ARBITRATION DECISION NO.:
654

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

EMPLOYER:
Ohio Department of Rehabilitation and Correction
Cuyahoga County Adult Parole Authority

DATE OF ARBITRATION:
11/24/97

DATE OF DECISION:
December 18, 1997

GRIEVANT:
Michael Majied

OCB GRIEVANCE NO.:
28 04 (96 08 28) 0099 01 09

ARBITRATOR:
John Murphy

FOR THE UNION:
Steven W. Lieber, OCSEA Representative
James LaRocca, Chapter President

FOR THE EMPLOYER:
Wendy F. Clark, OCB

KEY WORDS:
Grievant's Testimony
Insubordination
Just Cause
Progressive Discipline
Removal

ARTICLES:
Article 24 Discipline
Article 24.02"

FACTS:

The grievant was an Office Assistant 3 at the Cuyahoga County Adult Parole Authority, Department of Rehabilitation and Correction. The grievant shared with other clericals the duty of typing the pre sentence investigation reports (PSIs) prepared by the parole officers. In addition, the grievant alone was responsible for making copies of the finished reports on the workday prior to the presentation of the report to the appropriate judicial body.

On July 26, 1996, the Employer removed the grievant based on allegations that he had violated the Employer's rules regarding insubordination and failing to carry out work assignments on May 7, 8, and 16, 1996.

The Employer claimed that the grievant had failed to prepare sufficient copies of PSIs for the court files on those dates, thus violating a direct order from his supervisor. As a result, this grievance was filed

EMPLOYER'S POSITION:

The grievant's supervisor testified that on May 8, 1996, she looked in the bin that contained PSIs and noticed that the grievant had not prepared the required copies. She told the grievant that the cases must be prepared, and she wanted them done now. The grievant responded by saying that he was busy. Because tile supervisor had given an order to the grievant on May 8 and he failed to comply, he 'violated the Employer's rule against insubordination. As was evidenced by a complaint from a parole officer at the Justice Center, the grievant had failed to complete his PSIs on May 7. Finally, the grievant acknowledged that he did not complete copying the PSIs on May 16. He stated that he did copy five PSIs on May 16, and discovered that his supervisor had completed the necessary copying prior to the next workday.

The Employer also focused on the grievant's prior disciplinary record in supporting his removal. Since January of 1994, the grievant had been disciplined for insubordination and related charges on four separate occasions. This record of discipline pointed strongly to the appropriateness of discharge in this case. Furthermore, the prior disciplinary actions should be seen as relevant to the current charges because all of the charges against the grievant are essentially for violating the Employer's rule against insubordination. Because of these disciplinary actions, the Employer shifted supervision of the grievant from another supervisor to his current supervisor.

The Employer also claimed that it conducted a fair investigation of the grievant, and that the disciplinary action against the grievant was undertaken in a timely fashion. Therefore, the Employer argued that the grievant's removal must be upheld.

UNION'S POSITION:

In contrast to his supervisor's testimony, the grievant testified that the supervisor only asked 'questions of him concerning the copying of the PSIs. He testified that throughout the day of May 8, she had asked questions such as: "Have you seen the court bin today, it's full." He testified that late on the same day she asked, "Are you getting them (PSIs) done?" The Union contended that no direct order was given; therefore, the grievant could not have been guilty of insubordination. Similarly, on May 7 and May 16, the supervisor did not give the grievant a direct order; therefore, no act of insubordination could have occurred.

The grievant also claimed that the work environment was hostile, and that "things were directed to rne alone." The grievant stated that he was overwhelmed with work, that he should not have had typing assignments, and that he was guilty of not being able to perform two duties at the same time.

The Union argued that management in this case relied upon a supervisor who had no knowledge of the grievant's duties because the supervisor had just been transferred to the grievant's unit in April of 1996. Furthermore, the Union argued that the disciplinary action against the grievant was not undertaken in a timely fashion.

ARBITRATOR'S OPINION:

The Arbitrator resolved the difference in testimony in favor of the Employer. The resolution of the conflict was based primarily on what transpired on the preceding day, May 7. A parole officer from the Justice Center telephoned the supervisor to complain that copies were missing on PSIs. The supervisor went to the Justice Center and found that there were no copies in several cases. Because it was undisputed that it was the grievant's responsibility to make copies of PSIs, and because on May 7 the grievant failed to do so, the Arbitrator found that it was not believable that the supervisor would merely make inquiries about the completion of his assignment to copy PSIs on May 8. Consequently, the Arbitrator found that the grievant had violated a direct order on May 8 when he failed to complete copying of the PSIs as instructed.

Regarding the May 7 and May 16 charges of insubordination, the Arbitrator concluded that the grievant disobeyed a direct order. There was no dispute that the grievant had the duty to complete copying PSIs for presentation to the court or board, and the grievant failed to do so.

The Arbitrator also found that the facts show: (1) the supervisor acted fairly toward the grievant, (2) the Employer shifted supervision from another supervisor to his current supervisor because of the disciplinary actions that had been taken against the grievant by his prior supervisor; (3) the Employer initiated disciplinary action in a timely manner, and (4) the grievant brought upon himself his own problems by seeking to write his own rules for his work duties.

AWARD:

The Arbitrator denied the grievance, and as a result, he upheld the grievant's removal.

TEXT OF THE OPINION: * * *

In The Matter of the Arbitration

between

The State of Ohio

and

Ohio Civil Service Employees
Association, AFSCME Local 11

OPINION AND AWARD
GRIEVANCE 28-04-(96-08-28)-0009-01-09

ARBITRATOR:
John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE UNION: Steven W. Lieber
OCSEA Representative

4213 Bushnel Road
University Heights, Ohio 44118

Also present: James LaRocca
Chapter President

Michael Majied
Grievant

FOR THE EMPLOYER: Wendy F. Clark
Office of Collective Bargaining
106 North High Street
Columbus, Ohio 43215 3009

Also present: Carolyn Reed
Supervisor, Cleveland Adult Parole Authority

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On July 26, 1996, the Grievant was terminated after a predisciplinary conference. The termination was based upon allegations about the Grievant's violation of Employer rules on May 7, 8, and 16, 1996. The written basis for the termination stated:

> Rule 6. Insubordination Disobedience or inappropriate delay in carrying out a direct order of a supervisor. On May 8 and May 16, 1996 you were given a direct order to prepare the Court cases by the end of the day. On both days you left without having complied.
>
> Rule 8. Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment. On May 7, 1996, you did not prepare sufficient copies of PSIs for the Court files. On May 8 and May 16, 1996 you failed to prepare files by the end of the day.

A grievance was filed challenging the termination and the matter was brought to arbitration. The parties stipulated that the matter was arbitrable, and, that there were no issues concerning procedural or substantive arbitrability.

ISSUE:

Whether the termination of the Grievant was for just cause; if not, what should the remedy be?

RELEVANT STANDARDS OF EMPLOYEE CONDUCT:

The parties agreed that the Employer had unilaterally issued Standards of Employee Conduct, and that these standards were revised effective February 18, 1996. The termination of the Grievant was based upon allegations of his violation of Rule 6 and
Rule 8.

Rule 6. Insubordination disobedience or inappropriate delay in carrying out a direct order of a supervisor. **2**

Rule 8. Failure to carry out a work assignment or exercise of poor judgment in carrying out an assignment.

OPINION:

The parties divided over several questions that are discussed separately below. The questions included: 1) were the rules .violated? 2) was the discharge vindictive? 3) was discharge an excessive penalty? 4) was the investigation unfair and the discharge tardy under the contract?

A) Were the Rules Violated?

The testimony of the Grievant and his supervisor differs on what the supervisor told the Grievant on May 8. The supervisor testified that she looked at the bin that contained the PSIs and noted that the Grievant had not prepared the required copies. She told the Grievant that the cases must be prepared and she wanted them done now. She further testified that the Grievant responded by saying that he was busy. She then concluded by saying to the Grievant, "Okay, but the cases must be prepared, now."

By contrast, the Grievant testified that the supervisor asked only questions of him concerning the copying of the PSIs. He testified that throughout the day she asked questions such as: "Have you seen the Court bin today, it's full. He testified that later on in the day she asked, are you getting them (PSIs) done?"

This difference in testimony is resolved in favor of accepting the supervisor's statement of what was told to the Grievant on May 8. Consequently, the supervisor had given an order to the Grievant on May 8 to complete the copying of the PSIs.

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The resolution of the conflict in testimony is based principally on what transpired on the preceding day, May 7. A parole officer telephoned the supervisor from the Justice Center to complain that copies were missing on PSIs. The Supervisor went to the Justice Center and found that there were no copies in several cases.

It was undisputed that it was the Grievant's assignment to make copies of PSIs, and that he had performed this task for several years. Therefore, on the day immediately preceding May 8, the Grievant had failed to carry out a work assignment concerning the copying of PSI's. With this background, it is not believable that the supervisor on May 8 would merely make inquiries to the Grievant about the completion of his assignment to copy PSIs.

With respect to May 16, 1996, the supervisor and the Grievant's testimony do not differ on the issuance of a direct order by the supervisor to the Grievant to prevent the copying of PSIs. As a matter of fact, the Grievant testified that the supervisor came to his desk on two different occasions on May 16 and told him that she wanted the Court cases prepared too. While the Grievant did provide excuses that are more fully developed in the next section of this Opinion, the Grievant acknowledged that he did not complete copying the PSIs on May 16. He stated that he did copy five. PSIs on May 16, and discovered that the supervisor had

completed copying all of the other PSIs prior to the workday on May 17. **4**

The record, therefore, supports the conclusion that the Grievant violated Rule 6 in that the Grievant, disobeyed a direct order of a supervisor to complete the copying of PSIs on May 8 and May 16, 1996. . There was no dispute in this record that the Grievant had the duty to complete copying PSIs for presentation to the Court or Board. There is likewise no dispute that the Grievant failed to complete this assignment on May 7, 8 and 16, 1996 in violation of Rule 8.

B) Was the Discharge Vindictive?

This position was raised in a variety of ways by the Grievant. For example, the Grievant claimed that the work environment was hostile, that "things were directed to me alone.“ The Grievant also claimed that he was overwhelmed with work, that he should not have had typing assignments, and that he was guilty of not being able to do two duties at the same time.

The facts show, however, (1) that the supervisor, Ms. Reed, did act fairly toward the Grievant; (2) the Employer shifted supervision of the Grievant from another supervisor to Ms. Reed because of several prior disciplinary actions that had been taken against the Grievant by the prior supervisor; and (3) the Grievant brought upon himself his own problems by seeking to write his own rules for his work duties.

It was undisputed that Ms. Reed had known the Grievant since his date of hire and that they had been close friends. They worked together prior to Ms. Reed becoming a supervisor, and the Grievant **5**

had been to Ms. Reed's home for social visits since she became a supervisor.

The Grievant acknowledged that Ms. Reed and he discussed his duties on his assignment to Ms. Reed in April of 1996. In addition, the Grievant acknowledged that Ms. Reed asked him to indicate how much time would be necessary to perform these duties.

Lastly, other persons in the classification of Office Assistant 3 were assigned four or five PSI reports to type. It was undisputed that on a daily basis Ms. Reed only assigned one or no report to the Grievant to type because he was not proficient in typing.

Therefore, there is simply no evidence in this record to support the claim that the Grievant's immediate supervisor was acting unfairly or vindictively toward the Grievant. Quite to the contrary, the reverse conclusion is present in this record. The supervisor acted quite fairly to the Grievant.

The record included several disciplinary actions in the form of suspensions against the Grievant by another supervisor in 1994 and 1995. The record also shows that the regional administrator decided to shift supervision of the Grievant to Ms. Reed because of Ms. Reed's reputation for fairness. Therefore, the Employer sought to disentangle the Grievant from a situation that was rapidly deteriorating into increased discipline.

This record does not show that the discharge of the Grievant was vindictive by the Employer. To the contrary, the record shows that the difficulties of the Grievant were brought on by his

own **6**

insistence of what the rules for his duties should be. This is shown by the Grievant's insistence that he not have any typing duties and that there were priorities among PSIs for purposes of copying.

At the arbitration hearing, the Grievant testified that it was his opinion that post sentence reports are of a lower priority for purposes of copying. A higher priority for copying was that of pre sentence investigation reports.

The Grievant continued to have this position at the arbitration hearing even though he hid been told by his supervisor that there are no priorities within PSIs. As Ms. Reed testified, she had told the Grievant on several occasions that all PSIs must be completed. It is apparent in this record that the Grievant decided on his own to make a choice among PSIs for purposes of performing his copying duties in spite of a clear statement to the contrary by his supervisor.

Another attempt to rewrite the rules of the workplace occurred as the Grievant pressed the supervisor to eliminate any duty to perform typing. On May 16, 1996, the supervisor told him to complete copying the PSIs. He responded by requesting that she remove all typing duties from him. As noted above, she limited his assignment to typing one report per day. Moreover, typing and word processing were part of the duties of his classification.

Finally, the suggestion was made that the Grievant was overwhelmed with work. There is no evidence to support this assertion. Indeed, the record includes evidence that the volume of **7**

work had not increased. The record shows an employee who preferred to set his own rules f or the work place and then act upon those rules despite orders to the contrary from his supervisor.

C) Was the Discipline of Discharge Excessive?

This question centers on the weight to be given, if any, to prior disciplines received by the Grievant in 1994 and 1995. In January of 1994, the Grievant served a one day suspension for violation of the Employer's rule against insubordination. In January of 1995, the Grievant served a three day suspension for violation of the Employer's rule against inappropriate delay in completing an assignment. In March of 1995, the Grievant served a seven day suspension for violation of different rules of the Employer, including the rule against insubordination. Finally, in May of 1995 the Grievant served a ten day suspension for the violation of three Employer rules including two of the rules involved in this arbitration insubordination and failure to carry out a work assignment.

This record of prior disciplines points strongly to the appropriateness of discharge in this case. The prior disciplines approximate in time to the events that occurred on May 7, 8 and 16, 1996 that are the subject of this arbitration. Moreover, these prior disciplines are based in large part on prior violations of the very rules that were violated by the Grievant on May 7, 8 and 16, 1996. **8**

The question, however, is whether these prior disciplines should be given any weight in assessing the appropriateness of the discharge in this case.

The position of the Union is that grievances were filed concerning the one day suspension the three day suspension, and the ten day suspension, but they were not advanced up to arbitration through no fault of the Grievant. In other words, the decision not to arbitrate these three suspensions was unrelated to the merits of the grievances challenging these suspensions.

The record is ambiguous on this point. The president of Chapter 1801 of the Union testified that he did serve as the steward in processing these grievances, and did advance the three grievances to the third step in the grievance process. The president testified that he was not notified of the third step response, and, therefore, did not proceed further with the grievance. The president did not testify that he assessed the grievance and determined that its merit demanded further processing.

The record, therefore, includes these three suspensions that were grieved and the grievance was rejected at third step. The record does not show any appeal to arbitration from the Employer's decision at third step.

Finally, the contract states that the Employer's response at the third step "shall be forwarded to the Grievant" as well as to the Union representative. The contract also notes that where a grievance response of the Employer "has not been received by the

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Grievant . . . within the specified time limits, the Grievant may file the grievance to the next successive step in the grievance procedure." This record is totally silent on whether the Grievant pressed the Union to appeal the suspensions to arbitration.

The prior disciplines are found to be relevant, and they establish the appropriateness of discharge as the penalty for the Grievant's violations of Rules 6 and 8 on May 7, 8 and 16, 1996.

D) Was the Investigation of the Grievant Unfair and Was the Discharge Tardy Under the Contract?

The Union claimed that management in this case relied upon a supervisor who had no knowledge of the duties of the Grievant. There is no foundation for this claim. Indeed, the evidence shows that the supervisor, Ms. Reed, in fact, completed the copying of the PSIs on May 16, 1996. These were the PSIs that had been left incomplete by the Grievant.

As noted earlier, the Grievant and Ms. Reed were social friends since Ms. Reed became the Grievant's supervisor. In addition, they had worked together for years prior to Ms. Reed becoming a supervisor.

Lastly, the disciplinary action against the Grievant was undertaken in a timely fashion by the Employer. The contract requires that, "an arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The record shows that the events that triggered the disciplinary process occurred on May 7, 8 and 16, 1996. **10**

Approximately one month later (June 17,1996) the Grievant was notified of a predisciplinary conference to be held on July 11, 1996. That notice contains several attachments concerning right of representation and witness lists signed by the Grievant on June 25, 1996. The predisciplinary conference was held on July 11, 1996, and the termination notice was issued to the Grievant on July 26, 1996.

These facts support the conclusion that the Employer's decision to begin the disciplinary process against the Grievant was commenced in a timely manner.

AWARD:

The grievance is denied.

John J. Murphy
Arbitrator

Date: December 18, 1997 **11**