

ARBITRATION DECISION NO.:

64

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation,
District 5 Garage

DATE OF ARBITRATION:

November 12, 1987

DATE OF DECISION:

December 2, 1987

GRIEVANT:

Gary Reinbold

OCB GRIEVANCE NO.:

G-87-0250

ARBITRATOR:

Jonathan Dworkin

FOR THE UNION:

John T. Porter

FOR THE EMPLOYER:

Tim D. Wagner

KEY WORDS:

Just Cause
Insubordination
Mitigation
Mental Disability

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline

FACTS:

The grievance protested the removal of a custodial worker employed at ODOT. During the four years of the Grievant's employment Grievant received a verbal reprimand, two written reprimands,

two three-day suspensions, a five-day suspension, and a ten-day suspension, all for incidents of insubordination and aggression towards his fellow employees. The employer regarded him as incorrigible, a threat to safety, and as "poisonous" to the workplace. Grievant was subsequently discharged and this grievance was filed.

During the course of the hearing, it became apparent that the Employer was sympathetic to Grievant and would have preferred not to discharge Grievant had there been another alternative. A resolution was finally agreed upon whereby grievant was reinstated, but not to active employment. Grievant was placed on an indefinite leave of absence without pay, not to exceed one year from the date of the award. During this time it was hoped that Grievant would receive psychiatric and/or psychological treatment for Grievant's behavioral problems. Assuming that Grievant did, Grievant could submit to ODOT documentation that Grievant is sufficiently rehabilitated and able to function appropriately in the workplace. If Grievant produces such documentation, Grievant shall be placed into active pay status provided ODOT "accepts" the documentation. ODOT retains the right to challenge Grievant's bid to return to active employment. In the event Grievant is reinstated to active status Grievant will continue on "last chance" status for one year.

AWARD:

Grievant is hereby reinstated, but not to active employment. He shall serve an indefinite leave of absence without pay, not to exceed one year from the date of this award.

TEXT OF THE OPINION:

CONTRACTUAL GRIEVANCE PROCEEDINGS

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Ohio Department of Transportation
District 5 Garage
Newark, Ohio

-and-

OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
OCSEA/AFSCME, AFL-CIO
Local Union 11
State Unit 6

Grievance No.:
G87-0250

Hearing Date
November 12, 1987

Decision Issued
December 2, 1987

Grievant:
Gary Reinbold

REPRESENTING
THE STATE OF OHIO

Tim D. Wagner
OCB Arbitration Advocate

REPRESENTING OCSEA

John T. Porter
Association General Counsel

SUMMARY ARBITRATION AWARD

BACKGROUND

The grievance protests the removal of a custodial worker employed at ODOT's District 5 garage in Newark, Ohio. The reason for the action was that, despite numerous warnings and a significant progression of discipline, Grievant persistently behaved in a way which challenged supervisory authority and offended coworkers. His conduct was resistant to repeated corrective counseling by Supervision and it alienated Grievant's coworkers as well as managers and supervisors.

On November 5, 1986 Grievant provoked a coworker in an especially coarse, loathsome manner. Asked why, Grievant allegedly responded, "I like to make you mad. I think it's fun." When the incident was reported, Management was at the end of its patience. In four years, Grievant had received a verbal reprimand, two written reprimands, two three-day suspensions, a five-day suspension, and a ten-day suspension, all for incidents of insubordination and aggression towards his fellow employees. The Employer regarded him as incorrigible, a threat to safety, and "poisonous" to the workplace. Grievant was discharged on December 5, 1986.

The foregoing facts formed the substance of the State's case for upholding the disciplinary action. Standing alone, they are compelling. The union agrees, it does not argue that a person carrying on as Grievant did should be tolerated in the workplace. Nevertheless, the Union brought forth strongly mitigating factors. Grievant is retarded and suffers from an obvious personality disorder. The union called attention to the fact that his behavior improved markedly during a period of time when he was undergoing intensive counseling. It began to deteriorate when the counseling ended.

During the course of the hearing, it became apparent that the Employer is sympathetic to Grievant and would have preferred not to discharge him had there been a viable alternative. At that point, the hearing was recessed and the Representatives of the parties, together with the Arbitrator, exhaustively searched for a way to resolve this dispute. Finally, a resolution was tentatively agreed upon with the proviso that it be set forth as an arbitral award. The following award incorporates the resolution and, although it is summarily stated, it is intended to be as conclusive of the issues in this case as any other award issued by an arbitrator in accordance with the terms and limitation of the Collective Bargaining Agreement.

AWARD

1. Grievant is hereby reinstated, but not to active employment. He shall serve an indefinite leave of absence without pay, not to exceed one year from the date of this award.
2. Grievant's reinstatement will be without back pay or benefits. The Employee will retain his full seniority, but will not be permitted to exercise it for bidding or otherwise, except in accordance with the terms of this award.
3. It is hoped and anticipated that Grievant will obtain psychiatric and/or psychological treatment for his behavioral problems during the term of his unpaid leave. Assuming he does, he may submit to the Employer reasonably satisfactory psychological documentation demonstrating that he is rehabilitated and able to function appropriately in the workplace, particularly in his relationships with fellow employees and obedience to work rules and supervisory directives. If Grievant produces such documentation, he shall be placed in active pay status at the step he would have attained had he been employed throughout his period of unpaid leave. In no event shall such documentation be presented earlier than six months from the date of this award. It is recognized that Grievant's treatment will have to be intensive and continue for a reasonably long period of time before his behavioral difficulties could possibly be remedied. Therefore, nothing in this award shall authorize or require reinstatement to active employment before at least six months have elapsed.
4. The Ohio Department of Transportation will not necessarily be bound by any documentation Grievant may submit. The Employer will have the right to challenge Grievant's bid to return to active employment and will be entitled to require Grievant to submit to a fitness-for-duty examination conducted by a physician or psychologist chosen and paid for by the State.
5. In the event that Grievant is reinstated to active pay, he will continue on "last chance" status for one year. As used in this award, "last chance" shall mean that violations of work rules, insubordination, safety violations, and behavioral misconduct can result in Grievant's immediate removal notwithstanding the progressive discipline requirements of the Agreement.
6. During Grievant's unpaid leave, the State shall not be liable for contributions to the Public Employees Retirement System.
7. During his period of unpaid leave, Grievant may elect to participate in the health and major medical benefit plans offered to State employees. However, the State will not be liable for payments on behalf of Grievant. The Employee's share of the cost of coverage and the State's share will be borne entirely by Grievant.
8. If Grievant fails to seek treatment or fails to provide the documentation for reinstatement to active duty within a year from the date of this award, he shall have the options to seek disability retirement or submit his voluntary resignation. A voluntary resignation, if submitted, shall be retroactive to the date of Grievant's removal and shall be recorded in lieu of the removal. Should Grievant decline both options, the grievance will stand denied and the removal action will be upheld.
9. The Arbitrator retains limited jurisdiction of this dispute for two purposes:
 - A) In the event that Grievant submits documentation deemed insufficient by the Department and his re-employment bid is denied, the issue of whether or not the Department's decision is reasonable, non-arbitrary, and non-discriminatory may be referred to the Arbitrator.
 - B) In the event that the Department refers Grievant for a fitness-for-duty examination and there is disagreement between the report generated by the State and the documentation submitted by Grievant, the conflict may be referred to the Arbitrator for resolution.

Either party may invoke the retained jurisdiction by notifying the Arbitrator and the other party.

Decision Issued:
December 2, 1987

Jonathan Dworkin, Arbitrator