

ARBITRATION DECISION NO.:

620

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Corrections

Lebanon Correctional Institution

DATE OF ARBITRATION:

October 29, 1996

DATE OF DECISION:

December 3, 1996

GRIEVANT:

Sherri White

OCB GRIEVANCE NO.:

27-11-(95-06-23)-0337-01-03

ARBITRATOR:

Anna DuVal Smith

FOR THE UNION:

Michael Hill, Advocate

Robert Jones, Second Chair

FOR THE EMPLOYER:

James C. Spain, Advocate

Georgia Brokaw, Second Chair

KEY WORDS:

Constructive Discharge

Just Cause

Resignation

Voluntary Quit

ARTICLES:

Article 24 - Discipline

§ 24.01 - Standard

FACTS:

The grievant was employed as a Correction Officer at Lebanon Correctional Institution. The main issue in this case was whether the grievant resigned from her job on June 12, 1995. If she did not resign, then the issue becomes what shall the remedy be?

On June 12, 1995, the Deputy Warden and the Unit Manager conducted a corrective counseling meeting with the grievant. During this meeting, the grievant was informed of three problematic areas of her performance: difficult working relations with other correction officers, informal inmate complaints of

favoritism, and erratic overall performance on her cellblock. The grievant became angry and the steward tried to calm her down. Management witnesses claim that the grievant said "I quit" several times and that she subsequently removed her identification badge and left. The grievant, on the other hand, believed that she was being fired. In an agitated state, the grievant began to empty her locker. A Lieutenant approached the grievant and the steward and assisted the grievant in removing items from her locker. Then, they proceeded to the captain's office where the grievant was asked to sign a quit slip. The grievant refused to sign anything. Subsequently, the grievant was relieved of her badge and identification. However, the grievant was informed that she could get her badge and identification when she returned.

According to testimony, the grievant claimed that she thought she was fired and stated that she called in on the 13th and 14th of June to ask her shift commander why she was fired. She also attempted to schedule a meeting with the Warden. Conflicting testimony from the Warden stated that he never received a phone call from her rescinding her resignation. On June 22, the grievant filed a grievance charging the State with constructive discharge in violation of Article 24 of the Contract.

UNION'S POSITION:

The Union argued that the grievant did not voluntarily quit her position. Rather, the Union argued that no resignation ever existed. For a resignation to be effective, it must be conveyed to the proper authority. The resignation should have been confirmed by the Warden himself.

Secondly, the Union pointed to many inconsistencies in the record. The testimony of the witnesses presented by the State was conflicting. Further, the Union noted that the absence of the Lieutenant's testimony was significant. The Warden had relied upon the Lieutenant's statements that the grievant had resigned and the Lieutenant was the only witness who could have refuted the testimony that the grievant had refused to sign a written resignation.

Finally, the Union argued that even if the grievant resigned, the Warden was required to accept the resignation before the grievant left the institution because the grievant left with the intention to return. The Union asserted that the Lieutenant was aware of the grievant's state of mind since she informed the grievant that she would give the grievant her badge and identification upon her return. In any event, the Union asserted that the Warden acted upon a resignation that did not exist. As a result, the Union concluded that the grievant was discharged without just cause.

EMPLOYER'S POSITION:

The State claimed that it had met the burden of proof to establish that the grievant had resigned. The State argued that the testimony of the Union's witness was inconsistent while the testimony of the witnesses produced by the State was consistent with the fact that the grievant resigned. Further, the State claimed that the grievant's own testimony was contradictory and self-serving. The theory presented by the State was that the grievant knew that she had quit her job, but had second thoughts about her decision. The State maintained that the grievant brought this issue to arbitration because she changed her mind.

Secondly, the State noted that the grievant's claimed anxiety is not sufficient to excuse her voluntary act of resignation. In support of this position, the State cited several cases which stated that employees are responsible for their own decisions even if the decisions were thoughtless or made under pressure. Finally, the State concluded that since the grievant voluntarily resigned, she was not discharged. Therefore, the Employer had not violated Article 24 of the Contract.

ARBITRATOR'S OPINION:

The Arbitrator held that the grievant did not voluntarily resign and was constructively discharged without just cause. The cases cited by the State were not applicable to this situation because in those cases, the grievants actually signed a quit slip. This case presented a different factual situation since the grievant here refused to sign a written resignation. Further, the credibility of the witnesses was significant in the outcome of the decision. The Arbitrator noted that the credibility of all of the witnesses was questionable, thus the absence of the Lieutenant's testimony was important. The State needed to have the Lieutenant affirm that the grievant stated that she was quitting and that she voluntarily surrendered her badge and identification. If

this was proven, the State would have had a stronger case. Further, the Union presented uncontroverted testimony that the grievant refused to sign a written resignation. As a result of the evidence presented, the Arbitrator was not convinced that the grievant had resigned.

AWARD:

The grievance was sustained. The grievant was restored to her former position with full back pay, benefits, and seniority less the normal deductions and any earnings from employment she may have had in the interim.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration
Between

**OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL-CIO**

and

**OHIO DEPARTMENT OF
REHABILITATION &
CORRECTIONS**

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No.:

27-11-950623-0337-01-03

December 3, 1996

Sherri White, Grievant

Resignation

Appearances

For the Ohio Civil Service Employees Association:

Michael Hill, Advocate

Robert Jones, Second Chair

Warren Gebhart, Chief Steward

For the Ohio Department of Rehabilitation and Corrections:

James C. Spain, Ohio Department of Rehabilitation & Corrections; Advocate

Georgia Brokaw, Office of Collective Bargaining; Second Chair

Terri Decker, Assistant Chief of Labor Relations, Ohio Department of
Rehabilitation & Corrections

Ron Hart, Labor Relations Officer, Lebanon Correctional Institution

Hearing

A hearing on this matter was held at 9:10 a.m. on October 29, 1996 at the Lebanon Correctional Institution in Lebanon, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the State, were Harry Russell (Warden), Dan Burns (Deputy Warden, Operations) and Richard Huggins (Unit Manager), Testifying for the Union were Bret Land (Steward), Willie Worley (Correctional Officer), Darrin Davenport (Correctional Officer) and the Grievant Sherri White. A number of documents were entered into evidence: Joint Exhibits II A-F and III A-D and State Exhibits I-III. The oral hearing was concluded at 12:30 p.m. on October 29. Written closing statements were timely filed and exchanged by the Arbitrator on November 13, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

Issue

Did Sherri White resign on June 12, 1995? If not, what shall the remedy be?

Statement of the Case

The Grievant, Sherri White, was employed as a Correctional Officer at Lebanon Correctional Institution on February 8, 1993. This case concerns how she came to leave the employ of the Department on June 13, 1995.

On June 12, 1995, Deputy Warden Burns and Unit Manager Huggins conducted a corrective counseling meeting with the Grievant near the end of her shift. Union Steward Bret Land also attended at the request of the Grievant. A written statement was reviewed with the Grievant (Joint Ex. II-A). It noted three areas of problematic performance: difficult working relations with other correctional officers, informal inmate complaints of favoritism, and erratic overall performance of her cellblock. Upon hearing these criticisms, which the steward testified were harshly made but Management denied, the Grievant became angry. The steward tried to calm her down, but the Grievant remained upset. Management witnesses testified the Grievant said, "I quit" several times, removed her identification badge, and left the office. However, the Grievant testified that when she was told other officers did not want to work with her and that she had no right to be in the institution, she believed she was being fired and remarked to the steward that "these people just want me to quit." Feeling so ill from an impending anxiety attack, she got up and left.

Upon leaving Burns's office, the Grievant was intercepted by Lt. Marshall, whom the Grievant said badgered her to tell what had happened. Willie Worley, who was Chief Steward at the time, saw the Grievant approach in a state of agitation, followed closely by the lieutenant. He followed the two into the officers' station in E-block, where the Grievant began to empty her locker, shaking and crying and saying she was being blamed for a recent escape. Lt. Marshall assisted the Grievant and remarked that she would have to inventory the items being removed. The three then proceeded to the captain's office where the Grievant talked to her doctor on the phone and then refused to sign anything until she could meet with her doctor. The Grievant testified that Lt. Marshall relieved her of her badge, identification and PR-24 baton. C.O. Davenport was summoned to drive the Grievant home. At her car, the Grievant realized she had not clocked out and asked for her badge and identification so she could do this. However, Marshall said she would take care of it. The Grievant and Davenport both testified that Lt. Marshall said the Grievant could get her badge and identification when she returned. Davenport then drove the Grievant home. He said she was still upset and explained that "they want me to resign, but I'm not going to."

The next two days, June 13 and 14, were the Grievant's days off. On the 13th, Burns saw the steward again and tried to discuss the incident but Land refused, saying the Grievant had quit (according to Burns) or "I guess she quit" (according to Land). Warden Russell learned of the incident at his daily staff meeting. With three staff statements and a policy of allowing staff to make their own decisions regarding whether they wish to remain employed, he accepted the Grievant's oral resignation (Joint Ex. II-B) and directed the

personnel office to initiate the separation procedure (State Ex. I). Meanwhile, the Grievant testified she called in on the 13th and talked to her shift commander to ask him why she was fired. On the 14th, she talked to the union steward to ask about filing a grievance over intimidation and was told someone had resigned for her. She testified that on Thursday she called the warden's secretary to make an appointment with him, but was told he was too busy working on a recent escape. The warden, however, testified that he never got a phone call from her rescinding her resignation. But on July 13 he responded (Joint Ex. II-D) to her June 27 written letter in which she denied that she had resigned and requested reinstatement (Joint Ex-II-C).

On June 22, a grievance was filed charging the State with constructive discharge in violation of Article 24 (Discipline) of the Collective Bargaining Agreement and requesting reinstatement with full back pay. Being unresolved at lower steps of the grievance procedure, the case was appealed to arbitration where it presently resides for final and binding decision, free of procedural defect.

Arguments of the Parties

Argument of the State

The State's position is that it has carried its burden of proof to establish that the Grievant resigned. The two management witnesses were consistent from their initial reports through their testimony in arbitration and the Union never challenged the facts on which the warden relied. In contrast the testimony of Union witnesses was inconsistent, claims the State. Why would Steward Land advise the Grievant not to "act hastily" unless he heard her quit? Worley's testimony that the Grievant told him Management was blaming her for the escape is at variance with the Grievant's own testimony on cross that Huggins, Burns and Marshall did not counsel her about it. Davenport's testimony should be given no weight because he only heard part of a conversation. Finally, the Grievant's own testimony is self-serving and inconsistent. How could she be both rational enough to take her coffee pot home for cleaning and at the same time so upset that she collapsed on the floor in E-block? Moreover, no support was offered for her claim that she called her shift commander the next day to discuss her removal.

The State offers a theory alternative to the Union's to explain what happened. It believes the Grievant knew she quit her job, but had second thoughts on the way home, then tried to piece together a story that would get her job back.

In the view of the State, Management acted properly in accepting a voluntary resignation and in choosing not to rescind that decision. In support of its position it offers several resignation cases. Arbitrator Dworkin in *Cedar Coal Co.* (79 LA 1028) held that anxiety does not excuse one of responsibility for voluntary acts and that compassion is for the employer, not for the arbitrator. In the parties *Eilerman* case (Case No. 27-26-890629-0109-01-06) Dworkin reiterated that employees are responsible for their own decisions even if made in a thoughtless outburst. In *Davis v. Marion County Engineer*, 573 N.E.2d 51 (Ohio 1991), the Ohio Supreme Court held that while written memos of resignation, acceptance or withdrawal are preferred, they are not required.

The State concludes that inasmuch as the Grievant voluntarily resigned, she was not discharged and there is, therefore, no violation of Article 24. It accordingly asks that the grievance be denied in its entirety.

Argument of the Union

The Union, too, draws the Arbitrator's attention to inconsistencies and holes in the record. The testimony of Huggins and Burns about the corrective counseling meeting differs from that of White and Land, whom the Union claims were credible witnesses. Burns and Land conflict again over what Land said the next day. When the Warden decided to accept what he thought was the Grievant's resignation, he relied on Huggins' statement that he saw the Grievant emptying her locker. Yet in arbitration, Huggins testified he was hazy on this point while Union witnesses established that it was not the Grievant who emptied the locker, but Lt. Marshall.

The Union argues that the State's failure to call certain witnesses should cause the Arbitrator to draw conclusions adverse to the State. It did not call the secretary whose testimony might have resolved the issue

of whether the Grievant telephoned the warden. More significant is the absence of Lt. Marshall, upon whose statement the warden relied. Neither Worley nor Davenport heard the Grievant tell the lieutenant she quit, and Worley corroborated that she refused the lieutenant's request that she sign a written resignation. In addition, these witnesses confirmed that it was the lieutenant who relieved the Grievant of her badge, identification, and PR-24 (not that the Grievant surrendered them) and that it was the lieutenant who emptied the locker (not the Grievant). The State's failure to call this particular witness, especially given her role in the events of June 12, suggests her testimony would have been unfavorable to the State, says the Union, citing Wigmore on Evidence §285 3d ed. (and as cited by numerous arbitrators).

The Union contends no resignation ever existed. For a resignation to exist, it must be communicated to the proper authority. Conveyed to anyone else, it is nothing (*State ex rel. Sawyer v. Pollner* (1899), 18 OCC 304, 10 OCD 141). By the warden's testimony, only he can accept resignations from the institution's staff. He should, therefore, have confirmed the Grievant's decision directly with her himself.

Finally, even if the Grievant did resign on June 12, the warden would have had to accept it before she left the institution because when she left, she did so with the intent to return. Lt. Marshall was aware of this because she knew the Grievant had refused to sign a resignation letter and she said she would give the Grievant her badge and identification back when she returned to work. Either Lt. Marshall misled the warden or he ignored this information. But in any case, the warden acted on a resignation that did not exist on June 13.

The Union concluded that the Grievant did not voluntarily quit her job, but was discharged without just cause. It asks that the grievance be sustained, the Grievant reinstated to her former position with full back pay and benefits and with no loss of seniority, and be made whole.

Opinion of the Arbitrator

Although I hold to the same view as Arbitrator Dworkin regarding the responsibility of employees for their own decisions, Dworkin was not faced with the same facts in the cases cited as presented here. In both the *Eilerman* and *Cedar Coal* cases, there was no question that the grievant actually resigned because each had signed a quit slip. They were accordingly held responsible for their actions. The situation here is quite different, for the issue is whether the Grievant did, in fact, resign.

In this case, the warden based his acceptance on reports by other management staff that the Grievant had orally resigned and had behaved in a manner consistent with a person who has quit her job. Other witnesses to the same events, however, presented a version materially different from Management's. I have considered the credibility of the witnesses for and against the Grievant and am unable to conclude with any comfortable degree of certainty on credibility alone that one or the other side is clearly right and the other wrong. Both Union and Management witnesses gave evidence confidently and forthrightly. Both sides have an incentive to see things their own way. Almost all inconsistencies are minor or can readily be explained away. There is, however, a glaring hole in Management's case that brings me to a conclusion on other grounds. This is that although the warden relied in part on Lt. Marshall's statement about what occurred once the Grievant left the deputy warden's office, it presented no reliable evidence to substantiate what he says he learned from her: that the Grievant reiterated to her that she was quitting, that she emptied her locker, and that she voluntarily surrendered her official identification, badge and PR-24 in the lobby on her way out of the institution. If true, these acts, particularly the latter two, would lend credence to Management's view. However, without Lt. Marshall's testimony, these allegations are no more than hearsay, and I am left with two conflicting versions of what occurred in the corrective counseling meeting and one credible version of what occurred immediately thereafter.

It is probable that the Grievant did say something about quitting to Lt. Marshall before Worley saw them because the subject of an inventory came up, but I am unable to determine from the record exactly what was said. However, there was uncontroverted testimony from Worley, Davenport and the Grievant that the Grievant refused to sign a resignation when the lieutenant offered to have one prepared on the spot. Also uncontroverted was that although the Grievant removed some items from her locker, it was Marshall, not the Grievant who completed the job. I thus cannot tell whether the Grievant intended to clear out entirely, or

whether this was Marshall's idea. Moreover, it was Marshall, not the Grievant, who took the initiative to separate the Grievant from her official equipment, and then she told her she could have her badge back when she returned to the institution. Without testimony of Lt. Marshall to the contrary, it is evident to me that no matter what occurred in the corrective counseling meeting and en route to the Grievant's locker, what transpired at the locker and afterwards is both different from what the warden based his decision on and implies a different outcome than what he concluded, namely that when the Grievant left the institution for her "good days," she did so not as someone who had clearly resigned, but as someone indecisive and under pressure. Moreover, Lt. Marshall had to have had the same opinion, despite what she may or may not have told the warden. Since the State did not call Marshall or any other witnesses to rebut the Union on what happened after the Grievant left the deputy warden's office, I must infer that her testimony would not have been helpful to its case and that the above scenario is what occurred. In sum, the evidence does not convince me that the Grievant resigned her position. The Warden therefore had nothing to accept. This being the case, the Grievant was constructively discharged without just cause.

Award

The grievance is sustained in its entirety. The Grievant will be restored to her former position forthwith with full back pay, benefits and seniority retroactive to the effective date of her separation, less normal deductions and any earnings from employment she may have had in the interim. The Grievant will supply such evidence of earnings as the Employer may require. The Arbitrator retains jurisdiction for thirty (30) days to resolve any disputes that may arise in the implementation of this award.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
December 3, 1996