ARBITRATION DECISION NO.:
556

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

EMPLOYER:
Department of Public Safety
Division of State Highway Patrol
New Lexington Station

DATE OF ARBITRATION:
July 19, 1994
August 2, 1994

DATE OF DECISION:
August 13, 1994

GRIEVANT:
Kevin Redman

OCB GRIEVANCE NO.:
15-03-(93-08-25)-0068-01-07

ARBITRATOR:
Mollie Bowers

FOR THE UNION:
Linda Fiely, Gen. Counsel
Pat Schmitz, Assoc. Gen. Counsel

FOR THE EMPLOYER:
Anne VanScoy, Advocate
Robert J. Young, Advocate
Pat Morgan, Second Chair

KEY WORDS:
Removal
Disparate Treatment
Falsification of Records
Credibility
Credibility of Witnesses

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

FACTS:
The Grievant worked at the New Lexington Driver's Examination Station. An audit of the New Lexington

station was performed by a Sergeant. The Sergeant reported that the written record for December 29, 1992 appeared unusual. The Sergeant contacted one of the persons reported as having taken a test that day. That person indicated to the Sergeant that she had not taken a test on that day as indicated by the record. TWO investigations were conducted by the Employer on this subject. As a result of these investigations, the Grievant was terminated.

The Grievant was terminated for "intentionally falsifying/altering employment applications or any other job-related documents/records ..." and for making false statements to supervisors.

EMPLOYER'S POSITION:

The Employer contended that it had just cause for the Grievant's termination. The Employer argued that the evidence, coupled with the obvious inconsistencies in the testimony of the Grievant, establish by a preponderance of the evidence that the Grievant falsified the December 29th record. Further, the Union's claim of disparate treatment was without merit, and the seriousness of the charge warranted the Grievant's removal.

UNION'S POSITION:

The Union argued that the Employer lacked just cause to terminate the Grievant because management failed to show by a preponderance of the evidence that the Grievant breached the rule on dishonesty. The Union argued that the method of color coding used on appointment sheets was not consistently utilized by driver's license examiners and was not put into writing by the employer until eight months after the incident.

The Union further argued that the Grievant did not make any false statements during the Employer's investigation and that the investigation was both cursory and inadequate. Lastly, the Union argued that the penalty imposed was excessive for the offense charged and that the Grievant was a victim of disparate treatment.

ARBITRATOR'S OPINION:

The arbitrator found that the Employer had met its burden of proof that just cause existed for the discharge of the Grievant. On the issue of how reliable the investigations were, the arbitrator found the testimony of the Employer's witness more credible than that of the Grievant. The arbitrator held that the Grievant tailored his testimony to fit the most self-serving purposes.

The arbitrator gave no weight to the testimony of the Union witness because her testimony changed from the time of the investigation to the time of the hearing; also the witness had a personal relationship with the Grievant and, thus had a motive to fabricate testimony on his behalf.

The arbitrator found that the penalty of discharge was not too severe for the infraction alleged because of the limited amount of supervision that the Grievant was under. The amount of trust in the truthfulness of the employee's reports is of great importance in the Grievant's situation. When it is proven that such trust has been deliberately betrayed, discharge is not too severe a penalty.

The arbitrator did not find any evidence of disparate treatment because of the differences between the Grievant's case and the cases of others cited by the Union. Since the other individuals cited by the Union for disparate treatment were not similarly situated, they cannot be used to prove disparate treatment.

AWARD:

The grievance was denied.

NOTE: This arbitration award is currently in the process of being vacated by the union.

TEXT OF THE OPINION:

IN THE MATTER OF THE ARBITRATION BETWEEN:

Ohio State Highway Patrol

-and-

Ohio Civil Service Employees Association/
AFSCME, Local 11, AFL-CIO

Grievance No.:
15-03-930825-068-01-07
Grievant:
Kevin Redman

ARBITRATOR:
Mollie H. Bowers

APPEARANCES:

For the Employer:
Anne VanScoy, Management Advocate
Robert J. Young, Management Advocate
Pat Morgan, 2nd Chair
George Irwin, 6th District Supervisor
Capt. Darryl Anderson, OHP
Sgt. Richard S. Slater, OHP
Sgt. Mark A. Malcom, OHP
Trp. Donald L. Whipple, OHP
Mr. Don Goodman, OHP

For the Union:
Linda Fiely, General Counsel
Pat Schmitz, Associate General Counsel
Kevin Redman, Grievant
Louella Jeter, Steward
Tanya Duncan, Arbitration Clerk
Terry L. James, Driver Examiner
Catherine Short, Witness
Allen Roberts, Commercial Truck Driving Examiner

This matter was brought to arbitration by the Ohio State Highway Patrol (hereinafter, "the Employer") and the Ohio Civil Service Employees Association/AFSCME, Local 11, AFL-CIO (hereinafter, "the Union"). The Hearing was held in Room 703 at the Office of Collective Bargaining, 106 North High Street, Columbus, Ohio on July 19, and August 2, 1994. Both parties were represented and had a full and fair opportunity to present all witnesses and evidence in support of their case and to cross-examine that presented by the other party. At the outset of the Hearing, the parties stipulated the issue to be decided, that the grievance was properly before the Arbitrator, and that the Grievant was hired by the Employer on June 17, 1985, and terminated on August 24, 1993.

ISSUE

Was the Grievant removed for just cause?
If not, what is the appropriate remedy?

EXHIBITS

JX-1 Contract between the parties, 1/1/92-1/31/94

JX-2 Grievance Package

JX-2a Request for arbitration, 10/4/93

JX-3 Disciplinary Package

JX-4 Sign In Sheets for 12/29/92

JX-5 Employee Performance Reviews of Grievant 1988-1993

EX-1 Job Description, Drivers License Examiner I

EX-2 Audit of New Lexington Station on February 17, 1993

EX-3 Report of Investigation, 5/7/93

EX-4 Court Action re: Grievant, 11/4/93

EX-5 Summary Report of Investigation of Grievant, 7/22/93

EX-6 Sign in Sheets, various dates September, 1992

EX-7 Excerpt of court testimony of Grievant

EX-8 Copies of AT&T phone bills, 1/19/93
UX-1 Discipline Package for a Laura Metzger, 6/2/93

UX-2 Discipline Package for a Marlene Smith, 2/2/93

CONTRACT CLAUSES AND OTHER PERTINENT REGULATIONS

Contract

ARTICLE 24 DISCIPLINE
24.01 Standard
Disciplinary action shall not be imposed upon an employee except for just cause....

24.02 Progressive Discipline
The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense....

Department of Highway Safety Work Rules & Procedures

6. Employee Discipline
. . . Employees will not be ... removed unless such action is for just cause and involves misconduct ...

Examples of misconduct include,...

DISHONESTY: Intentional falsifying/altering employment applications or any other job related documents/records.

BACKGROUND

The events giving rise to this case began in February of 1993, with an audit of the New Lexington Driver Examination Station. Sergeant R.S. Slater, who performed the audit, reported to his superiors that the written record for December 29, 1992, appeared unusual and that he contacted one of the persons listed as having taken a test that day; a Ms. Sonia Short. Ms. Short had informed him that neither she nor her son, Aaron, had taken the test that day as indicated on the written record. Thereafter, the Employer conducted two investigations into this matter, one administrative and one criminal (EX-2-3, 5).

At the conclusion of the administrative investigation, the Grievant was notified on August 17, 1993 that he would be terminated for "intentionally falsifying/altering employment applications or any other job-related documents/records ..." and for making false statements to supervisors. A pre-disciplinary hearing was held on these charges on August 24, 1993, and the Grievant, a Union representative and a witness were present. At the conclusion of this hearing, the Grievant was notified of his termination. (JX3)

The Grievant, with the Union's assistance, timely filed a Grievance protesting the discharge, and alleging that this action violated Article 24, subsections 01 and 02 and other related articles of this contract between the parties (JX-1). This matter was not resolved during the Grievance steps (JX-2) and the matter was advanced to arbitration (JX-2a).

EMPLOYER POSITION

The Employer contends it has proven just cause for the Grievant's termination. The Employer, through testimony of witnesses and evidence (EX-1-8), asserts that it conducted two investigations into the Grievant' s activities on December 29, 1992, one a criminal investigation and the other an administrative investigation (EX-3 & 5). It also stresses that the criminal investigation resulted in the Grievant being convicted of falsifying official records by a jury in a court of competent jurisdiction (EX-4,7).

The Employer argues that this evidence, coupled with the obvious inconsistencies in the testimony of the Grievant and his main witness, Ms. Catherine Short, establish by a preponderance of the evidence that the Grievant falsified the December 29th record at the New Lexington Driver Examination Station and then gave false and misleading answers to the Employer representatives conducting the investigation.

According to the Employer, the Union’s allegation of disparate treatment is without merit. The Employer claims that the instances involving Ms. Metzger and Ms. Smith are not similar to the one at bar. These cases, the Employer argues, have different fact patterns, did not involve the giving of false statements or the closing a facility - all of which were elements in the instant case. Additionally, the two individuals involved were long term employees with otherwise clean disciplinary records.

Although the Grievant has received adequate performance reviews since 1988 (JX-5) as a Driver' s License Examiner (EX-1) , the Employer maintains that the seriousness of the record falsification, coupled with the provision of misleading information to persons investigating the incident, were egregious offenses and warranted the ultimate penalty imposed. For these reasons the Employer asks that the Grievance be denied.

UNION POSITION

The Union offers four main arguments in support of its claim that the Employer lacked just cause for the Grievant's discharge. First, it asserts that the Employer failed to show, by a preponderance of the evidence, that the Grievant breached the rule on dishonesty. The Union argues that it has proven that an informal method of color coding used on appointment sheets was not consistently utilized by driver examiners and, in fact, was not codified by the Employer until some eight months after the incident in question. For this

reason, the Union contends that the Employer's emphasis on these inconsistencies as proof of misconduct is both misplaced and misleading. The Union also points to the testimony of two witnesses, Ms. Short and Mr. Roberts, as corroboration of the Grievant's statements and testimony as to events which transpired on December 29, 1992, regarding the making and later cancellation of two appointments and the location of the Grievant during the afternoon hours.

Another Union defense is that the Grievant did not make any false statements during the Employer's investigation. It claims that, “(O)ne of the Grievant's accusers on this matter has hopelessly compromised the Employer's claims with contradictory statements." (UOS p. 3) It also charges that this investigation was both cursory and inadequate with a reliance by the investigator on information that, [has] since been controverted, while ignoring other unimpeachable evidence.” (UOS p. 4)

The Union's final arguments are that the penalty imposed was excessive for the offense charged and that the Grievant was the victim of disparate treatment. In support of these positions, the Union submitted documents (UX 1 & 2) and the testimony of Ms. Jeter, about the Employer's action in disciplining two other employees found to have falsified a public record.

Based on these considerations, the Union requests the Grievance be sustained. As remedy, it asks that the Grievant be reinstated to his former position with full back pay, benefits and seniority and that all records pertaining to this event be removed from his personnel file.

DECISION

After a thorough review of the evidence and testimony presented at the Hearing, it is found that the Employer has met its burden of proof that just cause existed for the discharge of the Grievant. The documents detailing the criminal and administrative investigations, coupled with the testimony of the investigators, provide ample evidence of the Employer's comprehensive efforts to determine the facts regarding the Grievant’s activities on December 29, 1992. The conclusions reached by the investigators are amply supported by the documents and testimony of those interviewed during the investigations.

Despite an assertion made by the Union that one of the Grievant's accusers had comprised the charges by contradictory statements, this allegation was unsubstantiated. The Union's reference is to testimony provided by Capt. Anderson that he saw the Grievant at McDonald's at approximately 11:00 a.m. on December 29. According to the Union, this testimony must be contrived since Mr. Irwin testified that lunch breaks were not to be taken until noon, yet the Grievant was not disciplined for this alleged offense. While there was speculation that the Grievant surely would have been disciplined, it was never established that Capt. Anderson knew the District 6 policy on lunch breaks or that he reported seeing the Grievant to Mr. Irwin. The Arbitrator also found Capt. Anderson's testimony more credible than that of the Grievant on this matter. Capt. Anderson obviously had nothing to gain, including an opportunity to discipline the Grievant, from his testimony - in contrast, in this regard and in several other instances the Grievant showed a remarkable willingness to tailor his testimony to fit the most self-serving purposes. The Arbitrator therefore, rejected the Union's assertion.

Two major examples of the lack of credibility of the Grievant's testimony are:

* The Grievant's explanation of why, among the four names on the December 29th appointments sheet, two have red lines drawn though them and two have check marks defies any semblance of credibility. To claim that both the red lines and the check marks mean the same thing, and that was his way of filling out the sheet, is so obviously self-serving that it deserves no weight in this decision. A review of the Grievant's testimony (EX-7) shows that he was well aware that the procedure for cancellation was to cross out the names with a red line (ibid p. 41) Additionally, lack of supplies cannot be claimed as a defense since it is clear from the record that the Grievant had a red pencil on December 29; and

* The Grievant's testimony that, after closing down the New Lexington Station, he returned to the Town and Country Station, and performed work there, is not supported by any documentation. Such documentation is essential for accounting and payroll purposes, yet there is no evidence the Grievant

worked the afternoon of December 29. The testimony of Union witness, Alan Roberts, that he saw the Grievant at Town and Country on December 29, sometime in the afternoon is not persuasive in light of the lack of documentation and of the facts that this witness was not presented during the original investigation or during the date on which he said he saw the Grievant at Town and Country.

The testimony of the Grievant's main witness, Ms. Short, regarding the appointments on December 29th was given no weight in this decision. Comparing her testimony at the Hearing to statements made to investigators indicates that she has changed her story regarding the events in question and her relationship with the Grievant so many times as to render her testimony to be totally lacking in credibility. It was also evident from the record that Ms. Short had a personal relationship with the Grievant and, thus, a motive to fabricate testimony on his behalf.

As to the Union's assertion that the penalty of discharge was too severe for the infraction alleged, the Arbitrator disagrees. When employees are permitted to perform their work with a minimum of supervision, trust in the truthfulness of their reports and the dependability of their service to the public is of paramount importance. When it is proven that such trust has been deliberately betrayed, discharge is not too severe a penalty.

Finally, consideration was given to the Union' s claim that the Grievant was subjected to disparate treatment. On first impression, the situation involving the Grievant and that of two other employees (JX's 1 & 2) appears similar. Analysis of the record shows that the similarity is only superficial; not material. In the case of the employees Metzger and Smith, it was noted that the Employer authorized them to use fictitious social security numbers for administrative purposes. Additionally, their utilization of these numbers for personal reasons was minimal, they still provided 8 hours work for 8 hours pay, they readily admitted their guilt, they made no false statements to investigators and they were both long term employees with spotless records. These facts contrast sharply with those of the case at bar and support a finding that the charge of disparate treatment is not sustained by the evidence of record. The Grievant was not a long service employee, his testimony about what transpired on December 29, has been found to be less than credible and is self-serving and the Grievant acknowledged that he got paid for a full day's work on the 29th, but no proof was supplied that he worked all of the hours for which he was remunerated. These are distinctions the weight accorded to which justifies the differences in the penalties meted out. Furthermore, the fact that the Grievant's case was considered by a different prosecutor than the one who reviewed the Metzger and Smith cases did not serve as mitigation. The Union only speculated that this made a difference but provided no evidence that 'but for' the prosecutor, the Grievant might never have been tried on criminal charges.

As a result of the foregoing analysis, the Employer has met its burden of providing just cause of the Grievant's termination.

AWARD

The Grievance is denied.

MOLLIE H. BOWERS, Arbitrator
Date: August 13, 1994