

ARBITRATION DECISION NO.:

651

THE UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Natural Resources

OCB GRIEVANCE NO.:

25-14-(97-01-17)-0002-01-07

ARBITRATOR:

Anna DuVal Smith

KEY WORDS:

Just Cause

Removal

Supervisory Responsibility

ARTICLES:

Article 24 - Discipline

§ 24.02 - Progressive Discipline

§24.04 - Pre-Discipline

FACTS:

The Grievant was a Mine Inspector 2 at the Lansing Rescue Station office of the Ohio Department of Natural Resources. Management removed him effective January 13, 1997, for insubordination, neglect of duty, immoral and indecent conduct, and failure of good behavior.

The Employer removed the grievant because he was allegedly involved in several acts of misconduct. These alleged that the grievant had: modified state equipment for personal use; engaged in dangerous "mortar demonstrations" at the work site; viewed an adult videotape in a state office; and made personal use of state equipment. The grievant had also received a 15 day suspension because of incident which occurred on March 20, 1996, when deputy sheriffs discovered the grievant in the Lansing facility at 1:00 a.m. with a female companion and alcoholic beverages.

EMPLOYER'S POSITION:

The Employer argued that there was just cause to remove the grievant. The grievant admitted to all of the alleged conduct, including that which gave rise to the fifteen day suspension. If the Employer had known about the other incidents when it gave the grievant the fifteen day suspension, it would have sought removal instead of a suspension.

The Employer also argued that it was not common practice for employees to use state equipment for personal reasons. Therefore, the grievant was not justified in using state equipment this way. The grievant did not have to participate in any of the alleged activities if he did not want to, regardless of what his supervisors were doing.

UNION'S POSITION:

- The Union argued that the grievant was not removed for just cause. The Employer failed to provide any testimony or evidence on the charge of failure of good behavior; therefore, that charge was moot.

The Union also argued that the charge of insubordination was unproven. The testimony and documents introduced established the opposite conclusion. The grievant's performance was well above satisfactory. The Employer failed to prove the essential elements of carelessness and incompetence.

The Union also argued that the charge of immoral or indecent conduct did not establish just cause. The grievant was not a participant in either the adult video tape incident, or the mortar demonstration. He was mere an observer, an innocent bystander.

The Union also argued that the grievant was not at fault for the other alleged incidents. The Employer was at fault for these incidents because the grievant's supervisors told him to do these things. The Employer knew about the poor conduct of the supervisors at the Lansing office, and it chose not to do anything about it.

Finally, the Union argued that the Arbitrator should consider the grievant's long service and good work record.

- **ARBITRATOR'S OPINION:**

The Arbitrator found that the grievant was not removed for just cause. The irregularities at the Lansing office were the responsibility of the Employer. The supervisors were not merely lax in enforcing the rules, they also instigated and participated in the wrongdoing. The grievant was justified in believing that his conduct was within acceptable limits. None of the grievant's actions were so obviously wrong that he should have known that his supervisors lacked the authority to approve them.

The Arbitrator did find, however, that the grievant was partially at fault for his actions. The Arbitrator therefore held that even though removal was unwarranted, some discipline was appropriate.

AWARD:

The grievance was sustained. The removal was reduced to a thirty day suspension. The Employer was directed to reinstate the grievant to his former position and restore his lost wages, benefits, and seniority less thirty days. The grievant was also instructed to receive instruction on the proper use of state time and property.

TEXT OF THE OPINION:

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VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration
Between

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

and

OHIO DEPARTMENT OF NATURAL RESOURCES

Richard Dingey, Grievant

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No. 25 14 970117 0002 01 07

Appearances

For the Ohio Civil Service Employees Association:

Jerry Buty, Staff Representative
Lynn Kemp, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Natural Resources:

Greg Rees, Labor Relations Coordinator
Ohio Department of Natural Resources

Shirley Turrel, Labor Relations Specialist
Ohio Office of Collective Bargaining

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Hearing

A hearing on this matter was held at 9:15 a.m. on September 30, 1997, at the offices of the Ohio 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 stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the State were Russell Scholl (Deputy Chief, Div. of Mines and Reclamation) and Gordon J. Gatién, II (formerly Labor Relations Administrator, Ohio Dept. of Industrial Relations). Also present was Shelly Ward, Labor Relations Officer, Ohio Department of Natural Resources. Testifying for the Union were Charles "Dick" Williams (formerly Acting Chief and Chief, Ohio Dept. of Industrial Relations), Paul Kidney (formerly Chief, Div. of Mine Safety, Ohio Dept. of Industrial Relations) and the Grievant, Richard Dingey. A number of documents were entered into evidence: Joint

Exhibits 1 4, State Exhibits 1 7 and Union Exhibits 1 8. The oral hearing was concluded at 3:00 p.m. on September 30 following oral summations, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

Issue

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

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Statement of the Case

The Division of Mines and Reclamation was created as the successor to the Ohio Department of Natural Resources (ODNR) Division of Reclamation when the Division of Mines was transferred from the Department of Industrial Relations upon the latter's abolishment in 1995. As part of the transfer, ODNR conducted an inventory audit in March 1996. There was difficulty reconciling equipment assigned to the Lansing Rescue Station, so a physical inventory was conducted. This inventory revealed numerous missing items (running to four pages) and also raised questions about the activities of personnel assigned to the station. An investigation was accordingly launched, which implicated a number of employees, both exempt and nonexempt, who were subsequently removed. The Grievant, two supervisors above him (Paul Kidney and William Brocklehurst), and the training officer (James Sloan) were among them.

At the time of his removal, the Grievant was a Mine Inspector 2 with 24 years of service. As such, he was a field employee working out of his home and earning about \$25 an hour, He was in receipt of the Department of Industrial Relations' Policy Manual and attended the orientation session conducted by ODNR in September 1995 prior to the transfer date. ODNR's disciplinary policy was part of the material provided to employees at that time. He had one active discipline on his record, a 15 day suspension for a number of rule infractions surrounding an incident that occurred on March 20, 1996, when deputy sheriffs discovered him in the Lansing facility at 1:00 a.m. with alcoholic beverages and a female companion. He received "above expectations" ratings on his performance evaluations

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and the State stipulated he had performed numerous tasks for the benefit of the State on his own time using his own equipment.

The Grievant was interviewed during the fall of 1996 after receiving a Garrity warning. On November 14, he gave a written statement describing incidents and, according to the State, admitting to using a state vehicle and state time to buy materials he needed to modify a water pump co workers used on a personal gold mining expedition, participating in a mortar demonstration on state time and property, viewing pornographic material on the job and borrowing the state owned video player so he could show the video to a female acquaintance. Deputy Chief Russell Scholl testified the Grievant also admitted to other personal uses of his state vehicle and routinely filling his personal oxygen tank at state expense.

For his part, the Grievant denied he used the oxygen for personal gain. He said it was for gate jobs and he had his direct supervisor's permission. He also used a state credit card to pay for gasoline when he used

his personal vehicle for state business. He stated he was asked in the presence of his supervisor and Paul Kidney, formerly Mine Safety Administrator, to make suction pipes for the water pump for their gold mining expedition. He agreed, but needed material, so went to Martins Ferry, about 3 1/2 miles away, to get what he needed. Neither manager asked him to wait until after work. He did the job in his own garage on his own time, but he never attached the pipes to the pump and therefore did not modify it. In fact he did not touch the pump. Regarding the 1994 mortar demonstration, the Grievant testified he did not participate, but only observed. In fact, he was not even there when they used fruit as a missile, but only heard about it later from
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Kidney. Regarding the pornographic video incident, which also occurred in 1994, the Grievant testified he went to the Lansing office on legitimate state business, and while he waited to speak to Kidney, his supervisor called him into the training room where the video was playing. The Grievant stated he only watched it for three or four minutes until Kidney got off the phone. Later, his supervisor told him to get the video out of the office. When the Grievant asked to borrow the VCR so he could show it to a friend, he was given permission and told to bring it back the following Monday. The Grievant stated it was very common to borrow state equipment and that management always allowed it.

Based on this investigation, the Department proceeded to take disciplinary action against the Grievant. A pre disciplinary hearing was held on December 19 after which the hearing officer noted the Grievant's prior 15 day suspension and recommended removal despite poor management at the field office. Scholl testified that had he known about these incidents when the 15 day suspension was under consideration, he would have aggressively pursued removal for the alcohol related infraction. Gatien, former Labor Relations Administrator with the Department of Industrial Relations, testified that department had removed employees for performing personal work on state time and that it would take action against employees borrowing state property for personal use. The Grievant, himself, was removed effective January 13, 1997, for insubordination, neglect of duty, immoral and indecent conduct and failure of good behavior.

This action was grieved on January 16, alleging violation of Articles 24.01, 24.02 and all other articles that may apply." Being unresolved at lower steps of the grievance
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procedure, the case came to arbitration where it Presently resides, free of procedural defect for final and binding decision.

Arguments of the Parties

- Argument of the Employer

The State argues the facts are not in dispute. The Grievant had a fifteen day suspension on his record and admitted in both written and oral statements to the violations for which he was removed. He originally admitted his responsibility, and only after his removal did he blame everyone else and recall details that minimize his participation.

The Union's argument that it was common practice throughout the Department of Industrial Relations to

borrow state equipment for personal use is unfounded, claims the State. Williams testified to this and Gatien, former Labor Relations Administrator, said that had he been aware of the violations. He would have taken appropriate administrative action. Gatien also testified that the practice of using personal tools for state business was not common and using state credit cards to reimburse mileage is a violation of contract and against OBM rules. The State claims the testimony that Scholl, himself, was a knowing beneficiary of using state property for personal reasons is false. That testimony implicated others who were on the Union's witness list but who were not called to substantiate it.

The Grievant held a professional level job with union representation. He could have said no if he did not want to participate and was protected from retaliation by the collective bargaining agreement. He was not ordered to participate. He partook equally. He does not have immunity just because his supervisors knew and participated themselves.

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Obviously, the supervisors were not going to discipline employees for activities in which they, themselves, engaged.

There was testimony the Grievant did work for other employees. He worked independently with little supervision. The State contends he got to pick and choose the work he wanted to do. This work unit was entrusted with the safety of Ohio miners, but at some point this responsibility became secondary to non state business, The State contends the work group had the Department duped into believing them, but this should not prevent ODNR from correcting the wrong that had been perpetrated over time, which it did by removing four employees and suspending several others. The State is not attempting to eliminate that mine section, but to correct the wrongdoing it found as the result of its investigation.

The State concludes that it had just cause to remove the Grievant and asks that the grievance be denied in its entirety.

Argument of the Union

The Union argues the charge of insubordination is unproven, saying it established through testimony and documents the contrary. The Grievant's performance was well above satisfactory, he followed orders and performed extra duties at the request of management by using his own time and equipment for the benefit of the State. The State failed to prove either of two necessary elements, carelessness and incompetence.

The Union also contends the State failed to provide any testimony or evidence on the charge of failure of good behavior, so this charge is moot.

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Concerning the charge of immoral or indecent conduct, the Grievant testified that he only oversaw for a few minutes what was going on in the office while he waited for Kidney to get off the phone. Yes, he did watch the tape, but not on state property or on state time, but in private, and he had permission to borrow the VCR.

Regarding the mortar demonstration, the Union contends it proved that the Grievant was only an

observer, not a participant.

In the view of the Union, Management failed to act responsibly at the Lansing office and the State admitted this in the pre disciplinary hearing officer's report. An important factor in this case is that the Grievant acted on direct orders of management, management used the Grievant's experience for its personal gain, and management engaged in the same conduct of which it accuses the Grievant. It should be held responsible for allowing the environment that set the Grievant's actions in motion. It knew about the lax rules at the Lansing office and chose not to do anything about it.

In the eyes of the Union, to remove the Grievant, who acted no differently than he did during his entire 24 year tenure with the State, is a gross violation of just cause.

The Union argues Management should be barred from going back months and years to resurrect alleged events to support discipline, especially as severe as removal. It asks the Arbitrator to recognize the Grievant's long service and good work record. Further, that the State brought no witnesses to the alleged events, but relied only on the Grievant's short written statement **8**

The Union concludes that the State did not have just cause to remove the Grievant and asks that he be reinstated to his former position, receive all wages and benefits but for the removal, and made whole.

Opinion of the Arbitrator

At the outset, the Arbitrator must state that she does not buy much of the Union's case. She agrees with the State that the Grievant's new memory of events that occurred three years ago is self serving. She also discounts the testimony of Paul Kidney. As one of the managers held responsible and terminated for the corruption at the Lansing station, he had nothing to lose and vengeance to gain by testifying on behalf of the Grievant and against the deputy chief. I nevertheless concur with the Union that the record shows the irregularities at the Lansing office were the responsibility of local management. They were not merely lax in enforcing the rules of the Department, they, themselves, were active participants and instigators, leading the facility, including the Grievant, into a set of practices improperly blurring the line between personal and state business. On the one hand, the Grievant was asked, allowed, and even rewarded for using personal time and property for the State. On the other, he was part of a system that had supervisors "borrowing" state equipment for personal use, testing a personal explosive device on state property and on state time, watching sexually explicit material on state equipment on state property on state time, and authorizing credit charges as reimbursement. Clearly all of these are improper and in violation of the Department's rules. But local management in effect created through its own pattern of conduct a different, informal, set of rules. The Grievant was therefore justified in believing his conduct was within acceptable limits. None

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of the infractions to which he admitted are so obviously wrong that the Grievant should have known his supervisors lacked authority to approve. He was not given permission to keep the VCR as his own, for example, and his superiors approved the gas as like kind reimbursement.

Although I hold the State to be bound by its supervisors even though they were violating their

responsibilities, I am concerned by the Grievant's apparent lack of understanding even in arbitration about the proper relationship between public and private. I therefore hold that although discharge is unwarranted because of local management's role, corrective discipline is called for. The removal is accordingly reduced to a thirty day suspension and the Grievant is to receive whatever instruction the State deems necessary in the proper use of State time and property.

Award

The Grievant's removal was not for just cause and is reduced to a thirty day suspension. He is to be reinstated to his former position forthwith and restored lost wages, benefits and seniority less thirty days. Back pay is to be reduced by such interim earnings as the Grievant may have had on account of his removal and he is to supply the State with such evidence of earnings as it may require. Further, the Grievant will receive such instruction on the proper use of state time and property as the State deems necessary,

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
November 16, 1997

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