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VOLUNTARY LABOR ARBITRATION TRIBUNAL

REVIEWED BY
Ce 9/22/02
SEP 28 2000

GRIEVANCE COORDINATOR

In the Matter of Arbitration *

Between *

OPINION AND AWARD

OHIO CIVIL SERVICE *

EMPLOYEES ASSOCIATION *

Anna DuVal Smith, Arbitrator

LOCAL 11, AFSCME, AFL/CIO *

Case No. 35-05-990709-0252-01-03

and *

OHIO DEPARTMENT OF *

Augustus Deeble, Grievant

YOUTH SERVICES *

Removal

APPEARANCES

For the Ohio Civil Service Employees Association:

Patricia Howell
John Porter
Ohio Civil Service Employees Association

For the Ohio Department of Youth Services:

Colleen Ryan, Labor Relations Officer
Ohio Department of Youth Services

Pat Mogan
Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on August 23, 2000, at the offices of the Ohio Civil Service Employees Association 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 Ohio Department of Youth Services (the "Department") were Albert Hilt, Operations Manager, Maumee Youth Center; and Nancy Hoff, Superintendent, Maumee Youth Center. Testifying for the Ohio Civil Service Employees Association (the "Union") were Jennilee Mohler, Human Resources Manager, Riverview Juvenile Corrections Center; and the Grievant, Augustus R. Deeble I. Also in attendance were James Ray, Jr. (Labor Relations Officer, Maumee Youth Center) and Union Steward Clara M. Colvin. A number of documents were entered into evidence: Joint Exhibits 1-16, Management Exhibit 1 and Union Exhibit 1. The oral hearing was concluded at 11:45 a.m. on August 23, 2000, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of his removal, the Grievant had been a Juvenile Corrections Officer at Maumee Youth Center for six years. His performance evaluations were mixed over the years, but in the main he met his employer's expectations. He had also been selected Employee of the Month two times during his first two years at the center and received a letter of recognition in 1996. However, he also had accumulated the following record of eleven active disciplinary actions.

| | | |
|---------|-------------------------------------|---|
| 11-2-95 | Oral reprimand | Failure to follow proper procedure (1c) |
| 1-26-96 | Oral reprimand | Failure to follow proper procedure (1c) |
| 3-12-96 | Suspension: 4 days | Excessive force (24a & 1c) |
| 4-25-96 | Written reprimand | Failure to follow proper procedure (1c) |
| 5-6-96 | Suspension: 4 days | Physical force/excessive force (24a & 1c) |
| 6-27-96 | Written reprimand | Carelessness (10) |
| 6-17-97 | Suspension: 1 day | Carelessness (10) |
| 8-11-97 | Written reprimand | Failure to perform duty (1b) |
| 9-18-97 | Suspension: 5 days | Excessive force, verbal abuse (24a, 19, 1c) |
| 5-7-98 | Suspension: 10 days (5 with pay) | Carelessness (10) |
| 1-27-99 | Suspension: 10 days | Failure to perform duty (1b) |

The events leading to the Grievant's removal began on April 20, 1999, when his uncle-in-law, a resident of Brooklyn, New York, passed away. The Grievant worked his usual 4 p.m. - midnight shift that day and the next without mentioning the death to his employer. He also worked the first half of his shift on the 22nd, taking off the second half with prior approval and again saying nothing about the death. April 23 and 24 were his regular days off. The

funeral was held in Toledo, Ohio on the 24th. The following day, the Grievant's family needed him at home to help with various matters occasioned by the funeral, so the Grievant called off to the duty officer, Albert Hilt, about 9:30 a.m., saying he was taking sick leave. The Grievant then thought better of the deception and called back at 10 o'clock to change his claim to bereavement leave, saying his wife's uncle had passed away. Mr. Hilt informed him there was no entitlement to bereavement leave for an uncle-in-law, so the Grievant said he would take emergency vacation and bring in documentation when he returned to work. The Request for Leave form filed on April 26 was accompanied by two documents indicating the funeral had been held on April 24. Since no documentation for the 25th was submitted, the leave request was denied by Superintendent Nancy Hoff. This placed the Grievant in an AWOL status for April 25. Following an investigation and pre-disciplinary meeting, Superintendent Hoff consulted the Department's labor relations officers. She then recommended the Grievant be removed from his position because of his disciplinary history and lack of improvement in conforming to the Department's rules. Accordingly, on July 7, 1999, the Grievant was terminated for violation of Rules 22(f) and 22(c), failure to provide documentation of absence and unauthorized absence of two or fewer days.

This action was grieved on July 9 and appealed through the grievance procedure to arbitration where it presently resides, free of procedural defect, for final and binding decision.

III. STIPULATED ISSUE

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

IV. PERTINENT CONTRACT PROVISIONS

ARTICLE 27 - PERSONAL LEAVE

27.04 - Notification and Approval of Use of Personal Leave

Personal leave shall be granted if an employee makes the request with a forty-eight (48) hour notice. In an emergency the request shall be made as soon as possible and the supervisor will respond promptly. The leave shall not be unreasonably denied.

ARTICLE 28 - VACATIONS

28.03 - Procedure

Vacation leave shall be taken only at times mutually agreed to by the Agency and the employee and shall be used and charged in units of one-tenth (1/10) hour. The Agency may establish minimum staffing levels for a facility which could restrict the number of concurrent vacation leave requests which may be granted.

Emergency vacation requests for periods of three (3) days or less may be made by employees in seven (7) day operations as soon as they are aware of the emergency. An employee shall provide the Employer with verification of the emergency upon return to work.

ARTICLE 30 - OTHER LEAVES WITH PAY

30.03 - Bereavement Leave

Three (3) consecutive days of bereavement leave with pay at regular rate will be granted to an employee upon the death of a member of his/her immediate family interpreted for the purposes of this Article to include: spouse or significant other ("significant other" as used in this Agreement, is defined to mean one who stands in place of a spouse and who resides with the employee), child, step-child, grandchild, parent, step-parent, grandparent, great-grandparent, brother, sister, step-sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law or legal guardian or other person who stands in the place of a parent. Bereavement leave will be granted in the case of a stillbirth conditioned upon the tendering of a death certificate.

V. ARGUMENTS OF THE PARTIES

Argument of the Department

The Department submits that the Grievant was removed for just cause. According to the Collective Bargaining Agreement, the employee must submit his request for emergency vacation leave as soon as he is aware of the emergency and submit verification documentation upon return to work. Department Directive B-6 also calls for the employee to obtain prior approval when possible. Since the Contract does not define "emergency," it is left to the employer's discretion. The Grievant's reason for wanting this leave did not meet the Superintendent's common sense definition: something that is not known until the last moment

and cannot be done at any other time. The Grievant's wife's request that he stay home to help does not rise to this level. In fact, the Grievant was not even required to be at work until 4 p.m., so he had the entire day to be at home with his family even without emergency leave. If a family member was ill, the Grievant should have submitted medical documentation and the Department would have been obliged to honor the request. Moreover, the Grievant had plenty of time before the funeral to request personal leave. Instead, he waited until the day he wanted off before he sought leave, and then submitted no documentation for that day. The Grievant followed his usual pattern of behavior, doing as he wanted to do without regard for policy.

With respect to issues raised by the Union, it is long term practice that the duty officer does not approve or disapprove leave requests. Only the superintendent can do that. Second, the human resources administrator at the time testified she spoke to the Grievant after the fact about what was sufficient documentation and even then she could not say what was appropriate to justify this absence. Third, the fact that the Grievant had leave balances muddies the waters. The issue here is whether the Grievant requested leave when he was aware of the "emergency" and whether he supplied appropriate documentation. Fourth, despite the Grievant's claim, he had to have been aware that his request was denied before he was terminated: Hoff denied the request on April 27 and his payroll card shows him in AWOL status. His check would therefore have been shorted. In addition, he was asked to make a statement and he received a pre-disciplinary notice. He was clearly on notice.

As to the penalty, removal may seem draconian, but the Grievant has an extensive disciplinary history over the last four years of his six-year employment with the Department. The last two actions against him were major suspensions. The Grievant was therefore on the

culp of removal when he called off without seeking guidance regarding the propriety of his request. The Department asks that his removal be upheld and the grievance be denied in its entirety.

Argument of the Union

The Union's position is that the Department took advantage of the situation, using its bureaucratic procedure as an excuse to get rid of an employee it perceived as a problem. This case is not about whether the Grievant had leave balances. The Superintendent testified various forms of leave could have been used and the Grievant had balances to cover his absence but he was not given the opportunity to do so. This case is also not about dishonesty, for the Grievant came clean the day he called off about why he was requesting leave and he submitted documentation to verify his claim of the circumstance necessitating his need to be with his family.

The Union argues that management has the responsibility to communicate its standards in precise form so the employee has constructive notice. The Superintendent's definition of what constitutes a genuine emergency and adequate documentation were not communicated to the Grievant. He therefore did not have notice of what was required. He did, however, give plenty of notice for coverage. During those six hours his request could have been walked through the system. Had this been done, he would have known prior to the start of his shift whether the leave was disapproved. Emergency vacation is a contractual benefit for times when there is little or no notice. Management's practice operates to disallow the benefit.

The Grievant is a long-term employee for his classification. He has given good and meritorious service. In the Union's eyes, the Department took advantage of the situation. For

this reason, it lacked just cause to remove the Grievant. The Union asks that the grievance be sustained and the Grievant made whole.

VI. OPINION OF THE ARBITRATOR

As I understand it, the sole reason the Department claims discipline is justified in this case is that this employee's documentation did not support his claim of "emergency." In the Department's view, the Grievant did not experience a genuine emergency on the 25th and his documentation concerned the 24th, not the 25th.

There are several problems with this position. To begin with, while the Union does not contest the Superintendent's definition of "emergency" (to the effect that it is an unforeseen combination of circumstances calling for immediate action),¹ it does dispute her determination that the particular circumstances faced by the Grievant on the 25th did not qualify under her definition. While it is true that the Grievant knew about the funeral in advance and so could have been expected to request leave for the 24th had he been scheduled to work that day, there is no reason to believe he could have known in advance the state of things at his home on the day following the funeral. Individual reactions to death in the family, travel arrangements and the like surrounding a funeral will vary, not always in a predictable fashion and not always necessitating medical treatment as would justify sick leave. While the circumstances of the 25th testified to by the Grievant do not describe an obvious emergency such as an automobile accident or a flood, they are close enough to meeting a "common sense" definition that the Grievant would have no way of telling that they did not rise to his employer's standard unless

¹*Black's Law Dictionary*, 5th ed.

his employer told him so. In other words, I find he was not on notice that failing to appear for work would result in his termination, despite having called off hours before his shift and stating the true reason for his absence. Indeed, the fact that the duty officer raised a red flag when the Grievant sought bereavement leave but did not do so when emergency vacation was mentioned would tend to reassure him. In other words, as I have previously held,² the emergency leave policy and practice has to be clear enough in communication and application that employees can predict with reasonable certainty whether their requests for such leave will be granted and, if not, what the consequences will be. This is especially critical in a case such as this where the employee is at the top of the discipline progression and therefore on the cusp of termination. As the Grievant said, had he known this incident would lead to his termination, he would have come in to work.

As for the documentation, it is true that the Grievant was not seeking leave for the funeral on the 24th. However, the funeral notices do support his claim that his emergency was occasioned by his uncle-in-law's death and funeral. It is not as if the Grievant was caught at the track on the 25th or seeking leave for a day two weeks after the funeral. If documentation functions to corroborate an employee's claim of why he was absent on a certain date, these notices suffice.

In other words, I find the Department's refusal to grant emergency vacation leave in this case to be unreasonable. The Grievant had leave balances, he gave ample notice and the

²*Ohio Department of Mental Health and O.C.S.E.A./A.F.S.C.M.E. Local 11 (B. Williams, Grievant)*, Case Nos. 28-18-961230-1402-01-04 and 28-18-961217-1397-01-04 (A. Smith, Arbitrator), July 17, 1997.

Department evidently had no over-riding staffing concerns on the day and shift requested. In the absence of clear communication of what the Department considers a qualifying emergency, the Grievant's application of the term to his circumstances was reasonable. It even arguably met the employer's definition. Without notice, the Grievant had no reason to believe his circumstances did not qualify and he submitted documentation supporting the circumstances giving rise to his emergency. Because the Grievant should not have been placed in an AWOL position, no discipline is warranted. Therefore, his termination was without just cause.

VII. AWARD

The grievance is sustained. The Grievant will be reinstated to his former position as a Juvenile Corrections Officer forthwith and his record expunged of the termination. He is to receive all back pay, seniority and benefits, less normal deductions. The Department may also deduct any earnings the Grievant had in the interim on account of his dismissal and require him to supply reasonable evidence thereof. The Arbitrator retains jurisdiction for a period of sixty (60) days for the sole purpose of resolving any dispute which may arise over the implementation of this Award.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
September 23, 2000

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