IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF JOB AND FAMILY SERVICES

AND

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

Grievant: Richard Collins

Case No. 16-11-04-03-08-0025-01-14

Date of Hearing: May 11, 2005

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Timothy L. Rippeth

Witnesses:

Richard Collins, Grievant

For the Employer:

Advocate: Richard C. Corbin
2nd Chair: Andy Schulman

Witnesses:

Rueben Lopez
Teresa Toronto
Christopher Barley

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: June 24, 2005

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003, through February 28, 2006, between the State of Ohio - Department of Rehabilitation and Corrections ("DR&C") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Richard Collins ("Collins"), for failure of good behavior for making false, abusive, inflammatory or obscene statements or gestures. The discipline was issued because the Grievant allegedly engaged in certain inappropriate conduct toward a co-worker in January 2004.

The removal of the Grievant occurred on March 5, 2005, and was appealed in accordance with Article 25 of the CBA. This matter was heard on May 11, 2005, and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing written closing briefs were presented by both parties, with the record being closed as of May 25, 2005. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Collins was employed as a Human Services Hearing Officer 2 for the Bureau of State Hearings in the Office of Legal Services for the Department of Job and Family Services ("ODJFS"). Collins had been employed by ODJFS for over nineteen (19) years at the time of his removal on March 5, 2004. Collins' duties included adjudicating challenges brought by individuals who were denied services under the authority of ODJFS.

As a hearing officer, Collins resolved eligibility issues including but not limited to the following: child support; food stamps; adoption assistance; Medicaid; Welfare, etc.

At all times pertinent herein A. Ruben Lopez ("Lopez") was Collins' immediate supervisor and Christopher Barley ("Barley") was Bureau Chief at ODJFS.

Giving rise to the removal was a series of emails that began on January 16, 2004, and ended on January 20, 2004. Collins, on January 16, 2004, emailed Yvette Turner ("Turner"), OCSEA Representative, inquiring whether a settlement which occurred on January 8, 2004 at mediation had been processed. Apparently, Collins believed that the Personnel Action ("PA") Form was to be completed by ODJFS on that day. (Joint Exhibit ("JX") 4)

Turner and Sharon Van Meter ("Van Meter") did not agree with Collins' recollection and Van Meter stated in her email on January 16, 2004 at 4:49 p.m. that " ... Neither my memory or notes from your mediation last week reflect any discussion of a desired turn-around time or a personnel action related to your settlement ... As a result, the Union considers your withdrawal of the 112-day suspension case and the settlement of the 20-day suspension (to 15-days) are considered to be valid and in full force and effect." (JX, pp. 1-2)

Collins, not in agreement with his Union's position, on January 20, 2004 emailed Turner and copied co-workers on the 8:20 a.m. email regarding his displeasure with the handling of his grievances. (JX 4, p.1) A co-worker, Michael Douglas ("Douglas"), responded to Collins at 10:29 a.m. and indicated that Collins was acting childish and made several references to biblical assistance that Collins should consider in his quest. Several other emails occurred between Douglas and Collins, culminating in Collins' email at 11:31 a.m., which directly led to his removal.

In the email at 11:31 a.m., Collins stated that Douglas was out of line for calling his (Collins') actions rude and added, "There's nothing more arrogant (or reprobate) than to live a lifestyle contrary to the Word, so openly, and then play gospel music all day." Collins maintained that Douglas attacked his integrity and his response was appropriate.

Douglas, on the other hand, provided an updated written statement (Management Exhibit ("MX") 1) and felt that Collins' email was intended "... to point at what Richard may feel my sexual orientation is, or may be. I believe that the email was a form of sexual harassment." (MX 1) Douglas further added that when he received the email he was shocked and humiliated. As a result of the above, Collins was charged with violating ODJFS Standards of Employee Conduct Policy F14 ("ODJFS Policy"). ODJFS Policy F14 forbids acts of discrimination, insult, intimidation, or harassment on the basis of race, gender, religion, national origin, disability, age, veteran status, or sexual orientation. Under ODJFS Policy F14, the first offense results in either suspension or removal, the second offense results in removal.

On February 10, 2004 the pre-disciplinary meeting occurred before Teresa Toronto ("Toronto"). At that meeting, Collins denied having any knowledge of Douglas' lifestyle or his sexual orientation. (JX 3, p. 6) Collins admitted that he was aware of the term 'reprobate' as a biblical term, but was unaware of its meaning. (JX 3 p. 6) Douglas, who was not present on February 10, 2004, informed Toronto verbally that he was not insulted by the alleged reference to his sexual orientation and wished that "... this would all go away ..." (JX 3, p. 6) Toronto considered Collins' letter and her verbal discussions with Douglas in reaching a determination of the appropriate discipline.

As of February 10, 2004, Collins' active discipline included a verbal reprimand for using rude and insulting language in an email and for failure to carry out work assignments; a ten (10) day suspension for being absent without leave, not providing a physician's verification when required, insubordination and failure to carry out and/or follow assignments; and a fifteen (15) day suspension for failure to provide notification of absence within thirty minutes of scheduled reporting time; two (2) violations of AWOL for less than one day; failure to provide a physician's verification when required resulting in denial of requested leave; and two (2) violations of failure to carry out and/or follow

assignments. Toronto reviewed Collins' active discipline and the current allegations then determined that discipline was appropriate.

Toronto determined that Collins did not violate ODJFS Policy F14, but was in violation of ODJFS Policy F2: making false, abusive, inflammatory, or obscene statements or gestures. Effective March 5, 2004 Collins was removed from his position by Thomas J. Hayes, Director, ODJFS. (JX-3, p. 8)

ISSUE

Was the Grievant, Richard Collins, disciplined for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA ODJFS WORK RULES 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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

ODJFS STANDARDS OF EMPLOYEE CONDUCT POLICY

F 2: Making false, abusive, inflammatory, or obscene statements or gestures

OFFENSE

1st	2nd	3rd	4th	5th
written reprimand or suspension	suspension or removal	removal		

F 14: Acts of discrimination, insult, intimidation, or harassment on the basis of race, gender, religion, national origin, disability, age, veteran status, or sexual orientation

OFFENSE

1st	2nd	3rd	4th	5th
suspension or removal	removal			

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

ODJFS contends that progressive discipline did not change Collins' behavior over time and the January 20, 2004 incident with co-worker Douglas was simply the last straw. Collins established a pattern of behavior that was not compatible with continued employment based upon past discipline for poor work performance, absenteeism, and misuse of email. The cumulative effect of Collins' prior discipline coupled with his refusal to demonstrate corrective behavior are sufficient grounds for removal.

ODJFS points out that in September 2002, Collins received a verbal reprimand for using rude and insulting language in emails and failure to carry out work assignments. In January 2003, Collins received a ten (10) day suspension for being AWOL for less than one (1) day; failure to provide physician verification; insubordination; and failure to carry out and/or follow assignments. In May 2003, Collins received a fifteen (15) day suspension for failure to provide proper notification of absence; two (2) AWOL charges; failure to provide physician verification; and failure to follow or carry out assignments.

Regarding Collins' work performance, Lopez in 2002, rated Collins' overall performance as satisfactory but rated him 'below target' in two categories: (1) Quantity Timeliness and (2) Teamwork. (M Ex 3, p.17) Lopez further testified

that Collins, similar to other ODJFS hearing officers, was required to render hearing decisions in a timely manner with the goal of no more than ten (10) pending unwritten state hearing decisions at the end of each month. Due to approximately forty-three (43) pending unwritten hearing decisions, Collins was placed on a performance plan effective March 3, 2003. Collins was off from work from April 3, 2003 until October 3, 2003. Overall, Lopez indicated that Collins did a good job in addressing the performance plan. Lopez's chief concern was that Collins would not follow ODJFS rules on authority, and would always question supervisors' directives.

Examples of Collins' combatant state are reflective in his emails to Christopher Barley ("Barley"), Bureau Chief at ODJFS, regarding a directive not to call or email Kim Chubb ("Chubb") or Douglas. Apparently, Barley believed that Chubb and Douglas were receiving too many calls from Collins that were not work related. Barley directed Collins not to call or email either Chubb or Douglas. (M Ex. 6, p. 2) Collins inquired of Barley what was the reason for the charge? (M Ex. 6, p. 2) Barley responded in part that he expected Collins to follow this directive and provided alternative contacts for Collins if he needed assistance from the Bureau of State Hearings Office. (M Ex. 6, p. 3) Collins replied, in part "....I interpret this directive as racist. You have not shown any proof of your accusations. Further, you cannot fault me for your staff being unsatisfied with your leadership ... Do not fault me for your own personal failures. If your office is out of control, do not blame me." (M Ex. 6, p.4)

Collins has a shared obligation to change his behavior consistent with ODJFS expectations, work rules and policies. He failed to do so, and the cumulative effect of the discipline warranted removal.

ODJFS further contends that Collins' removal complied with all notions of progressive discipline, in that ODJFS attempted to correct the behavior of Collins to no avail. In fact, Collins refused to accept any responsibility for his conduct but continuously blamed Barley, Lopez or others for his circumstances. ODJFS opines were Barley and/or Lopez responsible for Collins' failure to meet production standards, failure to have sufficient leave balances, failure to call off work properly, sending rude emails to co-workers, and misuse of the email system? Collins has been treated fairly and the past discipline was intended to correct his behavior.

On January 20, 2004, Collins, upset with the Union's handling of his mediation matter or a prior settlement, demonstrated poor judgment by involving Douglas in the dispute he had with the Union. As a result of Douglas' suggestion that he was out of line, Collins' reaction was personal, abusive and inflammatory, states the Employer. Toronto concluded that Collins' denials of any knowledge of Douglas' alleged lifestyle or the use of the word 'reprobate' as being non-offensive, lacked credibility. (JX 3, p. 6) Toronto added that due to Collins' extensive active discipline, including one of a similar nature, he has failed to demonstrate any corrective behavior, warranting removal.

ODJFS submits that the Union's claim of a procedural defect for failure of due process results from Toronto's finding of a violation of ODJFS Rule F2 as opposed to a finding of a Rule F14 violation is without merit.

Article 24.04 of the CBA imposes upon the employer the duty to provide documents that will be relied upon in imposing discipline. The pre-disciplinary hearing is intended to present the charges and evidence known at that time in order for the employee to understand the allegations and/or evidence relied upon by the employer. To find a procedural violation which denied Collins of due process, the facts must establish that Collins was not offered a reasonable opportunity to present his version of what occurred prior to discipline being imposed. Collins was aware as of March 3, 2004 that his removal was based upon ODJFS Rule F2.

Toronto reviewed all of the same documents provided to Collins in deciding ODJFS Rule F2 was violated as opposed to ODJFS Rule F14. No new evidence or witnesses were utilized that were not provided to Collins at the pre-disciplinary meeting. Toronto allowed Collins a full opportunity to present his position(s) on the events surrounding the January 20, 2004 email. ODJFS also points out that Collins, nor the Union, raised this procedural issue at any step of the grievance process, prior to Arbitration. Finally, ODJFS submits that the modification of the charge was not substantive and Collins had a full opportunity to present his viewpoint and that ODJFS relied upon the evidence submitted at the pre-disciplinary conference pursuant to Article 24.04 of the CBA.

POSITION OF THE UNION

The Grievant, an employee with over twenty (20) years of service, was removed without just cause.

The Grievant was originally charged with a violation of ODJFS Rule F14, but was removed for violating ODJFS Rule F2. The Grievant did not receive a pre-disciplinary hearing as to ODJFS Rule F2, thereby depriving him and the Union the opportunity to argue, retort, or contradict the new change. The Union submits that Toronto changed the charge without notice to Collins, which precluded him from responding, mandating that a pre-disciplinary hearing occur on the Rule F2 charge.

Regarding the January 20, 2004 email incident, Collins admitted at the hearing that he wished he had not sent that email. Collins was initially offended by Douglas' email reference to God and his religious beliefs. However, no action was instituted against Douglas, because Toronto did not see Douglas' conduct as inappropriate. Where's the fairness, and how can Toronto decide what is or is not inappropriate? If Douglas was offended by the email why did he not appear at the hearing? ODJFS was looking for a reason to remove the Grievant without regard to the procedural requirements ODJFS must follow under the CBA.

The Union submits that Barley was less than a stellar supervisor, in that other employees, including Lopez, filed charges of discrimination against Barley due to alleged mistreatment of minority employees under his supervision, contrary to state law. Barley also engaged in unprofessional conduct including sending rude emails to Lopez. (Union Exhibit (Un. Ex), 1) Barley treated Collins

and other minority employees differently and his acts of alleged discriminations must be weighed by the Arbitrator.

ODJFS's attempts to make Collins' overall work history unacceptable were not warranted based upon the information contained in his performance evaluations. The Union points out Collins' 2003 Performance Evaluation (M. Ex. 3) where his overall performance rating was unsatisfactory; however, Lopez indicated that Collins was doing a great job in catching up his work as outlined in the performance plan. If Collins was doing what Lopez wanted, what more could he do as an employee? If business reasons were non-existent for his 2003 unsatisfactory evaluation, this demonstrated the employer's desire to remove Collins at any cost from the work force.

The Union seeks back pay, benefits, and seniority entitlements.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bears the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (6th Ed., 2003). The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the ODJFS's burden to prove that the Grievant was guilty of wrongdoing. Due to the

seriousness of the matter and the Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of (the Grievant's) guilt. See, J.R. Simple Co. and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After a review of the testimony, exhibits and post hearing arguments of both parties, the grievant is denied. My reasons are as follows:

The employer bears the burden of proof to demonstrate that Collins' removal from his position for violation of ODJFS Rule F2 was for just cause in compliance with CBA Article 24. Rule F2 prohibits false, abusive, inflammatory, or obscene statements or gestures by any employee of ODJFS. A considerable amount of the hearing was devoted to the events surrounding the January 20, 2004 emails between Collins and Douglas, and rightfully so. However, the Arbitrator, as pointed out in the Union's post-hearing brief, is required to weigh the discipline as follows:

> The discipline must be commensurate with the offense and not solely for punishment; it must be for "just cause"; it must follow the principles of progressive discipline; and it must not be disparate in nature. [Brief, 3]

At the hearing the Union argued that Collins was denied procedural protections, in that ODJFS violated his due process rights. I concur that just cause requires procedural protections and if violated by ODJFS the impact could obviate the discipline, even if deserved.

The Union contends that Collins, although charged with a violation of ODJFS Rule F14 (acts of discrimination, insult...), was removed under ODJFS Rule F2 (making false, abusive...), depriving Collins of an opportunity to respond to the charges at the pre-disciplinary. The Union cited *McDaniel v. Princeton City Schools Board of Education* (45 Fed. Appx. 354: 2002 U.S. App. LEXIS 16713) in support of this position. In *McDaniel*, a teacher was provided a pre termination hearing to respond to the following charges: (1) attendance pattern; (2) failure to remain in classrooms; (3) excessive personal call on work time; and (4) neglect of duty.

In *McDaniel*, the United States Court of Appeals for the Sixth Circuit properly affirmed a summary judgment ruling for the Grievant where the Grievant was denied due process prior to termination. *McDaniel,* 45 Fed. Appx. 354 at 359. The Grievant was notified of certain specific charges against her, and a pre-termination hearing was held enabling the Grievant to defend against only those specific charges. Id. At 355. Following the hearing, the School Board terminated the Grievant and cited to the Grievant <u>new</u> reasons for her termination; reasons which were not contained in the original notification. Id. At 356. The School Board argued that the new charges were part of the general category of "neglect of duty". The new charges upon which she was removed included lack of lesson plans, lack of student plans and inappropriately disciplined students. *Id.* Therefore, the Court found the School Board's subsequent dismissal of the Grievant based upon these new additional charges failed to allow the Grievant the opportunity to present evidence on these matters.

As a result, the Employer violated the Grievant's procedural due process rights. *Id.* at 359.

The Union's reliance on *McDaniel* is misplaced. In contrast to *McDaniel*, the reasons for Collins' removal remains the same, and no new additional charges were added that Collins did not have an opportunity to present full evidence surrounding the January 20, 2004 event. Only the charge classification has altered. Collins was removed for a violation of ODJFS Rule F2 violation, "Making false, abusive, inflammatory or obscene statements or gestures," rather than a charge of ODJFS Rule F14: Acts of discrimination, insult, intimidation, or harassment on the basis of race, gender, religion, natural origin, disability, age, veteran status, or sexual orientation." The lesser charge of violation of ODJFS Rule F2 arises out of the exact action/conduct, regarding the original charge of violation of ODJFS Rule F14.

Also unlike *McDaniel*, Collins had an opportunity to respond to all of the conduct that brought him to the pre-disciplinary hearing. All of the objectionable conduct against Collins was fully disclosed to him in his notification prior to the pre-disciplinary hearing of February 10, 2004. The facts surrounding the reasons for the hearing remained unchanged and I conclude that Collins had a full and fair opportunity to address the conduct relied upon by the Employer to implement discipline. To wit, Collins responded fully to the 'charges' that resulted in his removal.

Accepting the premise that Collins was not notified of the ODJFS Rule F2 changes, the Union's procedural argument still does not successfully show a violation of Collins' procedural due process rights based upon Loudermill.

According to *Cleveland Brd. of Educ. v. Loudermill*, the procedural due process of an employee is not violated provided the employee is given the pretermination opportunity to respond at a pre-disciplinary hearing. *Cleveland Brd. of Educ. v. Loudermill*, 470 U.S. 532, 547-48 (1985). The Court held that the hearing need not be elaborate; the employee need only be given notice of the charges and an opportunity to respond to the charges. *Id.* at 545-46. The employee has the opportunity to present reasons either in person, or in writing, as to why the proposed action should not be taken.

In this case, no violation of Collins' procedural due process rights occurred. Collins was provided notice of the charges against him and the conduct upon which those charges occurred. A pre-termination hearing was held to allow Collins the opportunity to present reasons why the proposed discipline should not be taken. Thus, the employer provided Collins all the required procedural protections outlined in *Loudermill*, and no violation of due process is evident in this matter.

In applying the principles of progressive discipline - the underlying foundation is rehabilitation. The theory being, conduct should change or increasingly severe penalties under the theory of progressive discipline will result.

It is well settled that progressive discipline is the cornerstone of the concept of corrective behavior and is the central issue in this case. The employer contends and the facts support the finding that Collins had an unenviable disciplinary record. The Employer argues that Collins had a shared obligation to change behavior consistent with the employer's expectations, work rules and policies, and when the employee refuses or is unable to modify his behavior after the imposition of progressively severe penalties the appropriate and reasonable response of the employer is removal. ODJFS also contends that progressive discipline is the expectation, and that work rule violations and related disciplines are eventually considered cumulative. I concur, in addition, another key element in the system of progressive discipline is the fact that the final incident leading to removal does not have to be a major offense or interrelated to previous infractions. Accordingly, the timing of repeat offenses is critical to determine the next level of discipline.

Furthermore, as ODJFS points out, this is a case of progressive discipline and a classic case when an employee refuses to modify his behavior to meet the expectations of his employer for several years. Collins' record consists of his failure to meet production standards, failure to have sufficient leave to cover absences, failure to call off work, sending rude emails to your supervisor and co-worker and misusing ODJFS's email system. At the hearing, witnesses Barley and Lopez credibly testified that Collins was consistent in blaming others for his failures and misbehaviors. The employer used the following example: "Mr. Douglas (referring to Michael Douglas from the email exchange) impugned on

my integrity and I responded that he needed to judge himself before judging my integrity and professionalism." This statement represents, to this Arbitrator, the state of the record regarding Collins' view of his role as the aggressor.

Finally the Arbitrator finds that imposition of progressive discipline had little impact, if any, on Collins' behavior. A specific example is that this is not the first time he has been disciplined for sending rude emails; in fact, evidence and testimony indicated that Collins was asked by Barley not to call or email Douglas for any reason due to disruption beginning in 2002. The Employer contends, and I concur, that Collins' efforts, if any, did not reinforce his understanding of what was required of him. Collins was solely responsible for bringing Douglas into his fray with the Union not Barley, Lopez or the Union.

The January 20, 2004 email at 11:31 a.m. to Douglas in my opinion is inflammatory and borderline abusive. This email, as well as Collins' other "aggressive" emails, occurred on the employer's nickel as well. It is well accepted that the principles of progressive discipline under Article 24.02 should be followed in most instances. However, the language does not require nor is it intended for absolute adherence. I find that the employer did not act arbitrary or capricious under these facts, nor does any evidence suggest that the employer was punitive in the discipline issued to Collins. As noted by Arbitrator Jonathan Dworkin "...it (discipline) requires the employer to follow principles of progressive discipline. The principles of aggressive discipline allow for leeway. In following them, an employer is not obligated to issue a verbal reprimand for a first offense

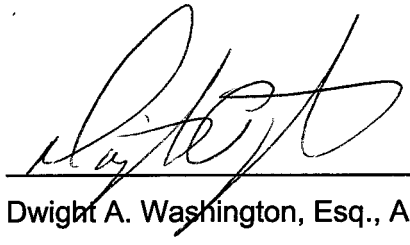
of murder, mayhem, or sabotage." (Arbitrator J. Dworkin, OBES and OCSEA, #G87-998, April 21, 1999, p. 21)

Finally, in applying the principles of mitigation to a long term employee, the quality of service must be analyzed in addition to longevity. Collins engaged in repeated offenses and made no effort to modify his behavior in response to progressive discipline, with the understanding that his 'active' discipline would have a grave impact on future violations. The Union could not argue that Collins as a long-term employee had a good work record without any active discipline. Furthermore, as a long-term employee, Collins was clearly aware that his position required the highest of public trust and confidence. Troublesome to this Arbitrator is Collins' refusal to accept any responsibility for his conduct. Under proper circumstances, Collins would be entitled to mitigation; however, the facts of this case warrant no mitigation.

AWARD

The grievance is denied.

Submitted this 24th day of June 2005:



Dwight A. Washington, Esq., Arbitrator