

ARBITRATION DECISION NO.:

319

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction, SCI, Lancaster

DATE OF ARBITRATION:

January 23, 1991

DATE OF DECISION:

February 6, 1991

GRIEVANT:

Terry Stoughton

OCB GRIEVANCE NO.:

27-24-(89-12-19)-0054-01-03

27-24-(90-05-02)-0068-01-06

27-24-(90-06-28)-0080-01-06

ARBITRATOR:

Harry Graham

FOR THE UNION:

John Fisher

FOR THE EMPLOYER:

Nicholas G. Menedis

KEY WORDS:

Removal

Insubordination - Refusal

to Shave Beard

OSHA Regulations

ARTICLES:

Article 24 - Discipline

FACTS:

The grievant was a welder employed since September 1986 by the Ohio Department of Rehabilitation and Corrections. The facility in which the grievant worked was ordered by the occupational Safety and Health Administration (OSHA) to develop policies regarding protecting employees from respiratory hazards. Policies were submitted to and approved by OSHA in June 1989.

Part of the policy covered employees, exposure to asbestos. The employer specified the Comfo 2 Negative Pressure Respirator to protect employees from asbestos. The respirator's instructions stated that it may not seal properly for persons with beards and OSHA standards call for persons wearing the respirator to

be clean shaven. The employer, therefore, specified that all employees who use the Comfo 2 must shave their beards. The grievant took and passed a fit test although he was wearing a beard at the time. The grievant continued to refuse to shave his beard. Therefore, he received five and ten day suspensions and finally was removed for insubordination. Grievances filed concerning all discipline were consolidated into this arbitration.

EMPLOYER'S POSITION:

There was just cause for discipline. The employer's guideline was reasonable and developed in accordance with OSHA guidelines and the respirator manufacturer's guidelines. There is no dispute that the grievant had a beard. The grievant wishes to use another type of respirator, however, the OSHA guideline requires the employer to select and provide respirators. Therefore, the employer has the authority to choose the respirator employees must wear. Additionally, the grievant continued his insubordination after he lost an arbitration of a three day suspension for another incident when he refused to shave prior to using the Comfo 2 Respirator.

The grievant's argument that his skin condition prevents shaving his beard was not persuasive. An employer ordered examination resulted in the conclusion that it is not necessary to wear a beard to cope with the grievant's condition.

UNION'S POSITION:

There is no just cause for discipline. The grievant has a medical condition which is aggravated by shaving. The grievant's physician stated that the grievant will experience this condition for the rest of his life. The Ohio Department of Industrial Relations has concluded that the grievant has been wrongly discharged. Also, the grievant passed a fit test administered by the employer. Lastly, the grievant has offered to use a full face respirator which the local union has offered to pay for. The full face respirator can be worn over beards and is OSHA approved.

ARBITRATOR'S OPINION:

There is contradictory evidence regarding the grievant's medical condition. The grievant's physician was unequivocal on the point that the grievant has a lifetime skin condition. This did not require the conclusion that the grievant must wear a beard to control the condition. The physician testifying for the employer stated that the grievant could shave with barber's clippers which was acceptable to the employer.

That the Ohio Department of Industrial Relations recommended reinstatement is irrelevant. The grievant was a Department of Rehabilitation and Corrections employee. In addition, the employer did not present its case to the Department of Industrial Relations. Therefore, that decision carries little weight and does not bind the arbitrator.

The employer's rule requiring employees to be clean shaven is reasonable. The respirator manufacturer and OSHA both recommend that users of the Comfo 2 be clean shaven. Also, the employer only requires employees to shave when they must use the respirator. That the grievant passed a fit test is not determinative because the test was conducted under ideal circumstances.

The fact that the grievant proposed using an alternate respirator is not relevant to the issue of insubordination. The grievant was clearly on notice of his responsibility to follow the employer's orders through prior discipline. The grievant's prior arbitrated case also put him on notice of his duty.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

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

Case Nos.:

27-24-(12/19/89)-54-01-03

27-24-(05/02/90)-68-01-06

27-24-(06/28/90)-80-01-06

Before:

Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

John Fisher

Staff Representative

OCSEA/AFSCME Local 11

1680 Watermark Dr.

Columbus, OH 43215

**For Department of
Rehabilitation and Correction:**

Nicholas G. Menedis, Chief

Bureau of Labor Relations

Department of Rehabilitation

and Correction

1050 Freeway Drive North,

Suite 206

Columbus, OH 43229

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Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter on January 23, 1991, before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

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Issue:

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

Was Terry Stoughton disciplined and subsequently discharged for just cause? If not, what shall the remedy be?

Background:

The events that led to this proceeding are not a matter of controversy. The Grievant, Terry Stoughton, has been employed since September 15, 1986 as a welder at the Southeastern Correctional Institution (SCI) in Lancaster, OH. The record indicates that to the time that the events under review here occurred that Mr. Stoughton was a good employee of the Department of Rehabilitation and Correction. Mr. Stoughton wears a beard. It is his beard and his refusal to shave it under certain circumstances that is the basis for his discharge.

In January, 1989 the Occupational Safety and Health Administration (OSHA) made a finding against SCI. Specifically, OSHA was concerned with what it regarded as deficiencies in SCI's program with respect to respiratory protection and confined space entry. In order to meet the deficiencies specified by OSHA it was necessary for the Institution to develop policies to improve protection for employees. It proceeded to do so. Its proposed policies were properly submitted to and approved by OSHA in June, 1989.

Among other features of the policies to protect employee health was a requirement that the Employer provide respiratory protection for employees who worked in areas that would expose them to asbestos. Mr. Stoughton was among those employees. After evaluation, the Employer decided to furnish a type of respirator known as a Comfo 2 Negative Pressure Respirator. The instructions furnished with the Comfo 2 (Employer Ex 7) indicate that it might not make a satisfactory face seal for people with beards. The manufacturer indicated that it would not warranty the performance of the Comfo 2 if used by bearded employees.

Employees who had to wear the respirator were required to take a fit test. Mr. Stoughton did so and passed. Despite that fact, the Employer was skeptical that the seal would be maintained in the actual work environment characterized by sweat and movement. Consequently the State directed that employees who had to wear the respirator shave their beards. In order to accommodate those who were very much attached to their beards the Employer indicated that it was not necessary that employees report to work clean shaven on a daily basis. Rather, they could grow their beards as they liked, shave them off when they had to use the respirator, and then regrow them. Mr. Stoughton would have had to shave his beard on several occasions during the course of the year.

Mr. Stoughton declined to shave his beard. Consequently the Employer commenced application of discipline. That discipline came to involve the five day suspension, ten day suspension and discharge under review in this proceeding. Mr. Stoughton was discharged on June 20, 1990. Grievances protesting the suspensions and discharge were filed and denied by the State. The parties consolidated the disciplinary grievances and they agree that they are properly before the Arbitrator for determination on their merits.

Position of the Employer:

The State claims that its actions in this situation were justified by the insubordination of the grievant when he failed to shave. It stresses that not only does the manufacturer of the Comfo 2 decline to warranty the product when worn by people with beards, OSHA standards call for wearers to be clean shaven. Thus, At 29 CFR Ch XVII (7-1-88 edition) is found the proviso that:

Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard, sideburns..... (Section 1910.134 5 i).

No dispute exists that Mr. Stoughton meets the test of having a beard. OSHA standards unambiguously speak to the relationship of beards and the difficulty of securing a satisfactory face seal when using a respirator.

Furthermore, OSHA has issued additional standards regarding respirators. At 29CFR 1926, 58(h)(2)(1) OSHA prescribes that the employer must select and provide respirators to employees at no cost. Employers must provide a powered air purifying respirator when an employee chooses to use such a device. In fact, Mr. Stoughton sought to use that type of respirator in lieu of the Comfo 2 provided by the State. There is however a modifier in the language of the OSHA standard. That is the word "and." That word, found between the language permitting employees to chose to use a powered respirator and language stipulating that such a device will provide adequate protection to employees permits the State to act as it did in this

instance it asserts. In the opinion of the State, use of a powered respirator entailing as it does a power pack and air hose is impractical under the circumstances in which Mr. Stoughton works.

The State points out that as a prelude to this case a three day suspension for the same offense was administered to Mr. Stoughton. It was submitted to arbitration under the expedited arbitration procedure of the parties. The arbitrator in that case sustained the State's position. Nothing has changed. In fact, as a result of the holding regarding the three day suspension Mr. Stoughton was put on clear warning that the State was likely to prevail in a subsequent proceeding. He continued his refusal to shave, thus demonstrating his insubordination.

The State anticipates a defense by the Union that Mr. Stoughton has a skin condition, folliculitis, pseudo folliculitis barbae or chancriform pyoderma. That defense should be rejected it urges. When it received information from Mr. Stoughton that he might be experiencing one of those conditions the State sent him to a dermatologist, Dr. Stephen E. Wolverton. At the time he examined Mr. Stoughton Dr. Wolverton was on the staff of Ohio State University. Dr. Wolverton concluded that Mr. Stoughton's history was consistent with pseudo folliculitis barbae but that wearing a beard was not required to cope with it. He recommended alteration of shaving technique, perhaps use of a barber clippers or electric shaver. (Employer Ex. 11). Furthermore, the State's doctor did not confirm that Mr. Stoughton had the condition at the time of his discharge. As no medical condition exists warranting use of a respirator other than that selected by the State the grievances should be denied it insists.

Position of the Union:

The Union is of the view that Mr. Stoughton refused to shave his beard as he experiences pseudo folliculitis barbae. That condition is aggravated by shaving. Evidence from Mr. Stoughton's physician, Dr. James Merk, (Union Ex. 7) is on record that he has been experiencing that condition since 1974 and that it will be with him for life. As this is the case, his refusal to shave is reasonable and does not furnish the State with the requisite just cause for discipline or discharge according to the Union.

OSHA is the agency in the State charged with enforcement of health and safety standards. It concluded that Mr. Stoughton was wrongly discharged. It recommended to the Department of Rehabilitation and Correction that he be reemployed and made whole. As OSHA came to that conclusion, the Arbitrator should as well according to the Union.

The Union points out that Mr. Stoughton passed the respirator fit test. Nonetheless, the State adhered to its requirement that he be clean shaven. That flies in the face of rationality according to the Union. The State established a test. The grievant passed. Nonetheless, he was disciplined. In the Union's view, this is nonsensical.

Mr. Stoughton has consistently offered to wear a powered air purifying respirator (PAPR). At the hearing he demonstrated such a device. His demonstration included an indication that the air hose would not be crimped by motion in the course of his duties. The local union has offered to pay for such a device. As that is the case, the Union urges the grievance be sustained and Mr. Stoughton be restored to employment and made whole.

Discussion:

The evidence concerning whether or not Mr. Stoughton is experiencing pseudo folliculitis barbae is contradictory. On the one hand, Dr. Wolverton of Ohio State was equivocal on the question. Dr. Merk, Mr. Stoughton's personal physician, was not. He indicated (Union Ex. 7) that Mr. Stoughton's condition was a life-time experience. The arbitrator accepts the fact that Mr. Stoughton suffers from pseudo folliculitis barbae. That conclusion does not prompt the conclusion sought by the Union, that wearing of a beard is essential to manage it. To the contrary, Dr. Wolverton indicated that the condition may be managed by shaving with a barber clippers. Shaving with such a clippers is not as close as shaving with a razor. In the opinion of the State, shaving in that fashion is acceptable. Furthermore, Dr. Merk does not state that Mr. Stoughton may not shave. He indicates only that Mr. Stoughton has pseudo folliculitis barbae. As shaving

with a barber clippers is acceptable for people experiencing that condition and is also acceptable to the State, the Union's medical defense must be rejected.

That the State OSHA agency recommended Mr. Stoughton be restored to employment is not germane to this dispute. Mr. Stoughton was an employee of the Department of Rehabilitation and Correction. His discipline and subsequent discharge was properly grieved through the grievance procedure of the parties. It is the exclusive method for resolving controversies of this nature. The conclusion of the Director of the Department of Industrial Relations urging that Mr. Stoughton be reinstated was based solely on accounts from officials of his Department. The Department of Rehabilitation and Correction was not heard to present its case to the Department of Industrial Relations. That Department did not conduct the sort of evidentiary hearing required by elementary considerations of due process. The conclusion of Director Harris is entitled to little weight in this proceeding. It is not controlling and does not serve to bind this or any other arbitrator.

That Mr. Stoughton passed the respirator fit test does not have a great deal of bearing on this case. He passed while taking it under ideal conditions. Furthermore, the manufacturer of the Comfo 2 indicates that it "may not provide a satisfactory face seal" when used by people with beards. (Employer Exhibit 7). OSHA indicates the same to be the case. (Employer Exs. 5 and 6). It is beyond doubt that employees who are bearded should not wear a respirator. The injunction of the manufacturer against wearing the Comfo 2 with a beard, coupled with similar sentiments expressed by OSHA compels a conclusion that the requirement of the State is a reasonable one. This is especially true in this situation when it is recalled that the State did not require Mr. Stoughton or similarly situated employees to be clean shaven at all times. Mr. Stoughton was only required to shave, using a barber clippers if he so desired, when he was assigned to work in the tunnels of the Institution. Bearing in mind that the area is replete with asbestos, such a directive is eminently reasonable.

The most troubling aspect of this dispute to the Arbitrator is the question of the PAPR. It is not as clear to the Arbitrator as it is to the State that the PAPR is entirely unsuitable for use in the tunnels at the Institution. The Grievant's demonstration at the hearing indicates that the principle objection to the device raised by the State, that the air hose was subject to crimping in the tunnels, was questionable. The power pack and air hose may be positioned on the wearer's body so as to minimize chances of snagging on fixtures and appurtenances in the tunnel. It is conceptually possible that the PAPR could be used by a welder in performance of his task in the tunnels.

That conclusion begs the question in this case. The issue here is one of insubordination. There can be no question that insubordination has occurred in this situation. The record on that issue is abundantly clear. The State followed the practice of progressive discipline to the letter in this instance. Increasingly severe suspensions were administered to Mr. Stoughton to call to his attention its displeasure with his conduct. A three day suspension was administered and arbitrated. The arbitrator denied the grievance. No clearer evidence than that could exist that insubordination occurred in this instance and that the State's action to remedy it was reasonable. In spite of the arbitrator's decision in the three day suspension, Mr. Stoughton continued to report to work with his beard.

It is obvious that Mr. Stoughton has a very handsome beard. It may well be believed that he is reluctant to shave it periodically, even if with a barber clippers rather than a razor. That said, the requirement of the wearing the Comfo 2 in these circumstances is eminently reasonable. Mr. Stoughton's continued refusal to wear it, even if it is credited that he experiences pseudo folliculitis barbae, manifests continued insubordination. It must be concluded that the State possessed the requisite just cause for its action in this situation.

Award:

The grievance is denied.

Signed and dated this 6th day of February, 1991 at South Russell, OH.

Harry Graham

Arbitrator