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REVIEWED BY
APR - 5 1999
GRIEVANCE COORDINATOR

STATE OF OHIO
AND OHIO CIVIL SERVICE EMPLOYEES' ASSOCIATION
VOLUNTARY RIGHTS ARBITRATION
PROCEEDING

In The Matter of Arbitration Between:

The State of Ohio, Department of Rehabilitation and Correction,

Employer,

and

OCSEA/AFSCME, Local 11, AFL-CIO

Union.

Grievant: Carolyn Detty

Grievance No.: 27-16-~~(09-17-97)~~(96-12-06)2622-01-03-3801-06

Arbitrator's Opinion and Award
Arbitrator: Dr. David M. Pincus
Date: March 29, 1999

Appearances

For the Employer

Name	Position
Day One	
Pat Mogan	Advocate
Jim Lendavil	Second Chair
Michael Duco	Mgr. Dispute Resolution
Robert Thornton	OCB
Frances Reisinger	Acting Unit Manager

Day Two	
Pat Mogan	Advocate
Michael Duco	Mgr. Dispute Resolution
Christine Money	Warden, MCI
Jolene Nelson	Chapter Representative, MCI 5110
Sheila French	Account Clerk II, MCI
Arrita Capers	Personnel Officer 1

For the Union

Name	**Position**
Day One	
Carolyn Detty	Grievant
Michael Hill	Staff Representative
Jolene Nelson	Chapter Representative, MCI 5110
John Lerch	Arbitration Clerk
Herman Whitter	Director of Dispute Resolution
Butch Wylie	OCSEA Second Chair
Kathy Chasteen	Student Intern
John Porter	
Day Two	
Brian Klopp	Clerk
Carolyn Detty	Grievant
Jolene Nelson	Chapter Representative, MCI 5110
Michael Hill	OCSEA Second Chair
Herman Whitter	Director of Dispute Resolution
Michael Allen	Corrections Captain
Randy Fox	Major

I. Stipulated Issue

Was the grievant's probationary removal within the 180 day probationary period as specified in Article 6.01 of the collective bargaining agreement. If not, what shall the remedy be?

II. Joint Stipulations

1. The Grievance has been timely filed and processed
2. The Grievant's hire dated is April 22, 1996 and first date at CTA was on November 6, 1996
3. The Grievant's 180th day of the Article 6.01 probationary period was on November 6, 1996
4. The Grievant's shift was from 6:00 A.M. to 2:00 P.M.
5. The Grievant was detained in the institution for some indeterminate period after her shift ended (approximately one-half hour)
6. The removal letter dated November 4, 1996 states that the probationary removal was effective November 7, 1996
7. Major Fox and Captain Allen's signatures are dated November 7, 1996 and the letter indicates that the Grievant refused to sign the November 4, 1996 letter of removal
8. Chapter President, Billy Waddell, signed the withdrawal form on March 19, 1997
9. The withdrawal issue was discussed at the mediation session.

III. Introduction

This is an arbitration proceeding pursuant to a grievance arbitration procedure in the agreement between the State of Ohio, Department of Rehabilitation and Correction (the Employer) and the Ohio Civil Service Employees' Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO (the Union). The parties had selected Dr.

David M. Pincus as the Arbitrator. At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

IV. Pertinent Contract Provisions

Section 6.01. A one hundred eighty (180) day probationary period for Correction Officers and Juvenile Correction Officers will commence when the employee completes the initial period of training at the Correctional/DYS Training Academy.

During such probationary period, the Employer shall have the sole discretion to discipline or discharge probationary employee(s) and any such probationary action shall not be appealable through any grievance or appeal procedure contained herein or to the State Personnel Board of Review.

V. Case History

A. The Arbitrability of the Case

The grievant, Carolyn Detty, (Ms. Detty), filed her grievance on November 27, 1996. The grievance worked its way up to step three wherein a grievance meeting was held on March 19, 1997. During that meeting, in addition to Ms. Detty's grievance, the parties addressed thirty to forty other grievances in a mass exchange of grievance related documents.

Apparently, in error, Chapter President, Billy Waddell, and Staff Representative, Butch Wylie, authorized the withdrawal of Ms. Detty's

grievance (Joint Exhibit 7). Ms. Detty, however, never executed the document.

According to the Union, Waddell's and Wylie's withdrawal of Detty's grievance was ineffectual because it violated the expressed terms of a published union policy prohibiting the Chapter President from withdrawing a removal grievance:

> Removal grievances cannot be withdrawn by the Chapter President or designee, or the Chapter Stewards Committee. In the event that a removal grievance lacks merit for arbitration, if the grievant refuses to sign off on a settlement or a withdrawal, then the Chapter can recommend that a grievance be withdrawn. It takes the action of the Arbitration Committee to withdraw removal grievances, if the grievant refuses to sign.

The Union's Arbitration Committee never took action to remove Detty's grievance. In addition, upon discovering the errant withdrawal of Detty's grievance, Wylie promptly notified the Employer's labor relations officer, Fran Reisinger, of the Union's mistake and he clarified its intent to go forward with Detty's grievance. The Employer denies any such recission and also denies knowledge of any published Union policy prohibiting the withdrawal of a removal grievance by the Chapter President.

B. The Merits of the Case

Ms. Detty was hired on April 22, 1996 as a corrections officer (CO) at the Marion Correctional Institution. She completed her initial period of training at the Corrections Training Academy (CTA) on May 10, 1996.

Upon completion of her training at the CTA, in accordance with Section 6.01 of the parties' negotiated agreement, Ms. Detty was to serve a 180 day probationary period wherein the Employer had the sole discretion to discipline or discharge her during that time :

Section 6.01. A one hundred eighty (180) day probationary period for Correction Officers and Juvenile Correction Officers will commence when the employee completes the initial period of training at the Correctional/DYS Training Academy.

During such probationary period, the Employer shall have the sole discretion to discipline or discharge probationary employee(s) and any such probationary action shall not be appealable through any grievance or appeal procedure contained herein or to the State Personnel Board of Review.

On November 6, 1996, the last day of Ms. Detty's probationary period, she clocked in at 5:42 A.M. for her 6:00 A.M. to 2:00 P.M. assigned shift. At the end of her shift, at approximately 2:00 P.M., she was picked up and driven back to the prison complex to attend a meeting with supervisors Major Fox and Captain Allen.

During this meeting, Ms. Detty was given a removal letter dated November 4, 1996. The November 4 letter, however, indicated Ms. Detty's removal would be effective November 7, 1996.

During the November 6 meeting, however, Ms. Detty's employee i.d. pass/time card was confiscated and her sick leave and vacation leave conversion forms were executed. These are normal removal procedures. Ms. Detty neither was paid beyond November 6, 1996, nor worked for the Employer past that date.

VI. Arbitrability Issue

A. The Employer's Position

Ms. Detty's grievance was withdrawn, pure and simple. Joint Exhibit 7 evidences a withdrawal dated March 19, 1997, signed by Chapter President, Billy Waddell, and by Staff Representative, Butch Wylie. Waddell and Wylie were two people in positions authorized by the Union to effect the withdrawal of a grievance.

The Union's internal policy prohibiting the Chapter President from withdrawing a removal grievance is irrelevant. Internal union policy does not control the grievance procedure. In any event, the Employer was unaware of such policy because it was never published or submitted to the Employer. Waddell's and Wylie's withdrawal of Ms. Detty's grievance is effective and should be enforced by the Arbitrator.

B. The Union's Position

Chapter President Waddell and Staff Representative Wylie errantly withdrew Ms. Detty's grievance during a Step Three meeting on March 19, 1997, wherein thirty to forty grievaces were being addressed and wads of paper were being shuffled. Wylie promptly notified Labor Relations Officer Reisinger of the mistake and corrected the error.

The Union's restriction on the Chapter President's right to withdraw a removal grievance is a well published Union policy that was distributed to the Employer. This policy has been in effect since 1989 and has governed the Union's grievance settlement process. Waddell's and Wylie's execution of the withdrawal of Ms. Detty's grievance was therefore ineffectual and the Employer had no reason to rely on it. Ms. Detty's grievance was never withdrawn and this Arbitrator has jurisdiction over the merits.

VII. The Arbitrator's Opinion and Award Regarding the Arbitrability Issue

From the evidence and testimony introduced at the hearing, and an impartial and complete review of the record, including pertinent contract language, it is this Arbitrator's opinion that the disputed matter is arbitrable and ripe for adjudication.

Although Chapter President Waddell and Staff Representative Wylie executed a document withdrawing Ms. Detty's grievance, this Arbitrator believes that it was done errantly during a March 19, 1997 Step Three grievance meeting wherein numerous grievances were being addressed and much paper was being shuffled. Wylie testified credibly that he promptly notified Labor Relations Officer Reisinger of the Union's mistake.

The Employer never adequately rebutted Wylie's testimony on this issue. Specifically, in the "State's closing statement," the Employer carefully finesses Wylie's testimony by noting that, "Ms. Reisinger testified that neither at the Step Three meeting where the withdrawal was signed nor at any subsequent time, did she ***agree*** with Mr. Wylie to rescind the withdrawal." (Closing Statement, p. 2). (Emphasis added).

The issue here is notice of the mistake not agreement with it. During the arbitration hearing, Ms. Reisinger could not say Mr. Wylie did not inform her about the mistake. The Employer's concession that Ms. Reisinger did not "agree" to withdraw the Union's grievance creates inferences in this Arbitrator's mind that Wylie's testimony about having informed Reisinger about the mistake is credible.

This Arbitrator therefore believes that the Employer was on adequate notice that Waddell's and Wylie's execution of a withdrawal form on behalf of Ms. Detty was an error. As such, the withdrawal of Ms. Detty's grievance by Waddell and Wylie does not deprive this Arbitrator of jurisdiction.

VIII. The Arbitrability Award

The grievance is arbitrable.

IX. The Merits of the Case

A. The Employer's Position

Ms. Detty was appropriately removed from her probationary position on November 6, 1997, the last day of her probationary period. The errant reference in her November 4 removal letter that her removal would become effective November 7 does not negate her removal.

In any event, Ms. Detty knew on November 6 that she was being terminated. She was picked up at the end of her shift and brought to a meeting with her two supervisors, Major Fox and Captain Allen, where she was provided with her removal letter and her final evaluation. She also surrendered her identification and time card and addressed sick leave and vacation conversion.

The Union's argument that Ms. Detty was removed outside of her probationary period because she was terminated after her shift on November 6 is meritless. The probationary language under Section 6.01 specifically defines probation in terms of days and not shifts and Ms. Detty's removal was appropriate even if it occurred after her shift. The Employer concedes it owes Ms. Detty one-half hour of overtime for holding her over after her shift for the meeting regarding her removal.

B. The Union's Position

Ms. Detty's termination was effective on November 7, 1996, her 181st day of employment. She therefore was a permanent employee who could not be terminated except for just cause. The Employer failed to articulate any just cause for her removal and she is entitled to reinstatement.

The Employer cannot escape the undeniable fact that its letter specifically indicates Ms. Detty's removal is effective on November 7, 1996. The November 4th date on the removal letter is irrelevant because it clearly states that the removal is effective on November 7th. The parties have stipulated that the grievant's 180th day of employment was on November 6, 1996. Ms. Detty thus was removed after her probation ended.

Other arbitrators have enforced an objective interpretation of clear language and have construed it against its author. *Avis Rent-a-Car and Teamsters Local 293*, 107LA197, 200 (Shanker, 1996). The Employer should be held accountable for its mistake and Ms. Detty should be considered a permanent employee who was entitled to just cause. Since no just cause exists here, Ms. Detty should be reinstated.

X. The Arbitrator's Opinion and Award on the Merits

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record, including pertinent contract provisions, it is this Arbitrator's opinion that Ms. Detty was properly removed as a probationary employee before the end of her probationary period. The Employer met its burden to demonstrate that Ms. Detty was removed on the 180th and last day of her probationary period. As such, the removal was in accordance with the terms of the parties' negotiated agreement.

Section 6.01 of the parties' agreement clearly and unequivocally provides for a one hundred eighty (180) **day** probationary period. (Emphasis added). This clear and unequivocal language defining Ms. Detty's probation in terms of days cannot be modified by extrinsic evidence. *Clean Coverall Supply Co.*, 47LA661 (Witney, 1966).

In any event, the Union failed to present any evidence demonstrating that the term "day" in Section 6.01 had been interpreted or applied in the past to mean shift. Most arbitrators construe the word day in its ordinary context as a twenty-four hour day from midnight to midnight. *AMF Western Tool, Inc.*, 49LA718 (Solomon, 1967). The Union's interpretation that discipline can occur only on work time also is illogical because it would theoretically negate a properly dated certified removal letter received after Ms. Detty's work shift. The Union's evidence that Ms. Detty was terminated after her shift thus is irrelevant to rebut her removal on November 6.

Given its errant execution of a withdrawal of grievance form on behalf of Ms. Detty, the Union's argument against the Employer's errant dating of the effective date of Ms. Detty's removal is a case of the teapot calling the kettle black. The parties have jointly stipulated that Ms. Detty's removal letter was dated November 4, 1996, but states that the probationary removal was effective November 7, 1996. Given the facts here, this Arbitrator views the November 7 reference as harmless error.

Ms. Detty knew that she was being removed on November 6, 1996. As she conceded, Ms. Detty was picked up from her work site and brought to a meeting with her two supervisors, Major Fox and Captain Allen, where she was provided with her removal letter and her final evaluation. She then surrendered her employee i.d. pass and time card. She also discussed sick leave and vacation conversion. As noted by Warden Money, these are the routine procedures that take place during an employee's removal. In addition, Ms. Detty's payroll records and time card entries indicate November 6 was her last day worked. Ms. Detty can hardly claim confusion that she was being terminated on November 6.

In addition, although she brought a number of witnesses forward, including management representatives, to deny her removal on November 6, none of them supported her claim. Major Fox's and captain Allen's admission that their notes on the November 4 termination letter stated 11/7/96 was merely a reflection of the errant November 7 effective date reference in the November 4 letter. The actions here speak more loudly than words. The parties' conduct on November 6 in executing routine removal documents outweighs any errant reference to November 7 as the effective date of Ms. Detty's removal. Ms. Detty failed to bring forth any credible evidence mitigating against a removal on November 6.

The Union's reliance on *Avis Rent-A-Car System, Inc. v. Teamsters Local 293,* 107 LA 197 (Shanker, 1996), is highly distinguishable. In that case, on the grievant's last day of employment, the Employer withdrew its termination letter because it believed it had made its decision based on false information. The arbitrator there ruled that the employer could not thereafter claim it had provided the grievant with appropriate notice during her probationary period.

Here, the Employer never changed its position regarding Ms. Detty's termination. Although the letter errantly stated that her termination was effective on November 7, the facts and circumstances clearly evidenced the Employer's intent to terminate Ms. Detty on the last day of her probation on November 6.

Even if this Arbitrator would read the Employer's November 7 effective date literally, he still believes Ms. Detty's termination would be effective within the 180 day probationary period. Since the 180 day probationary period is defined in days, and November 6 was the last day of the probationary period, November 7 would have been Ms. Detty's next working

day. Her termination essentially would be effective on November 7 because that is technically the first day she would no longer be an employee.

So under any standard, an application of the contract language based on the facts here, or an application of arbitral precedent, the Union's grievance has no merit and must be dismissed. This Arbitrator underscores that he loathes eleventh hour probationary terminations for the very reason established by the facts here. He encourages the Employer to be more diligent in the timing of its removal decisions in the future.

Finally, the Employer concedes it owes Ms. Detty one-half hour of overtime for having held her over for a mandatory disciplinary meeting. Based on the Employer's concession, this Arbitrator will award Ms. Detty one-half hour of overtime, calculated on her regular rate of pay.

XI. Award

The grievance is denied. The Arbitrator accepts the Employer's concession that it owes Ms. Detty one-half hour of overtime calculated based on her regular rate of pay and orders such payment to be made to her.

Dated : March 29, 1999
Cleveland, Ohio

Dr. David M. Pincus