

THE MATTER OF ARBITRATION BETWEEN

State of Minnesota, Department of)	BMS Case No. 07-PA-0788
Corrections, Minnesota Correctional)	
Facility – Stillwater)	Issue: Disciplinary Reprimand
)	
“Employer or MCF-STW”)	Hearing Date: 09-25-07
)	
and)	Brief SubmissionDate:10-19-07
)	
State Residential Schools Education)	Award Date: 11-26-07
Association)	
)	
“Union or SRSEA”)	Mario F. Bognanno, Labor
)	Arbitrator

JURISDICTION

Pursuant to relevant provisions in Article 16 in the parties’ Collective Bargaining Agreement (CBA), the above-captioned matter was heard on September 25, 2007 in Stillwater, Minnesota. The parties appeared through their designated representatives. Each party was afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into the record. Post-hearing briefs were electronically exchanged on October 19, 2007, and thereafter the matter was taken under advisement.

APPEARANCES

For the Employer:

Joy Hargons,	Labor Relations Representative Principal
Tony Brown,	Labor Relations Representative Principal
Carolyn Travis,	Assistant State Labor Negotiator
Lynn M. Dingle,	Warden, MCF-STW

John King,	Associate Warden, MCF-STW Operations
Tammy Nelsen,	Acting Director, MCF-STW Human Resources
Patricia Pawlak,	Director, MCF-STW Education
Patricia Halpauf,	Director, MCF-STW Information Technology

For the Union:

Jess Anne Glover,	Attorney-at-Law
JoAnn Winter,	Field Staff, Education Minnesota
Chad Schmidt,	SRSEA President, MCF-STW
Shirley Ingebritsen,	Literacy Instructor, MCF-STW
Steve Gillard,	Corrections Officer, MCF-STW
Todd Hankel,	Welding Instructor and Grievant, MCF-STW

I. BACKGROUND AND FACTS

The Grievant, Todd Hankel, is a Welding Instructor in the Education Department at the MCF-STW, where he teaches prison inmates. He was hired into this position in July 2004, although since 1999 he had worked as a contract employee at the correctional facility.

In March 2005, it was discovered that some of the Education Department's computer equipment was being used by unidentified prison inmates to access Internet pornography, which they would download onto CDs, print and assemble into packets that they would sell to other inmates. As a result, the Education Department was shut down for an extended period of time; an investigation was launched; and a facility-wide inventory of all IT equipment was taken. Moreover, new IT-related internal security procedures were put into place

to prevent this type of problem from reoccurring in the future. (Employer Tabs 8, B1 and 10) *Inter alia*, the new procedures required that the facility's staff conduct regular written audits and inspections of all of the IT equipment that is used in their individual areas of responsibility.

On August 22, 2006, when the Grievant was off-duty, some prison inmates were discovered listening to music on a computer that was located in the VT Tool Room: A Grievant-supervised work area. It was learned that that computer and a second one had not been inventoried, as required. Thereafter, the Employer determined that the Grievant was guilty of a security breach for not having properly secured all of the IT equipment under his supervisory control. The Grievant was issued a written reprimand on October 12, 2006. (Employer Tab 12)

On October 25, 2006, the SRSEA grieved the written reprimand and on February 8, 2007, at Step 3 in the grievance procedure, Lynn Dingle, Warden, denied the grievance. (Union Exhibit 2 and Employer Tab 2) Neither party chose to mediate the Employer's Step 3 denial. On February 23, 2007, JoAnn Winter, Minnesota Education Field Staff, mailed a letter to James A. Cunningham, Commissioner, Bureau of Mediation Services (BMS), State of Minnesota, requesting a list of arbitrators. Ms. Winter sent a copy of that letter to Carolyn Trevis, Assistant State Labor Negotiator, which she received on February 28, 2007, along with a letter dated February 27, 2007 from Mr. Cunningham that listed a set of arbitrators, *per* the Union's request. (Employer Tab 2)

The Employer contends that neither Ms. Winter's February 23, 2007 letter nor Mr. Cunningham's February 27, 2007 reply letter amount to proper notice of appeal to arbitration, as discussed in Article 16, Section 2.E of the CBA. As such, the Employer continues, the Union failed to file the proper notice of appeal to arbitration within the contractually allotted time and, therefore, the Union forfeited the grievance, rendering the merits of Grievant's case procedurally non-arbitrable. (Employer Tab 3) The Union strongly disagrees with this contention, maintaining that the SRSEA's appeal to arbitration was timely and that, if anything, this case boils down to a simple matter of "harmless error."

At the hearing, the parties presented evidence and argument bearing the Employer's arbitrability challenge and, thereafter, they presented evidence and argument on the merits of the Employer's disciplinary action. This Award will first consider whether the matter is arbitrable, as the Union urges, and, if so, then the undersigned will address the merits of the Employer's disciplinary action against the Grievant.

II. THE ISSUE

The parties jointly stipulated to the following statement of the issue:

1. Is the grievance arbitrable?
2. Did the Employer have just cause to issue a written reprimand on October 18, 2006 for just cause pursuant to Article 15, Section 1 of the Collective Bargaining Agreement between parties?
3. If not, what is the appropriate remedy?

(See: Statement of Issues, an unmarked joint submission)

III. RELEVANT CONTRACT PROVISIONS

ARTICLE 15 – DISCIPLINE

Section 1. Purpose. Disciplinary action shall be imposed on employees for just cause.

(Employer Tab14)

ARTICLE 16 – GRIEVANCE PROCEDURE

Days. “Days” means working days. Working days means Monday – Friday throughout the entire calendar year. This definition applies to teachers working both academic and non-academic calendars.

Section 2. Grievance Steps.

D. Step 4. Mediation. If the grievance remains unresolved after receiving the response at the last step, within ten (10) days either party may request, in writing, mediation. The written request shall be directed to the State and Local Association representative (in case of a request by the Appointing Authority or to the Chief Executive Officer (in case of a request by the Association). Within ten (10) days of the request, the party receiving the request shall respond in writing. If neither party requests mediation within ten (10) days after receiving the previous step response, the Association may immediately proceed to Step 5 of the Grievance Procedure.

E. Step 5. Arbitration.

3. If neither party requests mediation within ten (10) days after receiving the previous step response, the Association shall have ten (10) days from the last date available to request mediation to appeal the grievance, in writing, to arbitration.

In any of the above listed situations, the grievance may be appealed to arbitration by serving written notice upon the Deputy Commissioner of the Department of Employee Relations (State Labor Negotiator), or designee. The parties shall endeavor to ...

Section 4. Arbitrator’s Authority. The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement.

Section 6. Time Limits. The parties, by mutual written agreement, may waive any step and extend any time limit in this Grievance Procedure.

However, failure by the Association or the employee to adhere to the time limits specified herein will result in a forfeit of the grievance.

(Employer Tab 1)

IV. POSITION OF THE EMPLOYER – ARBITRABILITY

The Employer's principal contention is that since the Union did not file a notice of appeal to arbitration on the "...Deputy Commissioner of the Department of Employee Relations (State Labor Negotiator), or designee" as required by Article 16, Section 2.E of the CBA, the grievance is forfeited. (Employer Tab 1) Under this language, the Employer argues, the Union had 20 *working* days to appeal the matter to arbitration, following the Employer's February 8, 2007 Step 3 grievance answer or until March 9, 2007, since Monday, February 19, 2007 was a holiday. Further, the Employer argues, while Ms. Winter's February 23, 2007 letter to Mr. Cunningham, requesting a list of arbitrators, and Mr. Cunningham's letter that listed arbitrators, dated February 27, 2007, were received by Ms. Travis prior to the referenced March 9, 2007 cut-off date, neither letter constitutes proper notice to the Deputy Commissioner of the Department of Employee Relations (DOER).

Next, the Employer refers to testimony by Ms. Travis, Assistant State Labor Negotiator. Initially, she observed that the State of Minnesota employs thousands of unionized workers and that literally hundreds of grievances are advanced to arbitration, annually. Therefore, she continued, this volume of arbitration-bound cases necessitates a system for managing their orderly processing and for this reason DOER has negotiated clear language in its labor agreements indicating that written arbitration appeals are to be served on the

Deputy Commission/State Labor Negotiator, in whose office a so-called Grievance Tracking System is located.

With respect to the “or designee” language in Article 16, Section 2.E, Ms. Travis testified that she only serves as the Deputy Commissioner/State Negotiator’s “designee” when the latter is absent from work, and that she has never been appointed as a management “designee” for the purpose of receiving appeals to arbitration. Ms. Travis also testified that only written arbitration appeals that are addressed and mailed to the Deputy Commissioner/State Labor Negotiator are opened, entered into the Grievance Tracking System and taken up on their merits. Whereas, written appeals addressed to her or to the BMS Commissioner are neither entered into this system nor taken up.¹

In this respect, Ms. Travis referenced the set of e-mail exchanges found in Employer Tab 3. First, Ms. Travis testified that when Debra Corhouse, Attorney, Education Minnesota, contacted her on March 1, 2007, requesting to strike arbitrator names from the list, she advised Ms. Corhouse *via* return e-mail that the Grievant’s file had not been sent to DOER; she asked Ms. Corhouse whether the Union had properly appealed the matter to the Deputy Commissioner; and, further, she directed Ms. Corhouse to Trina Chernos, who was handling the Department of Corrections arbitration cases at the time. Second, by e-mail Ms. Chernos advised Ms. Corhouse on March 5, 2007, that she had no record of an SRSEA appeal to arbitration. Third, Ms. Corhouse’s March 6, 2007 e-mail reply

¹ Upon the Deputy Commissioner’s receipt of letters of appeal to arbitration, DOER employee Joanie Pream enters the appeals into the Grievance Tracking System. Apparently, she also contacts the state agency involved in the Step 3 grievance hearing to retrieve the accumulated grievance materials and she proceeds to create a DOER arbitration file.

to Ms. Chernos indicated that Ms. Winter had copied Ms. Travis on her letter to the BMS Commissioner requesting a list of arbitrators and that this method had not previously been challenged by the Employer. Fourth, on March 22, 2007, Ms. Charnos advised Ms. Corhouse by e-mail that the notice of appeal had not been properly communicated to the DOER Deputy Commissioner and that the matter was moot. Fifth, on that same day Ms. Corhouse sent an e-mail to Ms. Charnos, inquiring whether the arbitrability issue was to be arbitrated or dealt with in court. Finally, on April 3, 2007, in a reply e-mail, Ms. Charnos informed Ms. Corhouse that an arbitrator had previously ruled that the act of requesting a list of arbitrators from the BMS does not constitute a proper appeal to arbitration; that the grievance had been forfeited; and that the Employer would arbitrate the matter.

Continuing, the Employer objects to the Union's insinuation that to request a list of arbitrators from the BMS is an established arbitration appeals method. The Employer notes that previously Ms. Travis and Ms. Corhouse had been copied on two (2) letters dated August 17, 2007, that were authored by SRSEA's Ms. Winter, one addressed to Dr. Richard Berge, Interim Superintendent, Minnesota State Academics for the Blind, and the other addressed to BMS Commissioner Cunningham. In the letter to Dr. Berge, Ms. Winter advised that she was appealing the so-called Courtney Grievance to arbitration; and in the letter to Mr. Cunningham, Ms. Winter requests a list of arbitrators. On August 21, 2006, Ms. Travis sent the following e-mail to Ms. Winter, copying Ms. Corhouse and other principals from the Union:

JoAnn:

I just returned from vacation and saw this appeal. Please refer to the SRSEA agreement, Article 16, for the appeal procedures. You need to appeal a grievance to arbitration by serving written notice upon the State Labor Negotiator, Paul Larson. The appeal does not go to the superintendent, nor to me.

Carolyn

(Employer Tab 4) On that same date, the Employer observes, Ms. Winter proceeded to address and mail a letter to Paul Larson, Deputy Commissioner/State Labor Negotiator, appealing the Courtney Grievance to arbitration. That letter was copied to Ms. Travis and Ms. Corhouse, among others. (Employer Tab 4)

Further, the Employer urges that the Union was given ample opportunity to file a timely written appeal to the Deputy Commissioner. After all, the Employer contends, the March 3, 2007 e-mail from Ms. Travis to Ms. Corhouse that questioned the Union's method of appeal was sent six (6) days before the date of the appeal deadline, namely: March 9, 2007.

Still further, the Employer points to arbitral precedence. While acknowledging that the above-referenced arbitration award pertains to a different bargaining unit, the Employer contends that the written appeal to arbitration language in that contract is similar to that found in the SRSEA contract; and, in that award, the Employer notes that the arbitrator found that "... a copy of the BMS Letter did not meet the requirements of a proper referral of the instant grievance to arbitration." (Employer Tab 5) (*Minnesota Conservation Officers*

Associaion v. State of Minnesota, Department of Natural Resources, BMS Case No. 98-PA-420, p. 13: Arbitrator G. Wallin, 1998.)

Finally, the Employer reminds that Article 16 also limits the authority of the arbitrator and that for this and the other reasons cited, the grievance ought to be denied.

V. POSITION OF THE UNION – ARBITRABILITY

Initially, the Union contends that its appeal to arbitration was timely. The Union notes that Warden Dingle issued her grievance-denial letter on February 8, 2007 and shortly thereafter, on February 23, 2007, Ms. Winter wrote to BMS Commissioner Cunningham, requesting a list of arbitrators, and she copied Ms. Travis. Moreover, since Ms. Travis received Ms. Winter's letter [and Mr. Cunningham's February 27, 2007 reply letter] on February 28, 2007, the Union concludes that its appeal to arbitration occurred well within the allowable twenty (20) working days, as spelled out in the CBA. (Employer Tabs 1 and 2)

Second, the Union argues that having copied Mr. Cunningham's letter to Ms. Travis rather than to have written directly to the State Labor Negotiator was, at most, a "harmless error." Nevertheless, for the reasons discussed below, the Union maintains that the act of copying Ms. Travis on Mr. Cunningham's letter was a proper and timeliness appeal to arbitration under Article 16, Section 2.E, which states in relevant part:

... the grievance may be appealed to arbitration by serving written notice upon the Deputy Commissioner of the Department of Employee Relations (State Labor Negotiator) or designee.

(Employer Tab 1; emphasis added) The grievance is proper and timely for the following reasons: First, the use of the word “may” in this language is to suggest that “... serving written notice upon the Deputy Commissioner...” is “permissive,” not “mandatory.” Second, as the Employer-designated negotiator of the SRSEA contract, Ms. Travis is the State Labor Negotiator’s “effective designee” for all SRSEA-specific labor relations matters. Third, it is extreme to cause the Grievant to forfeit the right to have his grievance decided merely to satisfy the Employer’s need for the orderly processing of grievances. Finally, the variety of arbitration appeal notifications the Employer received from the Union demonstrates that the latter was acting in good faith and not being unduly disruptive to DOER’s operations.

Next, the Union urges that its failure to send the appeal letter to the State Labor Negotiator does not result in a forfeiture of the grievance under Article 16, Section 6 of the CBA, which specifically limits forfeitures to a party’s “failure...to adhere to the time limits specified herein...” In this case, the Union notes, its appeal to arbitration was timely sent even if, assuming *arguendo*, it was incorrectly sent to Ms. Travis.

Finally, the Union contends that the grievance ought to be sustained for the above reasons and because the Courtney Grievance does not amount to a binding past practice, and because the facts underlying the Wallin Award are distinguished from the facts of the instant case.

VI. OPINION - ARBITRABILITY

To decide this case requires a plain understanding of the fighting issue that divides the parties. The record shows that each party's theory of this case may be thusly phrased: The Employer maintains that the grievance is not arbitrable (i.e., it is forfeited) because it was not properly appealed to arbitration before March 9, 2007, which is the undisputed deadline for making said appeal; whereas, the Union maintains that a grievance is rendered non-arbitrable (i.e., forfeited) if and only if its appeal to arbitration is untimely, whether or not the appeal was improperly served. And, it is uncontroverted that the Employer knew about the Union's appeal to arbitration – whether or not proper – prior to March 9, 2007. From these divergent theories it is clear that this is not a typical timeliness case. Rather, the issue is whether grievance appeals to arbitration must be in writing and addressed specifically to the attention of the DOER Deputy Commissioner/State Labor Negotiator? The answer to this question notwithstanding, that appeals to arbitration must be timely is not being contested. We now turn to an analysis of the facts in evidence to determine whose theory they tend to support.

To begin, Ms. Travis persuasively testified that DOER has and does doggedly object to procedural violations in regard to grievance-processing, as her testimony was largely unchallenged. Ms. Travis also explained in pragmatic persuasive and uncontroverted terms why DOER has adopted and implemented such a strict and uncompromising grievance processing policy. Her explanation

was adequately explicated in an earlier part of this Award and will not be repeated.

Critically, this line of Ms. Travis' testimony was corroborated by the following uncontroverted facts. First, on February 28, 2007, Ms. Travis learned that the Union wished to appeal the Employer's Step 3 decision in this case, upon receiving Ms. Winter's February 23, 2007 letter to Mr. Cunningham and Mr. Cunningham's February 27, 2007 reply letter, with its list of arbitrators. In addition, on the very next day, March 1, 2007, Ms. Travis received Ms. Corhouse's e-mail request to strike arbitrator names. Ms. Travis' March 3, 2007 e-mail reply to Ms. Corhouse was as follows:

Deb:

I looked at this today (Todd Hankel grievance/arbitration list), and noted that we do not have a file for this grievance. Do you have any evidence that SRSEA properly submitted an appeal of this grievance to the Deputy Commissioner? If you do, please fax it to me or Joanie Pream at 651-296-2599, at your convenience.

Also, from the cc's on the letter to the BMS, it appears that this employee is employed by MCF-Stillwater. Since this is the case, my colleague, Trina Chernos, will be handling this matter. She has the Department of Corrections as an account.

Thanks!

Carolyn

(Employer Tab 3; emphasis added) In the opinion of the undersigned, the emphasized part of this e-mail confirms Ms. Travis' "strict and uncompromising" policy testimony and it communicated to Ms. Corhouse – well before the March 9, 2007 deadline for an appeal – that Ms. Travis expected her interpretation of Article 16, Section 2.E to be followed. To be explicit, Ms. Travis believed then, as

she testified at the hearing, that proper appeals to arbitration must be addressed to the attention of the Deputy Commissioner/State Labor Negotiator and that neither the Winter nor Cunningham letter was proper.

Second, approximately seven (7) months earlier, Ms. Winter, Ms. Corhouse and Ms. Travis had cycled through a somewhat similar fact scenario in regard to the Courtney Grievance. As previously discussed on August 21, 2006, Ms. Travis e-mailed Ms. Winter, copying Ms. Corhouse. In that e-mail, Ms. Travis explicitly referred Ms. Winter to Article 16 in the CBA and advised that

You need to appeal a grievance to arbitration by serving written notice upon the State Labor Negotiator, Paul Larson. The appeal does not go to the superintendent, nor to me.

(Employer Tab 4) Ms. Winter complied with this request, ending the matter. However, at the hearing, Ms. Winter testified that her compliant behavior ought not to be interpreted as acquiescence to Ms. Travis' interpretation of Article 16, Section 2.E. On the other hand, Ms. Travis testified that Ms. Winter did not object to her interpretation of Article 16, Section 2.E, at the time. The undersigned concludes that the unfolding of the Courtney Grievance events add weight to the Ms. Travis' testimony that DOER strictly applies the relevant appeals language in the SPSEA contract and others.

Finally, Ms. Travis testified about Arbitrator Wallin's 1998 award. (Employer Tab 5) The relevant and controlling contract language in that case is as follows:

If the grievance remains unresolved ...the Association may refer to the grievance to arbitration in writing to the State Negotiator within fourteen (14) calendar days of receipt the Appointing Authority's answer.

(Employer Tab 5) In that case, the Department of Natural Resources, State of Minnesota, issued its Step 3 grievance denial and immediately thereafter, the Minnesota Conservation Officers Association (Association) wrote a letter to the BMS Commissioner requesting a list of arbitrators. The Association did not write to the Deputy Commissioner/State Labor Negotiator, appealing the matter to arbitration, and a carbon copy of the BMS letter was not sent to the State Labor Negotiator. However, the Association alleges that it mailed a duplicate copy of the foregoing letter to the State Labor Negotiator and, a few days later, that it mailed a second copy to him. Neither copy of the BMS letter was received by the Office of the State Labor Negotiator, according to the latter. But within the above-quoted fourteen (14) calendar day appeal's window, the Office of the State Labor Negotiator did receive the BMS Commissioner's reply letter that referenced a list of arbitrators. After said window had closed, the Union contacted the State Labor Negotiator to strike arbitrator names. The latter agreed to strike names, but subsequently raised an arbitrability challenge, arguing that neither the BMS letter requesting a list of arbitrators nor the BMS Commissioner's letter satisfy the timely referral requirement of the CBA. Clearly, the fighting issue in this case was whether the Union referrals to arbitration must be addressed to the State Labor Negotiator. Arbitrator Wallin, relying mainly on past practice evidence, sustained the timeliness challenge and found that neither the Association's letter to the BMS nor the BMS Commissioner's letter meet the CBA's referral requirement. The facts, arguments and conclusions in the Wallin Award add still further weight to the credibility of Ms. Travis' testimony.

With respect to the Wallin Award, the Union correctly points out that the facts of the instant case and those underlying *Minnesota Conservation Officers Association* Award are distinguishable. Relative to the instant case, the Union avers that (1) past practices cannot be used to inferentially clarify any ambiguities in Article 16, Section 2.E because evidence of same were not presented; (2) the Assistant State Labor Negotiator did receive a timely copy of Ms. Winter's letter to the BMS and the BMS Commissioner's letter; and (3) the language in Article 16, Section 2.E includes the term "designee." These points of and others raised by the Union are discussed next.

Arbitrator Wallin concludes that the language

...the Association may refer the grievance to arbitration in writing to the State Negotiator...

is ambiguous. (Employer Tab 5; emphasis added) That is, this language cannot be read to exclude, as proper, written appeals to the BMS Commissioner that are copied to the State Labor Negotiator. To clarify this ambiguity, Arbitrator Wallin relied on past practices, which demonstrated that previous Association appeals to arbitration appear to have been in writing and mailed directly to the State Labor Negotiator.

By way of contrast, the disputed language in the instant case is

... the grievance may be appealed to arbitration by serving written notice upon the Deputy Commissioner of the Department of Employee Relations (State Labor Negotiator), or designee.

(Employer Tab 1; emphasis added) While this language and that appearing in the Association's contract are similar, there are critical differences. As to similarities, the word "may" appears in both contracts. In this case, the Union argues that the

word “may” is used in a “permissive” sense, implying that written notices of appeal need not be served directly on the State Labor Negotiator. However, this argument is not persuasive. The word “may” in Article 16, Section 2.E modified the word “grievance” and not the phrase “...serving written notice upon the Deputy Commissioner...” Thus, whether the Union chooses to appeal the grievance is what is “permissive,” and the word “may” has nothing to do with the phrase, “...serving written notice upon the Deputy Commissioner...” This interpretation is consistent with Ms. Travis’ testimony and the Association’s past practices, as described in the Wallin Award.

With respect to critical differences, the phrase “...in writing to the State Negotiator...,” as found in the Association’s contract and the phrase “...serving written notice upon the Deputy Commissioner...” in the instant contract are significantly different. Arbitrator Wallin concluded that the former expression was ambiguous and, arguably, that it may be proper to send written arbitration appeals to the BMS Commissioner, while copying the State Labor Negotiator. However, the underlined part of the instant language does not appear to be ambiguous. Rather, it requires that appeals to arbitration are to be made by “...serving written notice upon the Deputy Commissioner...” and not by serving written notice upon the BMS Commissioner with a copy to the Assistant State Labor Negotiator.

The instant language does not define whether a “written notice” ought to be served upon the Deputy Commissioner in person or by mail, by e-mail or by certified mail. But it clearly requires the “written notice” to be served “upon” the

Deputy Commissioner, where the preposition “upon” is defined as simply, “on” (the Deputy Commissioner). (*Webster’s New Collegiate Dictionary*, p. 1278 (1979))

Moreover, the applicable definition of the word “service” is:

10: the act of bringing a legal writ, process, or summons to notice as prescribed by law.

(*Webster’s* at p. 1051) With this definition in mind, it is reasonable to conclude that the parties intended the phrase “...servicing written notice upon the Deputy Commissioner...” to mean just that, namely: when the Union opts to appeal an Employer Step 3 grievance reply to arbitration, it shall serve notice on the other party to the contract who, in this case, is expressly identified as DOER’s Deputy Commissioner. Therefore, Article 16, Section 2.E in the parties’ CBA specifically provides that the manner for notifying the Employer of its decision to appeal to arbitration is by serving notice on the State Labor Negotiator and on no other party. This interpretation is consistent with Ms. Travis’ testimony about the parties’ past practices and e-mail exchanges in Employer Tab 3; and with the testimony and documents bearing on the Courtney Grievance.

The Union notes that the word “designee” does not appear in the Association’s contract and that under the instant CBA, Ms. Travis is the Deputy Commissioner’s designee. Ms. Travis denies that she has ever been appointed as the Deputy Commissioner’s designee for the purpose of receiving arbitration appeals and the record is devoid of testimony, documentation or past practice evidence to suggest that Ms. Travis’ testimony was anything but forthright.

On March 6, 2007, Ms. Corhouse e-mailed the following to Ms. Charnos:

Trina, your client was cc'd on the request for arbitrator list—giving them notice that it was being appealed to arbitration. This is apparently the way the parties have done it consistently w/o challenge. I'm not in the office this morning either, but let me know when it would be a good time to talk about striking. Deb

(Employer Tab 3; emphasis added) Note the emphasized sentence in this e-mail message. The Union's case does not explicitly rely on the affirmative defense that "...the parties have done it consistently w/o challenge." Nevertheless, it is important to observe that there is nothing in the record to impeach Ms. Travis' testimony that the Employer's interpretation of Article 16, Section 2.E is consistent with its long-standing application, which was variously corroborated as discussed above.

Finally, although the Wallin Award is not binding in a precedence-setting sense, the undersigned found it to be instructive, particularly where Arbitrator Wallin's reminder that the Arbitrator's fidelity is to the CBA. Specifically, Article 14, Section 4 in the instant CBA prohibits the Arbitrator from "...ignor[ing]..." other provisions in the CBA. Thus, the undersigned, as demanded by contract, must enforce Article 16, Section 2.E as he has interpreted it even though the instant arbitrability issue may amount to nothing more than "harmless error," as the Union contends. Accordingly, the "harmless error" claim is not determinative.

VIII. AWARD

For the reasons discussed above, the instant grievance is not arbitrable. Article 16, Section 2.E requires that grievance appeals to arbitration must be in writing and addressed specifically to the attention of the DOER Deputy Commissioner/State Labor Negotiator. Inasmuch as said appeal was never filed

in this case, the merits of the substantive issue may not be decided for lack of timeliness.

Issued and ordered on this 26th day of
November, 2007 from Tucson, Arizona.

Mario F. Bognanno, Labor Arbitrator