

ARBITRATION DECISION NO.:

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UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Industrial Relations

DATE OF ARBITRATION:

November 23, 1987

DATE OF DECISION:

December 7, 1987

GRIEVANT:

William Strahl

OCB GRIEVANCE NO.:

G-87-1187

ARBITRATOR:

Harry Graham

FOR THE UNION:

John Porter

FOR THE EMPLOYER:

David Norris

KEY WORDS:

Discharge

Just Cause

Mitigation, Mental Illness

ARTICLES:

Article 24 - Discipline

§24.01-Standard

FACTS:

Grievant was employed as a Mine Safety Inspector for The Department of Industrial Relations approximately six years. Part of the duties associated with this job are to assure the safety conditions of underground mines. Grievant suffers from a condition which is a biologically induced form of mental illness which is characterized by extreme mood fluctuations. While the condition is not curable, it is manageable with drug therapy. Grievant did not report to one of these underground mines on four different days in March. This failure to report was considered to be

improper by the Employer. In addition, at the end of the month Grievant was informed of the existence of a "squeeze" at this mine. (A squeeze is a geological event which may be likened to a collapse. Squeezes may be rapid or slow moving. No matter which, they endanger those working and their equipment and call for prompt and expert attention to prevent tragedy.) After inquiring about the safety of the equipment and the employees, and after learning that all were safe, Grievant decided not to visit the site. Grievant did not visit the site the next day because Grievant took a vacation day. As a result, officials of the Division of Mines did not learn of the squeeze until about twelve hours after Grievant became aware of it. Based upon the failure of Grievant to report to the underground mine on several occasions in March, as well as the Grievant's lack of action during the squeeze, the Grievant was discharged.

EMPLOYER'S POSITION:

The Employer contended that the Grievant was responsible for the underground mine in question and that on several occasions in March Grievant failed to arrive at the site to perform Grievant's assigned tasks. This failure to report was compounded by Grievant's failure to visit the site after being informed of the squeeze. The events in this situation indicated that the Grievant did not take steps to safeguard the employees or notify anyone. Grievant did not notify anyone in the Division of Mines of the squeeze when Grievant called in to take the vacation day. This behavior was irresponsible. The Employer realized that the Grievant suffered from a disease which was incurable; however, it was their contention that the Grievant would not be able to act decisively and responsibly because of this illness. Given the Grievant's record and the failure to respond to the site on several occasions, the Employer urged that the discharge be sustained.

UNION'S POSITION:

The Union contended that there was not a directive requiring the Grievant to report to the underground mine on a daily basis. In addition, Grievant's schedule allowed for the use of flex time at the end of the week if Grievant worked more than eight hours in any one day. Grievant was properly using flex time when Grievant did not report to the mine on three of the four occasions in March. No discipline may be administered for this proper use of time. The fourth day that Grievant was not at the mine Grievant was at a meeting with the Chief, discussing a suspension that had been administered to Grievant. No discipline may be imposed for attendance at such a proper meeting. Finally, the Union readily acknowledged the Grievant was aware of the squeeze at the site; however, after learning that all employees and equipment were safe, no useful purpose would have been served by visiting the site at that time.

ARBITRATOR'S OPINION:

The-Arbitrator held that on the four days in March that Grievant did not report to the underground mine he was properly elsewhere. (On March 13, 16 and 27, 1987, the Grievant was properly using accrued time in the flex-time work schedule system to complete paperwork. The State did not challenge this account of Grievant's time on those dates.)

In addition the Arbitrator held it would be impermissible for the State to engage in discussions with an employee concerning discipline and work performance and then discipline the employee for attendance at those discussions.

As for the day of the squeeze, the events do not give evidence of the "imminent danger" that the Employer asserted. As far as Grievant knew, all employees and equipment had been removed from the mine and all were safe. But, in not informing higher authority of the Division of Mines of the squeeze later in the day, and in taking a vacation day, the Grievant acted irresponsibly. No employee with due regard for his duties could properly act as the Grievant did; however, Grievant's

failure to act is a manifestation of his mental condition.

The Arbitrator held that while the Grievant may be unfit to serve, this does not justify the discharge under scrutiny in this proceeding and the State did not have just cause to discharge the Grievant under the circumstances that gave rise to this proceeding.

AWARD:

The Grievance is Sustained in part and Denied in part. The Grievant's discharge is to be reduced to a two-day suspension without pay. All other back pay is to be made to the Grievant and all record of this discharge is to be expunged from his personnel record.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

**The State of Ohio,
Department of Industrial Relations**

Grievance No.:

G87-1187

Appearances:

For OCSEA/AFSCME Local 11:

John Porter

Associate General Counsel

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For The State of Ohio:

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Introduction:

In conjunction with a number of other matters involving the Grievant in this dispute a hearing was held on November 23, 1987 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. No post-hearing briefs were filed in this

dispute and the record was closed at the conclusion of oral argument.

Issue:

The parties agree that the issue to be decided in this proceeding is:

Was William Strahl terminated for just cause? If not, what shall the remedy be?

Facts:

While there are certain elements of dispute between the parties over the facts that generated the discharge under scrutiny in this proceeding certain facts are not in question. The Grievant, William Strahl, was initially employed as a Mine Safety Inspector with the Department of Industrial Relations of the State of Ohio on January 11, 1981. For the first six years of his employment with the State he compiled a good work record.

Mr. Strahl suffers from a condition known as Bipolar Disease. Bipolar Disease is a biologically induced mental illness which is characterized by extreme mood fluctuations. People with Bipolar Disease may experience extremes of depression and euphoria. Bipolar Disease is not curable. It is manageable with drug therapy.

There exists in the eastern part of Ohio, in the vicinity of St. Clairsville an underground coal mine known as the Saginaw Mine. The Saginaw Mine is within the responsibility of the Grievant with respect to assurance of safety conditions. On March 3, 13, 16 and 27 Strahl did not report to the Saginaw facility. This failure to report was considered to be improper by the Department of Industrial Relations

On the morning of March 30, 1987 at 3:00AM the Grievant received a telephone call from the Saginaw Mine. He was informed of the existence of a "squeeze" at the mine. A squeeze is a geological event which may be likened to a collapse. Squeezes may be rapid or slow moving. No matter which, they endanger men and equipment and call for prompt and expert attention to prevent tragedy. Upon receipt of notification of the squeeze at Saginaw Strahl inquired about the safety of the men and equipment. He was informed all were out of the mine and safe. Upon learning of this he returned to sleep. He did not leave his home and journey to the mine site. In fact, he did not visit the mine later in the day during his normal working hours. He telephoned his office and took a day off work as a vacation day. Officials of the Division of Mines were not made aware of the squeeze at Saginaw until about 4:00PM on March 30, 1987, over twelve hours after Strahl learned about it. At that hour an official of Saginaw's parent firm, Ogelbay Norton Co. in Cleveland, OH. called the Chief of the Division of Mines, Warren Ellis, and informed him of the situation at Saginaw. Inquiry was made by Ogelbay Norton as to why the responsible Mine Safety Inspector, Strahl, had not put in an appearance at Saginaw.

Upon learning of the squeeze Ellis telephoned another Mine Safety Inspector and they both traveled to the Saginaw facility. Upon arriving they discovered that the Company's efforts to maintain the facility with the installation of "cribbing," wooden supports, was misplaced. In Ellis' opinion it would have been helpful if Strahl had been at the mine to assist in efforts to reduce damage from the squeeze. No injuries or death resulted from the squeeze. Equipment valued at approximately \$200,000 was lost as was cribbing valued at \$42,000.

Chief Ellis felt that it was the responsibility of Inspector Strahl to have proceeded to the mine upon notification of the squeeze. He also felt that it was improper for Strahl not to have notified other officials of the Division of Mines of the existence of the squeeze. Similarly, he felt that taking a vacation day in the midst of an emergency was improper. Based upon the failure of Strahl to report to the Saginaw mine on several occasions in March, 1987 as well as his lack of action

during the squeeze Strahl was discharged.

A grievance protesting this discharge was filed. It was processed through the procedures of the parties and no resolution was had. The parties agree that it is properly before the Arbitrator for determination on its merits.

Position of the Employer:

The State points out that Mine Safety Inspectors have great responsibility. They may literally be responsible for life and death situations, as well as for equipment of great value. As this is the case, they must be diligent, conscientious and alert at all times. The Grievant was assigned responsibility for the Saginaw facility. The record is undisputed that on several occasions in March, 1987 he failed to arrive at the mine to perform his assigned tasks. This is a serious infraction that standing alone is worthy of discipline according to the State.

Strahl's failure to report is compounded by his actions on March 30, 1987, the date of the squeeze. As a mine safety inspector the Grievant's actions are governed by both departmental policy and the mining laws of Ohio. At Section 4151.34 those laws indicate that:

If a deputy mine inspector finds danger of an imminent and extraordinary character in any mine he shall immediately take steps to safeguard the employees, notify the superintendent, the mine foreman... and require them to exercise their authority to remedy the situation; in all such instances he shall stop all workings in the particular section in which he found the dangerous condition or the entire mine if necessary.

The events in this situation indicate Strahl did not take steps to safeguard the employees or notify anyone. He went back to sleep. In addition, he took a vacation day when his normal work hours on March 30, 1987 commenced. He did not notify anyone in the Division of Mines of the squeeze at Saginaw when he called in to take his vacation day. This behavior is irresponsible to say the least in the opinion of the State.

Section 4151.36 of the Mining Laws indicate that:

Upon being notified by the owner, lessee, or agent of a mine or by a deputy mine inspector, that a major accident, causing injury to persons or property has occurred at a mine within his jurisdiction, the chief of the division of mines shall go...at once to such mine....

Strahl did not notify the Chief, Ellis of the squeeze. He knew about it and failed to inform appropriate safety officials. The State did not become aware of the squeeze at Saginaw until 13 hours after Strahl knew about it. The resources of the State which exist to protect life and property were not appropriately mobilized in this situation due to Strahl's neglect. This justifies his discharge in the State's opinion.

The State points out that all involved in this dispute, the Grievant, the Union and the State agree he is mentally ill. Due to the biological nature of his illness he will never recover. People serving as mine safety inspectors bear a special burden to act decisively and responsibly. Strahl cannot act in that fashion due to his illness. That this is so is illustrated by the events of March 30, 1987. The Grievant has been reprimanded verbally, and experienced a suspension all within a relatively short time period preceding this incident. Given this record and his dismal performance on March 30, 1987 the State urges the discharge be sustained.

Position of the Union:

The Union points out that there was no direction Strahl was to report to the Saginaw mine on a daily basis. Mine inspectors operate with a great deal of autonomy. They often work well more than the scheduled eight hour day. As a result of this unusual work situation mine inspectors are on a flex time work schedule. That is, they may work more than the normal eight hour day on a particular day but make up for it by securing time off from field work. They normally have such time off on Fridays and utilize it to do the paperwork associated with their job. March 13 and 27, 1987 were Fridays when Strahl properly did not report to the Saginaw facility. He was on flex time and at home doing his paperwork. Similarly, he was at home on flex time on March 16, 1987 as well. No discipline can be administered for this proper use of time insists the Union.

On March 3, 1987 Strahl was at the offices of the Division of Mines in Columbus. He was meeting with Ellis, the Chief of the Division, over a suspension that had been administered to him. No discipline can be imposed for attendance at such a proper meeting according to the Union.

The Union readily acknowledges that Strahl was aware of the squeeze at Saginaw at 3:00AM on March 30, 1987. However, the caller from the mine indicated they had "had" a squeeze. Strahl immediately inquired if the men and equipment were out of the mine and safe. He was informed they were. Under those circumstances there was nothing he could do at 3:00AM. No useful purpose would have been served by his reporting to the mine at that hour. As far as he knew, the squeeze had ended. Upon awakening later in the morning of March 30, 1987 his Bipolar Disease condition was of such magnitude he could not respond to the events at Saginaw, hence his use of a vacation day.

As does the State the Union points to Section 4151.34 of the Mining Laws to support its position. Cited above, that Section indicates in relevant part that "if a deputy mine inspector finds danger of an imminent and extraordinary character in any mine..." he must safeguard employees. As far as Strahl knew at 3:00AM on March 30, 1987 employees had been removed from danger. The Company told him they "had" a squeeze. They told him all men and equipment were out of the mine. To Strahl's knowledge, there was no imminent danger. In fact, the squeeze commenced at 10:00PM on the evening of March 29, 1987 it was subsequently learned. It must be concluded that the Company delayed notifying Strahl because it suspected he would forbid men remaining in the mine. As the Company wished to secure its equipment it placed its people in a hazardous situation without informing the responsible mine inspector. Strahl cannot be blamed for this sequence of events

The Union also points to Section 4153.43 of the Mining Laws. At F, that Section indicates that a mine operator must give notice to the "Chief of the Division of Mines" when a squeeze occurs. Section 4153.43 continues "No operator of a mine shall refuse or neglect to comply with this section." Oglebay Norton, the operator of Saginaw, clearly did not comply with that section of the statutes. No action was brought against the Company by the Chief of the Division of Mines. The Chief formerly worked for Saginaw. He lives 1.5 miles from the mine. The Grievant lives 22 miles from the mine. Under these circumstances it is improper to discipline the Grievant in any fashion insists the Union.

Discussion:

On the days in March, 1987 on which the Grievant did not report to the Saginaw facility he was properly elsewhere. Certainly no discipline may be administered for his failure to be at Saginaw on March 3, 1987 when he was in Columbus meeting with his superior concerning a disciplinary suspension. No indication was received by the Arbitrator that this was anything other than a properly conducted meeting. Nothing is on the record to indicate that the Division of Mines indicated to Strahl that his presence in Columbus on that date was improper and that he should

have been at the Saginaw facility. It is impermissible for the State to engage in discussions with an employee concerning his discipline and work performance and then discipline the employee for attendance at those discussions.

On March 13, 16 and 27, 1987 the Grievant was properly using his accrued time in the flex time work schedule system to complete his paperwork. The State did not challenge this account of Strahl's time on those dates. When employees are expected to use flex time in the fashion in which Strahl used it no discipline may be administered for his failure to report to the Saginaw mine. His absence from that facility on those dates was proper.

The events at Saginaw on March 30, 1987 do not give evidence of the "imminent danger" that the State asserts existed. Certainly Strahl was not informed of any danger to men and equipment at 3:00AM on March 30, 1987. To the contrary, Company officialdom indicated men and equipment were removed from the mine. Any imminent danger that existed to personnel and equipment occurred prior to the telephone call to Strahl. That the Company might delay informing a safety official of the State of the existence of a squeeze was acknowledged by both the Chief of the Division of Mines and the Grievant. If the Company placed its personnel and equipment in imminent danger prior to 3:00AM on March 29-30, 1987 cannot subject the Grievant to discipline. Section 4151.34 of the Mining Laws cannot serve to support the discharge in question in this proceeding as Strahl was not aware of the "imminent danger" contemplated by that Section of the Law.

In not informing higher authority of the Division of Mines of the squeeze at Saginaw later in the day on March 30, 1987 and in taking a vacation day the Grievant acted irresponsibly. No employee with due regard for his duties could properly act as Strahl did on March 30, 1987. His failure to act is a manifestation of his mental condition. Strahl's mental illness calls into question his fitness to serve as a Mine Safety Inspector. A reading of his medical history as well as his personnel record in its entirety must prompt great reservations about his ability to serve as a Mine Safety Inspector. That Strahl may be unfit to serve does not justify the discharge under scrutiny in this proceeding. The State did not have just cause to discharge William Strahl under the circumstances that gave rise to this proceeding.

This Arbitrator does not believe in giving gratuitous advice to the parties. However, in this case it must be clear that the State has erred in discharging the Grievant for his conduct in March, 1987. It must also be clear that Strahl's mental condition cannot give rise to any confidence that he will ever be able to properly perform the stressful duties associated with the position of Mine Safety Inspector. If it is possible for the Employer to consider a leave of some sort coupled with a transfer for William Strahl to a position of lesser responsibility that possibility should be explored. At some point Strahl's infirmities may be of such magnitude that his continued employment in his current position will no longer be feasible.

Award:

Based upon the preceding discussion the Grievance must be SUSTAINED in part and DENIED in part. The Grievant acted improperly on March 30, 1987 by failing to report the squeeze at Saginaw to higher authority and in taking a vacation day rather than dealing with the condition at Saginaw. As a mine inspector he must be expected to assume responsibility for the facilities in his charge. By failing to do so on March 30, 1987 some degree of discipline is appropriate. As discussed above, discharge is excessive. The discharge of William Strahl is to be reduced to a two-day suspension without pay. All other back pay is to be made to the Grievant and all record of this discharge is to be expunged from his personnel record.

Signed and dated this 7th day of December, 1987 at Chagrin Falls, OH.

Harry Graham
Arbitrator