

ARBITRATION DECISION NO.:

425

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Lottery Commission

DATE OF ARBITRATION:

March 10, 1992

DATE OF DECISION:

March 24, 1992

GRIEVANT:

Lionel Vaughn

OCB GRIEVANCE NO.:

22-10-(91-05-20)-0003-01-09

ARBITRATOR:

Marvin J. Feldman

FOR THE UNION:

Tim Miller

Staff Representative

FOR THE EMPLOYER:

Robert Thornton

Advocate

Rodney Sampson

Second Chair

KEY WORDS:

Removal

Dishonesty

Disparate Treatment

ARTICLES:

Article 24-Discipline

§24.01-Standard

§24.02-Progressive Discipline

FACTS:

The grievant was employed as an Inventory Control Specialist at the time of his removal on May 9, 1991. At that time, he had never been subject to any prior disciplinary proceedings. Grievant was removed for violating Ohio Revised Code Section 3770.07(A) which prohibits Lottery Commission employees from receiving prizes from Ohio Lottery Games. There was some evidence presented by the Lottery Commission's Security Department that grievant may have been involved in the theft of lottery coupons of

the type redeemed by grievant; however, there was insufficient evidence regarding the theft on which to base grievant's termination. Contrary to the testimony of grievant's supervisors, there existed no evidence in the files that grievant knew that such behavior could trigger severe discipline including discharge.

Two other Lottery Commission employees similarly violated the same work rules subsequent to grievant's removal; one resigned, and the other received a one day suspension. In addition, Rule 24 of the Agency handbook states that a first offense of dishonesty may be disciplined by means of suspension.

EMPLOYER'S POSITION:

Grievant was made aware of both Ohio Lottery Rule 24 and Ohio Revised Code Section 3770.07(A) in orientation lectures conducted by both his immediate and higher up supervisors. The investigations conducted by the Ohio Lottery Commission Security Department and the Ohio Highway Patrol revealed evidence that the grievant was involved in the theft of returned and/or redeemed lottery tickets from the warehouse in which grievant worked.

UNION'S POSITION:

Grievant was treated in disparate manner from employees who were found guilty of similar violations involving the same work rule. The subsequent and dissimilar treatment of the other employees established a practice that the first violation for a dishonesty charge cannot result in termination. The State failed to establish grievant's role in the alleged theft of lottery coupons.

ARBITRATOR'S DECISION:

The Arbitrator held that a practice is the parties' response to an event. A practice must be established before, not after an event, in order to constitute a defense. Further, the Arbitrator considered only the employee who received the one day suspension in concluding that one event does not create a practice. The activity which constituted the basis of the removal must be limited to those facts which were fully developed; therefore, grievant's alleged participation in the theft of lottery tickets must be disregarded. The boundary of corrective progressive discipline, as reflected in the agency's disciplinary grid, may be a suspension.

The Arbitrator also found a lack of proof in the record that the grievant, a recently naturalized citizen, was ever aware of the state statute or agency Work Rule 24. Further, there was no proof on file that grievant signed off to the purported orientation lectures. There was insufficient proof and/or testimony upon which to base a removal, especially considering the contractual language and the work rules regarding corrective progressive discipline.

AWARD:

Grievant shall be reinstated within thirty days from the date of this decision without back pay, but also without loss of seniority.

TEXT OF THE OPINION:

VOLUNTARY ARBITRATION PROCEEDINGS

CASE NO. 22-10-910520-0003-01-09

THE STATE OF OHIO

The Employer

-and-

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, AFL-CIO**

The Union

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OPINION AND AWARD

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APPEARANCES

For the Employer:

Robert Thornton, Advocate
Rodney Sampson, Advocate
Kathleen Weiss, Chief Legal Counsel
Bruce Moses, Witness
Rudy Stralka, Witness
Walter Bubna, Observer
Renee Bubna, Observer
Cynthia Rowser, Observer
Dennis Poltrone, Observer
Steve Kmiotek, Observer
Michael Musarro, Witness
Laurie Tall, Observer

For the Union:

Tim Miller, Staff Representative
James LaRocca, Local Union President
Lionel Vaughn, Grievant
Lynn Kemp, Observer
Tim Brown, Witness

MARVIN J. FELDMAN
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I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on the 10th day of March, 1992, at the conference facility of the employer in Cleveland, Ohio. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn but not sequestered and that post hearing briefs of the parties would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS

Certain facts were stipulated by the parties and they may be fairly stated as follows:

"STIPULATED FACTS

- 1) The grievance is properly before the aribtrator.

- 2) The grievant was employed as a temporary employee prior to his appointment as a full-time permanent employee on July 17, 1988, as a Data Entry Operator. He occupied the position of Inventory Control Specialist at the time of his removal, May 9, 1991.
- 3) Ohio Revised Code Section 3770.07(A) prohibits Ohio Lottery Commission employees from receiving prizes from Ohio Lottery games.
- 4) The Commission began a practice in early 1990, of securing the signatures of employees on forms acknowledging an employee's awareness and understanding of the provisions of ORC 3770.07(A).
- 5) There is no such form on record for the grievant.
- 6) The grievant states that he did redeem Ohio Lottery games tickets and accepted prize winnings.
- 7) The grievant had satisfactory performance evaluations during the tenure of his employment.
- 8) The grievant had no prior disciplinary actions at the time of his removal.
- 9) Another employee of the Ohio Lottery Commission, found guilty of a similar violation of the Employer's work rules, received a one day suspension."

At Ohio Revised Code Section 3770.07 at Subparagraph (A)4, the following language appeared:

"No lottery prize award shall be awarded to or for any officer or employee of the state lottery commission, or any blood relative or spouse of such officer or employee living as a member of such officer's or employee's household."

On May 8, 1991, the grievant was in receipt of a letter from the Director of the Ohio Lottery Commission for whom he was employed, revealing that the grievant was terminated. That letter of termination, in full, stated as follows:

"May 8, 1991

Mr. Lionel Vaughn
9802 Kempton Avenue
Cleveland, Oh. 44108

Dear Mr. Vaughn:

You are hereby notified that your employment with the Ohio Lottery Commission is terminated. Tile termination is effective at the close of business on May 9, 1991, and is the result of violation number twenty-four (24), DISHONESTY, of the work rules and regulations.

Pursuant to the documentation issued you and your union representative, and discussed during the pre-disciplinary meeting conducted on May 2, 1991, you were identified by an agent and his employee as the individual who redeemed large amounts of Pre-Lolita instant tickets at the agent's location on more than one occasion. Furthermore, the agent issued to our Security Department a batch of these tickets brought by you to his location on one occasion, which was related during the meeting.

Ohio Revised Code 3770.07(a) prohibits an employee of the Ohio Lottery Commission from accepting a lottery prize award and your dishonesty is a violation of the work rules and regulations.

Sincerely,

Virgil E. Brown, Director
Ohio Lottery Commission"

The record revealed that the grievant was first employed at the employer on June 15, 1987, and worked until August 21, 1987, as a student. Thereafter the grievant worked as a temporary employee and the grievant became a full-time employee on July 17, 1988. He worked there until he received the letter of termination. The grievant's personnel record further revealed that he had no prior discipline while employed and that he had received a promotion from the entry level job of data operator 2 to inventory control specialist.

Information was received by the Ohio Lottery Commission security department that the grievant was involved in cashing in certain lottery tickets at one of the stations at which lottery coupons are sold. An investigation was conducted and it was determined that the grievant was so involved. There was some evidence which revealed that the tickets might have been removed from the warehouse at which the grievant was employed and then cashed in for monies. The evidence of theft was never fully developed but there was sufficient evidence to cause the employer to believe that, in fact, the grievant was involved in activity contrary to the statutory authority revealed hereinabove. As soon as that was indicated by the investigation, a predisciplinary hearing of the grievant was had on May 6, 1991, and thereafter the grievant was terminated by the letter of termination dated May 8, 1981, which is revealed hereinabove. It might be noted that the contract of collective bargaining at Article 24, Section 24.01, contained language which revealed the following:

"ARTICLE 24 - DISCIPLINE

§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."

At Subparagraph 24.02 of the contract it was noted that the parties to the collective bargaining agreement, under which the grievant was employed and terminated, was committed to a system of corrective progressive discipline. That contractual clause stated as follows:

"§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."

Certain rules and regulations were unilaterally promulgated by the employer all of which were in use at the time the grievant was employed. In the handbook that was made an exhibit at the hearing, it was noted that twenty-five such rules were promulgated and Rule 24 revealed that an act of "dishonesty" will be

disciplined by virtue of a first time offense with a suspension or removal and then a second offense will be disciplined by removal. The handbook also reflected a policy of corrective, progressive discipline and in its preamble in that regard, the handbook revealed the following:

"RULES AND REGULATIONS

In all segments of society it is necessary to have rules and regulations. Rules and regulations are not meant to restrict the rights of anyone, but are designed to protect the rights and increase the safety of security of everyone.

The Ohio Lottery has implemented policies to maintain and provide maximum operating efficiency and consistency. When violations of these policies occur, it becomes necessary to correct the associate's behavior.

The Ohio Lottery Commission utilizes a progressive disciplinary system for the purpose of correcting associates' behavior, when violation of work rules and policies occurs. The progressive disciplinary steps include:

1. Verbal reprimand
2. Written reprimand
3. Suspension
4. Reduction of position
5. Removal

All disciplinary actions outlined above are noted on designated forms with copies maintained in the associate's personnel record.

Assessment of the progressive disciplinary step which will be imposed includes, but is not limited to, the following:

1. Type and nature of the violation
2. Associate's past disciplinary history
3. Occurrences and repetition of the particular violation (same and similar)

The Ohio Lottery has promulgated a progressive, constructive disciplinary policy (December, 1986) which contains suggested disciplinary guidelines. Please refer to this policy for clarification."

It might be known that the write-up for the predisciplinary hearing of the grievant in this matter dated May 6, 1991, and which was alluded to hereinabove as a triggering document for the May 8, 1991, termination letter, contained a paragraph concerning certain theft of Lottery Commission tickets. That paragraph revealed the following:

"The charge against Vaughan (sic) is an alleged violation of work rules, i.e., dishonesty and theft. Based on information provided it, Ohio Lottery Commission's Security Department did its own investigation of the allegations that Vaughan (sic) had stolen either returned and/or redeemed instant tickets and had cashed them, receiving payment therefor. Vaughan (sic) had worked in the now defunct Instant Redemption Department and currently works in the warehouse on Perkins Avenue. These are the only two departments in the Lottery where workers have access to the tickets in question."

It might be noted however that the final allegation which caused the termination of the grievant was mere

"dishonesty", there being insufficient evidence, presumably, upon which to base a theft charge as a basis for termination. It might be noted further that the Ohio Highway Patrol had been called in for investigative purposes and that the grievant was under indictment for presumably a theft charge awaiting trial at the time of the instant matter. At least there was no further evidence revealed to the contrary and there was such a statement in the third step write-up that such was the case.

There was some evidence placed in the record that two people, subsequent in time to the grievant's episode, had been charged with acts of "dishonesty" pursuant to the same rule section under which the grievant was charged. One such person resigned with no discipline having been invoked and the other person received a one day suspension. It is noted that the grievant filed a protest in this particular matter and sought reinstatement with full back pay. It is upon the record that this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

Rules in order to be considered inappropriate by an arbitrator must fail the test of publication, evenhandedness and reasonableness. In the matter at hand, the union did not contest the lack of publication of the rule concerning dishonesty nor did the union contest the reasonableness of the rule. The union did contest the lack of evenhandedness of the application of the rule involving dishonesty. It might be noted that two people who were similarly charged as the grievant, both subsequent in time to the grievant, revealed that one was given a one day suspension and the other resigned.

A practice is the parties response to an event as that event occurs on a sporadic but continuing basis. A practice may create a rule of contract. The union sought to establish that the first violation for a dishonesty charge is not termination since others were not similarly disciplined for the same charge. However, the union's defense to the termination in that regard must be held for naught. Firstly, the other events of dishonesty were subsequent in time to the occurrences involving the grievant. A practice must be established prior and not subsequent to the event at hand in order to be of assistance to the parties seeking to establish that defense. Secondly, only one person received a lesser discipline, because the other resigned. One event does not create a practice. Thus, there was no practice as to the discipline under the dishonesty rule prior to the event in which the grievant was involved.

It might be noted also that the contract as well as the rules are committed to a system of progressive discipline. Both the contractual clause and the preamble to the rules, hereinabove, which trigger that type of thinking were quoted. Thus, if the parties are committed to corrective, progressive discipline and if the grievant at hand had no prior discipline and worked for a period of years without it, then in that event it appeared that the grievant is entitled to some corrective discipline as a result of his first substandard act.

It might be noted and it was so stated in the third step write-up that there was some thought by the employer of theft of coupons that the grievant was involved in. That was never fully developed by the employer and while that thought may have been in the mind of the person who disciplined or finally discharged the grievant, the only developed facts involve the act of dishonesty and not theft. On that basis, the activity of the grievant in this particular cause must be considered only as to an act of dishonesty. The aspect of theft, if it did exist, is an activity outside the discipline in this matter and must be considered in another forum if considered at all. While the employer may have a gut reaction that the grievant was involved in theft, i.e., the theft of certain tickets or coupons that he thereafter cashed, there is no definitive proof in the record that such was the case and thus it cannot be held as a triggering event for discharge in this matter.

That is especially true in the case at hand because the only substandard act being considered under the letter of termination was dishonesty. It is noted in the frame of reference for a first discipline under dishonesty (in the statement of the rules) that the first step of corrective progressive discipline as a result of that substandard conduct may be a suspension. While it is true that there may be different degrees of dishonesty, dishonesty of any type still must be considered a severe substandard act and the employer unilaterally thought that suspension was an appropriate remedy in that regard and so stated. If the employer had thought that discharge was always the immediate answer to dishonesty then, the employer would have

so stated that in the unilaterally promulgated rules.

It is noted that the only proof on file of the grievant's wrongdoing is that the grievant cashed in some coupons contrary to statute. There is no proof that the grievant knew of the statute; there is no proof that the grievant was forewarned that such conduct would trigger severe discipline including discharge and the employer was knowledgeable that the grievant was born and raised in Barbados and later became a citizen of the United States when the grievant became employed at the employer herein. In other words, the grievant had no way of knowing that he committed a wrongdoing and he so testified.

The supervisors of the grievant testified, both his immediate and higher up and neither could show or reveal that they had counseled the grievant directly that such activity would trigger severe discipline up to and including discharge. Nor was there proof on file that the grievant had signed off to such orientation lectures that the employer's supervisors alluded to in their testimony.

For all of these reasons, it is apparent that the grievant should be reinstated without back pay but without loss of seniority.

Arbitrators are not prone to change a decision of management in regard to discipline matters, or discharge matters unless there is good and sufficient reason in the file to do so. This is one of those situations. This arbitrator cannot help but believe that the employer based part of their termination thought upon a gut reaction of theft. Terminations cannot be based upon a gut reaction. They must be based on hard probative evidence from the entire record in the file. If in fact the grievant is guilty of some further dishonest act, then discharge may certainly be the result. However, the facts in this case do not reveal sufficient testimony upon which to base a discharge, especially in light of the language of the contract and of the rules concerning corrective progressive discipline.

IV. AWARD

The grievant shall be reinstated to his employment within thirty days from the effective date hereof without back pay but without loss of seniority.

MARVIN J. FELDMAN, Arbitrator

Made and entered
this 24th day
of March, 1992.