

ARBITRATION DECISION NO.:

207

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction

DATE OF ARBITRATION:

August 24, 1989

DATE OF DECISION:

October 25, 1989

GRIEVANT:

Brenda Dilley

OCB GRIEVANCE NO.:

27-21-(88-09-23)-0017-01-03

ARBITRATOR:

Linda Klein

FOR THE UNION:

Carol Bowshier

FOR THE EMPLOYER:

Rodney Sampson

KEY WORDS:

Sexual Discrimination
Probationary Employees
Removal
Notification of Removal

ARTICLES:

Article 24-Discipline
 §24.04-Pre-Discipline
Article 25-Grievance Procedure
 §25.03-Arbitration Procedure
Article 43-Duration
 §43.02-Preservation of
Benefits

FACTS:

Grievant was an employee on initial hiring probation at the Department of Rehabilitation and Correction. At the midpoint of the probationary period, grievant's performance was rated as average. When grievant returned from a medical leave several supervisors noted work performance deficiencies. Notations on corrective action reports suggest that grievant knew of the supervisor's evaluations. A week before the probationary period was due to end, four supervisors recommended removal of grievant. The Warden approved the removal.

Grievant called the Warden during work hours to investigate rumors of her removal. The Warden stated that grievant was going to be discharged, but she was to continue working until they could have a meeting to discuss the reasons for her removal. On that same day grievant testified she became ill and went home. Grievant called in to report her continued illness for the next four days. She returned to work with a medical certificate attesting to an upper respiratory infection. Under Administrative Rule 5120-7-03, to remove an initial probationary employee, the employer must attend a pre-removal conference and notify the employee in writing of the reasons for removal. The employer made several attempts to contact grievant.

EMPLOYER'S POSITION:

The grievance is not arbitrable since during an initial probationary period employee may not grieve a removal. Grievant was notified by the Warden verbally and efforts to reach her at her official address were frustrated by the grievant. Grievant intentionally hid from written notification. Employer made every conceivable effort to discuss with employee the reasons for her removal. The probationary period should also be extended by the four days employee was ill. Since the employee was an initial probationary employee, her removal is not grievable under the Agreement per Article 25 section B.

UNION'S POSITION:

The employer did not comply with the probationary removal guidelines. Grievant was not given a conference; she was given no written notice of the removal. It was her own action of calling the Warden which informed her of the removal. Grievant also called in sick for four days with a documented upper respiratory infection. If the employer wanted to notify her they could have contacted her during the call-in procedure. Grievant's change of address was given to the employer and she stayed there while she was ill. Grievant did not flee. The probationary period expired without the employer following the procedures necessary for removal and grievant is entitled to a hearing by this arbitrator. The Union also points out the procedural defect that the Warden is not the proper authority to approve grievant's removal. The Union also claims that the corrective action reports which lead to grievant's removal were motivated by sexual discrimination, not by grievant's work performance.

ARBITRATOR'S OPINION:

The grievant was a probationary employee at the time of the removal. Grievant deliberately made herself unavailable for the conference and the timely written notification of the probationary removal. The grievance for employee's removal is not arbitrable. The grievant did assert a timely claim under Article 2.01 for sexual discrimination and this portion of the grievance is arbitrable.

AWARD:

The grievance is denied except for the portion of the grievance which deals with the claim of sexual discrimination.

TEXT OF THE OPINION:

**Arbitration Proceedings
Before
Linda DiLeone Klein**

In The Matter Between

**The State of Ohio
Department of Rehabilitation
and Correction**

and

**Ohio Civil Service Employees
Association, Local 11
AFSCME, AFL-CIO**

Grievance of Brenda Dilley

Case No.:

27-21-880923-0017-01-03

Heard:

August 24, 1989

Appearances

For the Employer:

Rodney Sampson

For the Union:

Carol Bowshier

Brenda Dilley

Issue

Is the grievance of Brenda Dilley arbitrable?

Opinion

The above-stated issue was framed by the Arbitrator after a review of the evidence presented at the hearing.

This case concerns the removal of Brenda Dilley, who became a full-time permanent employee of the Department of Rehabilitation and Correction effective April 18, 1988. She began her one hundred twenty day probationary period, and she received certain contractual benefits such as sick leave and health insurance; also, pursuant to the contract, she had no seniority until she completed her probationary period. In addition, in accordance with Article 25.01.B., "Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals".

During the grievant's initial probationary period, she was absent for approximately one month for medical reasons and her probationary period was officially extended. The parties stipulated that this extension meant that her probationary period ended September 16, 1988.

As per usual procedure, the grievant's performance as a probationary employee was evaluated at the mid-point of her probationary period. Her rating was average. Subsequent to her return to work after the absence due to medical reasons, the grievant's Supervisors noticed certain deficiencies in her work performance and five reports of employee corrective action were written. The notations on these reports suggest that the grievant was aware of the incidents and the cited deficiencies.

Also as per usual procedure, a probationary employee's work performance is evaluated prior to the end of the probationary period. On September 9, 1988, the evaluation form was completed by the grievant's Supervisor, and the quality of her work was rated below average; the Supervisor recommended that she be removed while on probation. Three other Supervisors signed the form and concurred with the ratings and recommendation for probationary removal. On September 12, 1988, the Warden accepted the evaluation and indicated on the form that there would be a probationary removal.

The Warden testified that the grievant telephoned him on September 12, 1988 while she was on duty and stated that she had heard a rumor that she was receiving a probationary removal; she asked if this was, in fact, going to occur, and the Warden said "Yes". The Warden testified further that he told the grievant to continue working until a meeting could be scheduled to discuss the matter and to review the paper work, including the evaluation form.

The grievant, however, testified that she became ill at work on September 12, 1988; she requested a gate pass and left the premises. She called in on September 13, 15, 16 and 17 to report her continued illness. When she returned to work on September 18, she had a medical certificate indicating that her absence was due to an upper respiratory infection.

The Employer is obligated by Administrative Rule 5120-7-03 to follow prescribed procedure for a probationary removal; this procedure includes having a conference with the probationary employee to discuss the matter of a probationary removal and the reasons therefor. If, after the conference, the decision is made to proceed with the probationary removal, the employee (appointee) must be notified of that fact in writing, and the reasons for finding the employee's work performance unsatisfactory must be set forth.

It should be said that Administrative Rule 5120-7-03 empowers the Appointing Authority of an institution to remove an appointee. Civil Service Laws define Appointing Authority as "the officer, commission, board or body having the power of appointment to, or removal from, positions in any office, department, commission, board or institution". Pursuant to Administrative Rule 5120-7-01, the Appointing Authorities within the Department of Rehabilitation and Correction are . . . "(d) the managing officer of each penitentiary or reformatory".

The State maintains that the Appointing Authority in this case is the Warden and that he properly exercised his authority in the probationary removal of the grievant.

According to the Employer, the Warden had anticipated having a conference with the grievant on September 12, 1988 to discuss the recommendation for probationary removal, but the grievant

left the facility. At this point, efforts were made to reach her at her residence of record. According to Management, a Sergeant and a Captain were sent to her house on September 13 with the final paperwork and the notice of probationary removal dated September 13, 1988. They went to the grievant's address of record, but could not locate her. A second attempt was made to deliver the written notification to the grievant's address of record, but the grievant was not there. According to Management, the Officers tried to learn how to contact the grievant, but her family provided no information. The notice of probationary removal and the final performance evaluation were then mailed to the grievant's address of record. There were two mailings; one was sent via regular mail. The other was sent certified mail. Management presented an exhibit which was a copy of the envelope addressed to grievant and sent via certified mail; the document reflects an attempt to deliver the letter on September 15, 1988. This letter was eventually returned to the sender. Also, a Sergeant hand-delivered the notice of removal and evaluation to the grievant's mother at the address of record.

On September 18, 1988, the grievant reported for work and personally received her removal notice and final evaluation. On September 23, 1988, the instant grievance was initiated to protest the removal and to assert a claim of discrimination.

The grievance was denied by Management on the basis that the grievant was a probationary employee at the time of her removal and, therefore, had no grievance rights in the matter of a probationary removal. The Employer takes the position that the grievance is not arbitrable.

The Union, however, maintains that the within matter is arbitrable. The Union submits that the removal is defective for the reason that the grievant's probationary period had expired two days before she received written notification of said action. The Union contends that the grievant had previously notified Management of her change of address, but Management made no effort to locate her at the new residence. Also, the grievant called the facility four times to report her absence due to illness and Management made no attempt to leave a message at the control desk for her to contact the Warden. Furthermore, says the Union, it was unreasonable for Management to expect mail delivery of the notice before her probationary period ended.

The Union vehemently denies Management's allegation that the grievant deliberately fled to avoid being served the notice of removal within the time limits of her probationary period; the Union contends that the grievant was truly ill and unable to report to work until September 18.

The Union also contends that other procedural defects exist in this case. The grievant was not officially removed by the Agency Head until September 22, 1988; this is clearly after the probationary period ended. Furthermore, Article 24.05 requires that the Agency Head make the final decision on a removal. In this instance, the Warden made the decision, which is contrary to the clear language of the Agreement.

The Union submits that the grievant's termination was, indeed, a disciplinary action; employees are frequently disciplined for poor work performance, as the grievant was. Accordingly, the Union asserts that the grievant was entitled to the contractually prescribed pre-disciplinary procedure set forth in Article 24.04; the grievant was improperly denied a pre-discipline hearing. To support its position in this regard, the Union cites the case of probationary employee Larry Glass; Mr. Glass received a pre-discipline hearing during his probationary period, and after a discussion of his infraction, he was not removed. The grievant was denied this benefit. The grievant was also denied the conference required by Administrative Rule 5120-7-03.

The Union takes the further position that the grievant was discriminated against during her probationary period and that said discrimination led to the issuance of corrective action reports and the poor evaluation by her Supervisor. The grievant, even as a probationary employee, has a legitimate grievance regarding the charge of sexual discrimination.

The Union asks the Arbitrator to hold that the instant grievance is arbitrable.

Prior to addressing the issue of arbitrability, it should be noted that the Employer initially raised the matter of timeliness in this case, but in its post-hearing brief, the Employer stated that said procedural objection was no longer being pursued.

As it pertains to a probationary employee, Management has the right to set certain standards of performance which must be met in order to successfully complete the 120 day probationary period. Management's right in this regard is further reinforced by Article 25.01., which states that probationary employees shall not be able to grieve disciplinary actions and removals. When viewed in its entirety, the contract gives Management the right to assess the work performance of a probationary employee and make an objective determination regarding his/her continued employment on the basis of said work performance.

What occurred in this case was a decision to terminate the grievant's employment during her probationary period based upon her work performance. She was not disciplined for an infraction of the rules, as was Mr. Glass. The evidence does not support the Union's claim that her termination was a disciplinary action. The documents pertaining to this case clearly reflect that the grievant was terminated by a probationary removal, a procedure outlined in Administrative Rule 5120-7-03.

The evidence establishes that the grievant was a probationary employee at the time of her removal. Her probationary period ended September 16, 1988, and she was verbally advised on September 12 that Management intended to prepare the paper work to implement the probationary removal action and to hold a conference with her to discuss the reasons therefor. The Arbitrator is of the opinion that the grievant then deliberately made herself unavailable for the conference and the timely written notification of the probationary removal. She left the facility as soon as she learned of the impending action and she could not be found at her address of record, despite Management's attempts to contact her there. While it is true that it was not her parent's responsibility to tell Management how to reach the grievant, the fact remains that reasonable effort was made to locate her, but to no avail. Furthermore, the grievant failed to officially notify her Employer of any address change. She testified that she wrote a note regarding an address change on an overtime slip and put it under the door of a Manager's office; this does not constitute compliance with the rule requiring that notification of a change of address be made to the Supervisor and the Personnel Department. The evidence demonstrates that Management met its obligation here by attempting to contact the grievant several times about the impending action. Because she had made herself unavailable, there was no alternative but to effectuate the probationary removal in a timely manner without the conference referenced in Administrative Rule 5120-7-03. The Warden and the Personnel Officer testified that Management intended to arrange for the conference prior to the grievant's absence, and their testimony in this regard was credible.

Management followed appropriate procedures in implementing the probationary removal. A timely evaluation of the grievant's work performance was completed on September 9, 1988, and there was review and concurrence in the Rater's decision by September 12. The Appointing Authority accepted this decision and so noted on the evaluation form.

The Arbitrator finds from the evidence that the probationary removal action was effectuated in a manner which was consistent with the procedures set forth in the Administrative Rules, which rules are incorporated in the Agreement by reference in Article 43.02. The Rules define probationary removal as "the termination of an original appointee's employment for unsatisfactory service". The Rules further empower the Appointing Authority to remove a probationary employee. In this case, the Warden is the Appointing Authority and he removed the grievant during her probationary period for what was claimed to be unsatisfactory service.

Probationary employees are not permitted to grieve removals, therefore, the inference to be drawn is that they cannot avail themselves of other contractual procedures governing removals.

Pre-discipline meetings for probationary employees who may be removed for unsatisfactory service are not required by contract. The probationary removal procedure is governed by Administrative Rule 5120-7-03; as stated before, the grievant herself thwarted the convening of the conference to discuss the impending action.

The Appointing Authority followed the probationary removal procedures set forth in the Administrative Rules. The grievant, in essence, evaded the process of the conference and the timely receipt of written notification. The State did not violate Article 24.05; there is no contractual requirement that the Agency Head approve a probationary employee's removal prior to the end of the probationary period.

The Arbitrator must find, however, that the grievant asserted a timely claim of sexual discrimination under Article 2.01, and she is therefore entitled to a hearing on the merits of that issue only. Article 25.01 gives the grievant access to the grievance procedure on this complaint.

At the conclusion of the hearing on August 24, 1989, the Union raised the issue of whether Article 25.03 provides that the same Arbitrator who resolves the arbitrability question should proceed to hear the merits of the case after deciding that the matter is arbitrable. This Arbitrator asked the parties to discuss said question in their briefs; the Union addressed the issue, but Management declined to do so.

Also, at the hearing, reference was made to the case of Michael Lepp wherein the issue of the Arbitrator's authority under Article 25.03 was analyzed. The decision, however, was not made available to this Arbitrator.

The Arbitrator is of the opinion that she has no authority to address the question of the application of Article 25.03. It appears to be a separate and distinct issue which may have previously been decided. If the Lepp decision is not dispositive of the issue, the parties have the option of submitting said issue to an Arbitrator or resolving the matter in some other forum.

AWARD

The only portion of this grievance which is arbitrable is the charge of sexual discrimination. The grievant is entitled to a hearing on the merits to resolve only the question of whether or not she was discriminated against based upon sex. In all other respects, the grievance is denied.

LINDA DILEONE KLEIN

Dated this 25th October, 1989

Cleveland, Ohio