ARBITRATION DECISION NO.:
533

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Highway Safety
(1) Huber Heights Center
(2) Centerville

DATE OF ARBITRATION:
December 15, 1993

DATE OF DECISION:
January 19, 1994

GRIEVANT:
Lasaundra Dudley
Vicky Howard
Tanya McKeever

OCB GRIEVANCE NO.:
15-03-(93-02-19)-0017-01-07
15-03-(93-02-19)-0018-01-07
15-03-(93-02-19)-0011-01-07

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Mike Muenchen

FOR THE EMPLOYER:
Richard G. Corbin
Cynthia Sorell

KEY WORDS:
Removal
Just Cause
Progressive Discipline
Disparate Treatment
Commensurate Discipline
Falsification

ARTICLES:
Article 24 - Discipline
- § 24.01 - Standard
- § 24.02 - Progressive Discipline

Article 25 - Grievance Procedure

§ 25.03 - Arbitration Procedures

FACTS:

The three grievants involved worked for the Department of Highway Safety as Drivers License Examiners, one at the Huber Heights center and two at Centerville. In an attempt to better serve the public, the department changed its schedule, offering driver license examinations Tuesday through Saturday. This pilot program was then surveyed at the grievants' stations to determine usage and demand for Saturday hours.

The grievants' duties partially consisted of scheduling examination appointments on a computerized system by blocking off particular times with an applicant's social security number. When allegations arose that some Driver License Examiners were filling scheduled times with fake numbers and proclaiming a high incidence of no-shows, an investigation was conducted by the Highway Patrol. This investigation of the examiners resulted in the firing of the three grievants, along with two other one day suspensions, one resignation, and one retirement. In addition, two of the grievants, the retiree and the resignee, were criminally charged, pleaded guilty, and entered a diversion program. The behavior of the grievants was not disputed. At issue was whether the discipline imposed on the grievants was disparate, whether the discipline was commensurate, and whether there was just cause for termination.

EMPLOYER'S POSITION:

The State believed there were significant differences between the cases which resulted in suspensions and those which resulted in termination, which justified the difference in penalties. The two examiners who were suspended from work at the Lancaster test center used their own social security numbers and their family members, social security numbers to block out times. These two usually blocked out the first and last shifts of the day, to give themselves more time to set up or break down the test. They also admitted blocking off times before or after the lunch break to run personal errands. In these two cases, the prosecutor found no evidence of criminal intent, and did not press charges. These two examiners had also completed 15 and 21 years of service for the department with no prior discipline.

The state asserted that the grievants, cases were distinguishable due to the destructive motive involved. At Huber Heights, one grievant, and a co-worker who later resigned, both denied falsifying the schedule during their first investigative interviews, but later confessed to the falsification. They claimed to have done this in order to stop the department from scheduling Saturday work. In addition to blocking out times with false numbers, the two proclaimed to the media that tax dollars were being wasted on needless Saturday hours. The other two terminated grievants were doing basically the same thing at the Centerville test center. Along with another examiner who later retired, the grievants entered false social security numbers into the scheduling computer and declared numerous no-shows in order to convince the State that Saturday work hours were a waste of time and tax dollars. These examiners also denied any wrongdoing in their first interviews but later confessed. Thus, as justification for the different penalties, the State pointed to the purposes for which the examiners entered false numbers, whether or not they admitted their wrongdoing right away, their respective employment histories, and the prosecutor's findings of criminal intent.

UNION'S POSITION:

The discipline was neither progressive, as required by section 24.02, nor commensurate with the infractions committed. Two other examiners were charged with the same violation and only received one day suspensions, while the grievants' jobs were terminated. The Union asserted that these terminations for first offense violations exceeded the discretion of the employer under the progressive discipline standards set forth in Section 24.02 of the Agreement. The Union also claimed that the terminations, in light of the one day suspensions given to two other examiners for the same violation, amounted to disparate treatment.

ARBITRATOR'S POSITION:

The Arbitrator first ruled that the difference in motive was sufficient to justify the difference in penalties. She stated that the difference was a rational basis for distinction. The Arbitrator contrasted the suspended

Lancaster examiners, who at worst were trying to gain some extra lunch time, with the other examiners in question, all of whom were trying to torpedo a new State program.

The Arbitrator then determined that the employer was justified in not acting progressively and that the penalties were commensurate with the violations. The Lancaster examiners both admitted their wrongdoing immediately, and both had long (15 and 21 years) service records with no prior discipline. The grievants, however, admitted their infractions only when it became apparent that they would be caught, and were relatively short term employees compared to those from Lancaster. Finally, the Arbitrator refused to substitute her judgment for that of management, and ruled that the motive of destruction of a State program versus the motive of personal convenience justified the disciplinary difference and the first offense terminations.

AWARD:

All three grievances were denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO
Union

and

Department of Highway Safety
c/o office of Collective Bargaining
Employer.

Grievance No.s:
15-03-(93-02-19)-017-01-07
15-03-(93-02-19)-018-01-07
15-03-(93-02-19)-011-01-07
Grievants:
L. Dudley
V. Howard
T. McKeever
Hearing Date:
December 15, 1993
Award Date:
January 19, 1994

Arbitrator:
R. Rivera

For the Employer:
Richard G. Corbin
Cynthia Sorell

For the Union:

Mike Muenchen

Present at the Hearing in addition to the Grievant and Advocates were Guy K. Parrott, Steward (witness), Donald Goodman, Richard Slater, John Ames, Anne K. Van Scoy, OSHP, Heather L. Reese, OCB, Rus Johnson, Mark Malcolm, Pete Shonk, and Walter Ashbridge.

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

1. Contract

2. a. Discipline Trail for Dudley
   b. Discipline Trail forHoward
   c. Discipline Trail for McKeever

3. a. Grievance Trail for Dudley
   b. Grievance Trail forHoward
   c. Grievance Trail for McKeever

4. a. Diversion Agreement for Dudley
   b. Diversion Agreement for Howard
   c. Diversion Agreement for McKeever

5. Report of Investigation, Statements, Appointment Record Audit for
   a. Lancaster Drivers' Exam Station
   b. Newark Drivers' Exam Station

6. Administrative Investigation 92-1185 concerning the Sharonville and Mt. Healthy Drivers' Exam Stations.

7. Disciplinary Action taken against DX 1 M.K. Smith and DX 1 L.E. Metzger as a result of the investigation into the use of false Social Security numbers to schedule appointments.

8. a. Performance Evaluations for Dudley: 10/91, 10/92
   b. Performance Evaluations for Howard: 7/90, 8/91, 7/92
   c. Performance Evaluations for McKeever: 10/90, 8/91, 7/92

9. a. Letters of Commendation for Howard: 4/22/92
   b. Letters of Commendation for McKeever: 9/22/92, 9/21/91, 9/06/91

10. a. Deportment Records for Dudley
    b. Deportment Records for Howard
    c. Deportment Records for McKeever

Employer's Exhibit

1. Drivers License Examination Appointment System

Issue

Were the terminations of the Grievants for just cause?
If not, what shall the remedy be?

Relevant Contract Sections

ARTICLE 24 - DISCIPLINE

§ 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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

§ 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 or more oral reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

ARTICLE 25 - GRIEVANCE PROCEDURE

§ 25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Union and/or Employer may make requests for specific documents, books, papers or witnesses reasonably available from the other party and relevant to the grievance under consideration. Such requests will not be unreasonably denied.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses

and/or documents. Such requests shall be made no later than three work days prior to the start of the arbitration hearing, except under unusual circumstances where the Union or the Employer has been unaware of the need for subpoena of such witnesses or documents, in which case the request shall be made as soon as practicable. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

Facts

These three Grievances involve three persons who worked for the Department of Highway Safety as Driver License Examiners. In July of 1992, the Department of Highway Safety decided to move from a Monday to Friday schedule to a Tuesday to Saturday schedule in order to accommodate members of the public who could not come for examinations on weekdays. A pilot program was established in two centers: Huber Heights and Centerville. The three Grievants worked at these two (2) stations. Part of the jobs of the Grievants was to make appointments for the public for drive license examinations. This process was computerized. The Grievants would make appointments by blocking off a particular time with the applicant's social security number. During the pilot program, the Department surveyed the new time periods to see if Saturdays were being used and whether having examinations on Saturday better served the public.

Subsequently, allegations arose that some Driver License Examiners were blocking off times on the examination schedules with false social security numbers. Allegations were made about stations at Lancaster, Newark, Delaware, Franklin, Huber Heights and Centerville. The Highway Patrol conducted investigations at all these stations. As a consequence of these investigations, these three examiners were fired, two other examiners were suspended for one day, one examiner resigned, and one examiner retired.

The essential issue in this Grievance is not the behavior of the Grievants but whether the discipline imposed was disparate. The Union alleges that in the case of these three Grievants the discipline was not progressive and not commensurate. Moreover, the Union argues that its position is borne out by the fact that two other examiners were only suspended while the Grievants in this case were terminated. The Employer maintains that significant differences exist between the cases of the two (2) suspended examiners and the cases of the three (3) terminated employees.

The two examiners who were suspended were located at the Lancaster station. When originally interviewed by the Highway patrol, the two Lancaster examiners immediately admitted that they blocked off time spots on the appointment calendars. To carry out these blockings, they used their own social security numbers or the social security numbers of relatives. They admitted blocking off, in some cases, the first and

last periods of the workday. They stated that the reason was to give them more time to set up and break down the test. They also admitted blocking off times either before or after lunch break to run a personal errand at the bank or of a similar nature. These two persons were disciplined with a one day suspension each. In the case of these two employees, the prosecutor declined to press charges for lack of evidence of criminal intent. At the time of the discipline, neither had any prior discipline, and they had worked for the Department for 21 and 15 years.

Two examiners at the Huber Heights station were interviewed. This center was involved in the new Saturday hours. The survey to determine the effectiveness of the station program indicated a high number of no shows. Among those examiners interviewed were the Grievant and J. Siller. Upon their first interview, neither person admitted that they had entered false social security numbers. However, subsequently, they changed their minds and asked for second interviews. At the second interviews, they admitted that they had entered false social security numbers in the Saturday schedule in order to stop the Department from having Saturday hours. They were very unhappy to have to work on Saturdays. Ms. Siller also contacted, with the Grievant's knowledge, the media and told the media that the Department was wasting taxpayer money by having the Center open on Saturday when nobody was showing up. Then both Grievant and Ms. Siller were interviewed by the TV media. Their TV interviews where they made these charges were never aired because the Department found out about the interviews before hand and succeeded in convincing the station to hold off until after the investigation conducted by the Highway Patrol. Of the two examiners one, Ms. Siller, resigned and the second, the Grievant, was terminated.

The other two Grievants were located at the Centerville station. They also used false social security numbers to block off appointments on Saturdays in order to stop the Department of Highway Safety from opening on Saturdays. They too were unhappy with having to work on Saturdays. A third employee (Ames) also participated in this behavior. He testified at the hearing and admitted falsifying the records to stop Saturday work. When these three persons were initially interviewed by the Highway Patrol, they all denied any knowledge of the falsification process. Subsequently, they all reconsidered after talking together and admitted the behavior in second interviews. The two Grievants deny that they ever talked with one another about the falsification although one of the Grievants admitted talking to Mr. Ames about what she was doing. All four employees (2 Grievants, J. Siller, Ames) were criminally charged in the matter, pleaded guilty, and entered a diversion program. Mr. Ames retired from state service. The two Grievants were terminated.

At the Arbitration Hearing, Donald Goodman, Commander of Human Resources Management, testified. His job was to review all disciplines across the state. He distinguished the differences in discipline between the Grievants and the two Lancaster employees in the following manner: First and foremost, was the reason for the falsifications: The Lancaster duo used the blocked off appointment times either to facilitate work or for personal reasons. They did not use false numbers but their own social security number or family numbers that could be easily traced to them. Second, they admitted their error immediately. In addition, they were long time employees with no prior discipline. The most significant reason for the difference lay in the motive of the Grievants. In all three cases, the Grievants were actively seeking to destroy a Department program because of their personal unhappiness with having to work on Saturday. They did this action knowing that it was occurring during the survey period. If they had succeeded, the Employer would have had no real idea of the public need for Saturday hours. Second, the Grievants used false numbers that made straightening out the system more difficult. Last but hardly least, all the Grievants in this case were criminally prosecuted in these matters. With regard to the Grievant from Huber Heights, the whole process was reported to the media in an attempt to sabotage the program. While the sabotage was averted, that intention was clearly manifested. The Grievants had significantly less service time than the two Lancaster personnel (8-1/2 years, 3-1/2 years, and 2-1/2 years). Like the Lancaster duo, the Grievants had no prior discipline.

Discussion

The first issue for the Arbitrator is whether the difference in motive is sufficient to justify the difference in level of discipline. The Arbitrator agrees with the Employer that the difference is a rational basis for distinction. The Lancaster duo used the process to, at worst, gain some extra lunch time and, at best, to

make their work easier. They also admitted the behavior on the first interview. The Grievants, on the other hand, deliberately set out to wreck a State program designed to meet public needs. They contributed to a false impression that public servants are lazy and indifferent to public needs. In addition, they only admitted their deeds when they were obviously about to get caught. In addition, the one Grievant went egregiously beyond the other two Grievants by falsely accusing the State to the media. The Arbitrator finds that the distinction in motive is sufficient to differentiate the discipline.

The second issue for the Arbitrator is to decide if termination in this case was commensurate and if the Employer was justified in not acting progressively. (All three Grievants had no prior discipline.) The case of the single Grievant from Huber Heights who had only two and 1/2 years of service involved such calculated misbehavior that no other result could obtain. To not only falsify the records but to then call the media with this lie is almost beyond imagination. This Grievant would have been wiser to have resigned with her partner. The case of the two Grievants from Centerville is only slightly less clear. While these persons had no discipline at the time of the incident, they were relatively short term employees compared to the Lancaster personnel. In addition, the motive of personal convenience versus the motive of destruction of a state problem is sufficient in this Arbitrator's eyes to justify significantly different discipline. Having reached this conclusion, the Arbitrator cannot substitute her judgment for that of management. The basis on which a difference was made is valid, and the behavior was sufficiently serious to warrant termination.

Award

All three Grievances are denied.

RHONDA R. RIVERA, Arbitrator
Date: January 19, 1994