

ARBITRATION DECISION NO.:

601

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Agriculture

DATE OF ARBITRATION:

August 31, 1995

DATE OF DECISION:

March 14, 1996

GRIEVANT:

Dr. Devendra Sinha

OCB GRIEVANCE NO.:

04-00-(94-04-08)-0012-01-13

ARBITRATOR:

Anna DuVal Smith

FOR THE UNION:

Robert L. Goheen

FOR THE EMPLOYER:

Barbara Valentine

Rodney Sampson

KEY WORDS:

AWOL

Disability Benefits

Insubordination

Mitigation

Ohio Revised Code

PERS

Removal

Timeliness of Initiating Discipline

ARTICLES:

Article 24 - Discipline

§ 24.01 - Standard

§ 24.02 - Progressive Discipline

FACTS:

The grievant had been employed as a Veterinarian Specialist for the Ohio Department of Agriculture for approximately 21 years. In January 1993, the grievant suffered neck and back injuries as a result of an automobile accident. He applied for and ultimately received State disability benefits, however, the benefits

ceased on March 31, 1994. The grievant filed for PERS disability retirement on March 14, 1994 after learning that his State disability payments would cease. The grievant also appealed the decision to terminate his State disability benefits.

During this time, the State attempted to get him to file the forms necessary to cover his absence in compliance with department leave policies and the Collective Bargaining Agreement. The State eventually issued an AWOL notice and a written direct order to the grievant due to his failure to comply with the proper procedures. In response, the grievant submitted a request for leave which was deemed improper by management and a complaint letter. After four months, the State again began trying to get the grievant either to submit proper leave requests or to return to work. In response, the grievant requested unpaid leave while waiting to hear the outcome of his PERS disability appeal.

However, because the grievant failed to meet the requirements for unpaid leave, the State sought a proper leave request. The grievant failed to respond. After learning that the grievant's disability benefit appeal had failed, the State issued another AWOL notice and instituted disciplinary proceedings. As a result, the grievant was removed for insubordination and AWOL violations. The Union notified the State that it was taking the case to arbitration, but before the hearing, PERS notified the grievant that his disability retirement was approved effective six days before the effective date of his removal.

EMPLOYER’S POSITION:

The State argued that it had established the necessary elements of insubordination which include failure to comply with clear and unambiguous requests and instructions in violation of Department policy and notice of the consequences for violating the policy. The employer pointed out that it still had not received the necessary forms the Grievant agreed to fill out at the pre-disciplinary hearing.

The State also argued that it had 45 days after the pre-disciplinary hearing to impose discipline. The grievant was not notified of the PERS disability decision for more than two months after the State had removed the grievant. Because PERS is not the employer, it cannot administer the Contract and work rules. In addition, the grievant's long service and good record do not serve to mitigate his offense because the State does not have to treat him any differently than any other employee.

UNION’S POSITION:

The Union contended that the Grievant's removal was not for just cause. It argued that when PERS granted the grievant disability retirement, it complied with Chapter 145.362 of the Ohio Revised Code (O.R.C). Since the O.R.C. subordinates collective bargaining agreements to public employee retirement law, the Grievant's PERS retirement should stand.

The Union argued three other points. First, it argued that the Arbitrator should allow the Grievant's long tenure and good evaluations to serve as a mitigating factor. Second, the Union argued that because the State waited nine months between the initial AWOL notice and the subsequent discipline, the discharge should be void for being untimely. Third, the Union stated that the grievant's correspondence demonstrated that he was not a grossly insubordinate employee.

ARBITRATOR’S POSITION:

The Arbitrator held that there was ample evidence of the grievant's defiance of the employer's authority to justify discipline. Past difficulties with paid leave do not justify the grievant resorting to self help. The grievant should have followed the "obey now, grieve later" rule of labor relations.

The Arbitrator also stated that although discipline was justified, removal was unreasonable under the unusual circumstances of this case. The Arbitrator held that a major suspension was in order with the understanding that if the grievant returns to work when fit to do so, it will be as a last chance.

AWARD:

The grievance was granted in part and denied in part. The grievant was removed without just cause. His record was to be amended to reflect his disability retirement and a 30-day suspension without pay. In addition a further violation of legitimate employer orders, rules, policies or procedures will subject him to

removal, if his disability improves and he is able to come back to work with the State.

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
AGRICULTURE**

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No.:

04-00-(94-04-08)-0012-01-13

March 14, 1996

Devendra Sinha, Grievant

Discharge

Appearances

For the Ohio Civil Service Employees Association:

Robert L. Goheen

Staff Representative

Ohio Civil Service Employees Association

Columbus, Ohio

For the Ohio Department of Agriculture:

Barbara Valentine, Advocate

Human Resources Administrator

Ohio Department of Agriculture

Columbus, Ohio

Rodney Sampson, Second Chair

Office of Collective Bargaining

Ohio Department of Administrative Services

Columbus, Ohio

Hearing

A hearing on this matter was held at 9:15 a.m. on August 31, 1995, at the Office of Collective Bargaining in Columbus, 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, and to argue their respective positions. The grievant did not appear, but the Union submitted his written authorization to proceed in his absence (Union Ex. 1). Inasmuch as the facts were not in substantial dispute, the parties agreed to present the case in narrative form, through exhibits and stipulations, and called no witnesses. The oral hearing concluded at 11:30 a.m., whereupon the record was closed. This opinion and award is based solely on the record as described herein.

Issue

The parties stipulated that the case is properly before the arbitrator. They further stipulated that the questions to be answered are:

Was the Grievant removed for just cause?

If not what should the remedy be?

Statement of the Case

At the time of his removal on April 7, 1994, for absence without leave and insubordination, the Grievant had been a Veterinarian Specialist for the Ohio Department of Agriculture for about 21 years. He has distinguished credentials and had excellent performance evaluations until a supervision change occurred, sometime in 1988 or 1989, after which his ratings declined (Union Ex. 2) and he accumulated four written reprimands for work performance, insubordination, and statements he made to others about operational changes in the lab where he worked (Joint Ex. E).

In January 1993 Dr. Sinha suffered neck and back injuries as a result of an automobile accident. He applied for and ultimately received State disability benefits through March 31, 1993, but his request for benefits after that date were denied (Stip. 5 & 6). On March 14, 1994, after receiving the January 7 final adjudication order denying additional benefits, Dr. Sinha filed for PERS disability retirement (Stip. 7).

In the meantime, the State was attempting to get him to file the forms necessary to cover his absence in compliance with Department leave policies and the Collective Bargaining Agreement, pending outcome of the State disability benefits application and appeals. A chronology of events and source documents submitted as Joint Exhibit F show numerous calls and mail between them, including an AWOL notice on March 18, 1993, (Joint Ex. F-15) and a written direct order on March 26, 1993, (Joint Ex. F-18). The Grievant's responses included an improper leave request on March 23, 1993, (Joint Ex. F-16) and a complaint letter on April 26, 1993 (Joint Ex. F-19).

About four months later, on September 2, 1993, the State again began trying to get him either to return to work or to submit leave requests for the period beginning March 31. The Grievant then requested unpaid leave to begin on September 6 (Joint Ex. F-21). The Union explained that Dr. Sinha had previously had a problem getting his paid leave balances restored when a workers compensation claim was approved. He was therefore attempting to get authorized unpaid leave while he waited to hear the outcome of his disability appeal. The Employer found this improper because Department policy (Joint Ex. C) and Article 31.01 of the Collective Bargaining Agreement (Joint Ex. A) require exhaustion of all paid leave to qualify for unpaid leave. It therefore responded with an explanation of the exhaustion-of-paid-leave condition and sought a proper request for leave for the March 31-September 6 period (Joint Ex. F-22). Nothing was forthcoming from the Grievant. On January 28, 1994, after learning Dr. Sinha's disability benefit appeals had failed, the State sent him another AWOL notice (Joint Ex. F-28 and D- 1), and, on February 9, 1994, instituted disciplinary proceedings against him.

On April 9, 1994, following a pre-disciplinary hearing conducted in accordance with the Collective Bargaining Agreement, the Grievant was removed for Absence without Leave (Rule 1-b) and Insubordination (Rule 5-b) (Joint Ex. D-3). This action was grieved on April 8, 1994, alleging violation of Article 24.01, 24.02, 2.02 and "any and all pertinent articles and sections of the Contract or law." specifically

Management's failure to prove just cause, lack of progressive discipline and discrimination because of national origin, age and disability (Joint Ex. D-4). Being unresolved at Step 3, the case was appealed to arbitration on May 15, 1994, where it presently resides for final and binding decision, free of procedural defect.

In the summer of 1994, after the Union notified the Employer it was taking the case to arbitration but before the hearing, PERS notified Dr. Sinha that his disability retirement was approved effective April 1, 1994, six days before the effective date of his removal. The parties were nevertheless unable to resolve the grievance, and so the case was heard on August 31, 1995, as described above.

Arguments of the Parties

Argument of the Employer

The Employer argues that it has established the necessary elements of insubordination: failure to comply with clear and unambiguous requests and instructions in violation of Department policy, and notice of the consequences for so doing. Like Grievant Rahr (Case No. 35-08-931228-0011-01-03, Arb. Pincus, May 8, 1995), Dr. Sinha knew what was expected of him, but chose to comply only with what he deemed necessary, disregarding all else, despite being on notice through phone calls back to January 27, 1993, and three AWOL notices prior to the March 26, 1993, direct order and notice.

The Employer points out that it still has not received the necessary forms the Grievant offered to fill out at the pre-disciplinary hearing, and argues that he has shown a lack of interest by not even attending his arbitration hearing.

In response to the Union's argument that the PERS action making Dr. Sinha's disability retirement effective on a date prior to his removal negates that removal, the Employer points out that the Contract requires imposition of discipline within 45 days of the pre-disciplinary hearing. Thus, it had until April 9, 1994, to take action. The PERS notification to the Grievant came on June 21, too late to affect the Employer's decision. Moreover, PERS is not the employer and thus cannot administer the Contract and work rules.

In response to the Union's plea to consider the Grievant's long service and good record, the Department says this does not alter its need to treat him the same as any other employee with a pending disability claim.

In conclusion, the Employer contends the Grievant has brought this situation upon himself by repeatedly failing to amend his behavior (citing Case No. 07-00-910527-0121-01-14, Arb. Graham, October 11, 1991). It asks that the grievance be denied in its entirety.

Argument of the Union

The Union contends that the Grievant's removal was not for just cause. It argues that when PERS granted him disability retirement effective April 1, 1994, this placed him on approved leave of absence with five years of reinstatement rights per Chapter 145.362 O.R.C. and effectively negated the removal of April 17, 1994. Since Chapter 4117.10 O.R.C. subordinates collective bargaining agreements to public employee retirement law, the employer cannot hide behind contractual provisions it may claim render its actions legitimate.

The Union also argues that the Grievant's long tenure and good evaluations should be considered a mitigating circumstance. It offers Arbitrator Rivera's decision in the Boyer case (Case No. 31-13-910703-0029-01-14) in which race and age differences between a longterm employee and her new supervisor were a factor in reducing the removal to a suspension.

The Union further points out that the Contract requires the Arbitrator to consider the timeliness of discipline. It says that the Employer sat on its hands from the AWOL notice of March 18, 1993, to that of January 28, 1994, and cites Arbitrator Graham's endorsement (in Case Nos. 27-05-021492-200-01-03 and 27-05-062592-231-01-03) of this Arbitrator's holding that "the Employer may neither shoot from the hip nor sit on its hands" in taking disciplinary action (Case No. 27-05-911202-0176-01-03).

Finally, the Union argues that letters the Grievant wrote to the Director about this matter show him not to

be a grossly insubordinate employee and that the Employer completely disregarded its moral commitment to this long term employee. It did not discuss the option of disability retirement with him and it disregarded his display of corrected behavior when he offered at the pre-disciplinary hearing to meet the Employer's terms, even though use of leave balances would have cost the Employer nothing.

It asks that the grievance be granted, Dr. Sinha's record adjusted to reflect his disability retirement, and that he receive all benefits due him under the Contract and the PERS.

Opinion of the Arbitrator

There is ample evidence of the Grievant's repeated defiance of his employer's authority and his consequent AWOL status to justify discipline. He was repeatedly asked, reminded, ordered and warned to supply documents requesting the proper form of leave, and he repeatedly came up short. Given the experience he apparently had some years ago when paid leave was not properly restored, one can understand his reluctance to use it while his disability claim was pending, but that does not justify his refusal to obey a reasonable direct order of legitimate authority. The grievance procedure, not self help, is the correct mechanism for addressing such problems when they occur. In short, Dr. Sinha should have followed the "obey now, grieve later" dictum.

On the other hand, while discipline is justified, removal is unreasonably severe under the unusual circumstances of the case. Even though discharge is unjustified, the Grievant's repeated refusals to comply with legitimate directives warrant corrective action significant enough to signify to him that even those with professional autonomy cannot flagrantly disregard legitimate employer needs and directives. A major suspension is in order, with the understanding that if the Grievant returns to work when fit to do so, it will be as a last chance.

Award

The grievance is granted in part, denied in part. The Grievant was removed without just cause. His record is to be amended to reflect his disability retirement and a 30-day suspension without pay. Should the Grievant exercise his reinstatement rights under Chapter 145.362 O.R.C. when fit to return to work, he will be on notice that a further violation of legitimate employer orders, rules, policies or procedures will subject him to removal.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
March 14, 1996