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IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA/AFSCME, AFL-CIO

AND

THE STATE OF OHIO/DYS

Before: Robert G. Stein
Panel Appointment
Case # 35-04 (990122) 0285 01-03

Principal Advocate for the UNION:

Herman S. Whitter, Esq., Director
Dispute Resolution
OCSEA/AFSCME
LOCAL 11 AFL-CIO
1680 Watermark Drive
Columbus OH 43215

Principal Advocate for the EMPLOYER:

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Ohio Department of Administrative Services
Human Resources Division
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INTRODUCTION

A hearing on the above referenced matter was held on 3/28/00, 5/12/00, 12/11/00, 12/14/00, 1/19/01, and on 3/12/01, in Massillon, Ohio and Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. However, the Union raised a procedural objection on four of the charges that were cited by the Employer. The parties presented evidence and testimony on the procedural objections first and then argued the merits of the case. The Arbitrator denied a motion by the Union to dismiss the four charges that were the subject of the procedural objection. The Arbitrator determined that he would rule on the procedural objections in his Award. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted briefs in lieu closing arguments. The hearing was closed on June 25, 2001 due to the exchange of reply letters following the submission of their briefs. The parties agreed that the Arbitrator's decision is to be issued within forty-five days following the day of the hearing.

ISSUE (originally presented by the parties)

Procedural issue:

- A. Did the Employer violate the procedural due process rights of the Grievant as provided for in Section 24.04, Pre-Discipline, of the Collective Bargaining Agreement regarding four charges (Rule # 2 Falsification of Documents; Rule

4 Deceitfulness; Rule # 1 Neglect of Duty; (a) failure to follow procedure)
filed against the Grievant? If so, what should the remedy be?

B. Did the Employer violate the “just cause standard” of the Collective Bargaining Agreement when it used rule violations that occurred prior to the issuance of a fifteen-day suspension (on 7/08/98) as a portion of the basis for its termination of the Grievant?

Merits:

Did the Employer discharge the Grievant for just cause? If so, what should the remedy be?

RELEVANT CONTRACT LANGUAGE

ARTICLE 24 Discipline

See Agreement for specific language (Joint Exhibit 1)

BACKGROUND

This was a difficult and contentious case for all involved. The Union vigorously pursued the defense of Ms. Jackson, and other legal actions were filed by the Grievant in response to her termination from employment. This arbitration award, by contractual agreement of the parties, was due by August 9, 2001. However, this arbitrator in consultation with the parties agreed to issue the award on August 6, 2001.

On August 3, 2001, just prior to issuing the Award, this Arbitrator was informed by e-mail (see attachment to award) of a resolution of this case pursuant to a lawsuit filed by Ms. Jackson in federal court (Cleveland, Ohio). As a result of this court settlement, it is this arbitrator's understanding that Ms. Jackson has been reinstated to her position of JCO with DYS and is to receive full back pay and benefits. In addition, her disciplinary record is to be expunged.

Therefore, the parties in the instant matter resolved all the issues with the exception of the general issue of whether roll call pay should be included in back pay awards. Therefore, at the request of the parties, this arbitrator shall confine his analysis and discussion to that single issue.

EMPLOYER'S POSITION

The Employer argues that the award of roll call pay for any actions under Article 24, DISCIPLINE, is specifically prohibited by the parties' Memorandum of Understanding ("MOU") regarding roll call (JX 12). The Employer cites the following language of the MOU:

"Any Employer initiated absences from the institution shall entitle the employee to be paid Roll Call Pay, except during a new employee orientation and for action taken under Article 24 Discipline."

The Employer argues that the testimony of Brad Rahr, Labor Relations Officer, supports the Employer's interpretation of this MOU. The above quoted section of this MOU was included in order to avoid the payment of roll call for incidents in which an employee was disciplined, according to the Employer. The Employer rejects the Union's contention that roll call should be awarded in such matters (based upon the countervailing

testimony of the Union's negotiator of the MOU, James Pagani). The Employer further argues that if the testimony of Mr. Rahr and Mr. Pagani is offsetting, the Union bears the burden of persuasion. A past practice of not paying roll call pay as part of back pay awards has been established by the Employer and has been accepted by the Union, argues the Employer. The Employer also points out that in the 15-day suspension that was reduced to 11 days, the Grievant did not receive roll call pay for the 4 days of back pay she received.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union flatly rejects the Employer's argument that once you are disciplined, justly or unjustly, you lose your opportunity to regain roll call pay. The Union also disagrees that roll call pay has not been paid in prior settlements with the Employer. The Union interprets the MOU language far differently than the Employer. It cites the following language of the MOU:

"Any Employer initiated absences from the institution shall entitle the employee to be paid roll-call pay, except during new employee orientation and for actions taken under Article 24 Discipline."

The Union argues that this language does not eliminate the just cause standards, and in fact asserts that the just cause standards require the payment of roll-call pay to the Grievant. The Union points out that if an employee receives a working suspension, he or she would be required to work next to co-workers for an entire shift without receiving the roll-call pay of other employees. The Union contends that the Employer's interpretation of the meaning of the MOU is nonsensical.

The Union also cites a prior case by Arbitrator Calvin Sharpe, in which an employee was reinstated with "full back pay and benefits." In this decision, Arbitrator Sharpe stated that the Employer is obligated to pay premium holiday pay benefits as part of the "full back pay and benefits" award.

Based upon the above, the Union requests that the grievance be granted.

DISCUSSION

The section of the MOU (JX 12) that addresses roll call pay appears to be based upon Article 36.06 that provides roll call pay to Correction Officers and Psychiatric Attendants. The MOU represents an agreement between the parties to create the single classification of Juvenile Correctional Officer (JCO). It covers a variety of matters (e.g. promotions, transfers, relocations, probationary periods, Security Officer 1 upgrades, roll call pay, etc.).

In the MOU, which has the same force and effect as a contract provision, the parties have made attendance at roll call a condition of employment, subject to Article 24 disciplinary standards. It is also clear that the MOU roll call pay is compensation that is directly tied to hours worked and not hours away from work that are initiated by the employee such as vacation or approved sick leave (JX 12, p.6). The MOU goes on to state that Employer initiated time away from work shall not affect the payment of roll call pay with two specific exceptions: new employee orientation and actions taken under Article 24 Discipline.

Mr. Pagani testified that it was his understanding that if an employee would have his/her discipline reduced, roll call pay would be included in any back pay. For example, if an employee has his suspension reduced from 10 days to 5 days, he would receive 5 days back pay including roll call pay. Mr. Rahr stated that he was not aware of such an understanding. Clearly the testimony of these two respected representatives is offsetting in this matter. Their testimony does not establish whether the parties intended that roll call pay be excluded in cases where discipline is reduced or eliminated after being issued.

However, reason and contractual requirements dictate that any "*actions taken under Article 24*" are not determined at the time of the Employer's decision to suspend or terminate an employee, but must be able to withstand a just cause review through the grievance process. In Article 24.01 the parties agreed to the following:

"Disciplinary action shall not be imposed upon an employee except for just cause."

If it is determined that the disciplinary action imposed by the Employer was not for just cause and is overturned, it no longer exists. The argument by the Employer that in the past it has not included roll call in its back pay awards is not controlling in this matter in light of the intent of the MOU within a just cause context. The Employer cited an award of the undersigned arbitrator in support of its position. The award issued in the Tod Pennington case called for a "make whole remedy" which should have included roll call pay. This arbitrator was not privy to the execution of this award by the Employer and had no way of knowing roll call pay was excluded. The discipline, or the portion of it that is eliminated or reduced, no longer represents "... *actions taken under Article 24 Discipline*" as described on page 6 of the MOU. Therefore, the portion of back pay and the time that accompanies it falls under the agreement of the parties that "*Any Employer*

initiated absences from the institution shall entitle the employee to be paid for Roll Call Pay... ”

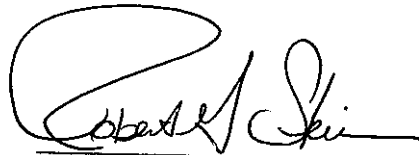
However, even absent this express understanding, it would be fundamentally unreasonable to deprive an employee of roll call pay based upon an employer's action that is found to be without just cause. It runs contrary to the fundamental principles of just cause. What the Employer is asking the arbitrator to believe is that it and the Union entered into an understanding that deprives an employee from recouping roll call pay (i.e. 30 minutes of pay per day) regardless of the length of time the employee was out of work. Such an interpretation is implausible when one considers the parties' clear contractual commitments. The first sentence of Article 24.01 starts with the overriding requirement "*... that disciplinary action shall not be imposed... except for just cause.*"

Roll call pay is for attending a mandatory briefing, and it is virtually indistinguishable from other work of a JCO that requires a meeting with management. It is ludicrous to deprive an employee of roll call pay in a back pay award/settlement when all other back pay is provided based upon disciplinary action that is imposed without just cause.

AWARD

The position of the Union is sustained. Unless otherwise agreed to by the parties, roll call pay shall be included in any back-pay award or settlement of an employee's discipline or discharge.

Respectfully submitted to the parties this 6th day of August 2001.

A handwritten signature in cursive script, appearing to read "Robert G. Stein". The signature is written in black ink and is positioned above the printed name.

Robert G. Stein, Arbitrator