

ARBITRATION DECISION NO.:

202

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation
Craig Bridge

DATE OF ARBITRATION:

October 5, 1989

DATE OF DECISION:

October 18, 1989

GRIEVANT:

Roscoe Townsend

OCB GRIEVANCE NO.:

31-02-(88-09-29)-0056-01-06

31-02-(88-10-18)-0064-01-06

ARBITRATOR:

Linda Klein

FOR THE UNION:

Lois Haynes

FOR THE EMPLOYER:

Rebecca C. Ferguson

KEY WORDS:

Progressive Discipline

Suspension

Removal

Discrimination

Stacking Charges

Sleeping on Duty

ARTICLES:

Article 24-Discipline

§24.01-Standard

§24.02-Progressive

Discipline

FACTS:

The Grievant was employed as a Bridge Lock Tender at an ODOT drawbridge. Before the events that led to the discipline at issue, the Grievant's record reflected the following disciplinary action: (1) a verbal reprimand for unexcused tardiness, leaving early or taking extended lunch hour; (2) verbal counseling for the same offense; (3) a written reprimand for the same offense, along with insubordination; (4) a written reprimand for carelessness with tools, keys and equipment, resulting in property loss or damage or an unsafe act; and (5) a three-day suspension for leaving the work area without permission of the Supervisor and for unexcused tardiness.

The discipline at issue is the Grievant's 10-day suspension and his subsequent discharge. The 10-day suspension stemmed from two events. First, while the Grievant was opening the drawbridge gate to traffic, it swung into a truck parked on the interstate. Second, on a later day, the Supervisor claimed that the Grievant was sleeping on the job. However, before the suspension notice, the Grievant was involved in two additional incidents, which led to his removal. In the first incident, the Grievant, who is black, became angry and shouted at the Supervisor that the reason a new employee was not training with him was that the Supervisor was prejudiced. The general practice was that new employees trained with bridge tenders on all three shifts. In the second incident, the Grievant refused to sign an employee evaluation form the Supervisor had completed for him. He grabbed the form from the Supervisor, returning it several days later. As a result of the 10-day suspension and subsequent discharge, this Grievance was filed.

EMPLOYER'S POSITION:

The State argued that the Grievant was suspended and later discharged for just cause. His record showed that progressive discipline was applied and that he was warned of the consequences of his continued violation of the rules. The State further argued that the Grievant was not denied due process and that he had been treated fairly and objectively.

UNION'S POSITION:

The Union argued that the State failed to establish just cause for the suspension and subsequent discharge. The Grievant did not hit a truck while operating the gate. Also, he was not sleeping on the job, but was merely temporarily drowsy because of the effects of medication his doctor had prescribed. The Supervisor who stood six feet from him made no effort to wake him or to determine what his condition was. On another occasion when the Supervisor suspected that an employee had been sleeping on duty, that employee received only a written reprimand. Accordingly, the Union claimed that the Grievant was treated more harshly than other employees. The Union asserted that the State stacked the insubordination charges to justify the severest penalty discharge.

ARBITRATOR'S OPINION:

The Arbitrator ruled that the State had just cause to suspend the Grievant for 10 days. Regarding the opening of the drawbridge gate into the parked truck, operating procedures required that all obstructions be clear of the gate before it was moved and that the operator observe the gate for the duration of its movement. The Grievant was negligent in failing to ensure that the truck was clear of the gate and in failing to watch the gate as it swung open. The Grievant's claim that the gate did not hit the truck is unbelievable, since two witnesses confirmed that the truck was hit by the gate. As for the sleeping on duty charge, even if the Grievant was drowsy from medication and merely resting his eyes, he is subject to discipline because he knew he was physically unable to perform his duties of monitoring the river and operating the bridge. Since failure to perform his duties could result in serious personal injury and property damage, he was

obligated to notify the Supervisor that his ability to perform his duties was seriously impaired.

The Arbitrator ruled that the State did not have just cause to discharge the Grievant. Discipline was warranted for the Grievant's over-reaction to the Supervisor's decision to assign the trainee to a shift other than the Grievant's, when there was no evidence to demonstrate that the Supervisor's decision was in any way discriminatory. Nonetheless, discharge was an excessive, unduly harsh penalty. Similarly, the Grievant's behavior in taking the evaluation form from the Supervisor was inappropriate. However, it would have been more reasonable for the State to have imposed a lesser discipline than discharge and then given the Grievant a chance to correct his behavior. While the Arbitrator did not find that the State stacked the charges, discharge was more punitive than corrective.

AWARD:

The Grievance protesting the 10-day suspension is denied, and the Grievant is reinstated to his position without loss of seniority or benefits. No back wages are awarded. The period from the effective date of discharge to the date of reinstatement constitutes a long-term suspension.

TEXT OF THE OPINION:

**Arbitration Proceedings
Before
Linda DiLeone Klein**

In The Matter Between

**The State of Ohio
Department of Transportation**

and

**Ohio Civil Service Employees
Association, Local 11**

Grievances of Roscoe Townsend

Case Nos.:

31-02(9/29/88) S6-01-06

31-02(10/18/88)64-01-06

Heard:

October 5, 1989

APPEARANCES:

For the Employer:
Rebecca C. Ferguson

For the Union:

Issues

- 1.) Was the grievant suspended for just cause?
If not, what shall the remedy be?
- 2.) Was the grievant discharged for just cause?
If not, what shall the remedy be?

Facts and Contentions

The grievant began his employment with the Department of Transportation on August 14, 1980; he was classified as a Bridge Lock Tender. Prior to the incidents giving rise to the discipline at issue here, the grievant's record reflects the following corrective action:

1) he received a verbal reprimand on November 5, 1986 for unexcused tardiness, leaving early or extended lunch hour; 2) he received a verbal counseling on October 8, 1987 for the same offense; 3) he received a written reprimand on April 1, 1988 for the same offense and for insubordination as well; 4) he received a written reprimand on April 4, 1988 for carelessness with tools, keys and equipment resulting in the loss, damage or an unsafe act; and 5) he was suspended for three days effective August 9, 1988 for leaving the work area without permission of the supervisor and for unexcused tardiness.

In June 1988, the grievant was assigned as a Bridge Lock Tender at the Craig Bridge, a two span draw bridge on Interstate 280 over the Maumee River. The bridge is owned and operated by ODOT and it carries approximately 60,000 vehicles daily. The Bridge Tender's primary function is to operate the bridge to allow safe passage of boat traffic on the river. The Bridge Tender is provided with an operating manual which includes procedures for safely stopping traffic on the Interstate, closing the gates, raising the spans, allowing the river traffic to pass, lowering the spans, opening the gates and switching the traffic signal to "Go".

On July 15, 1988, the grievant was operating the bridge to allow the passage of a boat. At this time, an outside contractor, Henry Gurtzweiler, Inc., was working in the area, and the southbound right lane of I280 was closed. The grievant closed the gates but (did not raise the bridge because a Gurtzweiler truck was parked in the right lane in the line of travel of the span. As soon as the truck was moved, the grievant was able to raise the bridge and the boat passed through the area safely. The grievant then lowered the bridge. As the grievant operated the gate to open the road for traffic, the gate swung and hit the Gurtzweiler truck. The gate stopped and the truck was not damaged; even though the gate stopped traveling, the motor was not turned off immediately and pins between the linkage and the shaft were sheared off and had to be replaced. The gate was pushed open the rest of the way in order to allow traffic to resume.

The grievant's Supervisor is the Assistant District Bridge Engineer, and he and Jack Middaugh, a former Gurtzweiler employee, testified as to the above-cited events. They both maintained that the grievant was the operator on duty and that the gate he was operating hit a truck. The grievant, however, denied hitting any object and asserted that he had performed his duties properly.

On July 21, 1988, the grievant and his Supervisor were on duty in the control room and the

Supervisor claimed that the grievant was sleeping on the job that day. The Supervisor testified that he noticed the grievant sitting in a chair with his head falling toward his left shoulder. The Supervisor testified that he walked to within six feet of the grievant and saw that the grievant's eyes were closed. The Supervisor observed the grievant in this position for about five minutes. Then, says the Supervisor, a door in the lower level of the operator's tower opened and the noise from the Interstate traffic woke the grievant.

The grievant, however, denied that he was sleeping on duty; he maintained that he was resting his eyes and that he was merely drowsy due to medication his doctor had prescribed.

As a result of these infractions, a pre-suspension meeting was scheduled for August 12, 1988, at which time the charges against the grievant were discussed. Subsequently, the grievant received written notice of a ten day suspension. On August 30, 1988, a letter was issued charging the grievant with insubordination, carelessness, and sleeping on duty; the letter further notified the grievant that his period of suspension would begin on September 12, 1988.

However, prior to the issuance of the suspension notice, the grievant was involved in two additional incidents with his Supervisor.

On August 26, 1988, the grievant and the Supervisor were discussing the fact that a new employee would not be training on the grievant's shift. In the past, the general practice had been for new employees to spend time training for the Bridge Tender position with the regular Bridge Tenders on all three shifts. On this occasion, the new employee was not scheduled to train with the grievant; the grievant was angry and felt that the reason the new employee was not training with him was because he, the grievant, was black. The grievant shouted at the Supervisor and said that the Supervisor was prejudiced. The Supervisor tried to explain his position on the training matter to the grievant, but the grievant would not listen or calm down. At the hearing, the Supervisor testified that he wanted the new employee to work at night with another Bridge Tender because there was less Interstate traffic and the trainee would have more opportunity to move the gates than he would have during the day with the grievant; also, no boats were scheduled during the day for the training period at issue. The Supervisor said that he was embarrassed by the grievant's abusive language. Two outside contractors were in the area at the time of this incident, and they corroborated the Supervisor's testimony regarding the grievant's abusive behavior.

On August 30, 1988, the Supervisor completed a written performance evaluation for the grievant, but the grievant refused to sign it. Later in the day, the Supervisor asked another Manager to come to the control room to witness the fact that the grievant would not sign the evaluation. It should be noted that it is permissible to refuse to sign an evaluation, however, the Supervisor wanted a witness to said refusal.

While the Supervisor was writing on the evaluation form, the grievant came over to his desk, grabbed the form and put it in his pocket. The Supervisor asked the grievant to return it, but the grievant refused. There were two witnesses to this incident.

After the witnesses left the area, the grievant and the Supervisor discussed the matter again, and the Supervisor issued a direct order to the grievant to return the evaluation form. The grievant refused. The grievant testified that he told the Supervisor that he wanted to show the form to his attorney and that he would return it in a day or so. The grievant returned the form several days later.

As a result of these two incidents, a pre-suspension and/or removal meeting was scheduled for September 12, 1988. The charges against the grievant were discussed at this meeting and on October 7, 1988, he was issued a notice advising him that he would be discharged effective October 14, 1988. The basis for the discharge was insubordination and the use of abusive, insulting language toward a Supervisor.

The Employer contends that the grievant was suspended and later removed for just cause in

accordance with Article 24.01 and 24.02 of the Labor Agreement. His past record shows that the principle of progressive discipline has been applied and that he has been forewarned of the consequences of his continued violation of the rules. The grievant was treated fairly and objectively, and he was not denied due process, adds Management. His repeated incidents of insubordination cannot be tolerated; his behavior adversely affects Management's ability to manage its operation. Based upon his record and the nature of his offenses, the Employer contends that the suspension and the removal were warranted. The Employer asks that both grievances be denied.

As it pertains to the suspension, the Union insists that the grievant did not hit a vehicle while operating the gate on July 15, 1988. The Union insists further that he was not sleeping on duty on July 21; he was temporarily drowsy due to the effects of medication he had taken. The Supervisor stood six feet away from the grievant and made no attempt to rouse him or to determine what his condition was. Furthermore, on another occasion, the Supervisor suspected that an employee had been sleeping on duty, but that employee received only a written reprimand. The Union maintains that the grievant was treated more harshly than others.

The Union contends that Management "stacked" the insubordination charges against the grievant in order to justify the severest penalty. The Union submits that this is unreasonable as well as punitive.

The Union asks that the ten day suspension and the removal be rescinded and removed from the grievant's record; the Union also asks that he be made whole for all his losses.

OPINION

As it relates to the ten day suspension, the evidence clearly and convincingly establishes that the grievant was careless in the operation of the gate on July 15, 1988, as shown by the fact that the gate he was operating hit a contractor's truck. Apparently there had been a problem with the location of the truck before the bridge span was raised and the truck had to be moved. Then as the bridge span was lowered and the grievant prepared to open the gate, he failed to consider the new position of the truck. Operating procedures require that all obstructions be entirely clear of the gate before it is moved. Said procedures also require the operator to observe the gate for the duration of its motion. The grievant was negligent here in that he failed to ensure that the truck was clear of the gate and he failed to watch the gate as it swung open. If he had performed his duties properly, he would have anticipated that the gate would hit the truck and he would have known to stop the operation. The grievant's claim that this event did not occur is simply unbelievable; the Supervisor and an employee of the outside contractor confirmed that the truck was hit by the gate which the grievant was operating.

The evidence regarding the sleeping on duty charge is not as clear as in the above-mentioned infraction., however, even if the grievant was drowsy from medication and just resting his eyes, he is nevertheless subject to discipline because he knew that he was physically unable to perform the duty of monitoring the river and the marine radio; if his eyes were closed, he could not continually be ready to stop highway traffic and operate the bridge.

When the grievant was told by his doctor that he needed to take medication and when he learned that the medication made him drowsy, he was obligated to inform the Supervisor that his ability to perform the duties of his position was severely limited. The grievant's job requires that he be in command of all his faculties at all times; failure to perform his duties properly can result in serious personal injury as well as property damage.

The Employer had just cause to discipline the grievant based upon the events of July 15 and 21, 1988. A ten day suspension was the appropriate step in the progressive discipline procedure.

The Arbitrator does not condone the use of abusive language toward a Supervisor, however,

the penalty of discharge was excessive and unduly harsh for the incidents of August 26 and 30, 1988.

While there was no evidence to demonstrate that the Supervisor's decision to assign the trainee to a shift other than the grievant's shift was in any way discriminatory the grievant may have perceived it to be the case, especially since this was the first occasion when a new employee did not train on each shift with each regular Bridge Tender. The grievant was looking for a reason for the departure from past procedure, but he over-reacted in his discussion with the Supervisor. Discipline was warranted, but not the severest penalty.

The grievant's behavior on August 30, 1988 was inappropriate as well. In fact, the grievant admitted taking the evaluation form and refusing to return it as the Supervisor ordered.

These incidents occurred just four days apart, and the Arbitrator is of the opinion that it would have been more appropriate to have imposed a lesser discipline and then afforded the grievant an opportunity to correct his behavior. The Arbitrator is not implying that the Employer "stacked" the charges as the Union claimed, however, for discipline to be corrective, the employee should be given a chance to demonstrate an intent to improve his behavior.

It appears to the Arbitrator that removal for these incidents was more punitive than corrective.

For the reasons set forth above, the removal shall be reduced to a long-term suspension.

AWARD

ISSUE 1.) The grievance protesting the ten day suspension is denied.

ISSUE 2.) The grievant shall be reinstated to his position without loss of seniority or benefits. There shall be no award of back wages. The period from the effective date of the removal to the date of his reinstatement shall constitute a long-term suspension.

LINDA DILEONE KLEIN

Dated this 18th day of October, 1989
Cleveland, Ohio