

ARBITRATION DECISION NO.:

558

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Public Safety
Division of Highway Patrol

DATE OF ARBITRATION:

September 20, 1994

DATE OF DECISION:

October 7, 1994

GRIEVANT:

James Stringer

OCB GRIEVANCE NO.:

15-03-(93-11-24)-0123-01-07

ARBITRATOR:

Anna DuVal Smith

FOR THE UNION:

Gerald Burlingame, Advocate

FOR THE EMPLOYER:

Lt. Richard G. Corbin, Advocate
Heather Reese, OCB, 2nd Chair

KEY WORDS:

Removal
Discipline
Failure of Good Behavior
Just Cause
Nexus

ARTICLES:

Article 24 - Discipline
§ 24.01 - Standard

FACTS:

The grievant was employed as a Driver's License Examiner 1 for the Ohio State Highway Patrol and was responsible for conducting written examinations, vision screening, and on-road tests. The grievant had no prior discipline on his record.

On November 19, 1993, the grievant was removed from his position for off-duty commission of a criminal act and Failure of Good Behavior, stemming from his arrest for possession of cocaine on October 1, 1993. On the advice of counsel, the grievant pled no contest to the drug possession charge and was found guilty of

the reduced charge of attempted drug abuse.

EMPLOYER'S POSITION:

The state argued that it was justified in removing the grievant from his position based on the grievant's criminal conviction. The state also found that the officer who arrested the grievant on October 1, 1993 was credible and that the grievant's recollection of the events that led to his arrest was probably impaired based on the amount of alcohol that he had consumed that night. The state believed that although the grievant's arrest occurred while he was off-duty, there was a connection between the off-duty arrest and the grievant's removal. Therefore, discipline was justified. Additionally, the state believed that the grievant's job required operating state vehicles, working autonomously in a position of trust and being a uniformed representative of an organization whose mission is law enforcement and public safety. Therefore, his off-duty arrest was a serious offense and removal was justified since the offense was in direct conflict with the employer's mission and was damaging to the employer's reputation.

The state believed that it did not act unreasonably, capriciously, or arbitrarily in removing the grievant, based on the circumstances.

UNION'S POSITION:

The union believed that the grievant did not possess illegal drugs and urged the arbitrator to evaluate the credibility of the grievant and the arresting officer. In addition, the fact that the arresting officer had previously been found guilty of lying in an interrogation and the fact that the grievant was willing to submit to polygraph and drug tests should have been considered, according to the union.

The union also believed that the grievant's criminal conviction was irrelevant and should not be considered due to the grievant's plea of no contest. In addition, no injury was shown to justify discharge. That is, there was no inability to work, no harm to the employer, and no danger to fellow employees. Therefore, according to the union, the grievant should be returned to his position with full back pay and benefits.

ARBITRATOR'S OPINION:

Management was not successful in carrying its burden of proving that the grievant was guilty of drug possession. Therefore, the removal was overturned. In addition, no weight was given to the grievant's conviction, which was based on a no contest plea to a reduced charge. This conviction did not establish the grievant's guilt but only his and the prosecution's desire to avoid trial on the felony charge. Management may not rely entirely on the no contest plea but is obligated to bring to arbitration other evidence to establish the grievant's guilt.

Evidence of the arresting officer's testimony was found unreliable due to a finding that the officer previously lied in an investigation. The arbitrator also believed that the facts did not support management's claims that the grievant was guilty but only that the grievant and prosecution were trying to avoid trial on a felony charge. Additionally, the fact that the grievant was willing to undergo drug tests and polygraph tests supported the union's position.

Corrective discipline for the grievant's possession of an open container was warranted but discharge was beyond reason for the offense, due to the grievant's good record. Therefore, a written reprimand for Failure of Good Behavior was commensurate with the grievant's offense.

AWARD:

The grievance was sustained in part and denied in part. There was no just cause to remove the grievant so he was returned to his position with full back pay, seniority and benefits. His record reflected a written reprimand for Failure of Good Behavior.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration
Between

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION LOCAL 11, AFSCME,
AFL/CIO**

and

**OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF HIGHWAY PATROL**

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No.:

15-03-931124-123-01-07

October 7, 1994

James Stringer, Grievant

Discharge

Appearances

For the Ohio Civil Service Employees Association:

Gerald Burlingame, Staff Representative, OCSEA/AFSCME, Advocate

James Stringer, Grievant

For the Ohio Highway Patrol:

Lt. Richard G. Corbin, Advocate

Heather Reese, Ohio Office of Collective Bargaining, Second Chair

Pete Shonk, Drivers' License Manager, Witness

Of. Charles List, Police Officer, City of Warren, Ohio, Witness

Staff Lt. Timothy Blubaugh, Human Relations Dept., Ohio Highway Patrol, Witness

Hearing

A hearing on this matter was held at 9:40 a.m. on September 20, 1994, at the offices of the Ohio Civil Service Employees Association in Fairlawn, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. The oral hearing concluded at 12:00 noon on May 20, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

Statement of the Case

At the time of his removal for Failure of Good Behavior on November 19, 1993, the Grievant had been a Driver Examiner 1 for the Ohio State Highway Patrol for over seven years, being hired on January 21, 1986.

His duties included conducting written examinations, vision screening, and on-road tests, which were carried out with considerable autonomy and often to juveniles. He was informed on the rules, had received positive performance evaluations and a letter of commendation from a superior officer, and had no prior discipline on his record. Co-workers provided affidavits stating him to be a dependable and courteous fellow employee.

The incident that led to the Grievant's removal was his arrest for possession of cocaine in the early hours of October 1, 1993 while off-duty and off-premises. Sometime after midnight, the Grievant was observed by Officer List leaving Jackson's Lounge (a bar and restaurant in Warren, Ohio) and entering a car with a drink in his hand. When Officer List investigated, he discovered a folded \$5 bill concealing what proved to be a quantity of cocaine. Officer List testified he saw the Grievant holding the bill, then making a furtive gesture as he dropped it, a claim the Grievant denies. Both agree this drug packet was recovered from the floor of the passenger side, where the Grievant was sitting, and that there were two other occupants--the driver and back-seat passenger. The Grievant testified he was casually acquainted with these people, and only getting a lift home from the American Legion, by way of Jackson's Lounge. In any event, the Grievant was arrested for an open container and possession of cocaine.

The Department launched an investigation and the Grievant was placed on administrative leave. On November 19, 1993, a pre-disciplinary meeting was held, the outcome of which was termination of the Grievant's employment. The removal order cites off duty commission of a criminal act and arrest as Failure of Good Behavior, Public Safety Work Rule (A)(6). This action was timely grieved on November 24, 1993, claiming violation of various sections of the Discipline Article of the 1992-94 Collective Bargaining Agreement and seeking reinstatement with full back pay. On May 12, 1994, on the advice of counsel, the Grievant pled no contest and was found guilty of the reduced charge of attempted drug abuse, §2923.02 and §2925.11 O.R.C. In the meantime, the grievance was processed through the contractual procedure without resolution, until it came to arbitration, where it presently resides for final and binding decision, free of procedural defect.

Issue

As stipulated by the parties, the issue before the Arbitrator is the following:

Was there just cause to remove the Grievant.
If not, what shall the remedy be?

Arguments of the Parties

Argument of the Employer

The Highway Patrol first argues that its evidence is sufficient to support removal. To begin with, the documents show a criminal conviction, which the Grievant knew from the rules would subject him to discipline. Raising an issue of credibility, the State compares the testimony of the Grievant with that of the arresting officer, arguing that its own witness is the more believable. On the one hand, Officer List's testimony is in accord with the documentary evidence and his memory of the incident must be clearer than the Grievant's because Officer List was not drinking that night. Although the State believes the Arbitrator should not weigh the disciplinary record of the police officer (being over two years old at the time of this hearing) it does demonstrate that the officer has everything to lose by lying. On the other hand, the Grievant has nothing to lose by lying and his recollection of the events that led to his arrest is likely impaired by the alcohol he consumed that night. The State might have been influenced to provide an opportunity for rehabilitation, bypassing discipline, but the Grievant refused to admit what the evidence shows. The Employer concludes that he is either a user himself or covering up for someone, and that his statements are self-serving.

Although the events leading to the Grievant's removal took place off-duty and off-premises, the Highway Patrol contends there is a nexus to the Grievant's employment justifying discipline. ^[1] The Grievant's job requires operating state vehicles, working autonomously in a position of trust (particularly with regard to

minors) and being a uniformed representative of an organization whose mission is law enforcement and public safety. Even off-duty cocaine possession is a very serious offense justifying removal as it is in direct conflict with the Employer's mission and tarnishes its reputation.

The Highway Patrol submits that in discharging the Grievant, it has acted neither unreasonably, capriciously, nor arbitrarily. Given the nature of the violation and the Grievant's awareness of its potential impact on his employment, discharge is not an abuse of employer discretion. It says that what the Union really wants is clemency, which the Employer argues is not the Arbitrator's to give, but its own. Because the Highway Patrol cannot accept responsibility for maintaining the Grievant's employment, knowing what he was involved with, employer leniency is out of the question as well. It therefore urges the Arbitrator to deny the grievance in its entirety.

Argument of the Union

The Union states emphatically that at no time did the Grievant have illegal drugs. Like the State, it urges to Arbitrator to evaluate the credibility of the two principal witnesses. One of these has an impeccable record (the Grievant); the other admits to prior procedural violations (the arresting officer). The Union further contends that the Grievant's offer to submit to polygraph and drug tests would be weighed, as should the Employer's decision to accept that offer.

As to the criminal conviction, the Union argues that this is not relevant and should not be weighed because the Grievant pled no contest. It offers *Ohio Veterans Home v. OCSEA (Wm. J. Smith, Grievant)*, Parties' Case No. 33-00-(92-12-07)-0450-01-05 (Goldberg, Arb.) as support.

Finally, the Union says that no injury has been shown that might justify discharge: no inability to work, no harm to the Employer, and no danger to fellow employees. The Grievant therefore should be returned to work with full back pay and benefits.

Opinion of the Arbitrator

The offense with which the Grievant is charged is a serious one. If true, it warrants discipline even though the conduct was off duty because of the nature of the Drivers License Examiner's job and the Department's mission. The Department successfully established adverse impact on its ability to carry out its mission. It was not successful in carrying its burden on proving the Grievant's guilt, however, and for this reason the removal is overturned.

The removal order states that the Grievant "did commit a criminal violation and [was] arrested ... for possession of cocaine." In support of this charge, the Department offers the conviction for attempted drug abuse and the testimony of the arresting officer along with investigative reports.

As to the Grievant's conviction for attempted drug abuse, I am unwilling to give weight to a conviction based on a no contest plea to a reduced charge. Such a conviction does not establish the Grievant's guilt, but only his and the prosecution's desire to avoid trial on the felony charge. The Employer may not rely on a no contest plea bargain, but must bring to arbitration other evidence that convincingly establishes the guilt of the Grievant.

As to the other evidence brought forth in arbitration, everything depends on witness credibility. On the one hand, there is a fairly long-term employee with an excellent record who has consistently claimed he did not touch the drug packet and is not a user. This, of course, could be a self-serving statement. On the other hand, there is an arresting officer who had procedural violations on his record at the time of the incident and whose story has been neither consistent over time nor in accord with the assisting officer's (most specifically with whether the drug was retrieved before or after the Grievant exited the vehicle), but who has no apparent motive for prevarication. In the absence of a reliable third witness to what transpired while Officer List was advising the Grievant of the open container violation, it is the word of one against the other whether the Grievant ever held, touched or even knew of the drug packet prior to its recovery. I am accordingly unable to conclude that the officer was clearly correct about what he says he saw. Moreover, there are plenty of facts to raise substantial doubt of the Grievant's guilt and to support his claim that he did not hold the drugs.

There is nothing in his work record or demeanor to suggest use or abuse of cocaine; he readily admitted to the open container violation; and he agreed to submit to polygraph and drug tests, something the Employer declined to pursue. Even the police officers stated he was out of his element, and thought the back seat passenger was the original holder of the drug.

This grievant was in the wrong place in the wrong company at the wrong time. The worst I can find him guilty of with any degree of certainty is imprudent association and having an open container. Given the mission of the Department and the Grievant's foreknowledge of the rules, corrective discipline for the open container violation is warranted. Discharge, however, is beyond reason for this offense by an employee with this work record. The Grievant will receive a written reprimand for Failure of Good Behavior.

Award

The grievance is sustained in part, denied in part. There was no just cause to remove the Grievant. He is to be returned to his former position forthwith, with full back pay, seniority and benefits. His record will reflect a written reprimand for Failure of Good Behavior (conduct inconsistent with the mission, goals and objectives of the Department).

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
October 7, 1994

[¹] *ODYS v. OCSEA (L.Jones, Grievant) Parties' No. 35-07-(07-30-91)-34-01-03 (1992) (Cohen, Arb.)*.