ARBITRATION DECISION NO.:
54

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Transportation

DATE OF ARBITRATION:
October 14, 1987

DATE OF DECISION:
October 29, 1987

GRIEVANT:
Mark VanSwearingen

OCB GRIEVANCE NO.:
G-87-0188

ARBITRATOR:
John E. Drotning

FOR THE UNION:
Daniel Smith

FOR THE EMPLOYER:
Rachel L. Livengood

KEY WORDS:
Discharge
Just Cause
Off Duty Conduct

ARTICLES:
Article 24 - Discipline
§24.01-Standard

FACTS:

The Grievant was an Administrative Assistant with the Ohio Department of Transportation. The Grievant had been employed by the Agency for approximately 27 years with no disciplinary problems prior to his discharge. Grievant was discharged subsequent to his conviction for submitting approximately $1,100.00 in false claims to his health care plan. This conviction, a fourth degree felony, carried with it a sentence of a one-year probation period plus restitution.

ARBITRATOR'S OPINION:

Arbitrators have traditionally held that an Employer cannot discipline employees for off-duty conduct unless some connection or "nexus" exists between the conduct and the Employer's business. In this case, the Arbitrator held that there was no nexus. The Argument that there is a connection between the crime of falsifying insurance claims and the Grievant's work duties is nebulous. A conviction for falsifying those claims is simply not related to his work duties. Grievant was still capable of carrying out his required work duties. The Arbitrator held that the Grievant committed a crime but he had "paid" for that crime by serving his probationary sentence and by making restitution to the health care plan. For these reasons, Grievant was reinstated without back pay.

NOTE: The Arbitrator held the standard to be used for discharge cases was just cause, not the language in Section 124.34 of the Ohio Revised Code.

AWARD:

Grievance is sustained. Grievant is to be reinstated without back pay.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF TRANSPORTATION

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LOCAL 11, AFSCME

ARBITRATION AWARD

GRIEVANCE NUMBER:
G-87-0188 (21-86-CO-A)

GRIEVANT:
Mark VanSwearingen

ARBITRATOR:
John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on 10/14/87 at 37 West Broad Street,

Columbus, Ohio. Appearing for the Union were: Daniel Smith, Esq. and the grievant, Mark VanSwearingen. Appearing for the Employer were: Rachel L. Livengood, Michael Duco, and John T. Paxton.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 10/14/87. The discussion and award are based solely on the record described above.

II. ISSUE

The parties jointly agreed to the issue as follows:

Was the grievant, Mark VanSwearingen, terminated from employment with the Ohio Department of Transportation for "Just Cause"? If not, what shall the remedy be?

III. STIPULATIONS

The parties stipulated to the following facts:

1. Mr. VanSwearingen was employed with the Ohio Department of Transportation for approximately 27 years.
2. Mr. VanSwearingen was classified as an Administrative Assistant I at the time of his termination, assigned to the Chemical Section of the Test Lab.
3. Mr. Van Swearingen had no discipline prior to his termination.
4. The pre-disciplinary meeting was properly conducted.
5. The State of Ohio provides a contributory plan which is funded by the State and employee contributions.
6. Mr. VanSwearingen was a participant in the State Health Plan.
7. Mr. VanSwearingen submitted approximately $1,100.00 in false claims to the State Health Care plan.

The parties also jointly submitted the exhibits marked Joint Exhibits #1 through #14.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. EMPLOYER

1. TESTIMONY AND EVIDENCE

Mr. John Paxton, Engineer of Tests and Chief Administrator of the Bureau of Testing, indicated that various sections in the Department carry out various functions. Paxton said that VanSwearingen is assigned to the chemical section and he supervised Van Swearingen's supervisor, Dr. Parrott and he also supervised the grievant when Dr. Parrott was absent.

Paxton went on to say that VanSwearingen is the Administrative Assistant to the Chemist in charge of the chemical section. He pointed out that Joint Exhibit #7 identifies the work duties of VanSwearingen who prepares reports based on the test information put on a work sheet by the testers.

Paxton went on to say that if the test on a particular material fails, the District is notified about the failure and such a failure can affect the supplier because it must be removed.

VanSwearingen, noted Paxton, dealt with contractors and suppliers because they want to know

the results of tests of their materials.

Paxton testified that he was responsible for the final results. Paxton testified that VanSwearingen could alter test results and that the report submitted could be different than the work sheet. In such a case, Paxton noted that the Employer would benefit because he would not lose time and it doesn't have to find another material supplier. Paxton then went on to say what would happen if a poor material were identified.

Paxton testified that VanSwearingen logged in the samples but he did not run tests and the samples are tested in the order that they are received and scheduling can affect the contractor because if it drags, the contractor suffers. Paxton testified that VanSwearingen could alter testing schedules.

Joint Exhibit #11, said Paxton, are letters of recommendation and Chemi-trol, DeSanitas Coating, Sylvan Feit, Potters Industries, and Oglesby Construction, Inc. are all suppliers to the Department of Transportation.

Joint Exhibit #9, continued Paxton, is posted at the laboratory and also sent to section heads and employees may also receive copies.

Paxton said that no other employees guilty of felonies were fired.

On redirect, Paxton testified that reports are responsibilities of the employees and that if tests were altered, it could affect his career.

The Employer also cross examined Mark VanSwearingen who testified that he assigned numbers to the tests.

VanSwearingen said that his theft, as far as he knew, could not have increased insurance rates for other employees.

2. ARGUMENT

The Employer argues that it had just cause to terminate Mark VanSwearingen. The work rules were posted and the felony conviction is the basis for removal. That rule, argues the Employer, is reasonable. It cites Employer Exhibit #3 which is a decision by the Court of Common Pleas in Franklin County upholding a removal of an employee who was convicted of five felonies involving sexual contact with minor boys (see Employer Exhibit #3).

The Employer also argues that there is a connection between VanSwearingen's misdeed and his work duties, but even if there were none, there is still basis for a termination. The Employer argues that the employees pay a portion of their hospitalization and the Employer is funded by the State of Ohio which receives its money through tax dollars. VanSwearingen's false filing of insurance claims in the amount of about $1100 could have increased the rates for other employees and it cites Whitley P. McCoy in Stockham Pipe Fitting case to support its position that Mark VanSwearingen's discharge be upheld.

B. UNION

1. TESTIMONY AND EVIDENCE

Mr. Mark VanSwearingen testified that he was convicted on 9/7/86 of a fourth degree felony over false claims to Blue Shield. He stated that he served no time but was put on probation for two years which was reduced to one year. VanSwearingen indicated that he made restitution through his attorney to Blue Shield.

VanSwearingen testified that he had been employed by the Department of Transportation for twenty-seven (27) years and that he was forty-seven years old with no prior convictions.

VanSwearingen went on to say that the impact of the conviction on his family was devastating. He said he, himself, was humiliated and the conviction has not made life easy for him and he is

well aware of his wrong doing.

VanSwearingen testified that Paxton's testimony on testing was accurate. He did not, however, that the worksheets at one time had been reviewed by Parrott, but that eventually he and one other chemist reviewed the worksheets. He noted that he always informed Dr. Parrott of any tests which failed.

VanSwearingen said that he never accepted a bribe from a supplier nor did he ever alter a report.

The Union also cross examined Mr. Paxton who testified that he has worked at the lab for one year more than VanSwearingen; namely, twenty-eight years.

Paxton testified that as far as he knew, VanSwearingen did not perform tests.

Paxton testified that he can check documents for alterations.

He stated that he was not aware of VanSwearingen altering any worksheets.

Paxton testified that Parrott would know of sample failures and he would definitely be aware of such problems which ran in the range of 3-4%.

Paxton testified that as far as he knew, VanSwearingen never re-arranged schedules and he noted that he had no knowledge of VanSwearingen ever accepting a bribe. Paxton testified that VanSwearingen was a good employee for twenty-seven years.

2. ARGUMENT

The Union argues that VanSwearingen has paid his price. He has been convicted and has repaid Blue Shield. There is no reason to hurt him again following this conviction.

The Union argues that there is no just for discipline. Moreover, the Union argues that there must be a nexus between the crime committed and the work duties of the grievant. In this case, there are none, argues the Union. While VanSwearingen did commit a felony, notes the Association, there is absolutely no relationship between that felony and his work duties.

The Collective Bargaining standard for discharge is just cause and not the language in Section 124.34 of the Ohio Revised Code.

Moreover, the Union argues that Employer Exhibit #3 is irrelevant because in that case, the appellee's discharge was upheld as a result of a conviction of five felonies involving sexual contact with minor boys. Moreover, Employer Exhibit #4, argues the Association, which involved the McDonnell Douglas Corporation, is not the basis for upholding the discharge because there could be a whole series of other cases which would have been in opposition to that arbitration award.

In this case, a suspension is far more sensible than a removal and that is the remedy asked for by the Union.

V. DISCUSSION AND AWARD

At the outset, the Arbitrator heard requests by the Association about the discovery of pre-disciplinary recommendations. There was no significant testimony or evidence submitted on that issue with the exception of Union Exhibit #1 which is an arbitration award dealing with the Union's request for pre-disciplinary reports which was taped. Presumably, there was testimony and evidence submitted at that hearing on the question of pre-disciplinary reports and the procedural issue was briefed. No evidence on such reports was entered in this case and, therefore, the Arbitrator can render no decision with respect to discovery of pre-disciplinary recommendations. Moreover, the issue as agreed to by both sides does not raise that question; rather, the parties asked:

"Whether VanSwearingen's termination was for just cause?"

The testimony of Paxton on cross was that VanSwearingen was a good employee for twenty-seven years; he had never altered test schedules nor had he altered the reports based on the worksheets generated by the chemists carrying out tests. The evidence indicates there is no prior discipline in VanSwearingen's records. On these grounds, what is the basis for terminating a twenty-seven year employee?

The argument that there is a connection between the crime of falsifying Blue Shield insurance claims and his work duties is nebulous. Moreover, the Court of Common Pleas decision submitted by the Employer to support the discharge dealt with an employee who had been convicted of five felonies involving sexual contact with minor boys and VanSwearingen's single felony conviction dealt with falsification of insurance claims to the tune of $1000.

This issue is significantly different than the sexual contact issue before Arbitrator Klein and her decision to support the removal of a grievant was based in part on the fact that the grievant, who was employed by the Department of Rehabilitation and Correction, was unable to carry out his duties because he could not carry a firearm. Thus, there was a connection between the employee's conviction, or at least the result of the conviction, which made it impossible for the grievant to carry a firearm and therefore he was unable to adequately carry out his duties. That is not the situation in this case. VanSwearingen was capable of carrying out his duties; the testimony indicates that he had not been disciplined for any wrongdoing in twenty-seven years; and, his conviction for falsifying insurance claims is simply not related to his work duties.

VanSwearingen committed a crime and he paid for that crime by probation and also by making restitution to Blue Shield. In addition, there is significant emotional trauma to this individual as a result of that conviction and he has been unemployed by the Department of Transportation since some time in 1986. VanSwearingen's prior work record, the lack of comparability between the issue before Arbitrator Klein and this Arbitrator, VanSwearingen's emotional suffering, and that he paid for his felony conviction support the Union's position.

Therefore, the appropriate remedy in this case is to reinstate the grievant without back pay.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
October 29, 1987