

ARBITRATION DECISION NO.:

219

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Agriculture

DATE OF ARBITRATION:

December 11, 1989

DATE OF DECISION:

January 3, 1990

GRIEVANT:

Tim Holbrook

OCB GRIEVANCE NO.:

04-00-(88-08-29)-0032-01-06

ARBITRATOR:

Harry Graham

FOR THE UNION:

Bob Rowland

FOR THE EMPLOYER:

Al Matthews

KEY WORDS:

Removal

Investigation by Bargaining

Unit Members

Progressive Discipline

ARTICLES:

Article 24-Discipline

§24.02-Progressive Discipline

FACTS:

Grievant was employed as a Grain Warehouse Examiner by the Ohio Department of Agriculture and also helped run his grandfather's sixty-five acre farm. Grievant's grandfather's farm needed to be planted in order to receive a government subsidy, but grievant had no leave time left. Grievant did not attend work for four days so that he could work on his grandfather's farm. The Department of Agriculture, suspicious about grievant's absence, assigned an investigator. The

investigator took photographs of the grievant working on the farm. The employer removed grievant.

EMPLOYER'S POSITION:

Grievant in one year had accumulated two oral and two written reprimands. The photographs of the investigator clearly showed grievant driving a tractor, lifting objects, and opening seed bags. Grievant was physically able to work as a grain inspector on those four days when he did not attend work. Grievant was not on approved leave time for those four days and should be considered AWOL. The internal guidelines of the Department prescribe discharge for employees that are AWOL for three or more days. Although grievant has medical evidence of a back problem during the four days absence, he was physically able to work. Grievant chose to leave the employ of the State by choosing to take off work. The discharge is justified by the grievant's previous discipline record and the internal guidelines of the Department.

UNION'S POSITION:

First the employer did not follow a system of progressive discipline by moving from a written reprimand to a removal. The investigator who took photographs of the grievant farming is a member of the bargaining unit and any evidence gathered by him should not be allowed.

Grievant also had a back injury that made his work duties impossible and therefore his absence was proper. If grievant experienced back pain or a back spasm while climbing a grain elevator, the fall would be fatal. Work activity can be distinguished from the work grievant did on his grandfather's farm. A fall from a tractor would not be fatal. Employer knew of grievant's situation and should have made provisions for his lack of leave time.

ARBITRATOR'S OPINION:

Although the Union's argument that the employer had not followed the principles of progressive discipline is technically correct, that argument does not consider the four instance of discipline and the severity of the offense. Grievant's medical excuse is unconvincing. The photographs of grievant working on the farm show him using a wide range of motion and lifting fifty pound bags of seed. The medical excuse does not contain any work restrictions. The grievant even testified that he had no back pain during the four days of labor on his grandfather's farm.

The investigator being a bargaining unit member does not invalidate the evidence he gathered. To hold that bargaining unit members can not investigate other bargaining unit members would be an improper restriction of the State's ability to police its own internal affairs.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department

of Agriculture

Case No.:

04-00-(88-08-29)-0032-01-06

Before:

Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

Bob Rowland
Staff Representative
OCSEA/AFSCME Local 11
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Columbus, OH. 43215

For Ohio Department of Agriculture:

Al Matthews
Deputy Director of Administration
Ohio Department of Agriculture
65 South Front St.
Columbus, OH. 43215

Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter on December 11, 1989 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. In addition to the central issue to be decided in this proceeding there developed an additional issue concerned with any remedy that might be appropriate in the event the Grievant were restored to employment with the State. Post hearing submissions were received from the parties. Those submissions were concerned exclusively with the issue of remedy. Receipt of those documents was acknowledged on December 22, 1989 and the record in this proceeding was closed on that date.

Issue:

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the Ohio Department of Agriculture remove
Tim Holbrook from his position as a Grain
Warehouse Examiner for just cause?

If not, what shall the remedy be?

Background:

There is no factual dispute over the events that give rise to this proceeding. The Grievant, Tim Holbrook, has been employed as a Grain Warehouse Examiner by the Ohio Department of Agriculture since July, 1985. In addition to his employment with the State Mr. Holbrook assists his grandfather in the operations of a 65 acre farm. During June, 1988 the deadline set by the Federal Government for payments under the farm set aside program was fast approaching. In order to qualify for payments under that program acreage had to be planted by the deadline established by the Federal Government. As the deadline approached, Mr. Holbrook's grandfather had not met it. As payments under the set aside program are an important part of farm income it was essential that the deadline be met in order to qualify for them. This was especially true in 1988 as that year was marked by a severe drought.

In order to assist his grandfather Mr. Holbrook absented himself without leave from work on June 17, 20, 21 and 22, 1988. Suspicious about the nature of Mr. Holbrook's absence, the Ohio Department of Agriculture dispatched an investigator to the farm site on June 20, 1988. Dave Ullom, the Department investigator observed the Grievant on his tractor, planting seed. Mr. Ullom took a large number of photographs to document the fact that Mr. Holbrook was actively engaged in seed planting on that date.

The Department considered Mr. Holbrook to have been absent without leave. As he had accumulated a number of other instances of discipline the Department discharged him, effective August 25, 1988. A grievance protesting that discharge was filed. It was processed through the procedure the parties without resolution. The parties agree that the grievance is properly before the Arbitrator for determination on its merits.

Position of the Employer:

The State insists its action in this situation was justified. In the twelve month period prior to June, 1988 the Grievant had accumulated four instances of discipline. Two were oral reprimands and two were written reprimands. The State was aware that Mr. Holbrook was engaged in farming in addition to his employment with the Department of Agriculture. Consequently, when he did not report to work towards the end of June, 1988 it became suspicious. Investigator Ullom was dispatched to Mr. Holbrook's grandfather's farm. He observed the Grievant on a tractor. Unbeknownst to Mr. Holbrook, Mr. Ullom took a number of photographs. These show the Grievant performing a number of tasks associated with planting. Included are driving the tractor, lifting seed bags, opening them and emptying their contents into the planter. Such activities are characteristic of people with a wide range of motor movement. They do not show that Mr. Holbrook was experiencing any restriction on his motor functions on June 20, 1988. To the contrary, they indicate that he was in robust good health on that day. At the minimum, they show he was able to perform the duties associated with his position with the State. Those tasks include climbing grain elevators to inspect their contents. As Mr. Holbrook could plant on June 20, 1988 he could have carried out the tasks for which he was being paid according to the State.

There is no dispute that Mr. Holbrook was planting on June 20, 1988. He admitted as much in the course of the disciplinary procedure. He was not on approved leave from June 17-22, 1988. Consequently, discharge is appropriate the State insists.

The Employer acknowledges that Mr. Holbrook has medical evidence of a back problem that existed during the period in question. There is no indication that Mr. Holbrook's doctor placed any restriction on his activity as a result of that problem. In the State's view, Mr. Holbrook was AWOL

for four days. That should end the matter as the internal guidelines of the Department of Agriculture prescribe discharge for employees who are AWOL for three or more days. Considering the instances of prior discipline on Mr. Holbrook's record, the State insists its action in this case was proper.

The State is well aware that Mr. Holbrook is engaged in farming in addition to his employment as a Grain Warehouse Examiner. In its view, he had to make a choice between farming and continued employment with the State. By his actions in June, 1988 he chose farming. As that is the case the discharge should not be overturned according to the Employer.

Position of the Union:

The Union points out that prior to this incident the Grievant had no discipline more serious than a written reprimand on his record. To move from a written reprimand to a discharge represents a disregard of the principles of progressive discipline that should not be permitted to occur in the Union's opinion.

The Union also takes exception to the discipline administered to Mr. Holbrook because the State's investigator, Mr. Ullom, was also a member of a bargaining unit. Evidence gathered by a bargaining unit member should not be permitted to be used against another bargaining unit member in the Union's view.

In fact, Mr. Holbrook was properly absent from work during the period in question. Included among the joint exhibits is a form completed by his doctor indicating that on June 14, 1988 he had experienced a "subluxation complex sacro-iliac joint." He was cleared to return to work on July 5, 1988. (One form indicates that he was released to return to work on July 5, 1988, another indicates the date to be July 6, 1988. The difference is immaterial to this dispute).. According to the Union, as he had a back injury he was unable to perform the duties associated with his position.

Consequently his absence was proper. The Grievant pointed out that if he had experienced back pain or spasms while climbing a grain elevator, a fall was potentially fatal. A fall from a tractor would be much less serious in his view.

There is a bureaucratic Catch 22 evident in this situation. The State makes no provision for people who need leave but who have no paid leave balance in their account. What are employees to do in such situations? Mr. Holbrook had a bad back. He had to plant on behalf of his grandfather in order to become eligible for set aside payments. In these circumstances his actions were reasonable. The Union urges the discharge be overturned.

Discussion:

The principles of progressive discipline enjoy wide acceptance in the industrial community. In essence, they indicate to all concerned that increasingly severe discipline may be administered in an effort to call to an employee's attention behavior that the employer regards as unacceptable. Progressive discipline is a concept that represents the general rule with respect to application of discipline. It does not represent a set of standards that must be slavishly followed, irrespective of the severity of the offense which may prompt discipline. If an employee with an unblemished record and long service were found to have stolen from the employer, or perhaps to have vandalized the employer's premises, the Union would be in an unsupportable position if it argued against a discharge on grounds that progressive discipline had not occurred. There must be a balancing of the severity of the offense and the severity of discipline. When the Union in this instance urges that the concept of progressive discipline has not been followed it is technically correct: the State moved from a written reprimand to discharge. That argument overlooks the fact

that Mr. Holbrook had accumulated four instances of discipline in the twelve month period preceding his discharge. It also overlooks the severity of his offense.

It is undisputed that Mr. Holbrook was working on the family farm in June, 1988 when he should have been working for the State. The medical excuse proffered is unconvincing. The photographic evidence submitted by the State shows him in a variety of positions, evidencing a wide range of motion. He is pictured lifting 50 pound seed bags. Such evidence is not characteristic of people experiencing a great deal of back pain. Furthermore, the medical excuse form completed by Dr. Hubbell indicates there would be no restrictions on his job activities. While Dr. Hubbell's form indicates that restrictions do not apply upon return to work, the activities of the Grievant while at work on the farm belie the assertion that he was physically unable to perform the duties associated with his position. In his statement to Investigator Ullom on June 22, 1988 Mr. Holbrook indicated that his back was not bothering him on June 20, 1988. He did not aggravate his back injury by his own account. If he could engage in farming, a strenuous activity, without pain and without harming himself on June 20, 1988, he could have been at work. The Grievant absented himself from work in June, 1988 because of a conflict between his duties with the State and his duties to the family farming enterprise. Acknowledging that this conflict was real and severe, that does not serve to justify the taking of leave without pay to operate the family farm.

That Mr. Ullom was a member of a bargaining unit and investigated another member of a bargaining unit does not serve to invalidate the discharge under scrutiny in this proceeding. In the course of events it is likely that bargaining unit members would have cause to investigate other bargaining unit members. To hold discipline inappropriate under such circumstances would be to place an improper restriction upon the State in its efforts to police its internal affairs.

Award:

Based upon the preceding discussion the grievance is denied.

Signed and dated this 3rd day of January, 1990 at South Russell, OH.

Harry Graham
Arbitrator