

Arbitration

**In The Matter of Arbitration
Between:**

**Independent School District 278, Orono, MN
and
School Service Employees Local No. 284**

BMS Case No. 14 PA 1354

**Carol Berg O'Toole
Arbitrator**

Representatives:

For Independent School District 278, Orono:

**Trevor S. Helmers
Rupp, Anderson, Squires & Walspurger, P.A.
527 Marquette Avenue South, #1200
Minneapolis, Minnesota 55402**

For School Service Employees Local No. 284:

**David Hoaglund
SEIU Local 284
450 Southview Boulevard
South Saint Paul, Minnesota 55075**

Witnesses

For Independent School District 278, Orono

**Justin McCoy, Coordinator of Facilities and Safety
Diane Turnbull, Human Resources
Tom E. Stringer, Director of Business Services
Aaron M. Ruhland, Director of Learning and Accountability**

For School Service Employees Local No. 284:

**Stephen Miltich, Steward and Class II Custodian
Isaiah Campbell, Class II Custodian, Grievant**

Preliminary Statement

The hearing in the above entitled matter commenced on September 7, 2014, at 9:15 A.M in the Assembly Room at the Independent School District 278, 685 Old Crystal Bay Road North, P. O. Box 46, Long Lake, Minnesota 55356-0046. The parties involved are Independent School District 278, Orono (Employer) and School Service Employees Local No. 284 (Union). The parties presented opening statements, oral testimony, oral argument, joint exhibits and closing statements. All exhibits offered were joint exhibits previously agreed upon by the parties. All exhibits were received. Post hearing written briefs were waived by both parties. The hearing was closed shortly after 1:00 PM on September 7, 2014.

Issues Presented:

The arbitrator fashioned the issue as follows:

Issue One: Was the grievance timely?

Issue Two: If so, was there a violation of the Collective Bargaining Agreement (Agreement) and racial discrimination when the Employer, refused to award the day shift Custodian II position to Grievant.

Contractual and Statutory Jurisdiction

The Employer and Union are signatories to an Agreement in effect for two years, July 1, 2012, through June 30, 2014. Joint Exhibit 1. The Agreement provides in Article XV, Section B, Timeliness, that, if preliminary efforts to resolve a dispute are unsuccessful, the parties proceed to arbitration. The parties stipulated at the beginning

of the hearing that the matter was properly before the arbitrator. The Agreement provides that the arbitrator's award shall be final and binding.

The parties agreed that although the decision on the first issue of timeliness may obviate the need for a decision on the second issue, the parties would present their cases on both issues. A hearing on both issues was held. This award is bifurcated with the issue of timeliness discussed first.

Provisions of the Agreement Related to Timeliness

The Agreement provides that a grievance be initially filed within fifteen working days following knowledge of the act or condition which is the basis of the grievance. Thereafter, the time limits for decision or appeal are five, ten, and ten working days in Step 1, 2, and 3 respectively. The Agreement also provides that failure by the Employer to respond timely permits the grievant to appeal to the next step. Similarly, "Except by mutual agreement, failure by the grievant at any step to appeal ...within the specified time limit shall be considered acceptance of the decision at that step." Joint Exhibit 1, Article XV, Section B.

Position of the Employer on Timeliness:

Employer's Opening and Closing Arguments

The Employer maintains that the Grievant accepted the May 13, 2014, denial of the grievance at Level 2 when he failed to timely appear to Level 3. Joint Exhibit 13. The Employer states that the Grievant was a day late when he appealed on May 29, 2014. The Employer argues that the Agreement's deadline for ten working days from the May 13, 2014, denial would have been May 28, 2014. Joint Exhibits 1, 14 and 15. The Employer seeks a dismissal of the grievance because the Grievant failed to timely

appeal it within the ten day period required in the Agreement. The Employer further argues that there is no language in the Agreement that requires a that a response be mailed or hand-delivered.

Employer's Witness as to Timeliness:

Thomas E. Stringer

Thoma E. Stringer (Stringer) testified that he is the Director of Business Services and has been since December, 2010. In addition to his other duties, he was the chief negotiator for the Employer in negotiating the present Agreement. Stringer testified that he delievered the Level 2 response to the Grievant on May 13, 2014. He testified that on the same day he e-mailed the response to the Union representative, David Hoaglund (Hoaglund), with "hard copies" mailed the next day. Joint Exhibit 13. Stringer stated that Employer did not waive the untimely response dated May 29, 2014. Joint Exhibit 14. When asked about the arbitration, Stringer said he viewed going to arbitration as an obligation and a requirement.

On cross examination, Stringer was asked if a hearing was held with the School Board. He stated that it was because the School Board members were committed to hearing directly from the Grievant. Stringer said that the Union and Grievant were "never informed that it was a Level 3 hearing" and that they never waived the timelines. Stringer was asked about why the District continued to offer ways to settle the grievance. Stringer replied that the Employer wanted to find a solution and were not sure the grievance was timely. He also said that the School Board wanted to hear from the Grievant as a courtesy to the Grievant. Stringer pointed to the written reference to untimeliness in Joint Exhibit 15, which reads in pertinent part, "Your attempt to file a

Level 3 grievance is hereby denied as untimely because you accepted the District's denial of your grievance at Level 2 by failing to timely grieve the matter to Level 3." Joint Exhibit 15.

Stringer was asked on re-direct why the Employer proceeded to arbitration if they were alleging untimeliness. Stringer said that they generally go to arbitration even if they have a procedural matter as the arbitrator can decide those kinds of issues. Stringer testified that he got an e-mail on May 29, 2014, which was dated May 29, 2014. Stringer stated that the e-mail was the procedure normally used. Stringer testified that the e-mail was an attempt to appeal the grievance to Level 3. Joint Exhibit 14.

Position of the Union on Timeliness:

Union's Opening and Closing Argument

The Union argues that the date of actual receipt in his office of the hard copy denial of the grievance is the operative date to consider in determining timeliness of the appeal by Grievant of the Employer's decision. He points to Stringer's testimony that the Employer was not sure that the grievance was timely as proof of the validity of the Union's position that the grievance appeal was timely. The Union also inferred that because of the settlement discussions by the Employer and the hearing in front of the School Board offered to the Grievant that the Employer waived its right to object to timeliness.

Union's Witness as to Timeliness

Isaiah Campbell

Isaiah Campbell (Grievant) was asked if Joint Exhibit 13, the May 13, 2014, letter to him regarding the Level 2 Grievance Response was delivered. He agreed it was.

Grievant was asked if Joint Exhibit 14, the May 29, 2014, the letter by Hoagland appealing the grievance to Level 3 was delivered. He agreed it was. The Grievant was asked by the Union if the Employer objected to timeliness of the grievance and if the School Board heard his case. He testified that they did.

Discussion

The Language of the Agreement

“A general presumption exists that favors arbitration over dismissal of grievance on technical grounds.” Rodeway Inn, 102 LA 1003, 1013 (Goldberg, 1994), as cited by Elkouri & Elkouri, *How Arbitration Works*, (7th Ed. BNA 2012) at 5-11. “However, where the parties’ collective bargaining agreements contain specific language regarding the filing of grievances, arbitrators will deny a grievance where the procedure is not followed.” Monroe Mfg., 10 LA 877, 879 (Stephens, 1996), as cited by Elkouri & Elkouri, *How Arbitration Works*, (7th Ed. BNA 2012) at 5-11.

In the instant case, the language is clear. Joint Exhibit 1, Section B. It provides that an appeal of a denial in Level 2 to Level 3 must be filed within ten working days. The parties have no dispute as to the method of counting work days. Both parties counted weekdays and did not count the weekend days or the intervening holiday, Memorial Day. The parties agree that the operative time limit is ten working days and they agree on which days.

The only thing disputed was the method of service of the notice. The Agreement is silent on method of delivery. It merely says “communicate”. Joint Exhibit 1, Article XV, Section B. The Union claims there must be actual receipt in the Union office of the Employer’s denial via the U.S. Mail. Stringer credibly testified that the denial was

communicated to the Grievant on the date of the written document, May 13, 2014, and that he e-mailed Hoagland on the same day. He also said that this was the customary method of service. There was no testimony that the Grievant did not receive the denial on May 13, 2014. The Union said they received the denial but simply claimed it had to be sent by U.S. Mail and that their May 29, 2014 appeal would then be timely.

If we take that argument and extend the phantom requirement of actual receipt in the Union's office by U.S. Mail, the appeal receipt by the Employer would be even later. The appeal is dated May 29, 2014. If dropped in a U.S. mailbox the Employer would be lucky if it was delivered in a day. That argument fails in light of the absence of testimony supporting it and the clear and mutually agreed upon exhibits, Joint Exhibits 1, 13 and 14. I find that the denial of the appeal was made on May 13, 2014, and that ten working days from that date was May 28, 2014. The appeal of that denial was untimely.

The Good Faith of the Parties

"The parties attitude in handling grievances, probably more than any other aspect of the labor management relationship, indicates their good faith....Moreover , a desire to settle grievances, rather than win them, is essential." Elkouri & Elkouri, *How Arbitration Works*, (7th Ed. BNA 2012) at 5-6.

The Union, in the instant case, argued that the settlement discussion proved that the Employer didn't raise the timeliness issue or negated it. To the contrary, settlement discussions are always encouraged and don't prove a thing, except that the parties are operating in good faith. I find the settlement discussions had nothing to do with whether the appeal by the Union was timely.

The Testimony of Witnesses

The testimony of Stringer on the Union's failure to timely appeal was uncontroverted. The method of delivery used by the Employer was what the Employer did and what had been done before. Grievant received the denial and so did the Union. The Agreement requires that the Employer communicate that denial. Nothing more.

The Exhibits

The Joint Exhibits, particularly Joint Exhibit 13, 14, and 15 prove at least two points: 1) the issue of timeliness was raised early, in fact, shortly after the untimely appeal was made, and long before the arbitration hearing; 2) the courtesy hearing before the Board Members was not a waiver of the timeliness issue.

Untimeliness Issue

The Employer should generally raise the untimeliness defense at a reasonably early time. “[R]egardless of the procedure followed during the steps leading to arbitration, if a party does not timely object to the arbitrability of the grievance, but instead waits until the hearing or shortly before the hearing to object, some arbitrators hold that the party waives the objection.” Ardco, Inc. 108 LA 326, 330 (Wolff, 1997), as cited by Elkouri & Elkouri, *How Arbitration Works*, (7th Ed. BNA 2012) at 5 -11. Joint Exhibit 15 and the testimony of Stringer prove the Employer did not waive the Union and Grievant's untimeliness issue. It was raised soon after the missed the deadline.

“Waivers, because they result in defeat of the rights of the parties without consideration of the merits of the dispute, are not lightly inferred by arbitrators. Elkouri & Elkouri, *How Arbitration Works*, (7th Ed. BNA 2012) at 5-20. I loathe making a decision on a technicality. I loathe cutting off the opportunity of this ardent Grievant to have a

decision on the merits. I loathe even more, substituting my judgment for that of the parties.

The parties negotiated an agreement allowing ten days to file an appeal to Level 3 and that is what I am going to hold the parties to. They did not specify in the Agreement the requirements the Union suggests. "In the vast majority of cases, arbitrators strictly enforce contractual limitations on the time periods within which grievances must be filed, responded to, and carried through the steps of the grievance procedure where the parties have consistently enforced such requirements." Protection Tech. Los Alamos, 104 LA 23, 29-30 (Finston 1994), as cited by Elkouri & Elkouri, *How Arbitration Works*, (7th Ed. BNA 2012) at 5-26.

Settlement Discussions and the Courtesy Hearing

When clear and timely objections are made to a delayed filing or appeal, the objecting party should then discuss the grievance on the merits so that all issues will be ready for arbitration. North Am. Aviation, 17 LA 715, 719 (Komaroff, 1951), as cited by Elkouri & Elkouri, *How Arbitration Works*, (7th Ed. BNA 2012) at 5 -31. Both representatives are to be commended for their vigorous, yet civil, polite, and cogent advocacy for their respective positions. The parties are lauded for trying to settle the case and for giving the Grievant several opportunities to have his say, in the hearing before the School Board and in this arbitration. But, if the parties want less stringent time limits and a specific method of communication delineated, they must negotiate it into the Agreement. Accordingly, since the appeal was untimely, I do not reach the merits of the case.

Decision: The grievance is denied and the case dismissed.

Dated this 22 day of September, 2014

Carol Berg O'Toole