ARBITRATION DECISION NO.:
403

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Public Safety
Division of State Highway Patrol
Model Facility

DATE OF ARBITRATION:
November 7, 1991

DATE OF DECISION:
December 10, 1991

GRIEVANT:
Anthony Clacko

OCB GRIEVANCE NO.:
15-03-(91-04-01)-0053-01-07

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Gene Freeland
Pay Mayer

FOR THE EMPLOYER:
Anne Arena
Paul Kirschner

KEY WORDS:
Discipline
Disparate Treatment
Removal
Falsification of Documents

ARTICLES:
Article 24-Discipline
- §24.01-Standard
- §24.02-Progressive Discipline
- §24.04-Pre-Discipline

Article 25-Grievance Procedure
- §25.02-Grievance Steps
- Step 3

FACTS:

This grievance arose from an incident which took place at a facility run by the Highway Department. At this facility, the state administers tests for Commercial Driver's Licenses (CDL). The grievant was a Driver's License Examiner 1 of 13 months and had no prior discipline. On February 1, 1991, an applicant came to the facility to take the three-part CDL exam. The applicant failed the first part of the exam but passed the last two. The grievant then changed the score sheet of the applicant so that the score for the first part of the exam indicated that the applicant had passed. The grievant was subsequently removed from employment and charged criminally with falsification but these charges were dropped.

EMPLOYER'S POSITION:

The employer asserted that a removal is an appropriate disciplinary measure for falsification of records even for a first offense. The employer argued that the grievant, in effect, licensed an illegal driver. This not only harms the integrity of the state testing system but could also bring harm to the public. The employer believes that there are no mitigating factors and that there was no disparate treatment.

UNION'S POSITION:

The union claims that there are mitigating factors surrounding the grievant's actions and that a removal is too severe. The union points out that the grievant had no prior discipline and was rated as a good employee. The union also mentions that the employee did not benefit in any way from his actions, thus his actions were not self-serving. The union also claims that the grievant did not act alone but that another examiner within the department actually made the changes on the score sheet. Additionally, the union contends that the grievant was treated differently than other employees who falsified licenses. The union urges the arbitrator to reduce the removal.

ARBITRATOR'S OPINION:

The arbitrator found that the grievant clearly knew that he was violating the rules of the facility and exceeding his authority. Thus, the arbitrator is not persuaded by the union's argument that there were mitigating factors. Falsification of licenses is serious enough to warrant a removal on the first offense. The arbitrator also found no incident of disparate treatment. The two other cases cited by the union also involved employees caught in the act of license falsification who were removed from employment or retired in anticipation of being removed. The arbitrator said that falsification of an exam is an extremely serious infraction of a criminal nature and provides just cause for the grievant's removal.

AWARD:

The grievance is denied in its entirety.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO
Union

and

State of Ohio
Ohio State Highway Patrol
Employer.

Grievance No.:

15-03-910401-0033-01-07
Grievant:
(A. Clacko)
Hearing Date:
November 7, 1991
Award Date:
December 10, 1991

Arbitrator:
R. Rivera

For the Employer:
Anne Arena
Paul Kirschner

For the Union:
Gene Freeland
Pat Mayer

Present at the Hearing in addition to the Grievant and Advocates were James R. Gilmore, DXII, Steward (witness), Janes Hartsell, DX-I (witness), Captain John M Demaree, Management Representative, Harold L. Shonk, Administrative Officer I (witness), Mark Irmscher, DX-I (witness), Larry Woolum, Lieutenant (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. Witnesses were sequestered. All witnesses were sworn.

Joint Issue

Was the Grievant discharged for just cause?
If not, what shall the remedy be?

Joint Exhibits

1. AFSCME Contract

2. Grievance Trail - 15-03-910401-0033-01-07

3. a. Administrative leave Letter dated February 28, 1991
   b. Statement of Charges dated March 14, 1991
   c. Pre-termination Letter dated March 18, 1991
   d. Hearing Officer Reply dated March 25, 1991
   e. Removal Letter dated March 25, 1991

Employer's Exhibits

1. Opening Statement

2. Section 3.2 of Examiner's Manual Entitled "Vehicle Inspection Test Administration"

3. O.R.C. 2921.13 Falsification

4. Ohio State Highway Patrol Mission Statement

5. Driver's License Examination Report - Annual 1990

6. Section 6 entitled "Employee Discipline" from Department of Highway Safety's Work Rules and Procedures

7. Page I-4 entitled "Employee Conduct" from Department of Highway Safety's Work Rules and Procedures.
8. Acknowledgement signed November 30, 1989 by Grievant which acknowledged receipt of Department of Highway Safety's Work Rules and Procedures.

Union Exhibits

1. Opening Statement

2. Arbitration dated July 11, 1991, Grievant (W. Ollom)

3. Statement given by Geo. W. Daniel to Sgt. Bahr on March 4, 1991

4. Test papers of Rhonda D. Bennett

5. Letter from J.R. Gilmore to Lt. Woolum dated April 17, 1991

6. CDL of Robert Highsmith

7. Statement by Constance Barber

8. Evaluation of Grievant dated December 6, 1990

9. Court docket slip showing Bond Forfeiture on August 12, 1991 by Grievant

Relevant Contract Sections

§24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:
A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);

D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§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.

§25.02 - Grievance Steps

Step 3 - Agency Head or Designee

If the grievance is still unresolved, a legible copy of the grievance form shall be presented by the Union to the Agency Head or designee in writing within ten (10) days after receipt of the Step Two response or after the date such response was due, whichever is earlier. Within fifteen (15) days after the receipt of the written grievance, the parties shall meet in an attempt to resolve the grievance unless the parties mutually agree otherwise. In the Ohio Department of Transportation Step 3 meetings will normally be held at the worksite of the grievant. If the meeting is held at the district headquarters the chief steward will be permitted to represent.

The Agency Head or designee shall process grievances in the following manner:

A. Disciplinary grievances (suspension and removal)

The Step 3 grievance response shall be prepared by the Agency Head or designee and reviewed by the Office of Collective Bargaining. The response will be issued by the Agency Head or designee within thirty-five (35) days of the meeting. The response shall be forwarded to the grievant and a copy to one representative designated by the Local Chapter Officer. Additionally, a copy of the answer will be forwarded to the Union's Central Office. This response shall be accompanied by a legible copy of the grievance form.

If the grievance is,not resolved at Step 3, the Union may appeal the grievance to arbitration by providing written notice and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given whichever is earlier.

B. All other grievances

The Agency Head or designee shall give his/her written response and return a legible copy of the grievance form within fifteen (15) days following the meeting. The Agency shall forward the response to the

grievant and a copy to one representative designated by the Local Chapter Officer.

Procedural Issues

The Union agreed that the Arbitration was properly before the Arbitrator. However, at the outset of the hearing, the Union made the following procedural objections:

There were no management witnesses at the Pre-Disciplinary hearing, even though the second paragraph of the Pre-Disciplinary hearing letter of response, management mentions and identifies the state's witnesses as Lt. L. Woolum, and Administrative Officer Harold L. Shonk. Lt. Woolum read the charges, but they did not witness the event. No actual eyewitnesses were present and due process was severely harmed. No facts could be established.

At the Step III grievance hearing, the only person from management present was the hearing officer, Anne Arena. There were no management witnesses present, and this prevented the union from having the right to question managements' witnesses. This was not proper procedure, and severely harmed the due process of the hearing.

The Employer made the following response:

1. Officer Shonk and Lt. Woolum were at the pre-disciplinary meeting and were management witnesses.

2. Under §25.02, Step III does not require management witnesses.

3. The Grievant has received full due process.

Facts

This Grievance arises out of an incident which took place at the Model Facility run by the Highway Department. At this Model Facility, the state administers an examination for a Commercial Driver's License (CDL). This test is a relatively new procedure designed to implement a recent statute. The test is essentially in three parts. Part I (Pre-Trip Inspection Test) involves the examiner and the applicant going to the vehicle. At the vehicle, the applicant must use the vehicle as a demonstration model to identify and explain the various parts. The second and third parts of the CDL examination involve skill tests and are not relevant to this Grievance. To learn to administer this test, the examiners receive training and, in addition, are furnished a manual. The Grievant in this case is a Driver's License Examiner I (DX-I) stationed at the Model Facility. His hire date was December 4, 1989. At the time of the discipline, he had no prior discipline. His evaluation showed him to have been rated a good employee (see Union Exhibit #8).

On February 1, 1991, George W. Daniel came to take his Commercial Driver's License Examination. Examiner (DX) Irmscher took Mr. Daniel from the building to his vehicle to do the Pre-Trip Inspection test. That test was given from 2:40 p.m. to 3:00 p.m. Mr. Daniel received 56/104 according to Irmscher's calculations. DX Irmscher, pursuant to policy, proceeded to administer the second two parts of the CDL. The applicant passed these sections. DX Irmscher told Applicant Daniel that he had failed the first part of the test, that he (Daniel) would have to retake that part, and that he (Irmscher) would see if he could get Daniel back on Monday to retake the exam. Together DX Irmscher and Applicant Daniel walked into the Facility and up to the desk. DX Irmscher laid the test on the desk and asked if anyone (addressed to other examiners) could fit the applicant in on Monday. The time was now late on Friday, probably around 4:00 p.m. According to DX Irmscher and not denied by the Grievant, the Grievant then said "Are you going to make this guy come back Monday just to identify his lug nuts?" DX Irmscher said yes, that the applicant had failed the Pre-Trip Inspection section and had to repeat it. At that.point, the Grievant took the form, added hash marks against certain sections, changed the score to 83/104 instead of 56/104 and wrote "pass" over "fail." He then asked DX Irmscher to sign and seal the form which DX Irmscher refused to do. The Grievant

then took the fee form (#6211), added a second box to the Pre-Trip Inspection section indicating a pass on 2/1/91 (DX Irmscher had already indicated a "not-passed" on the same date). In addition, the Grievant waived a second fee of $10.00 for the applicant Daniel. Daniel was then free to secure a Commercial Driver's License which he apparently did. Grievant admits these actions but alleges that a second examiner (Mr. Roberts) also participated in changing the scores. DX Irmscher, however, said that Mr. Roberts was standing near this scene but he (Roberts) did not change or add marks as far as he (Irmscher) knew. The Grievant said that the reason he gave the applicant more hash marks (i.e., credit) was because he (the applicant) should have been credited originally. The Grievant admitted that he added up the new and old hash marks improperly and that later he realized that he was mistaken because they did not add up to 83 but 77 i.e., not passing. The Grievant also testified that he had been charged with falsification as a criminal act but that the prosecutor had subsequently dismissed the charges when he, the Grievant, agreed to forfeit his bond.

Procedural Discussion

The Union alleges that the Employer violated the contract by the failure to present "eyewitnesses" at the pre-disciplinary meeting. Section 24.04 does not require that an "eyewitness" be present at the pre-disciplinary meeting. The only persons required by the Contract are "the employer representative recommending discipline" (subject to certain conditions) and the Appointing Authority's designee (to conduct the meeting).

The Union alleges that no management witnesses were at the Step III and, thus, the Contract was violated. Under §25.02 (Step III), the Contract does not require management to make witnesses available at Step III. The section only requires that the parties "meet in an attempt to resolve the grievance."

The Arbitrator finds that the Employer did not violate §24.04 or §25.02. The fact that the Employer did not violate these two specific sections would not, in and of itself, show that basic notions of due process inherent in the process were not violated. However, the Union failed to show specifically any unfairness or prejudice emanating from the investigation or the discipline which violated notions of due process.

Discussion - Substantive

The Union attempted to show that on two occasions a supervisor had changed an applicant's score. The evidence with regard to these alleged incidents was far from clear and convincing. Moreover, the evidence was also irrelevant. If a supervisor changed a score, that fact does not change the fact that the Grievant was unauthorized to change scores. Moreover, the Union introduced no evidence that the supervisor did not have the authority to do what he was alleged to have done.

The Union also attempted to show with some success that guidelines and rules changed from time-to-time at the new facility. In fact, the Employer's main witness agreed that adjustments were made to accommodate new problems under a new procedure. No evidence was adduced that any former or later procedure allowed an examiner to change the grades given by another examiner or that any former or later procedure allowed a Pre-Trip inspection to be given in the facility. No evidence was adduced to show that the Grievant was ever given, before or after the incident, supervisory control over Examiner Irmscher.

The unassailable facts are that the Grievant, without authority, changed the grades given by another examiner and, in essence, conducted a Pre-Trip Inspection in the facility and without a vehicle. The Grievant clearly knew that he was violating the rules of the facility and exceeding his authority. In addition, the Grievant knew or should have known that his rule violation allowed an unauthorized driver on the roads in charge of a large and potentially dangerous vehicle. Moreover, at the hearing, the Grievant did little to explain his actions beyond indicating vaguely that he believed that in certain cases the applicant should have earned more points than DX Irmscher gave him. The evidence shows that the Grievant not only violated the procedures, but he did so openly in front of other examiners and in front of a member of the Public. Moreover, he did so in a way which was embarrassing and demeaning to DX Irmscher. (In his testimony, the Grievant made much of his own embarrassment when fired due to the public nature of some of the procedures. He made no allusion, however, to the embarrassment he caused DX Irmscher.)

The Employer provided no evidence that the Grievant in any way benefitted from his act nor did the Employer provide any evidence to suggest that the act was planned nor solicited by the applicant Daniel. In fact, neither side has provided any reasonable explanation for the aberrant act. Given that the actual violation was admitted by the Grievant, three issues raised by the Union remain.

1. Disparate Treatment

The Union claims a second bargaining unit member and examiner (Mr. Roberts) was involved and made changes but that he was not disciplined. The evidence is not persuasive on this point. DX Irmscher said that only the grievant made changes. The Grievant said another examiner made changes. As between these two men, without any other persuasive evidence, the Arbitrator finds that only the Grievant was involved, and no disparate treatment is involved.

A second prong of the Union's disparate treatment argument is that the Grievant was treated differently than other employees who falsified licenses. Two other cases were cited: an employee, Mr. Amicarelli, who fraudulently obtained a CDL. His case was discussed by Arbitrator Cohen in the Ollom case (Union Exhibit #2). Arbitrator Cohen concluded that "had he not chosen to retire from employment, the record indicates that Amicarelli ... would have been removed from employment" (at p. 17-18). Arbitrator Cohen found no disparate treatment between Amicarelli and Ollom. The Union claims different treatment between Ollom and this Grievant. In the strict sense, the State has tried to treat them equally. The State removed Ollom and removed the Grievant. The difference occurs because Arbitrator Cohen reinstated Ollom. Does the Ollom decision indicate a basis to overrule the removal of the Grievant?

On one hand, Ollom apparently did falsify an examination for his own benefit; the Grievant's falsification benefitted Daniel but the Grievant received no personal benefit. In the Ollom decision, Arbitrator Cohen found Ollom's motive a mitigating factor. Cohen found Ollom's motive "an attempt to achieve an inconsequential and vain result" but no motive of personal gain. What can be said of Grievant's motive? None was adduced, although no personal gain or benefit was alleged.

What of harm? The harm apparently alleged by the state in the Ollom case was "adverse publicity and the harm on the image of the Agency." The Arbitrator gave little weight to the harm and contrasted it to the burden suffered by Ollom through criminal proceedings, fine, and probation. Here, the harm was much clearer. The Grievant, in essence, licensed an illegal driver. Moreover, he carried out this act in front of fellow workers, undermining rules, and in front of the applicant, a member of the public. Moreover, he embarrassed publicly another worker.

What of mitigating factors? Ollom was an employee of 15 years with virtually no discipline. The Grievant, at the time of the incident, was an employee of 13 months with no discipline.

In Ollom, the Arbitrator did re-instate Ollom but with a suspension equal to the time of his removal until the date of the award. In essence, he received a severe penalty and was only reinstated because of his long employment.

Here the Arbitrator can find little to mitigate the Grievant's act. He gave no coherent reason for what was an arbitrary and foolish action which violated the basic mission of the Employer. While his work record was good, he had only been employed 13 months.

As Arbitrator Cohen indicated, falsification of an exam by an employee is a "extremely serious" infraction of a criminal nature. The Arbitrator finds no disparate treatment nor mitigating factors and finds the Grievant's removal to be for just cause.

Date: December 10, 1991
RHONDA R. RIVERA, Arbitrator'