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GRIEVANCE COORDINATOR

ARBITRATION DECISION

May 3, 2004

In the Matter of:

State of Ohio, Department of Youth Services,)
Cuyahoga Hills Juvenile Correctional Facility)
) Case No. 35-03-20030902-0053-01-05
and) Darryl Pope, Grievant
)
Ohio Civil Service Employees Association,)
AFSCME Local 11)

APPEARANCES

For the State:

Krista Weida, Advocate, Labor Relations Specialist, OCB
John Kinkela, Second Chair, Labor Counsel
Benjamin Bower, Superintendent
Cindy Cox, Supervisor
Darren Huggins, Trooper, Ohio State Highway Patrol

For the Union:

Victor Dandridge, Staff Representative, OCSEA
Marva McCall, Second Chair, OCSEA
Darryl Pope, Grievant
Clyde McDowell, President, Chapter #1830

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant is Darryl Pope. He was hired on July 17, 2000, as a Food Service Worker. The grievant was promoted to Cook 1 on November 18, 2001. At the time of his termination, the grievant's active discipline included a three-day fine in December 2002 for failure to notify a supervisor of his absence and to follow call-in procedures and a ten-day working suspension in April 2003 for tardiness and verbal or written abuse of others.

The grievant's termination was triggered by two separate events. First, on June 15 and 16, 2003, the grievant was late for work. On the first day he was 22 minutes late and on the next day he was one minute late. Second, on July 1, 2003, the grievant was arrested at the facility for failing to pay a fine for a traffic offense and taken to the City of Warrensville Heights jail. When the grievant's request for emergency use of vacation time was denied, he was place in unauthorized leave of absence status.

On August 5, 2003, the grievant was notified that a pre-disciplinary hearing would be held on August 12, 2003. He was told that he was charged with violating Rules 1.3, 3.4, 5.1, and 5.9 of Department Directive 103.17, the General Work Rules. The hearing officer, Carol Metz, found that there was just cause for discipline.

On September 2, 2003, Benjamin Bower, the Superintendent, notified the grievant that he was being removed. He stated that the basis for the action was his tardiness on June 15 and 16, 2003, in violation of Rule 1.3, and his unauthorized absence on July 1, 2003, in violation of Rule 3.4.

The union filed a grievance on behalf of the grievant. It charged that the grievant was removed without just cause. The union asked that the grievant be reinstated and made whole.

When the grievance was not resolved, it was appealed to arbitration. The hearing was held on March 19, 2004. Written closing statements were received on April 2, 2004.

RELEVANT CONTRACT PROVISIONS

Article 24 - Discipline

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

* * *

24.02 - Progressive Discipline

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

Disciplinary action shall include:

A. One or more oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. working suspension;
D. one or more fines in an amount of one (1) to five (5) days, the first time an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB;
E. one or more day(s) suspension(s);
F. termination.

* * *

24.05 - Imposition of Discipline

* * *

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

* * *

ISSUE

The issue as agreed to by the parties is:

Did the Department of Youth Services remove the Grievant for just cause? If not, what shall the remedy be?

STATE POSITION

The state argues that the grievant's tardiness justified his discharge. It points out that he admitted being late for work on June 15 and 16, 2003, and acknowledged that he knew that tardiness violated Policy 103.17. The state claims that the grievant offered no mitigating reasons for his tardiness.

The state contends that the critical issue is not the number of minutes the grievant was late but his history of not showing up for work on time. It reports that in August 2001 he was counseled for being tardy on ten occasions. The state adds that in April 2003 he received a ten-day working suspension for tardiness.

The state maintains that the grievant was not treated differently than other employees. It observes that Cindy Cox, the grievant's supervisor, acknowledged that no other employee was terminated for tardiness but stresses that she testified that no other employee had as poor a record as the grievant. The state indicates that Bower reported that attendance is a serious problem at the facility and that a lot of employees are disciplined for tardiness. It stresses that it was important for the grievant to be at work on time because if meals are late, it disrupts other activities at the facility.

The state cites OCSEA/AFSMCE Local 11 and The State of Ohio, Department of Mental Health; Case No. G87-2611; December 6, 1989, in support of its position. It observes that the grievant in that case received a six-day suspension for being tardy a total of eight minutes over a four-day period. The state notes that Arbitrator Harry Graham stated:

> while the cumulative time at issue in this proceeding is small, it takes on significance when viewed in the context of [the Grievant's] extensive record of tardiness which extends over his entire employment history with the State. The State is correct when it asserts that the true issue here is not the amount of time [the Grievant] was late for work but rather his continued pattern of tardiness.
> ...Arbitrators should be careful not to usurp managerial authority when it has been correctly utilized. In this situation, the discipline administered to the grievant was warranted by his record. When viewed in the context of the repeated unsuccessful attempts by the State to call his attendance problems to his attention the six day suspension under review here is justified, severe though it is. (State Written Closing Statement, page 3)

The state also offers the decision of Arbitrator Graham in OCSEA/AFSCME Local 11 and The State of Ohio, Department of Commerce; Case No. 07-00-(91-05-27)-0121-01-14; October 11, 1991. It observes that in that case he found that the state did all it could to indicate to the grievant that his behavior was unacceptable. The state reports that Arbitrator Graham held that by "failing to alter his behavior after receipt of the great amount of discipline that proceeded his discharge, the Grievant has brought this sad situation upon himself." (Ibid.)

The state argues that the grievant's irresponsible conduct led to his arrest on July 1, 2003. It points out that several weeks earlier Trooper Darren Huggins had warned the grievant that he needed to contact the Warrensville Heights Police Department to take care of a warrant. The state notes that when Trooper Huggins checked LEADS on July 1, 2003, and found that the grievant's warrant was still outstanding, he had to arrest him. It

maintains that the fact that the court later purged the contempt of court charge against the grievant had no bearing on the validity of his arrest.

The state rejects the union's argument that it was not the grievant's fault that he was put in an unauthorized leave status. It acknowledges that Bower pulled the grievant from his work area but stresses that he "had a responsibility to keep disruption to a minimum and control the amount of embarrassment to [the grievant]." (State Written Closing Statement, page 5) The state adds that "employees are role models for the youths and must act in an appropriate manner." (Ibid.)

The state contends that the grievant was not entitled to emergency vacation leave. It points out that Bower testified that emergency leave is rarely granted. The state emphasizes that leave is never granted under the circumstances at issue in the instant case.

The state challenges the union's claim that other employees had been arrested at the facility and were able to return to work. It clams that the union was unable to provide any verifiable evidence or witnesses to support its contention. The state notes that Bower testified that he was unaware of any employee who was arrested at the facility who returned to work.

The state cites this Arbitrator's decision in Department of Transportation, Office of Traffic Engineering, Sign and Signal Section and Ohio Civil Service Employees Association, AFSCME Local 11; Case No. 31-13-(1-15-97)-03-01-06; February 13, 1998, in support of its position. It points out that in that case an employee was terminated when his incarceration resulted in a one-hour unexcused absence. The state notes that this Arbitrator recognized that "while the grievant's absence was due to his

incarceration, he was responsible for this incarceration." (State Written Closing Statement, page 6) It reports that this Arbitrator concluded that the grievant's termination was justified given that he was disciplined 11 times in the previous 4 1/2 years.

The state concludes that the grievant's tardiness on June 15 and 16, 2003; his arrest on July 1, 2003; and his past disciplinary record constitute just cause for his termination.

UNION POSITION

The union argues that the matter before the Arbitrator "defies logic." It claims that while the state attempted to paint a "vile and incorrigible picture of the grievant," he advanced himself in his three years of employment. The union points out that the state released him from his initial probationary period for Food Service Worker and later promoted him to Cook 1. The union adds that the grievant had only two active cases of discipline in his file and that the state submitted an evaluation, which was not in his personnel file and was never given to him.

The union asserts that the charge that the grievant was AWOL in violation of Rule 3.4 is "absolutely lubricious." It points out that Bower testified that on July 1, 2003, he ordered the grievant to clock out three hours early. The union stresses that it is "not possible for [the grievant] to be AWOL when he was ordered off the clock by the superintendent." (Union Written Closing Statement, page 1)

The union contends that the grievant's arrest was improper. It observes that Trooper Huggins directed the grievant to make some "arrangement" with the Warrensville Heights Police Department. The union claims that Lieutenant William Brown of the Warrensville Heights Police Department reported that the grievant did

make an arrangement that was agreeable to the department and that the department did not cause him to be arrested.

The union charges that the grievant was treated differently than other employees. It claims that the statement of Elizabeth Reaves indicates that although she was arrested at work, she maintained her employment. The union observes that Bower acknowledged that an employee named Hudson, who was arrested at the institution, is still working. It adds that in any event, the grievant's arrest cannot be considered because it was not addressed in his removal letter.

The union contends that the grievant's tardiness does not justify his termination. It acknowledges that he was 22 minutes late on June 15, 2003, and one minute late on June 16, 2003, but points out that the institution has a policy of not disciplining employees unless they are late more than once in a pay period. The union complains that this means that the state is asking the Arbitrator to allow it to dismiss the grievant for being one minute late for work on July 1, 2003, even though in the past he received only a ten-day suspension for being tardy seven times. It adds that between June 16, 2003, and his removal on August 14, 2003, the grievant was not tardy.

The union charges that the state is targeting the grievant. It complains that the state failed to consider "the mitigating circumstances which were affecting [the grievant's life." (Union Written Closing Statement, page 2) The union indicates that the grievant's tardiness did not create a hardship and did not lead to any loss of pay.

The union suggests that the grievant should have been placed on a last chance agreement. It claims that other employees were placed on such agreements. The union

notes that Bower testified that employees who violated last chance agreements were sometimes granted extensions.

The union concludes that the grievant's termination was not for just cause. It asks the Arbitrator to order the state to return the grievant to his position as a Cook 1 and to make him whole for lost wages and benefits.

ANALYSIS

The issue before the Arbitrator is whether there is just cause for the grievant's discharge. The state argues that there are two grounds for his termination. First, it contends that the grievant's tardiness on June 15 and 16, 2003, combined with his record of being late for work justifies his dismissal. Second, the state maintains that the grievant's arrest at the facility on July 1, 2003, which resulted in him being placed in unauthorized leave status, supports his termination.

The facts surrounding the first charge are uncontested. The grievant acknowledges that he was late on June 15 and 16, 2003, as charged by the state. Although the union's written closing statements alluded to mitigating circumstances, there was no testimony regarding them or any indication how they might have been related to the dates at issue.

The union's argument that the grievant is being discipline for being one minute late must be rejected. While the union may be correct that employees are disciplined only after a second absence in pay period, it does not change the fact that the grievant was late for work on two consecutive days. Furthermore, the grievant did not deny that he had prior problems with tardiness.

The facts surrounding the grievant's arrest at the facility on July 1, 2003, are also uncontested. When Bower learned that Trooper Huggins planned to arrest the grievant at the facility, he ordered the grievant to clock out and escorted him to the parking lot where he was placed under arrest and taken to the Warrensville Heights Police Department. The grievant's request for the emergency use of vacation leave was denied and he was placed in unauthorized leave status.

The union challenged the state's action on several grounds. It claimed that the grievant had made arrangements with the Warrensville Heights Police Department regarding his unpaid traffic ticket. The union offered a letter from Lieutenant Brown in support of its contention.

The Arbitrator does not believe that the letter offered by the union establishes that the grievant had taken care of the outstanding warrant as he had been warned he had to do by Trooper Huggins. First, Lieutenant Brown's letter states only that it "appears" that the grievant spoke to "an officer" in "an attempt" to rectify the situation. Second, the hearsay nature of the letter and the failure of Lieutenant Brown to testify at the hearing are a significant concern to the Arbitrator. Most important, despite the fact that Trooper Huggins warned the grievant on June 6 and 14, 2003, that he needed to have the warrant canceled or he would be arrested, he had not done so by July 1, 2003.

The union asserted that other employees had been arrested at the facility and had not been discharged. In support of this contention the union submitted part of a Narrative/Supporting Report from the Shaker Heights Police Department dated September 23, 1999. The report indicates that Reaves and Hudson were arrested at the facility on active traffic warrants. It also provided a note from Reaves that she was not

terminated as a result of her arrest and testimony from Bower that he believed that Hudson was still employed at the facility.

The Arbitrator cannot conclude that this evidence establishes that the grievant was the victim of disparate treatment. First, the single page of the police report and the brief note from Reaves do not make clear what happened. In particular, there is no indication that they were warned on two occasions that they needed to have the warrants canceled or they would be arrested. Second, it is well established that disparate treatment involves treating similarly situated employees differently. There is nothing in the record to suggest that Reaves or Hudson has a poor a record as the grievant.

The Arbitrator must discount the union's suggestion that the grievant was improperly placed in unauthorized leave status. While it is true that Bower directed the grievant to clock out and escorted him to the parking lot, he was simply trying to eliminate the disruption that might result from an employee being arrested in the facility. It was clear that the grievant was going to be arrested and taken to the Warrensville Heights Police Department regardless of where he was placed under arrest.

The Arbitrator must reject the argument that the grievant's arrest was improper. Although the judgment entry for the Bedford Municipal Court reveals that the contempt of court charge against the grievant was purged, it is clear that on July 1, 2003, there was a valid warrant for the grievant's arrest. The subsequent action of the court does not alter that fact.

The fact that the grievant's termination letter does not mention his arrest is irrelevant. He was not terminated for his arrest for an unpaid traffic ticket. The grievant was discharged because of his unauthorized leave that resulted from his arrest. Since the

reason for his absence was immaterial to his termination, it was unnecessary to refer to it in his removal letter.

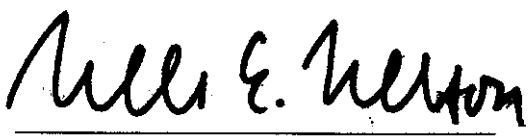
The remaining issue is the proper penalty. While the Arbitrator appreciates the fact that discharge is the most severe penalty an employer can impose, the state's removal of the grievant was not a violation of the collective bargaining agreement or an abuse of its discretion. First, the grievant had a poor discipline record. He received a three-day fine on December 23, 2002, and a ten-day suspension on April 7, 2003. The events leading to his discharge occurred less than three months after his ten-day suspension. Second, while Arbitrators often consider long service to be a mitigating factor, the grievant had only three years of seniority. In addition, both Bower and Cox testified that the grievant's performance during that time was poor.

The Arbitrator must reject the union's suggestion that the state was obligated to allow the grievant to return to work on a last chance agreement. Nothing in the collective bargaining agreement requires it to offer a last chance agreement to an employee. Furthermore, the grievant's limited seniority and poor work record would not seem to justify granting such a request.

Based on the above analysis, the Arbitrator must deny the grievance.

AWARD

The grievance is denied.



Nels E. Nelson
Arbitrator

May 3, 2004
Russell Township
Geauga County, Ohio