

ARBITRATION DECISION NO.:

315

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Youth Services

Mohican Youth Center

DATE OF ARBITRATION:

November 2, 1990

DATE OF DECISION:

January 14, 1991

GRIEVANT:

Ellen Jenkins

OCB GRIEVANCE NO.:

35-06-(89-03-28)-0016-01-09

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Brian J. Eastman

FOR THE EMPLOYER:

Rachel Livengood

KEY WORDS:

Resignation

Duress or Coercion

Polygraph Examination

Revocation of Resignation

Constructive Discharge

ARTICLES:

Article 25-Grievance Procedure

 §25.01-Grievance Procedure

Process

 §25.03-Arbitration Procedures

Article 24-Discipline

 §24.04-Pre-Discipline

 §24.07-Polygraph/Drug Tests

FACTS:

This case involves an employee at the Mohican Youth Center who was responsible for the distribution of the youths, personal belongings. The grievant also handled the youths, money one youth did not receive

\$50.00 due him when he was released. The grievant told her supervisor that she had given the envelope with the money to the driver who escorted the youth. The driver denied that he had ever received the envelope. A thorough search of the office by the supervisors did not turn up the money. Three or four days later an envelope with \$50.00 was found lying out in the open, on top of a file cabinet.

The supervisor called the Highway Patrol to conduct an investigation into the incident. The Highway Patrol decided they would like to polygraph both the grievant and the driver. The grievant agreed to take the polygraph test and almost a month later took the test. The trooper who administered the test told the grievant that she had "failed miserably." After the polygraph the grievant took her lunch break and when she returned to work the supervisor asked to speak with her. It is unclear whether the grievant ever openly admitted her guilt. The supervisor left the room while the grievant was asked to write a full statement. The supervisor did not comment on the future action of the Highway Patrol. The grievant, seemingly quite calm, resigned. Two days later the grievant accompanied by a Union steward tried to rescind her resignation. The State denied this request.

UNION'S POSITION:

There was a great deal of pressure exerted on the grievant. The grievant was constructively discharged without just cause. The grievant thought that she had to resign or she could be convicted because of the polygraph results and was only given seventy minutes to choose between prosecution and a resignation. She did not even choose the effective date of the resignation. All these factors are evidence that the grievant's choice was not voluntary. see Stone v. University of Maryland Medical System Corp., 855 F.2d 167 (1988).

EMPLOYER'S POSITION:

The grievance is improperly before the arbitrator. The grievant has no standing since she voluntarily resigned from the institution. The employer did not pressure the grievant to quit. The grievant understood the consequences of her decision. If the grievant had stayed she would have faced discipline and possible embarrassment for stealing money from the facility. Her own written statement acknowledged, "A few days later I realized that I shouldn't have taken the money because I am not a thief ... I put the envelope back in the drawer unopened." The grievant understood that she was going to be polygraphed by the Highway Patrol and had almost a month to decide what to do. At no time was the grievant denied representation. This was not a constructive discharge but a voluntary quit. It is not the employer's fault that the grievant chose to quit.

ARBITRATOR'S OPINION:

The arbitrator found two questions to be relevant as to whether the grievant could challenge the validity of her resignation:

1. Was the grievant competent to make the decision to resign ?, and
2. Was the decision made voluntarily without inducement by misrepresentation, coercion or duress ?

There was no evidence of the grievant's emotional instability that would render her incompetent. She read a newspaper, conversed with the trooper, talked with co-workers and was notified of this test and the procedures for the polygraph almost a month beforehand. The grievant could have consulted anyone she wanted in the time beforehand or even during her meeting with her supervisor. The grievant clearly understood the consequences of her action. There is no evidence of misrepresentation, coercion, or duress. As an ex-employee the grievant does not have standing to have her grievance arbitrated and therefore the grievance is denied.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

**In the Matter of the
Arbitration Between**

**OCSEA, Local 11
AFSCME, AFL-CIO
Union**

and

**State of Ohio
Employer.**

Grievance No.:
35-06-032889-0016-01-09

Grievant:
(Jenkins, Ellen)

Hearing Date:
November 2, 1990

Briefs Date:
December 5, 1990

Award Date:
January 14, 1991

For the Employer:
Rachel Livengood

For the Union:
Brian J. Eastman

Present at the hearing in addition to Grievant (Ellen Jenkins) and the Advocates named above were the following persons: Robert L. Goheen, Staff Representative, OCSEA, Linda Fieley, Counsel OCSEA, Tim Wagner, Director of Arbitration, OCB, Sally J. Childers, Acting Superintendent, Department of Youth Services (witness).

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.

Joint Exhibits:

1. Contract
2. Grievance Trail

3. Letter of resignation by Grievant which reads in full as follows:

"March 14, 1989
3:49 p.m.

I, Ellen Jenkins, do hereby resign my position at Mohican Youth Center for personal reasons. Effective 4:30 on 3/14/89.

Ellen L. Jenkins"

Employer Exhibits

1. Written statement of Grievant of 3/14/89 which reads in full as follows:

"March 14, 1989
2:40 p.m.

The day that Nick Glassburn left the institution I forgot to give the driver his money. I later discovered it in the desk drawer and decided to keep it and say I gave it to the driver. I didn't remember who the driver was however. Later when the money was reported missing I didn't really do anything about it.

A few days later I realized that I shouldn't have taken the money because I am not a thief and I have always been able to get by on what I make working here at MYC so -- I put the envelope back in the drawer unopened.

Mr. Bumpus (I think) then found the money and I thought that would be the end of it.

I am very sorry this happened -- it never happened before and it will most definitely never happen again. I sincerely hope this one stupid mistake will not cost me my employment.

Ellen L. Jenkins"

2. Personnel Action -- Resignation of Grievant dates 3/15/89

3. Statement of Sally Childers dated 3/17/89 (notarized)

Union Exhibits

1. Written statement of Grievant dated 3/15/89 (unwitnessed and unnotarized)

Employer's Statement of the Issue

Did the events of March 14, 1989 in which Ellen Jenkins tendered a written resignation result in a voluntary quit or a constructive discharge?

Union's Statement of the Issue

Whether the Grievant's resignation was voluntary or made under duress and coercion so as to amount to a constructive discharge. If resignation was not a voluntary quit, what should the remedy be?

Contract Sections

§25.01 - Grievance Procedure Process (in part)

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

§25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

§24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

§24.07 - Polygraph/Drug Tests

No employee shall be required to take a polygraph, voice stress or psychological stress examination as a condition of retaining, employment, nor shall an employee be subject to discipline for the refusal to take such a test.

Unless mandated by federal funds/grants, there will be no random drug testing of employees covered by this Agreement.

Facts

The Grievant was employed at the Mohican Youth Center (MYC) at the time of the incident in question. She had been employed for 8-1/2 years. At the time of the incident, she was the receptionist at the institution and during the course of the events she received a promotion to technical typist. One duty of the receptionist at MYC was to ensure that youths leaving the institution receive their personal belongings and personal money which has been sealed in an envelope.

On February 3, 1989, Sally Childers received two (2) calls inquiring what had happened to the money (\$50) due youth NG on 1/31/89 when he was released. Ms. Childers first asked the Grievant because turning over the money was her responsibility. The Grievant said she had given the money to the driver who escorted youth NG, but she could not remember who the driver was that day. Ms. Childers asked the Grievant to find out which driver was on duty. On February 5, 1989, Ms. Childers received another inquiry about the money. She found that the Grievant had forgotten to check on the driver. So, Ms. Childers found that the driver was Robert Fiske. Ms. Childers questioned the Grievant and Larry Styers. The Grievant again reiterated that she had given the money to the driver. Operations Supervisors thoroughly searched the Operations office and the file cabinet where the payroll books were kept. They took out file drawers, desk drawers, moved furniture, checked the Grievant's desk and files. They did not find the money or its envelope.

Three or four days later, the Operations Supervisor found the money still in its envelope lying openly on top of the payroll books in the file cabinet next to the grievant's. The Grievant continued to maintain that she had given the money to the driver.

Ms. Childers called the Highway Patrol (HWP) and asked them to conduct an investigation. As part of the investigation, the HWP decided they wished to polygraph the Grievant and Robert Fiske, the driver. The Grievant agreed to take the polygraph and in preparation the Patrol asked Ms. Childers to give the Grievant the applicable sections of the Ohio Revised Code and to read them to the Grievant. This reading took place two or three weeks before the scheduled polygraph. On March 14, 1989, the Grievant drove with a trooper to Massillon to have the polygraph. At the end of the test, the trooper (Schaub) who administered the exam told the Grievant she had "failed the test." The trooper drove her back to the Post. The Grievant went home and had lunch. She returned to work at approximately 2:00-2:30 p.m. During this time period, Trooper Schaub called Ms. Childers and told her that the Grievant "had failed the test miserably." The Grievant when she came in was asked by Ms. Childers to step into her office. According to the Grievant, she said "I have good idea why." Ms. Childers said that she had received a call from Trooper Schaub who said that the Grievant had failed her test. The Grievant said that "she knew that." Ms. Childers asked "what was going on with this situation. Did you or did you not take the \$50.00?" She replied "I must have because polygraphs do not lie." (Employer Exhibit #3 and Union Exhibit #1 and Arbitration testimony of both Childers and Grievant.)

At this point, Childer's testimony and the Grievant's testimony about the conversation diverges somewhat.

Childers said that she asked a second time and Grievant said "Yes, I did take the money." However in both her written statement (Exhibit U-1) and her testimony, Grievant never agreed that she made this direct verbal admission Childers gave the Grievant and asked her to write a full statement. The Grievant did so. (See Exhibit E-1 reproduced in full on p. 2). This statement was dated 3/14/89 at 2:40 p.m. While the Grievant wrote this statement, Ms. Childers left the room. She returned in approximately 20 minutes. She read the statement. According to Ms. Childers, the Grievant then asked Ms. Childers what was going to happen to her. Ms. Childers replied that she did not know and would have to call Columbus. Ms. Childers left. Ms. Childers testified that the Grievant was reading the newspaper when she left and when she returned. According to Ms. Childers she called Columbus and was told 1) that the Department would allow a resignation and 2) that Department could not speak for what the HWP would do. The Columbus official also told Childers that if the Grievant did not resign, Childers was to fill out an investigation notice and give it to the Grievant in the presence of a Union Steward.

The Grievant maintains that before Childers called Columbus, she (Childers) told the Grievant that the Department had no idea what the HWP would do but that the Department would allow a resignation and her

personnel records would not reflect the incident. According to Childers, the Grievant said she wanted to resign. She said she was concerned about her daughter's reaction. Ms. Childers again gave the Grievant a pad and pen. The Grievant wrote her resignation dating it at 3:49 p.m. (See Joint Exhibit #3) When Childers returned, she suggested that the resignation be dated later in the day to give the Grievant time to go to Personnel. The Grievant then added the words "Effective 4:30 on 3/14/89." Ms. Childers accompanied the Grievant to Personnel. The Grievant stopped along the way and had social conversations with co-workers. On 3/15/89, the Grievant was contacted by a Union representative.

On 3/16/89, the Grievant returned to the institution with a Union representative and attempted to rescind the resignation; her attempt was futile.

At the hearing, Ms. Childers said that during the course of these events, she neither offered to get a Union representative nor did the Grievant ask for one. Moreover, the Grievant asked in a calm and even relaxed manner, reading a newspaper while waiting. Ms. Childers said that she did not discuss discipline nor threaten it. The Grievant described herself as threatened, coerced, and intimidated.

Union's Position

The Grievant did not resign, rather she was constructively discharged without just cause. Her alleged resignation was not done knowingly and was the result of duress and coercion. The Grievant labored under the misinformation that she could be convicted because of the polygraph. All fair indicia from Stone v. University of Maryland Medical System Corp., 855 F.2d 167 (1988) of lack of volition are met:

1. "Was the employee given some alternative to resignation."

She was told resign or face possible discipline (Union brief). She said she understood the choice to resign or be prosecuted.

2. Did the employee understand the nature of the choice?

No she believed polygraphs were conclusive evidence, thus she was deprived of an opportunity to make an informed choice.

3. Was the employee given a reasonable time to choose?

No, she had to choose within a 70 minute time period.

4. Was the employee permitted to select the effective date of resignation?

No, the effective time was dictated by Ms. Childers.

Employer's Position

1. The employee did have a choice. She could resign with a clean slate or be handed an investigatory notice and face discipline. The Employer made no representations of the action of the HWP.

2. The Grievant made an informed decision. She had known of the coming polygraph for weeks. She willingly agreed to it and discussed it openly with co-workers. Childers gave her information about the Code and the test well in advance of the test. Prior to the test, she had a booklet to read and thoroughly review the questions she would be asked. After the test, she went home and had lunch. When asked to step into Childers' office, she did so and in fact, said she had a "good idea" why she was asked. She had ample time while Ms. Childers was out of the office to reflect on her situation. She remained calm throughout the process. No evidence exists that the Grievant was not competent. While the time on 3/14/89 was about 2 hours in length, the Grievant had significant time to reflect on the situation for over a month. Moreover, both statements with dates and times were written by Grievant while Ms. Childers was out of the room. The

writings taken together evidence a clear intent to resign, knowingly executed. The Grievant resigned; she had no rights as a non-employee to grieve. Therefore, the Grievance is not before the Arbitrator properly.

Discussion

The basic criteria to decide offered by the Employer and Union are basically the same: (1) Was the Grievant competent to make the decision? Was she operating under such an emotional deficit as to render her incompetent? (2) Was the grievant's decision made voluntarily or was it induced by misrepresentation, coercion, or duress?

The Arbitrator finds no evidence that the Grievant was suffering or under such an emotional state that she was "incompetent" to decide. While the Grievant testified that she was extremely upset at the polygraph test site, she was able to ride back with the trooper carrying on a social conversation (by her admission), drive home, eat lunch, and return to work. She displayed no evidence of emotional instability during the time with Ms. Childers, no crying, no screaming, no visible behavior changes.. She was able to read a newspaper and talk to co-workers coherently. She clearly understood the possible consequences: criminal charges, loss of her job, humiliation of her family.

The Arbitrator finds no evidence of coercion or duress. The Grievant had weeks to consider this scenario. During that period, she chose neither to consult a lawyer or her union. Ms. Childers said she could resign. Ms. Childers did not speak for the HWP. The Grievant had discussed the issue with a trooper only 2 hours earlier. While Childers did not discuss discipline, any reasonably person could conclude that given her written confession, the Employer had to react. To choose to resign was not unreasonable. The Arbitrator does not believe Childers threatened or coerced the Grievant. The situation was tense. However, the Grievant could have left the room at any time, could have refused to talk, etc.

The Union says that the conclusiveness of the polygraph was misrepresented to the Grievant and that she relied on this misrepresentation to her detriment. This argument fails. Weeks before the test, she was read material on it. Before the test, she was given a pamphlet. After the test, she went home and had lunch and could have consulted whomever she wished.

The statement written by the Grievant is not a perfunctory canned confession. She describes the events in a realistic and clear way in which she exhibits significant sophistication about consequences.

The Grievant was not, under the contract, entitled to an offer of a steward. The investigation was still unfocused. Driver Fiske was still to be polygraphed. A more prudent Employer might have asked a Union steward to be present as a courtesy. Even after her resignation, the Grievant did not call a steward but only responded after a steward contacted her.

Perhaps, the Grievant would have been wiser if she had refused to discuss the issue and gamble on discipline. With her 8-1/2 years employment and good record, she might have fared better in the long run. However, the Arbitrator cannot subsequently rearrange reality. The Grievant knowingly and voluntarily resigned. The Employer could have allowed a rescission but no contract provision so obligates them. As an ex-employee, Grievant had no standing to grieve. The Grievance is not properly before the Arbitrator.

Award

Grievance is not arbitratable and therefore is denied.

Date: January 14, 1991

Rhonda R. Rivera
Arbitrator