the list until only one name remains. The arbitrator whose name remains shall hear the grievance.
3. The decision or award of the arbitrator shall be final and binding upon all parties. The standard of proof shall be the preponderance of the evidence of clear and convincing evidence and never shall the standard of beyond a reasonable doubt [sic]. In cases of disciplinary action, the standard of proof shall be clear and convincing evidence. The expenses of the Board of Arbitration shall be borne by the parties equally. The arbitrators shall have no authority to add to, amend or modify any of the provisions of this Agreement.

The following is a summary of the evidence relating to grievance processing. Cherie N. Camuel, Administrator of the Employer's facility, was the primary witness for the Employer. She testified that, on March 6, 2008, she telephoned the grievant and told him that a female resident had alleged that he sexually abused her on the previous day, March 5, 2008. Camuel told the grievant that she was suspending him from work so that she could investigate the allegation. On March 11, 2008, Camuel sent the grievant a letter that informed him of the suspension in writing -- though the letter stated that her telephone call had occurred on March 5, 2008, and that the abuse complained of had occurred on March 4, 2008. The letter indicates that a copy was sent to Anthony Davis, a Business Representative for the Union. Camuel testified that she thought she followed her usual

practice of delivering a copy of the letter to a Union Steward on the premises of the facility -- in this case, Joseph Deleon, a Steward who was classified as a Cook. She testified that she had used this manner of notification to the Union for several years and that the Union had never informed her that it did not regard delivery to a Steward as notice to the Union.

In accord with licensing regulations of the Minnesota Department of Human Services (the "DHS"), Camuel notified the DHS that a resident had made an allegation of sexual abuse against the grievant. She also notified the Robbinsdale Police Department of the allegation. She made these notifications just after she learned of the allegation.

Camuel testified that she heard nothing from the grievant or from the Union after her letter of March 11, 2008. On April 11, 2008, she sent the following letter to the grievant by certified mail:

Since March 5, 2008 you have been suspended from working due to a criminal investigation regarding your conduct. Given this extended period of time, and the fact that this criminal investigation prohibits you from working with vulnerable residents, and is still ongoing as of this date, we believe it is best for both parties that as of 03/05/08 you are no longer an employee at Robbinsdale Rehabilitation and Care Center.

A receipt for certified mail, signed by the grievant, indicates that he received Camuel's letter of April 11, 2008, on April 24, 2008. Camuel testified that she thought she followed her usual practice -- that she handed a copy of this letter to the Steward, Deleon, as notification to the Union, saying to him "here is another letter to fax to Tony Davis." She also

testified that she had told Deleon just before April 11, 2008, that the grievant would not be reinstated.

The parties presented conflicting evidence about the manner in which the grievance now before me was initiated. The document itself was prepared on a word processor, with text keyed in on what appears to be a standard form used by the Union for preparation of written grievances.

Below, in my reproduction of relevant parts of the grievance, I indicate by my underlinings the text that appears to have been keyed in on the form:

Facility:	<u>Robbinsdale Rehab</u> Date: <u>May 27, 2008</u>
Department:	<u>Nursing</u>
Grievance Subject:	<u>Unjust Termination</u>
Name of Grievant:	<u>Mark Dischinger</u>
Grievance Violation:	<u>Article IX Discharge and Quits (A)</u> <u>No discharge without just cause and</u> <u>any other article that may apply</u>
Desired Remedy:	<u>To be made whole for any loss of</u> <u>wages or benefits and return to work</u> <u>immediately pending investigation by</u> <u>State DHS.</u>

[Signature of the grievant]
Sign and Date

Thus, the grievance shows a keyed in date, "May 27, 2008," at the top. The grievant's signature appears on the form, but no date appears at the place of his signing.

Ashley R. Christenson testified that in the spring of 2008 she was a clerical worker for the Union, that she prepared the grievance by using a word processing template of the grievance form and that she keyed in the added text on the form, as reproduced above. She thought the keyed-in text came from longhand notes given to her by Davis. She testified that she

prepared the grievance on May 2, 2008, and that her examination of the document's "properties," as registered on the computer used to prepare it, confirmed that the document had been prepared on May 2, 2008. The Union presented in evidence a computer print-out of the document's properties, which showed it had been prepared on May 2, 2008.

Christenson also testified that she mailed three copies of the grievance to the grievant, not using certified mail, with the expectation that he would sign one copy and send it to the Employer, send another copy back to the Union offices and keep one copy for himself. Though she had that expectation, she did not include instructions with the three grievance copies sent to the grievant; rather, she assumed that Davis had instructed the grievant about execution and distribution of the grievance copies. In describing what she did with respect to this particular grievance, Christenson used the auxiliary verbs, "would" and "would have," and, for that reason, I interpret her testimony as providing a general description of the usual procedures she followed after preparing a grievance rather than a recollection specific to this grievance.

The grievant testified as follows with respect to the initiation of the grievance. During the week following his receipt of Camuel's suspension letter of March 11, 2008, he was interviewed by the Robbinsdale Police and provided them with a DNA sample by saliva swab. About April 15, 2008, he was also interviewed by an investigator from the DHS.

On April 24, 2008, the grievant received by certified mail Camuel's letter of April 11, 2008, which discharged him. He

telephoned the Robbinsdale Police Department on April 30, 2008, and learned that a decision had been made not to charge him with a crime. On Thursday, May 1, 2008, he telephoned Davis and told him he wanted to grieve the discharge. Davis told him that as long as a grievance was "filed," nothing could be done until "they finish the investigation." The grievant testified that Davis said he would send him three copies of a grievance and that he should sign them, keep one for himself, send one to the Union and send one to the Employer by certified mail.

The grievant testified that he received the grievance copies on Monday, May 5, 2008, and that on the same day, he signed them, though he did not read the text of the grievance, except to determine that it was a grievance. Thus, according to this testimony, he signed the grievance copies without being aware that the date appearing at the top of the form was May 27, 2008, and he signed them, but he did not indicate a date at the place where he signed them.

The grievant testified that after signing the grievance copies, he went to a post office, also on May 5, 2008, and had one copy mailed to the Union and had another copy sent by certified mail to the Employer, directing it to Camuel's attention. He asked of the postal clerk that the envelope sent to the Employer be sent by certified mail, but did not request that a signed return be obtained from the Employer indicating that the Employer had received it. He testified that, though he did not request that a signed return be obtained, he did receive the postal clerk's receipt, which confirmed that he had mailed

an envelope to the Employer by certified mail on May 5, 2008. He testified, however, that he lost the receipt from the post office.

Camuel testified that after she sent the grievant the letter of March 11, 2008, which suspended him, she had no communication with the Union until just before she sent the discharge letter of April 11, 2008. Just before that date, she told Deleon that the Employer was not going to reinstate the grievant, and, as noted above, she gave to Deleon a copy of the April 11, 2008, letter and asked him to fax it to Davis. She testified that she had several conversations with Deleon asking him if the Union was going to grieve the discharge, but that it was not until toward the end of May -- she estimated about May 22, 2008 -- that Deleon told her "it looks like" the grievant was going to grieve. Camuel testified that she never had any discussion with the Union that would indicate that the Employer would waive the time limits for grievance processing, as established by the labor agreement.

Camuel testified that she received the grievance after the date that appears on it, May 27, 2008, and that, after several postponements, a grievance meeting was held in late June of 2008. Camuel testified that she and Julie Ann Auerbach, Director of Nursing, attended the meeting as representatives of the Employer and that the grievant attended with Davis and Deleon as his representatives. Camuel testified that she told the meeting that she was there merely to listen to what the grievant and his representatives had to say. In Auerbach's

testimony, which I describe more fully below, she estimated that the meeting occurred on June 26 or 27, 2008.

According to Camuel, by the time of that meeting, she had completed her investigation and had decided not to have the grievant employed at the facility 1) because she had interviewed the complaining resident and believed her account of sexual abuse and 2) because she had become aware of a previous allegation of inappropriate sexual contact, in 2005, made by a resident against the grievant. She testified that she had learned in June of the County Attorney's decision not to prosecute the grievant, but thought that decision was not relevant to her decision whether to continue his employment at the facility. She also testified that, though she did not yet have a report of the investigation by the DHS, she considered that report not to be relevant to her decision about continuing his employment -- because the investigation of the DHS related to licensing issues, primarily to a determination whether the Employer had procedures in place to prevent resident abuse.

Auerbach testified that she and Camuel attended the grievance meeting on June 26 or 27, 2008, with the grievant, Davis and Deleon. She testified that Camuel told the meeting she was there only to listen, that Davis indicated the Union was waiting for the DHS investigation report and wanted to obtain the investigation report from the Robbinsdale Police. Auerbach's testimony acknowledges that the Union was focused on obtaining those reports. As I interpret the testimony of Auerbach and Camuel about the grievance meeting, they were not interested

in those reports for any purpose that might relate to reversing the decision to terminate the grievant's employment. In contrast, however, it appears that Davis wanted to obtain the reports in order to persuade Camuel to reverse the decision.

Neither Davis nor Deleon testified. The following is a summary of the grievant's testimony about the meeting -- the one that Camuel described as having occurred in late June and that Auerbach described as having occurred on June 26 or 27, 2008. The grievant testified that the meeting occurred on July 3, 2008, and that he, Davis, Camuel and Auerbach attended, but not Deleon. The grievant testified that, before the meeting, Davis had told him that disposition of his case would have to await the report from the DHS, because he could not be reinstated if that report were adverse to him. He received a telephone message from the Union on June 25, 2008, informing him that he was to attend a grievance meeting on June 26. He did not attend because he was traveling, but Deleon telephoned him and told him the meeting had been rescheduled for July 3, 2008. At the meeting, Camuel said that she was just there to listen. Davis said the discharge was unjust and that the Union supported the grievance. The grievant testified that Camuel then said that the Employer could not do anything until the report from the DHS was received. The grievant testified that he asked her if she had received the Police report and that she said she had not received it. He testified that Auerbach said that it sometimes takes a very long time to receive a report from the DHS -- sometimes up to eighteen months. According to the grievant,

Davis said he would call and try to get the report expedited. At the conclusion of the meeting, Davis told Camuel that he would be unavailable for an extended time and that she should communicate through Deleon. The evidence shows that at this meeting, 1) neither Camuel nor Auerbach indicated that the Union had not complied with the time limits established by the labor agreement's grievance procedure and 2) that neither of them made an express waiver of any objection to such compliance.

On July 1, 2008, Camuel wrote the following letter, addressed to Davis, and gave it to Deleon for delivery to Davis, who did not receive it because Deleon forgot to deliver it to him:

Re: Grievance Meeting for Mark Dischenger

Robbinsdale Rehabilitation and Care Center has made the decision to not reinstate Mark Dischengers Employment. If you have any questions please contact me at [telephone number omitted].

Auerbach testified that she was aware as early as late March of 2008 that no action would be taken by the DHS against the facility for a failure to comply with regulations safeguarding residents. She was able to read the full report of the DHS on its website during August of 2008.

The grievant testified that he tried but was unable to obtain the report until December 9, 2008, when he went to the offices of the DHS and obtained it. The Union presented the report in evidence. It is dated July 22, 2008, and it finds the evidence about the allegation against the grievant "inconclusive." The report includes the following statement about the complaining resident:

Although resident #1's story remained consistent during the facility's internal investigation, the details of her allegation did not remain consistent during the course of the [investigation by the DHS]. Further allegations were made that were not credible or consistent. . . .

The grievant testified as follows. On December 9, 2008, after he obtained the DHS report, he telephoned Davis and told him that the report was favorable. Davis told him he would call Camuel and arrange a meeting. Davis called him back and told him the meeting with Camuel was arranged for December 16, 2008. The grievant testified that on December 16, 2008, he went to the area outside Camuel's office, saw Davis and Camuel talking at the doorway to her office, but was told by Davis to wait outside the office. According to the grievant, Davis then came out and told him that there would be no meeting because the paperwork was not in order.

On December 23, 2008, Davis wrote the following letter to Camuel:

I met with you on Tuesday December 9th [the parties stipulate that the correct date was December 16, 2008] to discuss Mark Dischinger's grievance that has been pending since May 2008, and at the time you couldn't find all of his information. You mentioned that a letter was sent to me in July about your position on Mark's employment at Robbinsdale. I have checked our files and there is no record that any letter was mailed to the union. I am requesting all information pertaining to Mark Dischinger including but not limited to the grievance language in the collective bargaining agreement.

Camuel testified that in early December of 2008 Davis talked to her by telephone and told her that the Union was not going to pursue the grievance. She also testified that Deleon told her then that the Union wanted the information she had relating to the 2005 allegation that the grievant had engaged

in sexual contact with a resident, in order to support the Union's decision not to pursue the grievance. On December 19, 2008, Auerbach sent Camuel the following email:

Subject: Mark D

Hi just heard from Joe [Deleon] the union isn't going after the Mark thing. they would like the file notes and information on the prior thing with [name omitted] they are going to include that in there reasons why not.

Camuel testified that Davis had called her before December 16, 2008, and arranged a meeting for that day to discuss general Union business and another grievance. She was surprised when Davis arrived at the meeting accompanied by the grievant. After she received Davis' letter of December 23, 2008, she wrote a note and attached it to his letter. Some of the text of the note is difficult to read, but the following reproduction is a substantially accurate reading:

During a phone call prior to the meeting I informed Tony [Davis] that I found an old file with Mark's name on it but I have not had a chance to go through it. Tony said he would be out at the Center visiting Joe [Deleon] on December 9th and he would stop in and we could discuss. No info was requested. I was under the impress [sic] the meeting was reg general union issues and so the discussion on Mark I was surprised to see Mark show up and was not prepared for a grievance meeting.

Thus, the meeting between Camuel and Davis on December 16, 2008, did not proceed to any substantive discussion of the grievant's case.

The grievant testified that on January 9, 2009, Davis told him that he was being reassigned to another state and that from then on Steven S. Sitta, another Union representative, would be handling his case.

Sitta testified as follows. On about January 12, 2009, he received the grievant's file from Davis, and he also received the following handwritten notes from Davis:

- Mark Dischinger recieved a letter from Robbinsdale Rehab on March 11th 2008 saying that he was suspended until further notice.
- He recieved a follow up letter a week or two after saying he was terminated. Mark has the letters the state report and grievance I notified him to make copies and send to you. (The grievance was filled timely after termination letter.)
- I met with the Employer Administrator Cherie Camuel the Union Steward Joe Deleon and the grievant Mark. Cherie stated that Mark was terminated for sexual abuse to a resident. Robbinsdale police were investigating and the state of mn department of human services. At that time both parties agreed (verbally) to wait until the state report comes out to follow up our next step of the grievance procedure.
- In early July management gave a letter to the Union Steward Joe Deleon stating their position not to rehire Mark.
- Robbinsdale never notified the Union or mailed that letter to the Union.
- In the middle of July Robbinsdale recieved a report from the State that the allegations were inconclusive. They never notified the Union or Mark but told the Union Steward Joe. At no time was the Union notified.
- Mark contacted the State early December 2007 [sic] and recieved a report of the investigation. He called the Union spoke to Dave. Dave explained that I was handling the case. The call was transferred to me. I spoke with Mark and asked did he want to continue to pursue he stated yes. I scheduled a meeting with Cherie at Robbinsdale Tuesday December 9th with me, Joe, Mark and Cherie at 1:00 p.m. Once at the facility Cherie said she was looking for the paper work and was not prepared. I explained we needed all documents to proceed. Mark had an appointment to go to. I asked for the paper work to be faxed to the Union office. Never recieved for a week. Joe the Union Steward reapproached Cherie and asked her to send the papers to the Union. . . .

Sitta also received from Davis what Davis described as a "Personal Remark," as follows:

- Mark was accused in 2005 for having sex with a resident. Their was a different administrator at that

- time. The state report was inconclusive.
- Cherie was hired to become administrator shortly after incident and decision was made by previous administrator not to discipline.
 - Cherie and the DON - Director of Nursing had a meeting with Mark. She explained that she could not go back in discipline. Cherie said Mark admitted to having sex with the resident (who didn't). The DON witnessed the statement and is willing to testify if this grievance is moved to arbitration.
 - If the case was moved to arbitration this is the second time he has been accused and inconclusive is not a solid yes or no. My suggestion is present to the merit board for decision.

Sitta testified that he telephoned Camuel in mid-January and that she told him to contact David C. Keating, Corporate Counsel for the Employer's parent corporation, Extendicare Health Services, Inc ("Extendicare"). After Sitta did so, Keating sent Sitta the following letter on February 13, 2009:

I am in receipt of your fax dated February 12, 2009. Upon review, the written grievance is dated May 27, 2008. As discussed, the termination letter to Dischinger was dated April 11, 2008. That letter was received by Dischinger on April 24, 2008. A copy of the certified receipt is attached for your convenience. A copy of said letter dated April 11, 2008 was delivered to the Union.

Pursuant to Article II of the Agreement, the May 27th grievance related to Mr. Dischinger's termination is untimely. Any grievance related to Mr. Dischinger's termination is permanently waived and barred from the grievance and arbitration procedure. Therefore, the May 27th grievance is denied. . . .

On March 12, 2009, Sitta sent the following letter to Camuel:

After reviewing the [DHS] Investigative Report [relating to the allegation against the grievant] . . . , it is our position that there was absolutely no justification for terminating Mr. Dischinger . . .

It is also our position, that this employer, and [the Union] mutually agreed to postpone the grievance meeting until such time as the employer received the states report. The meeting was finally scheduled for 2:30 PM, on Tuesday, 12/16/2008, which was again cancelled because

the employer did not have the paperwork ready. We have tried to reschedule that meeting with you, to get this matter settled, but you refused to meet. Therefore, it is our intention to proceed to the next step in the grievance process, which is arbitration.

On March 17, 2009, Noah G. Lipschultz, attorney for the Employer, sent Sitta a letter that included the following passage relevant to issues of timeliness:

Without waiving any arguments as to the union's failure to comply with the applicable time limits contained in the collective bargaining agreement's grievance & arbitration provisions, I am reviewing your letter and expect to be able to respond on the Company's behalf after I return from out of town travel, early next week.

DECISION

The Employer's Arguments.

The Employer makes the following arguments that the Union failed to comply with the grievance procedure established by Article II of the labor agreement. Article II, Section A, requires that an "aggrieved party" "promptly give written notice of his or her grievance to the other party setting forth the grievance in detail and requesting submission of the grievance for immediate settlement." Article II, Section B, which describes Step 2 of the grievance procedure, sets clear time limits for giving such notice by the "aggrieved party to the other party." I repeat the relevant language of Step 2 below:

In no case shall there be any consideration given to any grievance unless such notice is submitted by the aggrieved party to the other party within twenty (20) days after the occurrence of the grievance . . . Failure to give such notice shall constitute a permanent waiver and bar of such grievance.

The Employer argues 1) that the "occurrence" in this case was the discharge of the grievant, which was completed by

Camuel's letter of April 11, 2008, 2) that Camuel gave a copy of that letter to Deleon, who as Steward was the Union's designated agent for its receipt, 3) that she sent the letter to the grievant by certified mail, and 4) that his certified mail receipt shows that he received it on April 24, 2008.

The Employer argues that, to meet the time limit established by Step 2, the Union was required to give the Employer notice that the discharge was being grieved within twenty days of April 24, 2008, i.e., by May 14, 2008. The Employer notes that the grievance itself shows that it was not written till May 27, 2008, and Camuel testified that she did not receive it until after May 27, 2008. The Employer urges, therefore, that, because it did not receive notice of the grievance within the time limit established by Step 2, there has been "a permanent waiver and bar" to the grievance, as provided in the last sentence of Step 2.

The Employer also makes the following argument. The Union did not initiate any discussion of the grievance until June 26 or 27, 2008, when a grievance meeting occurred. At the meeting, Camuel informed the Union representatives that she was there to listen, and after the meeting she sent a letter to Davis, again delivered to him by delivery to Deleon, the Union's agent, clearly informing him that the grievant would not be reinstated, thus denying the grievance.

Step 3 of the grievance procedure, mediation, as described in Article II, Section D, is a voluntary procedure, which was not invoked in this case.

The Employer argues that, after Camuel's denial of the grievance on July 1, 2008, the Union failed to seek arbitration (Step 4) within the time limits established by Article II, Section E, of the labor agreement. I repeat Paragraph 1 of Section E below:

Arbitration -- Any grievance alleging a violation of an express provision of this Agreement that has been properly and timely processed through the grievance procedure set forth in Article II of this Agreement and has not been settled at the conclusion thereof, may be appealed to arbitration by the Union serving the Employer with written notice of its intent to appeal twenty (20) days after the Employer has denied the grievance at Step 2 or Step 3 if the mediation procedure is used.

The Employer argues that the Union failed to give written notice of its intention to appeal the grievance to arbitration within twenty days after Camuel's Step 2 denial of the grievance on July 1, 2008, and that, therefore, the grievance should be dismissed because the Union did not meet the Step 4 time limit for appeal to arbitration. The Employer notes that the first notice of the Union's intention to have the grievance arbitrated occurred with Sitta's letter to Camuel on March 12, 2009.

The Employer argues that Article I, Section E, of the labor agreement, which describes the parties' agreement about the role of Stewards, recognizes the authority of Stewards to act in behalf of the Union:

The Employer recognizes the right of the Union to elect or select from employees who are members of the Union, a job steward to handle such routine Union business as may from time to time be delegated to him/her by the Union in connection with this collective bargaining relationship, which does not unduly interfere with the assigned duty of any employee. The name of such job stewards shall be furnished in writing to the Employer, and any changes in

stewards shall be reported to the Employer in writing. In addition to the above stewards, the Employer also agrees to recognize the Business Representatives of the Union as the proper authority to adjust with the Employer any controversy between the parties to this Agreement as to the meaning and application of the provisions of this Agreement.

It is the philosophy of Labor and Management that a cooperative relationship is in the best interest of the parties. To this end, Stewards shall be allowed a combined total of eight (8) hours per month on the clock to investigate issues that could lead to or are grievances in an effort to resolve problems expediently and in providing union representation for employees under the Weingarten rights. These hours are paid at straight time and are not accumulative from month to month.

The Employer argues that Deleon, who was a designated Steward during 2008, had authority to act in behalf of the Union in this case -- at least the authority to receive in behalf of Davis, its Business Representative, the April 11, 2008, letter of discharge, which Deleon did fax to Davis, and the letter of July 1, 2008, that denied the grievance. With respect to the letter denying the grievance, the Employer argues that Deleon's authority to receive it in behalf of Davis was confirmed by Davis' explicit statement to Camuel at the end of the meeting of June 26 or 27, 2008, that while he was traveling for the next few weeks, Camuel should regard Deleon as his agent.

The Employer also makes the following argument. Even if a ruling is made that Camuel's letter was not a denial of the grievance that began the Step 4 time limit for appeal to arbitration, Keating's letter of February 13, 2009, was clearly a denial of the grievance that started that time limit. The Union's only appeal to arbitration, however, came with Sitta's letter of March 12, 2009, to Camuel -- more than twenty days after Keating's letter of February 13, 2009.

The Union's Arguments.

The Union makes the following arguments. It notes that Article IX, Section B, of the labor agreement requires that "A written notice of any discharge, suspension, or disciplinary action shall be given the employee and a copy thereof shall be sent to the Union." It argues that Camuel's delivery of a copy of the discharge letter to Deleon, a Steward, did not meet the requirement that she send a copy of it "to the Union."

The Union also argues that I should construe the evidence as showing that the grievance was prepared on May 2, 2008, as Christenson testified, and then was mailed to the Employer by certified mail on May 5, 2008, as the grievant testified -- thus meeting the Step 2 time limit, which required notice of the grievance to be given to the Employer by May 14, 2008. The Union argues that Christenson's testimony that she erroneously dated the grievance "May 27, 2008," should be credited, thus negating the date that appears on it. The Union urges that her testimony is corroborated 1) by the document properties registered on the computer she used to prepare the grievance, and 2) by the grievant's testimony that, on May 5, 2008, he received the grievance, signed it and mailed it to the Employer.

In addition, the Union makes several arguments opposing the Employer's contention that it failed to meet the Step 4 time limit that required the Union to appeal the grievance to arbitration within twenty days of a grievance denial. The Union argues that Davis and Camuel had an agreement to delay grievance processing until the DHS investigation was completed. According

to the Union, such an agreement is indicated 1) by the way in which Davis drafted the "Desired Remedy" in the grievance -- "To be made whole for any loss of wages or benefits and return to work immediately pending investigation by State DHS," 2) by the grievant's testimony about the grievance meeting (on June 26 or 27, 2008, according to Auerbach, but on July 3, 2008, according to the grievant), at which, as he testified, Camuel and Auerbach agreed with Davis to await the DHS investigation report before disposition of the grievance, and 3) by the handwritten note that Davis gave to Sitta on January 12, 2009.

The Union also makes several arguments relating to Camuel's letter to Davis of July 1, 2008. It argues that its delivery to Deleon, a Steward, did not constitute delivery to the Union, that it should have been sent to Davis, a Business Representative and that because the letter was not properly sent to the Union, the letter should not be regarded as a denial of the grievance that triggered the Step 4 time limit for appealing the grievance to arbitration. The Union also argues that Camuel must have been confused when she prepared the letter and dated it July 1, 2008, and when she referred in the letter to a grievance meeting, which, according to the grievant, did not occur until July 3, 2008. The Union argues that the letter was not an effective denial of the grievance and that, therefore, the Step 4 time limit for appeal to arbitration should not be measured from Camuel's letter of July 1, 2008.

The Union also argues that the Employer has waived any argument it might have about timeliness of grievance processing

by failing to assert such an argument until Keating's letter to Sitta of February 13, 2009. The Union notes that even that letter objected only to the timeliness of the Step 2 grievance and not to the Step 4 appeal to arbitration.

I make the following rulings, resolving the arguments of the parties. First, as I interpret Article I, Section E, of the labor agreement, the parties intended to give individuals whom the Union has designated as Stewards authority to "handle routine Union business" delegated by the Union. Here, the evidence shows that the Union did not object to the practice that notices to the Union be given through Stewards. Camuel so testified, and no evidence contradicts that testimony. Accordingly, I rule that Deleon had authority under the provisions of the labor agreement to receive not only disciplinary notices referred to in Article IX, Section B, of the labor agreement, but notices required under the grievance procedure, i.e., the notice of the grievant's suspension, dated March 11, 2008, the notice of discharge, dated April 11, 2008, and Camuel's letter of July 1, 2008, which the Employer views as a denial of the grievance.

Second. Notwithstanding the date that appears on the grievance, May 27, 2008, I accept Christenson's explanation that she entered that date in error and that she prepared the grievance on May 2, 2008, and mailed three copies of it to the grievant on that date. I also credit the grievant's testimony that he received the three copies on May 5, 2008, and after signing one, mailed it to the Employer on the same date by certified mail. The only evidence that can be interpreted as

contradicting that testimony is the date that appears on the grievance itself, which, because of my finding above relating to Christenson's preparation of the document, I regard as an incorrect dating. I also rule that the mailing of the grievance on May 5, 2008 -- within the Step 2 time limit -- was sufficient compliance with that time limit. Even under the more restrictive reading that actual receipt of the grievance before May 14, 2008, was necessary to satisfy the Step 2 time limit, I would find the evidence insufficient to show that Camuel received it after that date; her testimony that she thought she received it after May 27, 2008, was tentative and uncertain. I conclude that the Union met the Step 2 time limit for giving the Employer notice of the grievance when the grievant mailed it to Camuel on May 5, 2008.

Third. I find that the grievance meeting described in the testimony of the grievant, Camuel and Auerbach occurred on June 26 or 27, 2008, as Auerbach testified, and I find that Camuel's letter of July 1, 2008, referred to that meeting. In order to find that the meeting occurred on July 3, 2008, as the grievant testified, I would be required to reject the testimony of Auerbach and Camuel that the meeting occurred in June, and, in addition, I would be required to determine that the letter, which by its content shows that it was written after the grievance meeting, was misdated, either intentionally or in error. The evidence does not support such a determination.

I interpret the letter of July 1, 2008, as a statement that the Employer has "made the decision not to reinstate [the

grievant's employment," notwithstanding the grievance meeting -- clearly a written denial of the grievance.

I interpret the evidence about the grievance meeting as follows. The meeting was attended by Camuel and Auerbach and by the grievant, Davis and Deleon. Though the grievant testified that Deleon was not in attendance, I find that he was there, as Auerbach and Camuel testified, and that at the conclusion of the meeting Davis told Camuel to communicate with Deleon while Davis was traveling for the next few weeks.

Because Davis and Deleon did not testify, I do not have their testimonial description of the meeting. I have Davis' hearsay notes given to Sitta on January 12, 2009, which describe what is apparently, but not clearly, the grievance meeting of July 26 or 27, 2008:

I met with the Employer Administrator Cherie Camuel the Union Steward Joe Deleon and the grievant Mark. Cherie stated that Mark was terminated for sexual abuse to a resident. Robbinsdale police were investigating and the state of mn department of human services. At that time both parties agreed (verbally) to wait until the state report comes out to follow up our next step of the grievance procedure.

I interpret this hearsay statement in the context of the other relevant evidence. It appears from Davis' notes that he believed that the external investigation reports from the DHS and the Robbinsdale Police Department could result in the grievant's reinstatement and that Davis thought there was an agreement to suspend grievance processing until the reports were available. I have the testimony of the grievant that there was such an agreement.

I also have the testimony of Camuel and Auerbach that there was no such agreement. They testified that they had decided from their own investigation that they would not reinstate the grievant, regardless of the external investigations. Auerbach's testimony acknowledges that Davis was focused on obtaining the external investigation reports, but she testified that, because of their internal investigation, she and Camuel were not interested in those reports for any purpose that might result in reversing the decision to terminate the grievant's employment.

In addition, I have Camuel's letter of July 1, 2008, in which she refers to the grievance meeting and 1) makes the unconditional statement that the grievant will not be reinstated -- a clear denial of the grievance -- and 2) makes no mention of an agreement to suspend grievance processing. After the letter of July 1, 2008, no communication relevant to the grievance occurred between the Union and the Employer until December, a lack that can be explained by Deleon's statement to Camuel that he forgot to deliver the letter to Davis.

Thus, from the evidence that is available, it appears that Davis did, indeed, say that the Union was waiting for the investigation report from the DHS and wanted to obtain the investigation report from the Robbinsdale Police, and it appears that there was discussion about the availability of those reports among Davis, Camuel and Auerbach. I do not find, however, that Camuel or Auerbach agreed to suspend grievance processing until the external reports could be obtained. I find

that their testimony denying there was such an agreement is credible and consistent with Camuel's written refusal to reinstate the grievant in her letter of July 1, 2008.

I conclude that, though Davis wanted a suspension of grievance processing, he did not reach such an agreement with Camuel. Her letter of July 1, 2008, was an effective written denial of the grievance, and it triggered the start of the Step 4 time limit for appeal to arbitration.

Fourth. With respect to the occurrences in December of 2008, I do not have testimony from Davis or Deleon. I do have the following evidence -- 1) the grievant's testimony that he obtained the DHS report on December 9, that he telephoned Davis after receiving it, that Davis told him they would be meeting with Camuel on December 16 and that he went to the area outside her office on that date, but did not meet with her; 2) Camuel's testimony that Davis told her in early December that the Union was not going to pursue the grievance, that Deleon confirmed that statement, telling her the Union wanted the information she had about the 2005 allegation against the grievant in order to support the Union's decision not to pursue the grievance, that she was surprised when on December 16 Davis brought the grievant to her office, and that nothing relevant to the grievance occurred at that meeting; 3) Auerbach's testimony and her email to Camuel on December 19, in which she stated that Deleon told her the Union wanted Camuel's notes about the 2005 allegation to support the Union's decision not to pursue the grievance; 4) Davis' letter of December 23, with Camuel's note appended to

that letter; and 5) Davis' hearsay description given in his January 12, 2009, notes to Sitta.

This evidence supports the following inferences. When the grievant obtained the DHS investigation report on December 9, he called Davis and made it known to Davis that he wanted to continue with his grievance. Davis contacted Camuel, in an effort to restart processing of the grievance, but he also considered the possibility of advising the Union's "merit board" (the term he used in his later note to Sitta) to drop the grievance as not tenable. Eventually, a decision was made, whether by Davis alone or by others in the Union, to continue with the grievance. The contact between Davis and Camuel on December 16 was an effort by Davis to restart the process, but Camuel refused to do so.

I conclude that the events that occurred in December of 2008 made no change in the status of grievance processing. The written denial made by Camuel's letter of July 1, 2008, remained in effect.

Fifth. The events of January, February and March of 2009, did not change this status. Sitta testified that, after Davis was reassigned, he took over the processing of this grievance. When he called Camuel in mid-January, she told him to contact Keating, and Sitta did so by fax on February 12, 2009. Keating's responsive letter of February 13, 2009, objects that the Union did not meet the requirements of Step 2 of the grievance procedure by giving timely written notice of the grievance; that letter is also a restatement of the grievance

denial. Sitta's letter of March 12, 2009, is a Step 4 appeal to arbitration, and Lipschultz' letter of March 17, 2009, expressly reserves "any arguments as to the union's failure to comply with the applicable time limits contained in the collective bargaining agreement's grievance & arbitration provisions."

The Union argues that, because Keating's letter of February 13, 2009, objected only to the timeliness of the Step 2 grievance notice and not to the timeliness of a Step 4 appeal to arbitration, the Employer has waived objection to the Union's compliance with the Step 4 time limit. I rule that, though Keating could have raised an objection to the Step 4 timeliness in his letter of February 13, 2009, the right to assert such an objection remained available until the Union's actual appeal to arbitration on March 12, 2009. Lipschultz' letter of March 17, 2009, five days after the appeal to arbitration, gave the Union prompt notice of the Employer's non-waiver of that objection.

Accordingly, I sustain the Employer's procedural objection and dismiss the grievance.

AWARD

The Employer's procedural objection to arbitration is sustained.

September 8, 2009


Thomas P. Gallagher, Arbitrator