

REVIEWED BY

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GRIEVANCE COORDINATOR

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IN THE MATTER OF ARBITRATION
BETWEEN
THE OHIO DEPARTMENT OF TRANSPORTATION
AND
THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 31-09 (12-04-01) -20-01-13
Kevin Clark, Grievant

Advocate(s) for the UNION:

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Advocate for the EMPLOYER:

Louis Kitchen, Advocate ODOT
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INTRODUCTION

A hearing on the above referenced matter was held on June 25, 2002, August 12, 2002, and August 15, 2002 in Jackson and Wellston, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties provided written closing arguments. The hearing was closed on September 3, 2002. The Arbitrator's decision is to be issued within forty-five (45) calendar days following the date of the hearing or no later than October 19, 2002.

ISSUE

The parties agreed upon the following definition of the issue:

Was the Grievant, Kevin Clark, removed for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

This case involves the removal of Kevin Clark, a Transportation Technician Specialist who had been employed at the Ohio Department of Transportation ("ODOT"), District 9. District 9 is located in Chillicothe, Ohio. The Grievant had over thirteen (13) years of service with ODOT at the time he was terminated. His hire date with ODOT was May 2, 1988.

He was terminated on December 2, 2001 for violation of the following three (3) ODOT directives:

- *WR 101-I-4-Interfering with and/or failing to cooperate in an official investigation,*
- *WR 101-I-6-Fighting with a fellow employee or non-employee on State time or State property, and*
- *WR 101-I-24-Possession of weapons shall not be permitted on ODOT property on the person of an ODOT employee while on Duty or in a State vehicle.*

The penalties assigned for all three ODOT work rules cited above

range from a suspension to a removal on the first offense. The Grievant had no prior discipline. The Grievant suffers from chronic back pain and high blood pressure that he attempts to manage by taking prescription drugs. He has two herniated discs in his back (Jx 11). The drugs he admitted to be taking during September of 2001 were Oxycontin, Zanaflex, Lorazepam, and Prinivil.

On September 27, 2001 the Grievant arrived late to work, and according to his coworkers, he appeared to be in an impaired state. His speech was slow, and he was moody. At times he appeared lethargic and then suddenly would become upset. During the interview with investigator Reel, the Grievant was mumbling, his eyes were red, and he appeared to be unsteady on his feet (Jx 8, 20). Friend and co-worker, Carl Rice, indicated that he observed the Grievant experiencing a progressive state of impairment during the past 4 to 6 weeks (Jx 8). Based upon the Grievant's statements to investigator Les Reel, the Employer concluded that Mr. Clark was taking double doses of Oxycontin (some 60 pills in 14 days), in addition to his other prescribed drugs.

During an interview conducted by investigator Clark, the Grievant appeared to be confused about losing his checkbook and wallet. When he could not find them, he allegedly accused fellow employee Ed Woodbridge of stealing them. On September 26th he went to work and thought he left his wallet in a bag on his office desk. When he returned to

his office he stated that his wallet was gone. After a frantic search, he requested and was granted emergency vacation time to go home and search for it. He did not find it. During his search at home, he hit an inside wall with his left hand, allegedly out of frustration for not finding his wallet. On September 27, 2001, the day following the search for this wallet, he showed a 9mm bullet to fellow employee and friend, Carl Rice.

Investigator Reel was called into ODOT District 9 to question the Grievant about his possession of the bullet and the possible possession of a firearm. The Grievant denied having any weapons in his vehicle. The Grievant agreed to have his truck searched by Mr. Reel, and a 9mm handgun was found in the console of his truck. A loaded 9mm clip of ammunition was found in a black bag in his vehicle. Mr. Reel also found the Grievant's wallet in the console, lying on top of the handgun.

The Employer terminated the Grievant for violation of the previous cited work rules. He subsequently filed a grievance arguing that he was terminated without just cause.

EMPLOYER'S POSITION

The Employer contends that the Grievant failed to cooperate with investigator, Les Reel, when he told him that he did not suspect anyone of

stealing his wallet. The Employer accuses the Grievant of lying because he had told fellow employee, Carl Rice, that he suspected either coworker, Ed Woodbridge, or one of the new engineers in training (E. I. T.) of stealing his wallet. Investigator Reel found the Grievant's wallet in the console of the Grievant's pick-up truck that was parked on State property in the ODOT parking lot.

The Employer also argues that the Grievant again failed to cooperate with Mr. Reel's investigation by stating he did not have a weapon in his truck. Mr. Reel found a 9mm handgun in the console of the Grievant's truck, under his wallet. The Employer further points out that the Grievant changed his story about how the weapon got into his truck. He first said he placed it there about 6:00 p.m. on September 26, 2001, in anticipation of going shooting with a friend after work the next day. However, during the hearing he provided different testimony. He stated his son placed the weapon in his truck, argues the Employer.

The Employer also states that the Grievant contradicted himself during the investigative interview when he said that he took an excessive amount of Oxycontin pills that had been prescribed on September 12, 2001, and that is why there were so few pills in the bottle when it was discovered during Mr. Reel's investigation. The Employer argues that the Grievant stated during the hearing that he only carried 3 to 4 pills with him at a time and that is why there were so few in the bottle. The Grievant

claimed that the remainder of the pills were at home. When these inconsistencies are coupled with the presence of a weapon on State property, the Employer contends that there was sufficient evidence to support its actions.

Based upon these facts, the Employer contends it had just cause to terminate the Grievant.

UNION'S POSITION

The Union argues that the Grievant is a long-term employee with an excellent work record. On September 27th he did not purposely bring a weapon on state property, contends the Union. The Union asserts that the Employer was unable to substantiate that the Grievant made any threats against anyone, and it was unable to prove that WR 101-I-6 was violated.

The Union rejects the Employer's contention that the Grievant failed to cooperate with the Employer's investigation. It points out that the Grievant gave the investigator permission to search his truck, willingly submitted to a drug test, released medical and psychological information to the Employer, and answered all of their questions. Therefore, the Employer was unable to prove a violation of WR 101-I-4, argues the Union.

The Union contends that WR 101-I-24 has been unevenly enforced and that another employee committed a violation of this work rule (Ux 1,

John Denniston case). The Union points out that Mr. Denniston, who did not intend to harm anyone, displayed a weapon on State property, allegedly fired it and only received a written warning. The Union argues that the Grievant did not intend to harm anyone and that his punishment of termination was excessive when compared to other employees who have violated WR 101-I-24.

The Union argues that consideration should be given to the Grievant who suffers from chronic back pain. In the words of the Union, "*Pain management is like teaching a baby to walk.*" The Grievant was attempting to find the right medicine to control his pain and this takes time, argues the Union.

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

DISCUSSION

I find the Employer met its burden of proof regarding its charges that the Grievant violated WR 101-I-4 and WR 101-24. He lied to investigator Reel about having a handgun in his truck, and he brought a weapon onto ODOT property. The evidence does not support the third charge that the Grievant violated WR 101-I-6, threatening a fellow employee. Mr. Clark's behavior was volatile, moody, and arguably paranoid during the month or more preceding September 27, 2001.

However, there was insufficient evidence to prove he specifically threatened anyone. The Grievant alluded to the possibility of the involvement of coworkers in the alleged theft of his wallet; however, this behavior does not rise to the level of a threat.

The Union argued that during the investigation, Mr. Clark cooperated and did everything that was asked of him. The evidence and testimony in part support this argument with one notable exception. Investigator Reel asked Mr. Clark whether there were any weapons in his truck at this time. He responded with an unequivocal, "No." This statement subsequently proved to be patently false. Mr. Clark's own testimony and other evidence dispelled the plausibility that he forgot the 9mm handgun was in the console of his truck.

The following evidence undermines Mr. Clark's position in regard to the WR 101-I-4 charge. On p. 6 of Jx 9 (the Grievant's interview with Mr. Reel) the Grievant was asked the question, "Do you own a 9mm weapon?" His response was, "I can't think of what it is." Yet, he was very detailed in where it was kept. He stated precisely that it was kept under a doll dress his wife made (Jx 9, p. 6). Furthermore, the Grievant testified that he put the gun in his truck at about 6:00 p. m. on the evening before September 27, 2001. He also said, "I planned to go to a friend's house...we go out and shoot" (Jx 9, p. 8). It is reasonable to presume that

a person with a clear mind who owns and recreationally uses firearms would know that he owns a 9mm handgun.

The presumption that Mr. Clark was untruthful during his interview with investigator Reel is confirmed by his own admission. After the 9mm handgun and ammunition clip were found in his truck, Mr. Reel asked the Grievant the following question: *"I asked you about the gun in your truck; you lied to me."* The Grievant's response to this question was, *"Yep."* When asked why he lied, he stated, *"Poor judgment"* (Jx 9, p. 8). The Employer also contended that the Grievant lied about having prescription drugs with him. Mr. Clark was not charged with any violation regarding his possession or abuse of prescription drugs. The evidence indicates that the Grievant may have had a serious problem with being on too many drugs. However, there is insufficient evidence to demonstrate that the Grievant failed to cooperate with the investigation regarding his use of prescription drugs (Jx 9, 11).

The two rule violations that were committed by the Grievant called for a penalty that ranges from a suspension to a termination. Both of these violations are serious in nature, and there should be no mistake that being uncooperative in an investigation is a serious breach of trust. Weapons have no place in a work setting, and I find the Employer's rule to be reasonable in this regard. However, I find there are substantial mitigating factors in this case. The Grievant's thirteen (13) year work

record demonstrates that he was a dependable employee who had no past discipline. It appears that the odd behavior that the Grievant displayed in the weeks preceding September 27th was out of character. There was nothing in Mr. Clark's evaluations prior to the immediate period leading up to September 27th to indicate that he displayed unstable or dangerous behavior. In fact, his evaluations demonstrate that he has been a productive employee for the past thirteen (13) years.

It also seems reasonable to assume from the evidence and testimony that the Grievant was either prescribed too many drugs or was abusing his prescriptions. It is not clear whether both or one of these conditions apply. According to investigator Reel, at 10:57 am on September 27, 2001 the Grievant was physically impaired (Jx 2). And, in the opinion of the Grievant's physician, Dr. Lance, Mr. Clark's impaired state may have been caused, in part or in whole, by "...a side effect of a muscle relaxer, Zanaflex..." (Jx 3d). The Employer provided evidence and testimony that implied the Grievant might have been illegally abusing prescription drugs by taking twice as many Oxycotin tablets as prescribed (Jx 4). However, a subsequent management memo indicates the Grievant's prescription was only half-filled by his pharmacy (Jx 3d), thereby undermining the Employer's charge of abuse.

The Grievant willingly submitted to the Employer's unsuccessful drug screen after he demonstrated signs of impairment. There was no medical

evidence to help determine the Grievant's physical state on September 27, 2001. However, it is reasonable to rely upon the observations of Mr. Reel, an experienced investigator. The statements of other employees further support his observations on September 27th. There appears to be a high degree of certainty that the Grievant was substantially impaired on September 27, 2001 and had previous episodes of aberrant behavior in the five or six weeks leading up to September 27th. Absent substantial evidence to the contrary, it cannot be assumed that the Grievant's impaired state was intentionally induced. However, the possibility of his addiction to prescription drugs cannot be ruled out.

The parties' commitment to a drug free workplace is well established and is accompanied by a contractual commitment to emphasize the rehabilitation of employees who abuse drugs (JX 1, Appendix M). Even though the Grievant was not terminated for being under the influence of drugs, the evidence substantially indicates he was impaired, which may in large part explain some of his unusual conduct. Of course, it does not rule out other psychological bases for his conduct. However, the Grievant's impaired state is a double-edged sword. It cannot be used as an excuse for rule violations. More importantly, it heightens the Employer's and the employees' concern for safety when you factor into the equation the presence of a handgun on state property.

The motivation of the Grievant in having the handgun in his truck and in showing a bullet to Carl Rice was not made clear by the evidence. Possible reasons can range from an explanation of sinister intent to commit violence to a foolish lapse in judgment. While it could be argued that the events of September 26, 2001 were a rationale for bringing a gun on state property, there is a lack of sufficient evidence to demonstrate that this is the only plausible explanation.

A second mitigating factor of significance in this case is the Grievant's seniority and work record. Prior to the problems he caused for himself in the late summer of 2001, his thirteen (13) year record was free of discipline and by all accounts was productive (Jx 22). The Grievant's seniority and good work record become important mitigating factors in cases like this one.

According to the disciplinary system in place at the time, the Employer had a choice between suspending the Grievant and terminating his employment. The Grievant's gun that was on state property was not on the Grievant's person or in the building where he works. It was locked in his truck. This does not mean that he could not have had ready access to it. However, its location possessed less of an immediate threat to the workplace. The Union's argument of disparate treatment and lax enforcement of WR 101-I-24 are not persuasive. The Employer has the right to reestablish a rule and the penalty for violation of

the rule with its workforce. With proper notice, an employer is free to then enforce the reestablished rule and is not encumbered by a lack of past enforcement. The Employer's argument that employees fear for their safety if the Grievant returns to the workplace was undermined by the testimony of Union employee witnesses.

Discipline has a range of penalties for a good reason. There is no question that the evidence demonstrates that the Grievant lied to Mr. Reel and had a gun in his vehicle that was located on state property. These are serious rule violations that must be addressed with attention-getting discipline. It is also apparent from the evidence that the Grievant's use of prescription drugs may have played a major role in his aberrant behavior that occurred prior to and on September 27, 2001.

It is well understood that in Article 24 of the Collective Bargaining Agreement the parties firmly subscribe to the concept of progressive discipline. Mr. Clark compiled a thirteen (13) year record of good performance, and given the totality of the facts in this case, he has earned a second chance to keep his job.

AWARD

The grievance is sustained in part.

The Grievant's termination shall be converted to a time served suspension for violation of WR 101-I-4 and WR 101-I-24. The Grievant is to be reinstated to his former position and shift with no back pay or benefits. He shall have all of his seniority restored.

His return to work will be conditioned upon:

1. A general return to work physical,
2. A drug screen and,
3. An independent medical examination conducted by physician who is selected by the Employer, and who is qualified in the area of pain management and substance abuse. The purpose of this examine is to specifically evaluate the Grievant's use/possible addiction to medication and to provided the Employer with a written report. The report shall specifically indicate whether the Grievant can safely return to work and shall include the physician's recommendations (if applicable per physician) for a follow-up treatment plan for pain management and the responsible use of prescription drugs.

These examinations shall be paid for by the Employer and shall be scheduled as soon as practical, but no later than thirty- (30) calendar days following the date of this Award. The Employer may choose to have one physician perform all or more than one of tests outlined above. Unless the Physician(s) determines the Grievant is not fit to return to work, he shall be placed on the ODOT payroll within two full pay periods following the date of his medical examination described in condition 3 above.

The Arbitrator shall retain jurisdiction over this Award for a period of 120 days for purposes of assisting the parties in its implementation.

Respectfully submitted to the parties this 17th day of October, 2002



Robert G. Stein, Arbitrator