

SUSAN GRODY RUBEN, Esq.
Labor Arbitrator and Mediator
30799 Pinetree Road, No. 226
Cleveland, OH 44124

1076

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

RECEIVED / REVIEWED

DEC 20 2010

DCSEA-OFFICE OF
GENERAL COUNSEL

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, AFSCME Local 11
AFL-CIO

and

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Case No. 27-11-20090615-0034-01-05
Grievant: Yuntaya Carter

ARBITRATOR'S
OPINION AND AWARD

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ("the Union") and the STATE OF OHIO ("the State"), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. The Parties stipulated the grievance was properly before the Arbitrator. Her decision shall be final and binding pursuant to the Agreement.

Hearing was held September 21, 2010 at the Lebanon Correctional Institution in Lebanon, Ohio. The Union advocate and the State advocate were afforded full opportunity for the examination and cross-examination of witnesses,

introduction of exhibits, and for argument. Both Parties submitted timely post-hearing briefs.

APPEARANCES:

On behalf of the Union:

ROBERT JONES, Staff Representative, OCSEA

On behalf of the State:

**BEN DUNN, Labor Relations Officer, Lebanon
Correctional Institution, ODRC**

ISSUE

**Did the State have just cause to remove the Grievant?
If not, what shall the remedy be?**

**RELEVANT PORTIONS OF THE PARTIES' COLLECTIVE BARGAINING
AGREEMENT
2009-2012**

...

Article 24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action....

Article 24.02 – Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- a. One (1) or more oral reprimand(s) (with appropriate notation in the employee's file);**
- b. One (1) or more written reprimand(s);**
- c. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.
If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may**

- choose a reduction in leave balances in lieu of a fine levied against him/her.
- d. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;
- e. Termination.

...

...

Article 24.04 – Investigatory Interview

...

...Employees who are interviewed or testify during an investigation have no right to a private attorney, Ohio Revised Code (ORC) 9.84, notwithstanding.

...

Article 24.06 – Imposition of Discipline

...

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

...

Article 24.07 – Prior Disciplinary Action

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

The retention period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave....

...

FACTS

The Grievant began her employment May 10, 1999. At the time of her June 5, 2009 removal, she worked as a Correctional Food Service Coordinator at Lebanon Correctional Institution ("LeCI"). The State removed the Grievant based on its determination she had violated Standards of Employee Conduct Rule 24 –

Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.¹

The investigation in question arose from events that began on the morning of April 28, 2009, when local deputies arrived at the Grievant's home in response to gunshots reported by a neighbor. After not permitting the deputies to enter her home, the Grievant was arrested on a charge of Obstructing Official Business.² The regional newspaper reported deputies removed from the Grievant's home "a brown paper bag stuffed with \$49,980 in cash, an envelope with another \$2,020 as well as four guns, a holster and ammunition...."

The State opened an internal investigation regarding the Grievant's arrest. As part of that investigation, it interviewed the Grievants three times. Before the second and third interviews, the Grievant signed ODRC Garrity Right statements which provide in pertinent part:

You are advised that you are being questioned as part of an official investigation by the Ohio Department of Rehabilitation and Correction. You will be asked questions specifically directed and narrowly related to the performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws the Constitution of the State of Ohio and the Constitution of the United States, including the right not to be compelled to incriminate yourself and to have a representative present during questioning.

I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties or fitness for duty, you will be subject to departmental charges, which could result in your termination. If you do answer, your statements cannot be used against you in any subsequent criminal proceedings. However, these statements may be used against you in relation to subsequent disciplinary actions.

Do you understand your rights and responsibilities? [The Grievant checked the "yes" box both times.]

¹ At the time of her removal, the Grievant had seven active disciplines, including three performance-related disciplines. The seven active disciplines consisted of five written reprimands and two two-day fines.

² The Grievant was eventually acquitted of the charge.

During the three investigatory interviews, the Grievant was asked about property removed from her home the morning of the arrest. Each time, she responded the investigator should contact her attorney:

Q. On the arrest [sic] of April 28, 2009, was there any property that was removed from the house?

A. Refer that question to my attorney. I don't think that has anything to do with my work.³

The investigator, after having explained at the beginning of the interview the Grievant needed to cooperate, admonished the Grievant again:

Q. Do you understand that you are required to cooperate with this investigation. Refusal to answer questions, or failure to give honest, truthful answers could result in further disciplinary action. Do you understand?

A. I already answered that question. That was Question #2.

Question 2 had been:

Q. You are required to cooperate with this investigation. Refusal to answer questions, or failure to give honest, truthful answers could result in further disciplinary action. Do you understand?

A. Yes.

The State decided the Grievant's responses to the property questions violated her duty to cooperate in an internal investigation. The State gave the Grievant notice of a pre-disciplinary meeting. It was held May 12, 2009. The State proceeded to remove the Grievant. The May 26, 2009 Notice of Disciplinary Action states in pertinent part:

...

You are to be removed for the following infraction:

Internal Affairs Incident Report by: Mr. C. Case

On May 1, 2009, management of Lebanon Correctional Institution became aware that you had been arrested on April 28, 2009 for obstructing official business. Mr. C. Case, Investigator, conducted an investigatory interview with you on May 1, 2009. Following the

³ This question and answer is from the first investigatory interview. With regard to the property question and the issues in this arbitration, the three interviews were very similar.

investigatory interview, Mr. Case submitted an incident report indicating that you were evasive and not forthcoming. Particularly, when asked if property was removed from your residence the night you were arrested, you immediately told Mr. Case to refer that question to your attorney.

On May 7, 2009, Mr. G. Craft conducted an investigatory interview with you again you refused to answer a question directed to you by referring this question to your attorney.

It is management's contention that you were uncooperative and not forthcoming with information during the official investigations conducted by Mr. C. Case and Mr. G. Craft.

Your actions constitute a violation of Rule 24 – Interfering with, failing to cooperate in, or lying in an official investigation or inquiry; of the Standards of Employee Conduct.

...

PARTIES' POSITIONS

State's Position

The Grievant engaged in self-help by refusing to answer legitimate and reasonable questions regarding her off-duty conduct. She ignored the axiom of "work now, grieve later."

The Grievant knew her rights and the possible consequences of refusing to answer the questions. In spite of that knowledge, the Grievant continued to make her choice – she refused to cooperate by referring the State to her attorney.

The State had no duty to contact the Grievant's attorney. Even if the State had contacted her attorney, the Grievant would still have been obligated to answer the State's questions.

The State has the reasonable expectation all employees will conduct themselves in a manner such that their activities both on and off duty will not adversely affect their ability to perform their job duties. The State has a legitimate interest in protecting the general public, prison staff, visitors, and inmates from illegal activity of staff. In order to protect that interest, the State must be able to exercise its right to question employees about their on and off duty conduct.

Because the Grievant chose to not cooperate with an official investigation, the State was unable to complete a proper investigation. As a result, the State's interests were placed in jeopardy.

Absent the cooperation of the Grievant, the State could not determine the Grievant's fitness for duty. It is not for the Grievant to determine fitness for duty; it is the State's responsibility. Without the Grievant's complete cooperation during the investigation, the State could not make a fully informed decision regarding the Grievant's fitness to carry out her duties and/or if the security of the facility had been compromised.

The Grievant knew the State's expectations, knew her responsibilities regarding appropriate conduct, and knew the probable consequences of her actions. The Grievant had received a copy of the Standards of Employee Conduct, which provide in pertinent part:

During the course of any official investigation, employees are under an affirmative duty to cooperate fully with investigators by answering all inquiries truthfully, and by providing any and all pertinent information of which they possess [sic]. Failure by any employee to answer any inquiry truthfully, fully and to the best of the employee's knowledge shall be grounds for disciplinary action.

SOEC, p. 4.

At the time of her removal, the Grievant had seven active disciplines, of which three are performance-related. Thus, the instant Rule 24 violation was the Grievant's fourth performance discipline. The disciplinary grid mandates removal for a Rule 24 violation third offense. A fourth offense is off the grid. The record demonstrates the State had just cause for removing the Grievant. A return to employment in corrections would be wholly inappropriate.

Union's Position

The State did not have just cause to remove the Grievant. On May 1, 2009, when the Grievant was first asked if any property had been taken from her home on April 28, 2009, she responded by referring the investigator to her attorney. She further stated she felt the question did not relate to her work.

The investigator testified at the arbitration it was not his job to contact the Grievant's attorney. When the Grievant's attorney called the investigator, the investigator told the attorney it was too late. It should never be too late to find out the truth.

During the May 7, 2009 interview, the investigator asked the Grievant again about property taken from her home. The Grievant asked to speak with her attorney so this question could be answered. At that point, the investigator ended the interview. This shows a rush to judgment and a disinterest in the truth.

The State lacks sufficient evidence to prove the Grievant failed to cooperate in the investigation. The State abruptly ended the interviews without caucusing with the Union steward and the Grievant about a duty to respond. There is no evidence to support a direct order was given the Grievant to answer the particular question about property being taken from her home. Either one of these actions could have moved the investigation along and led to a reasonable conclusion.

The State failed to give the Grievant clear forewarning of the severe consequences of her actions. Neither investigator explained to the Grievant he had the authority to immunize her from criminal prosecution when answering questions about property taken from her home. There is no record the Grievant received training about Garrity Rights.

The Grievant testified at the arbitration she was following the direction of her attorney not to answer the question about property removed from her home

because she could possibly lose the money (over \$50,000) police took from her home. The Grievant answered all the questions the best she could. The Grievant was fit for duty and able to work.

This was the Grievant's first offense for alleged violation of Rule 24. Progressive discipline was not followed pursuant to Article 24.02. This first offense on the grid is a two-day suspension or removal. Disciplinary action should be commensurate with the offense pursuant to Article 24.06, and should not be solely for punishment. The removal of the Grievant was solely for punishment.

The Union requests a make whole remedy, including reinstatement of the Grievant to her previous position, along with back pay, seniority, and all benefits.

OPINION

The State has the burden of proving just cause for the Grievant's removal. Substantively, this case boils down to two issues: 1) whether the Grievant's response -- "talk to my lawyer" -- in an internal investigation constitutes sufficient cooperation; and 2) if the Grievant did not sufficiently cooperate in the internal investigation, whether removal was the appropriate remedy.

Whether the Grievant Sufficiently Cooperated During the Internal Investigation

The Grievant was asked on three separate occasions to answer whether property was taken from her home in connection with her April 28, 2009 arrest. Each time, she responded the investigator should speak to her attorney. The Grievant further opined the question was not related to her fitness for duty.

The Grievant is well aware she worked in a corrections facility. Such a place of employment has its own unique issues and interests. Among the foremost of these issues and interests is ensuring the corrections employees are conducting themselves on the right side of the law.

The Grievant's arrest for obstructing official business gave the State cause to conduct an internal investigation. The Grievant was well aware she had a duty to cooperate fully during that investigation. When asked whether property was removed from her home, however, she chose not to answer. Rather, she referred the investigators to her attorney.

The State's employment relationship is with the Grievant, however, not her attorney. It is the Grievant who had a duty to cooperate fully with the investigation, not her attorney.⁴ It is clear from the record the Grievant understood her Garrity rights.⁵ She was told in writing she could not be criminally prosecuted for statements she made during the internal investigation.

As noted in How Arbitration Works:

[A]n employee's invocation of the constitutional right against self-incrimination does not necessarily insulate the employee from discharge. There is no constitutional right to refuse to cooperate with an employer, and failure to do so under appropriate circumstances may warrant discharge.

2008 Supplement to the 6th Edition, p. 469. Similarly, Arbitrator Alexander explained:

The Grievant had a right as a private individual to refuse to incriminate himself. Did this right then protect him from the result of that action in his employment forum? Because he lost his deputy powers by refusing to cooperate, under fear of self incrimination, does this mean his public employer had to keep him employed? I conclude not.

My study of precedent leads me to conclude that a public employee may invoke his right against self incrimination, but that by invoking it, he or she is not thus protected against the resulting loss of employment where there is a direct relationship between the investigation or questions refused and the employee's ability to do his or her job.

City of Indianapolis, 117 LA 911 (2002).

⁴ See Article 24.04: ...Employees who are interviewed or testify during an investigation have no right to a private attorney, Ohio Revised Code (ORC) 9.84, notwithstanding.

⁵⁵ See Garrity v. New Jersey, 385 U.S. 493 (1967).

The Grievant testified at the arbitration she did not want to answer the property questions because she was concerned about forfeiting the \$50,000 the police took from her home.

It certainly is understandable the Grievant was concerned with the return of the \$50,000. However, that concern did not absolve her from her Rule 24 duty to cooperate fully with an internal investigation.

During the internal investigation, the Grievant stated she did not feel the property question had anything to do with her fitness for duty. The Arbitrator disagrees. It was within the State's reasonable interest to investigate various aspects of the Grievant's arrest to determine whether she was fit for duty. Among these aspects was the property question. By referring those questions to her attorney rather than answering them herself, the Arbitrator finds the Grievant did not sufficiently cooperate during the internal investigation.

Whether Removal Was the Appropriate Remedy

As discussed above, and as held by the courts, an employer has the right to remove an employee who refuses to cooperate during an internal investigation:

[There is a] long-established rule that when a public employer conducts an internal investigation it may dismiss an employee who refuses to answer investigative questions....Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005).

With regard to Article 24.02 progressive discipline, and Article 24.07 prior disciplinary actions, the Grievant had seven active disciplines at the time of her removal, three of them performance-related. Thus, it was within the zone of reasonableness for the State to conclude it was appropriate to remove the Grievant for the serious offense of not cooperating in an internal investigation. Particularly in a law enforcement setting, employees have a duty to cooperate in

an internal investigation. Accordingly, the State had just cause to remove the Grievant from her position.

AWARD

For the reasons set out above, the grievance is denied.

Dated: December 19, 2010
Arbitrator

Susan Grody Ruben,