ARBITRATION DECISION NO.:
195

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

EMPLOYER:
Department of Youth Services

DATE OF ARBITRATION:
July 10, 1989

DATE OF DECISION:
August 11, 1989

GRIEVANT:
Robert Mayhew

OCB GRIEVANCE NO.:
35-03-(88-10-21)-0083-01-03

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Tim Miller

FOR THE EMPLOYER:
Deneen Donaugh

KEY WORDS:
Progressive Discipline
-Pre-layoff Discipline of Reinstated Employee
Effect of Failure to Investigate
Standard of Proof
Intoxication

ARTICLES:
Article 18 - Layoffs
§18.01-Layoffs
§18.02-Guidelines
§18.08-Recall
§18.09-Re-employment
Article 24 - Discipline
§24.01-Standard

§24.02-Progressive Discipline
§24.06-Prior Disciplinary Actions

FACTS:

The grievant was laid off by the Department of Mental Health. While working for the Department of Mental Health he had been subject to a ten day suspension and a last chance agreement.

After being laid off, he was rehired pursuant to Article 18 of the contract by the Department of Youth Services (DYS). One morning, around one month after his new appointment became effective, the grievant traveled to the DYS training center at Columbus in a state vehicle with another employee.

The other employee was driving. She testified that the grievant smelled of alcohol. The grievant asked the driver to stop at a convenience store since he had missed his breakfast. The grievant returned with a bag of food which he proceeded to eat. At some point, he took out a smaller bag with a bottle of amber colored liquid wrapped in it. The grievant drank the liquid and then threw the bottle from the car as they approached the training center.

The trainer observed the grievant when he got to the training center. She testified that she knew the grievant "was on something because of his eyes." She also said that he talked and moved slowly, he made an off-the-wall comment about his "vice-president," and he smelled of alcohol. She stated that in her professional opinion, the grievant was intoxicated. The trainer has a Bachelor's degree and is a licensed professional counselor. She has all the credits toward a drug/alcohol certification but has not been certified and has never worked in that capacity.

The driver did not immediately report the incident. That evening she was asked by the trainer if she had smelled alcohol on the grievant's breath. Four days later, the driver was asked and did write a statement about this trip. The trainer also did not report the incident immediately. She probably notified the administration that evening, but the exact time remained unclear.

A training officer present in the class room testified that grievant smelled of alcohol and was slow and deliberate in his speech. The training officer concluded that the grievant was "under the influence of something."

The grievant testified that he had drunk a great deal the previous evening and had risen extremely early to get to work on time to leave for the training center. He said that the liquid in the bottle was Vernor's, an amber colored soda pop, not beer. He said that the comment he had made had been an attempted joke: while looking for his assigned room be had asked for the "presidential suite."

The grievant was removed for consuming alcohol on state property and possessing alcohol on state property (the state vehicle being the state property).

MANAGEMENT'S POSITION

The grievant was removed for just cause. Evidence of grievant's pre-layoff discipline is admissible since those recalled from layoff under Article 18 are not subject to a new probationary period.

UNION'S POSITION:

Management did not have just cause for the removal. Evidence of the earlier discipline was irrelevant since the discipline had been imposed on a prior job.

ARBITRATOR'S OPINION:

The-discipline given the employee when he worked for another state agency can be considered in an arbitration over a discipline being imposed on an employee for offenses alleged to have occurred after being hired by a different agency. Since the employer loses the right to probationary review, it is fair that the employee keeps his prior disciplines.

DYS needed to provide clear and convincing proof in order to establish that DYS had just cause for removing the grievant. The arbitrator found that the charge was not sufficiently proven.

No one saw the grievant drink. Those having suspicions did not immediately report them so as to allow objective verification. The grievant's explanations of the odor, his sleepiness, and his remarks are plausible. Furthermore, grievant's normal speech as heard by the arbitrator is slow and he is not articulate. Thus, DYS had no evidence that anyone observed the grievant with alcohol.

The arbitrator then considered whether the employer had offered any objective proof that the employee was intoxicated. In setting forth what is required to prove intoxication, the arbitrator cited other arbitrators who had set forth the same requirements. "Intoxication" is defined as having a certain quantity of alcohol in one's blood. Intoxication must be shown by objective, clear and convincing evidence such as a blood test or, in some cases, a behavior test by a medical expert or other expert trained in alcoholism. The trainer's observations did not rise to required level.

ARBITRATOR'S AWARD:

The grievant was reinstated with full back pay, benefits, and seniority. The grievant remains subject to the terms of any last chance agreement which may exist.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

Department of Youth Services, State of Ohio,
Employer

and

OCSEA, Local 11, AFSCME, AFL-CIO
Union

Grievance No.:
35-03-881021-0083

Grievant:
Mayhew

Hearing Date:
July 10, 1989

Award Date:

August 11, 1989

For the Employer:
Deneen Donaugh

For the Union:
Tim Miller

In addition to the Grievant Robert Mayhew and the advocates named above, the following persons attended the hearing: Rodney Sampson (OCB), Robert L. Jackson, Deputy Superintendent, Cuyahoga Hills Boys School (DYS), witness, Carolyn McCarthy, Personnel Officer, Cuyahoga Hills Boys School (DYS), witness, Leslie Sluka, Youth Leader II (CHBS-DYS), subpoenaed witness, Robert L. Mossbarger, Training Officer (DYS Training Academy), subpoenaed witness, Jacklyn Moreland, Training Office (DYS Staff Training Academy), subpoenaed witness, Dorothy O. Brown (AFSCME/OCSEA), John Porter, Assistant Director of Arbitration (AFSCME/OCSEA), John Feldmeier, observer, and Michael G. Dobronos, observer.

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn. Neither party requested that witnesses be sequestered.

Issue

The parties stipulated to the issue:

"Was the Grievant discharged for just cause? If not, what is the remedy?"

Joint Exhibits

The parties presented the following Joint Exhibits:

1. Grievance Trail
2. Discipline Trail
3. Grievant's evaluations
4. Grievant's Transfer to DYS from layoff list cert #98668
5. Grievant's Re-employment Notice Letter dated June 24, 1988
6. DYS: General Work Rules
7. DYS: Investigation of Alleged Misconduct by DYS Employees
8. DYS: Disciplinary Actions
9. Contract
10. Subpoenas for Sluka, Mossbarger, Moreland

Relevant Contract Sections

§18.01 - Layoffs

Layoffs of employees covered by this Agreement shall be made pursuant to ORC 124.321-.327 and Administrative Rule 123:1-41-01 through 22, except for the modifications enumerated in this Article.

§18.02 - Guidelines

Retention points shall not be considered or utilized in layoffs. Performance evaluations shall not be a factor in layoffs. Layoffs shall be on the basis of inverse order of state seniority.

§18.08 - Recall

When it is determined by the Agency to fill a vacancy or to recall employees in a classification where the layoff occurred, the following procedure shall be adhered to:

The laid-off employee with the most state seniority from the same, similar or related classification series shall be recalled first (see Appendix I). Employees shall be recalled to a position for which they meet the minimum qualifications as stated in the Classification Specification. Any employee recalled under this Article shall not serve a new probationary period, except for any employee laid off who was serving an original or promotional probationary period which shall be completed. Employees shall have recall rights for a period of eighteen (18) months.

Notification of recall shall be by certified mail to the employee's last known address. Employees shall maintain a current address on file with the Agency. Recall rights shall be within the Agency and within recall jurisdictions as outlined in Appendix J. If the employee fails to notify the Agency of his/her intent to report to work within seven (7) days of receipt of the notice of recall, he/she shall forfeit recall rights. Likewise, if the recalled employee does not actually return to work within thirty (30) days, recall rights shall be forfeited.

§18.09 - Re-employment

Re-employment rights in other agencies shall be pursuant to Administrative Rule 123:1-41-17. Such rights shall be for eighteen (18) months.

§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.

§24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

Statute - 123:1-41-17(D)

(D) Probationary period. Any employee re-employed under this rule shall not serve a probationary period when re-employed; except an employee laid off or displaced while serving an original or promotional probationary period shall begin a new probationary period.

Procedural Issue

The Employer sought to introduce evidence of prior discipline imposed on the Grievant when he was employed previously by the Department of Mental Health. The Union objected to the introduction of this material on the ground that such discipline had been given on a prior job and was irrelevant therefore to this alleged infraction. The Employer pointed out that Grievant was recalled from layoff pursuant to Article 18 of the Contract. Section 18.09 references Administrative Rule 123.1-41-17(D) which provides that an employee recalled from layoff has no probationary period. The Arbitrator, at the hearing, took this evidentiary matter under advisement.

The Arbitrator holds that the prior discipline could be considered in determining the level of discipline as long as the guidelines of §24.06 were followed. Article 18 provides that the seniority in one state position gives recall rights after layoff to the same position in another state agency. In essence, this right translates to a right to a new position without the burden of a probationary period. The employer thus forfeits its ability to review an employee's work in the normal probationary period. The employee has merely moved from one part of the state system to another but in the same classification. He or she, therefore, also carries with him or her their prior discipline to the extent allowed by §24.06. The employer looses the right to a probationary review and concomitantly, the employee keeps prior discipline -- a fair balance.

Therefore, the Grievant prior to the incident at hand came into his position with DYS with a 10 day suspension from April-May 1988 (Exhibit E-6) and a "last chance agreement" (Joint Exhibit No. 2).

Facts

The Grievant had been laid off by the Department of Mental Health. On June 24, 1988, pursuant to Article §18 of the contract, he was offered the position of Maintenance Repair Worker 2 at Cuyahoga Hills Boys School with the Department of Youth Services (Exhibit J-5). He accepted and his appointment was effective 7/18/88 (Exhibit J-4). The Grievant was removed from this position effective 10/17/88 because he allegedly "consumed and/or were in possession of an intoxicating substance on or within state property" (Joint Exhibit J-2). The state property involved was a state vehicle (Joint Exhibit 1; letter of 12/29/88). This offense violated A(6) of DYS Work Rules (Joint Exhibit 6) and could subject the Grievant on the first offense to suspension or removal, on the second offense to suspension or removal, and on the third offense to removal [See Disciplinary Guideline No. 7 (Joint Exhibit 8)].

On the morning of August 15, 1988, the Grievant was to travel to the DYS Training Academy with another employee, Leslie B. Sluka, a Youth Leader II, who was also going for training. Ms. Sluka said that she and the Grievant left CHBS at 8:35 a.m. that day. They were late because the state car was not ready. Ms. Sluka was driving. She said that prior to entering the car, the Grievant had a smell of alcohol and mints about him and that the alcohol smell became stronger within the confines of the car. The Grievant asked Ms. Sluka to stop at a convenience store to buy some food because he had missed his breakfast. She stopped before they reached the Interstate. The Grievant returned with a bag of food which he proceeded to eat. At some point, he took out a smaller bag with a bottle in it. The bottle had an amber liquid; the Grievant drank the liquid and at one point offered Ms. Sluka a drink of the liquid which she refused. As they approached the Training Center, the Grievant threw bottle and bag from the car. On the evening of 8/15/88, Ms. Moreland asked Ms. Sluka if the Grievant had smelled of alcohol. Subsequently, on 8/19/88, Ms. Sluka was asked and did write a statement about this trip.

Ms. Moreland is a Trainer at the Training Academy. She said she noticed the Grievant when he entered the classroom on August 15, 1988. He and Ms. Sluka were late and had to take the only two seats left in the classroom. Ms. Moreland said that from the moment she saw the Grievant she knew "he was on something because of his eyes." She said he also talked and moved slowly. She said that at the lunch break the Grievant had made an "off-the-wall" remark . . . something about his "vice-president". As a consequence, she took the opportunity to get close to the Grievant; she said he smelled of alcohol. Ms. Moreland said that it was her "professional opinion" that the Grievant was intoxicated. Ms. Moreland has a Bachelor's degree and is a Licensed Professional Counselor. She indicated that she has all the credits toward a drug/alcohol certification but has not been certified or worked in that capacity. Ms. Moreland said she did not report the Grievant immediately but probably talked to an administrator at the Training Center that evening. The exact time that Ms. Moreland notified the administration remained unclear.

Mr. Robert Mossbarger, Training Officer II, also testified. He reported that in the classroom on August 15, 1988, the Grievant smelled of alcohol and was slow and deliberate in his speech. Mossbarger concluded that the Grievant "was under the influence of something."

The Grievant also testified. He admitted to drinking a great deal the previous evening and being hungover on the morning of August 15, 1988. He said that he had had to arise extremely early to get to CHBS in order to leave and had missed breakfast. He said he was drinking Vernor's, a yellow or amber soda pop, and not beer. He said at lunch time he had attempted to joke and had asked when looking for his assigned room for "the presidential suite".

The Grievant was subsequently dismissed.

Discussion

The question is did DYS have clear and convincing proof that the Grievant had consumed alcohol on state property or was in possession of alcohol on state property. The Arbitrator concludes that the charge was not sufficiently proven. No one saw the Grievant drink. No one saw alcohol in his possession. Moreover, no one promptly reported their suspicions and, as a consequence, no one in authority confronted the Grievant at the time in question or sought to have any kind of objective evidence obtained or gathered. Ms. Sluka did not get out of the car and go immediately to a superior. Ms. Moreland waited hours, perhaps a day or so, to report her "professional opinion". The Grievant's explanation for the odor, for his alleged "sleepiness", and for his remarks are plausible. The Grievant's normal speech, as heard at the hearing, is slow; he is not an articulate person.

Thus, the Employer had no evidence that anyone observed the Grievant with alcohol. Secondly, the Employer had no objective proof that the employee was intoxicated. A person is not intoxicated until and unless a certain quantity of alcohol is found in one's blood (See Durion Co. and USWA Local 604C, 85 LA 1127, 1129). While intoxication need not be shown beyond a reasonable doubt, some objective, clear, and convincing evidence, be it a blood test or, in some cases, by a behavior test by a medical expert or other expert trained in alcoholism. (See Gen. Tel. Co. of Cal. & CWA Local 11588, 73LA531.) The observations by Ms. Moreland and Mr. Mossbarger did not rise to that level. (See General Services Administration and American Federation of Government Employees Local 2061, OPM/LAIRS No. 16733 (1985).)

Award

The grievance is sustained. The Grievant is to be reinstated with full back pay, benefits, and seniority. If a "last chance" discipline exists, he remains subject to those terms.

August 11, 1989
Date

Rhonda R. Rivera
Arbitrator