

#982

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION  
AND CORRECTION

- AND -

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 11

GRIEVANT: BRYAN ROBINSON

GRIEVANCE NO.: 27-13-20061226-2832-01-03

ARBITRATOR'S OPINION AND AWARD  
ARBITRATOR: DAVID M. PINCUS  
DATE: 10-10-07

APPEARANCES

FOR THE EMPLOYER

Deborah Timmerman Cooper  
Mathew Crisler  
George W. Franey  
John Kinkela  
Vickey Justus  
Aimee Hage  
Chris Lambert  
Beth Lewis

Warden  
Administrative Assistant 2  
Commander - Eastland Police Dept.  
Labor Counsel  
Labor Relations Officer  
Intern  
DRC - Labor Relations Officer  
Advocate

FOR THE UNION

Bryan Robinson  
Steve Thornton  
Robert W. Steele, Sr

Grievant  
Chapter Vice President  
Advocate

## INTRODUCTION

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panel between the State of Ohio, Department of Rehabilitation and Correction, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFCSME, hereinafter referred to as the Union, for the period March 1, 2006 to February 28, 2009 (Joint Exhibit 1).

At the Arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing written closings. The parties submitted closings in compliance with guidelines established at the hearing.

## JOINT ISSUE

Was the Grievant, Bryan Robinson, removed for violation of Rule 22 for just cause? If not, what shall the remedy be?

## JOINT STIPULATIONS

1. Grievant was hired by the Department of Rehabilitation and Correction on November 22, 2004.
2. Grievant was removed on December 19, 2006. Grievant had two (2) years of service at the time of his removal.
3. Grievant was removed for violation of SOEC Rule 22 - Falsifying, altering, or removing any document or record.

## CASE HISTORY

Bryan Robinson, the Grievant, was employed as a Correction Officer for approximately two years at the time of his removal. He was removed for violation of Rule 22 - Falsifying, Altering or Removing any document or record.

On August 8, 2006, the Employer was notified by Y. Richardson, Second Shift Captain, that the Grievant might have called-off sick on the same days he had requested education leave.

The Educational Leave Policy provides employees up to five (5) paid hours per week. The Grievant requested leave for every Monday, Tuesday and Wednesday to attend classes (Joint Exhibit 5 D). He attended these classes at the Eastland-Fairfield Career Technical Center in the Police Academy program (Joint Exhibit 6).

After an investigation of surrounding circumstances, the Grievant was removed on December 13, 2006. The Notice of Corrective Disciplinary Action contained the following allegations in support of the removal decision:

XXX

**You are to be fined for the following infractions:**

You misused education leave authorized to attend classes at the Eastland Police Academy. On three documented occasions you used the leave when there were no scheduled classes. Thus you falsified leave forms for education leave however, did not attend classes as there were no classes scheduled for you on that day. Furthermore, you called in and used sick leave for a non-FMLA issue, and then attended a class entitled "Subject Control Techniques", on that same date during your normal work hours.

**This is a violation of the Standards of Employee Conduct Rule:  
Rule 22 - Falsifying altering, or removing any document or record.**

XXX  
(Joint Exhibit 3)

The alleged incidents fall into two categories. The first incident allegedly took place on April 10, 2006. The Grievant purportedly attended a Subject Control Techniques class, while calling in sick (Joint Exhibit 5 F). The remaining three incidents dealt with falsified requests for educational leave. The Employer alleged that on June 26, 2006, July 3, 2006, the Grievant used educational leave for periods of time when no classes were scheduled.

The Grievant challenged the administrative decision by filing a grievance. It contained the following response:

XXX

On 12/19/06 Mr. Robinson was removed from his position as a Correctional Officer for alleged work rule violation 22. Management failed to consider mitigation prior to removing Mr. Robinson.

XXX

The parties were unable to settle the disputed matter in subsequent stages of the grievance procedure. Neither party proposed any procedural nor substantive arbitrability arguments. As such, the grievance is properly before the Arbitrator.

## THE MERITS OF THE CASE

### The Employer's Position

The Employer opined it had just cause to remove the Grievant for falsification. It also vehemently refuted the Union's procedural defect claims.

The Employer asserted it met all contractual notice requirements; Sections 24.05 and 24.06 were not violated. Section 24.05 deals with pre-disciplinary notice requirements. The Notice of Pre-Disciplinary Hearing (Joint Exhibit 4 F) was provided to the Grievant and the Union prior to the hearing. It also specified the possible level of discipline and the reasons justifying the contemplated discipline.

The Union's argument is further deflated because of timeliness defects. It first raised the notion that the pre-disciplinary notice was not sufficient at the Arbitration hearing. As such, this issue should be rendered moot by the Arbitrator. The Union had ample opportunity to raise the issue at the pre-disciplinary and/or the Step 3 hearing (Joint Exhibit 2 B).

At the Step 3 hearing, the Union only mentioned that the pre-discipline hearing notice only identified "four (4) dates of incident." Since the Union failed to raise this procedural issue at earlier stages of the grievance procedure, it should not be permitted to raise this issue at the arbitration stage of the process.

When questioned about incidents on particular days, the Grievant was able to provide specific responses to specific questions. Appropriate defenses to the various charges were provided without any confusion surrounding the incidents in question.

Similar arguments were raised in response to the defective removal order argument. The Employer complied with contractual requirements when it notified the Union and the Grievant in writing that a final decision had been made to impose discipline. In fact, the removal order establishes reasons in support for removal by specifying exactly the same language contained in the pre-disciplinary notice. In terms of content, the Union and Grievant were provided with sufficient information to defend and process the grievance through various stages of the grievance procedure. The absence of dates on the removal order in no way caused representation problems. Nothing in the record suggested that dates and related incidents were changed during the grievance process.

Granted, the removal order contained two forms of discipline: removal and fine. The Grievant, however, clearly understood that he was being removed and the reasons in support of removal. If any confusion existed, it was quashed when Warden Timmerman-Cooper read the removal order to the Grievant. He was then escorted to the Human Resources Department for out-processing. The Grievant never attempted to return to work which further discounted the Union's confusion argument.

The Grievant was properly removed when he falsified a request for sick leave on a date he was not sick, and by falsifying requests for educational leave when classes were not scheduled.

On April 10 the Grievant used eight (8) hours of sick leave. Unfortunately, he spent part of his time in an education class called a Subject Control Techniques class. The Grievant called off work at 11:05 a.m. It, therefore, appeared the Grievant injured his leg at some earlier portion of the class, and continued with the class. He must not have been injured seriously, if at all, because he was able to continue with the class.

The Union relied on alleged statements made by Dennis Palmentera, the instructor on the day in question. His statement failed to support the Grievant's claim because it was at best ambiguous. George Franey, Commander, further weakened the Union's charge. He testified that normal injury protocols were not followed; indicating that an injury never took place.

The Grievant clearly falsified requests for educational leave covering June 3 and June 26, 2006. On both of these occasions, the Grievant was not scheduled for classes (Joint Exhibit 5 M) but did submit educational leave requests.

The Grievant changed his version of events, and his justifications dealing with the educational leave charges. These various defenses eroded the Grievant's credibility and provided support for removal.

### The Union's Position

The Union claimed the Employer did not have just cause to remove the Grievant. This conclusion is based on a series of notice related procedural errors, unfair investigation claims and excessive punishment without considering any mitigating circumstances.

The Union was unable to provide a proper defense because of notice violations. Section 24.05 was violated because the pre-disciplinary hearing notice was insufficient in terms of specificity regarding the dates in dispute. As such, it became virtually impossible to respond or fashion an adequate defense. A similar defect concerned a Section 24.06 violation dealing with lack of specificity regarding the removal order. Here, the Employer failed to specify the dates in dispute. Also, the Employer confused the Union regarding the nature of the discipline imposed. Both removal and fine were designated as the appropriate outcomes.

Mathew Crisler, the investigator, conducted an unfair investigation which impacted the Grievant's due process rights. He chose to investigate the education leave charges without focusing any attention on the FMLA dates. Unlike the hearing officer who confirmed the Grievant's injury claim by speaking to Palmentaro, Mathew Crisler, the investigator minimized this portion of the record.



Further due process violations were engaged in by Warden Timmerman-Cooper. She gave the record a cursory review prior to imposing the administrative decision.

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Educational Leave Policy (Joint Exhibit 6). This notice breach critically damaged the Employer's case in chief. It supported the Grievant's claim that he never intentionally violated the policy. He merely misunderstood how he should have properly applied his education leave requests.

The disciplinary penalty imposed was used solely for punishment. Clearly, the imposed removal was unreasonable and not commensurate with the offense. The Employer's Standards of Conduct provides a range of potential disciplinary outcomes for a Rule 22 violation. If any form of penalty is supported by the record, then a less severe penalty would seem more appropriate. This outcome is especially true when one considers the Grievant's clean prior disciplinary record.

#### **THE ARBITRATOR'S OPINION AND AWARD**

From the evidence and testimony adduced at the hearing, a clear and impartial review of the record including pertinent contract provisions, and the parties' written closing statements, it is this Arbitrator's opinion that the Employer had just cause to remove the Grievant for falsification.

Every Correction Officer is held to a higher standard regarding certain types of misconduct. When an employee is found to have falsified a series of request forms to receive compensation for which he is not entitled, this misconduct is equivalent to "theft." A form of misconduct engaged in by a segment of the facility's incarcerated population. This misconduct is also viewed as egregious based on the Grievant's length of service which serves as an aggravating circumstance justifying removal. One needs to recognize that these proven infractions were initiated by the Grievant shortly after completing his probationary period. There is no telling what additional forms of misconduct would have been engaged in by the Grievant if the disputed incidents had not surfaced and been dealt with in a fair manner. Neither the general public, the Employer, nor the Union should expect an alternative outcome.

None of the notice defects were proven by the Union. Normally, Sections 24.05 and 24.06 claims are raised by the Union as an affirmative defense when the Employer intentionally specifies ambiguous charges making the Union's attempt to defend the Grievant virtually impossible. Here, the dates in question and related misconduct were raised during the course of the investigatory interview. It should be noted that Crisler's report was transmitted to the Union. Again, the dates of misconduct were contained in the report. Further, specific disclosure was provided at the pre-disciplinary hearing and subsequent stages of the grievance procedure.

Notice issues regarding the Educational Leave Policy (Joint Exhibit 6) were also properly refuted. Even if the Employer was unable to establish that the Grievant received this policy, other portions of the record transcend this issue. The Grievant should have known he was only permitted to use educational leave to attend class. The Request for Educational Leave form reflects this requirement; each time the Grievant signed the Request for Educational Leave forms (Joint Exhibits 5 (E) and 5 (J)). By signing these documents he acknowledged release time "to attend the below listed course(s). I understand (in) order for this request to be approved, the release time may not exceed five (5) hours per week.....(course schedule must be attached)" (Joint Exhibit 5 (D)). Clearer notice in terms of requirements are unnecessary when evaluating these form entries. No reasonable person could read these requirements without understanding that paid educational release time would be granted to those employees attending scheduled classes. Outside individual or group activities involving physical training or "homework" are clearly outside the scope of this policy.

The error regarding the fine entry on the removal order did not cause any due process defect. Warden Timmerman-Cooper advised the Grievant of her decision. He was clearly informed that he was to be removed. The Grievant was then escorted to out-processing. The Grievant, moreover, never made any attempt to return to work. Within these circumstances any "confusion" defense appears ludicrous.

The evidence and testimony clearly indicate that the Grievant defrauded the Employer on April 10, 2006, June 26, 2006 and July 3, 2006. On each of these dates, the Grievant falsified his leave requests and engaged in multiple forms of misconduct.

On April 10, 2006, the Grievant used eight (8) hours of sick leave. As such, the Grievant was in class during the timeframe he used sick leave. His participation in the class was incompatible with his use of sick leave when one surmises he called off at 11:05 a.m. (Joint Exhibit F).

There is also a significant question regarding the Grievant's injury. The Union merely provided uncorroborated claims. Palmentara was never called as a witness to corroborate the Grievant's injury. Reliance on a claim contained in a Hearing Officer's report falls short of providing the Arbitrator with any probative facts.

The Union was also unable to rebut testimony provided by Commander Franey. He acknowledged a procedure exists for documenting injuries during class time. He never received any reports documenting the Grievant's injury.

Records submitted at the hearing regarding attendance and class schedules clearly establish that the Grievant falsified his Request for Educational Leave forms for June 26, 2006 and July 3, 2006. On both dates the Grievant filed for educational leave, but classes were not scheduled. These facts are not in dispute.

The Grievant's credibility was terribly minimized based on the differing justifications he proposed for his misconduct. During the investigatory interview he acknowledged it was "stupid" of him not to come to work on the days in question (Joint Exhibit 9A). At the pre-disciplinary hearing his justification changed. The Grievant maintained he was engaged in "group physical training" which he deemed as required "assigned" homework. This justification runs counter to the educational leave policy. Commander Franey, moreover, never sanctioned this activity as formal classwork assignments. If he merely misunderstood Commander Franey's instructions, other peers should have testified on his behalf. The Union failed to produce any other peers with similar misunderstandings.

**AWARD**

The grievance is entirely denied. The Employer had just cause to remove the Grievant for several Rule 22 violations.

October 10, 2007

Beachwood, Ohio

Dr. David M. Pincus  
Arbitrator