

**Ohio Civil Service Employees Association, AFSCME Local No. 11, AFL-CIO, and
State of Ohio, Office of the Attorney General**

Grievance Number: 13-51

**Opinion and Award
Arbitrator Sarah R. Cole**

Appearances

#12

For the Union

Patricia Howell, OCSEA Staff Representative
Amber VanDine, Vice President Chapter 2580

For the Employer

Kathleen Madden, Director of Human Resources
Matthew Karam, Assistant Attorney General
James Rosenthal, Assistant Attorney General

Witness for the Union: Deena Gray

RECEIVED / REVIEWED
JUL 30 2014
OCSEA - OFFICE OF
GENERAL COUNSEL

Background

James Ross, the grievant, began working at the Ohio Attorney General's office on June 25, 2007, as a classified bargaining unit employee. On February 28, 2010, Ross was promoted to the unclassified position of Administrative Staff from the bargaining unit position of Clerk 2. On April 17, 2013, the Ohio Attorney General (Employer) alleges that Ross sent an e-mail to his supervisor which contained threatening remarks. As a result, the Employer placed Ross on administrative leave, effective April 18, 2013. Following an investigation, the Attorney General's office determined that Ross violated the Attorney General Code of Conduct. Kathleen Madden, Director of Human Resources, met with Ross on May 14, 2013 and presented him with a letter. The letter stated that the Attorney General intended to revoke his unclassified position and that, due to his misconduct, he forfeited his fall back rights to his classified position. The letter further stated that the Employer would not terminate Ross if he agreed to several

conditions including: (1) serving a 15 day suspension from May 13 – 31, 2013; (2) accepting a demotion to the position of Clerk 2; (3) serving a 180 day probationary period as a Clerk 2 starting June 3, 2013; and (4) executing a last chance agreement that would be effective for a two-year period. The Employer gave Ross until the end of business on the 14th to accept or reject the offer.

Following this meeting, Ross retained an attorney, Diane Einstein. At Einstein's request, the Employer granted Ross additional time to consider the terms initially conveyed to him on May 14, 2013. Ross asked that the probationary period language be removed. The Employer agreed. On May 16, 2013, Ross's attorney agreed that Ross would serve the suspension, accept the demotion and sign the last chance agreement (LCA). Madden sent Ross's attorney the LCA and Ross's attorney forwarded the LCA to Ross. Ross did not sign the LCA.

Ross returned to work on June 3, 2013, in the classified Clerk 2 position. The Employer deducted union dues from his paycheck. When Madden realized that Ross had not signed the LCA, she sent an e-mail to Ross's attorney, copying Ross, attaching the LCA and requesting that Ross sign the LCA. Ross refused to sign the LCA, however, because he was concerned that the word "misconduct" as used in the LCA was not properly defined. Despite clarifications regarding the language, Ross continued to refuse to sign the LCA. Madden gave him the weekend and all day July 1, 2013 to sign the agreement. When Ross failed to sign the LCA by the end of business on July 1, 2013, the Employer removed him from his employment.

The Union filed a grievance on Ross's behalf on July 3, 2013, claiming that his removal was improper. The Employer countered that Ross's removal was not grievable because Ross was not a bargaining unit member when he agreed to sign the LCA, be demoted to the Clerk 2 position, and serve a 15 day suspension.

Following exhaustion of the grievance process, this matter came to hearing in front of Arbitrator Sarah R. Cole on February 6, 2014. Following the hearing, which focused solely on whether Ross was a member of the union at the time of the hearing, Arbitrator Cole held that Ross was a member of the union because, when Ross failed to sign the last chance agreement, the Employer reinstated him to the Clerk 2 position, which placed him back into the bargaining agreement. While the Employer had a right to refuse to reinstate Ross if Ross failed to sign the last chance agreement, it chose not to invoke that right. As Arbitrator Cole stated in her opinion, “[b]y reinstating Ross, the Employer waived its right to demand the occurrence of the condition (the signing of the LCA) before tendering its performance. Ross was reinstated to a classified position on June 3, 2013, became a member of the union and began paying union dues. As of the date of Ross’s reinstatement, then, Ross is a member of the union.”

Following this decision on arbitrability, the parties agreed to arbitrate whether Ross’s termination was for just cause. Between the first arbitration and second, however, Ross died. The parties agreed to proceed with the arbitration over whether Ross’s termination was for just cause and that hearing took place on July 17, 2014. At the hearing, the Employer presented the same documents it had submitted during the previous hearing. The Employer and Union also presented agreed upon stipulations. The Employer did not submit any additional evidence. The Employer contends that it did not have to follow the procedures outlined in the Agreement because it did not believe that Ross was a member of the Union at the time of his termination. The Union presented the testimony of one witness, Deena Gray, who was the Chapter President of Ross’s bargaining unit at the time of his termination. The Union contends that because Ross was a member of the Union at the time of his termination, the Employer was obligated to follow the procedures outlined in the collective bargaining agreement that govern the discharge of a

union member. Because those procedures, including sending a notice of hearing to the Union, offering the Union the opportunity to refute, rebut or bring evidence to the Employer about Ross's termination or providing notice to the Union about Ross's termination, were not followed, Ross's termination was not for just cause and he should be reinstated to the Clerk 2 position, given back pay and provided retroactive life insurance from July 1, 2013 to June 26, 2014, the date of his death. In addition, the Union asserts, he should have medical bills during this same time period paid by his employer and he should receive his leave accruals, which are 48 hours of personal leave, 120 hours of sick leave and 160 hours of vacation leave.

Opinion

James Ross, the grievant, was a member of the bargaining unit at the time of his reinstatement on June 3, 2013 as well as at the time of his termination on July 1, 2013. Under the collective bargaining agreement, an employee may not be terminated in the absence of just cause. In addition, prior to the termination of a bargaining unit member, the Employer must send the Union a notice of hearing to determine misconduct, afford the Union the opportunity to confront the evidence against the bargaining unit member and otherwise provide representation to the bargaining unit member during the disciplinary process. The Employer argues that it did not have to provide any process to Ross prior to terminating him because he was not a union member at the time of his termination.

The Employer's belief that Ross was not a member of the bargaining unit at the time of his termination (Employer Ex. 13, letter from Employer to Ross identifying Ross as an unclassified employee at the time of his termination on July 1, 2013), and subsequent unwillingness to provide Ross the process the Agreement outlined prior to the implementation of

discipline, is a violation of the Agreement. That the Employer believed in good faith that Ross was not a member of the Union does not justify breaching the parties' Agreement.

Ross was a bargaining unit member at the time of his termination and therefore entitled to representation throughout the termination process. The Employer chose to ignore the possibility that Ross was a member of the bargaining unit, although, as discussed in my previous opinion, continued to treat Ross as if he were a member of the bargaining unit. Because I find that Ross was a member of the bargaining unit on June 3, 2013 until the time of his termination, he should have been entitled to the process the Agreement outlines before his termination was finalized. Thus, I find that Ross should be reinstated to his Clerk 2 position from July 1, 2013 until his death on June 26, 2014. He is entitled to back pay for that time period at the Clerk 2 rate and is entitled to have his leave balances paid out at his Clerk 2 rate. No evidence was presented regarding insurance costs, medical bills or any other benefits. Thus, additional awards of Ross's medical bills and life insurance are not warranted.

____ Sarah R. Cole _____
Sarah Rudolph Cole, Arbitrator

July 30, 2014