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C. L. 6/27/07
JUN 27 2007

VOLUNTARY LABOR ARBITRATION TRIBUNAL

GRIEVANCE COORDINATOR

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. 04-00-001030-17-01-07
Krystyna Gasior, Grievant
Removal

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Steven W. Lieber, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Agriculture:

John H. Hix, Human Resources Administrator
Ohio Department of Agriculture

Neni Valentine
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:35 a.m. on May 9, 2001, at the Lausche State Office Building, 615 West Superior Avenue in Cleveland, 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 Agriculture (the "State") were Mahmood Sabihi, DVM, Veterinary Supervisor; and William E. Choate, Jr., Meat Inspection Supervisor. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") was the Grievant, Krystyna Gasior. A number of documents were entered into evidence: Joint Exhibits 1-7 and Union Exhibits 1-4. The oral hearing was concluded at 1:25 p.m. following oral summations, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

Chronology

This case concerns the removal of a twelve-year Meat Inspector of the Ohio Department of Agriculture for poor performance. The record does not reveal any job performance issues for the Grievant until after the State changed its meat inspection system from results-oriented after-the-fact detection to a focus on prevention during the production

process. The new program (known as “Hazard Analysis of Critical Control Points,” or “HACCP”) requires inspectors to verify that their assigned producers follow their hazard plan at every step. Under this new system the total list of inspection tasks (“PBIS” for “Performance Based Inspection System” tasks) for a given facility is sampled by computer every two weeks and a list of those to be performed in the following two weeks at the site is generated. Producers are unaware of which elements are on any given bi-weekly list at the time their facility is inspected. The inspector’s job is to determine whether there is a deviation from plan and, if so, what is being done to correct it. Sometimes it is not possible to perform a given task as, for example, when a particular product on the inspection list is not being produced on the inspection date. In such a case, the inspector marks the task as “not performed” and moves on. But if a product is produced on an inspector’s shift, according to District Veterinary Supervisor Mahmood Sabihi, the inspector is responsible for performing the related tasks on the list before leaving the plant.

According to Sabihi, this new system required a complete change for inspectors, who received both off-site and on-the-job training to help them perform effectively. Some inspectors adapted, others did not. Departmental records establish that the Grievant, who was hired in 1988, underwent HACCP training in 1999. Her performance evaluations were not submitted, but she did have two disciplinary actions for poor performance on her record: a written reprimand issued May 3, 1999, and a five-day suspension issued May 13, 1999. In March of 2000 she was reassigned to Ashland, Ohio, but she grieved this and was returned to Cleveland on August 1, 2000, where she was re-assigned to three facilities on the west side of the city. By August 10 she had produced written records leading her supervisors to believe her

performance was inadequate. A pre-disciplinary meeting was held on September 25 over performance deficiencies allegedly occurring on August 4, 7, 8, 9 and 10. The pre-disciplinary hearing officer dismissed the August 4 and 7 charges and found eight allegations relating to August 8, 9 and 10 to be “relatively minor, involving records inspections” (Joint Ex. 3). However, three were “directly related to lack of inspection of meat products which subsequently entered the food chain for human consumption” and were thus deemed serious. Inasmuch as the Grievant had a performance-related discipline record, had received “additional training beyond the normal... HACCP” and had been “reassigned to allow her to develop her skills,” the hearing officer concluded she was unresponsive to development efforts and recommended discipline, either a 6-month suspension and retraining, or termination. The Director chose termination.

The Grievant was accordingly removed from her position on October 30, 2000, for violation of Rules 28 (violation of §124.34 O.R.C.) and 31a, b and c (poor performance: failure to properly carry out work assignments, failure to complete assigned tasks, and performance at substandard levels). The specific incidents cited were:

- August 8 Failure to properly perform the 03C02 PBIS task at Blue Ribbon Meats, thus allowing lamb racks to enter the food chain without inspection.

- August 9 At Maher Poultry, failure to properly perform the 01B02, 06D01 and 03C01 PBIS tasks, which cumulatively would have exceeded the 30 minutes the Grievant spent at the plant.

 At M&M Foods, failure to perform the 04B03 PBIS task, thus allowing product to be shipped without inspection of its label.

August 10 Failure to perform the 03B02 PBIS task at Blue Ribbon Meats, thus allowing two lots of Italian sausage to enter the food chain without inspection.

A grievance protesting this termination was filed on October 30 and duly processed through the grievance procedure without resolution, finally coming to arbitration as aforesaid, free of procedural defect, for final and binding decision.

The Incidents

Regarding the Blue Ribbon lamb racks, company records for the August 8 day shift show that lamb racks were produced that day at 1:00 p.m. The sign-in sheet showed the Grievant's supervisor, William Choate, that the Grievant was in the plant from 10:05 a.m. until 2:00 pm. The Grievant testified that she did not perform the required task for this product because she did not know it was being produced. Ordinarily, she said, this product is produced during the evening shift and the room that is used was being cleaned all that morning. Although she is not given a copy of the production schedule, she does have access to it. Employees do not tell her what they are doing and do not come to get her unless she tells them that she needs to observe a particular task. She may have been working on something else, such as paperwork, at the time of this incident, and her office is on the other side of the plant from the room in which lamb racks are cut.

With respect to Maher Poultry on August 9, this is a two-shift plant with the first shift cleaning the process area for the second shift's production. Since no product was produced during the first shift, the Grievant testified that her pre-op inspection (01B02) was abbreviated. Her inspection was based on the pre-op done by the day shift manager and so was limited to the freezer and lunchroom and possibly the bathroom and locker. Also, since the plant was

being cleaned, the Grievant could not do a complete 06D01. Regarding the 03C01, she testified that this might have been the result of a call to get some chicken out right away. In any event, she concluded that she could have performed all three tasks in half an hour.

The Grievant testified that there had been a labeling problem at M&M for years. She wrote it up many times and talked to Choate about it. He told her to lay off and just write an MI-19 as a reminder, so she did. There was no management testimony on this incident.

Blue Ribbon records show Italian sausage was produced at 5:10 a.m. and again at 1:15 p.m. on August 10. Choate's notes indicate the Grievant was in the plant from 6:00 a.m. until 8:30 a.m., from 9:40 until 12:05, and from 1:30 until 2:15 p.m., but they also indicate the sausage was produced at 6:10 a.m. The Grievant testified that since the morning run was completed before she arrived, she could not have performed the 03B02 task on it.¹ The afternoon run was near the end of her shift. She testified that she was monitoring wieners the entire day, but could have been in her office catching up with paperwork when the second batch was made. Blue Ribbon employees complain that she is the only inspector who watches them the whole time, so they do not tell her when they are making something. If she is not in the room where something is being produced, she cannot inspect it, and she cannot be in two places at once. Also, she was told that she was not expected to do everything on the list if there was a long task. She chooses what to do by eliminating repeats and not interrupting long tasks, but admits that cooked products (such as wieners) are lower priority than uncooked ones (such as Italian sausage). When asked if she was required to inspect only if the product is

¹“Ver HACCP rcds ensur effective monit CCP’s, limis; corr act for one proc”

made while she is in the plant, she replied that it depends on the code. "Monitor" means to observe while the product is being made, so this can only be done if the product is produced while she is there. She says there are different ways of doing things and the inspector has some leeway, so if she chooses to monitor and nothing is made, then she cannot perform the task.

III. ISSUE

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

IV. ARGUMENTS OF THE PARTIES

Argument of the State

The State says that because it is not possible to supervise on site every single inspection by its more than 200 field employees, it has to rely on them to follow the instructions provided about what, when and how to inspect. When, despite training and correction, an employee can no longer be relied upon to perform these duties consistently, diligently and correctly, there is no alternative but removal. Such is the case here. The record shows a history of performance-related discipline, and the discharge itself is also performance-based.

HACCP is a mandated program. The job of the inspector is to follow the assigned tasks in the priority in which they are established on the procedure schedule. Neither the plant owner, its management, nor its employees, determine what is to be done nor whether the inspector will be looking over their shoulder. It is the rules and regulations that the Ohio Department of Agriculture abides by. The State expects its long-term employees, such as the Grievant, to realize that they are in charge and responsible for the activities and inspections that are supposed to occur. The State submits that it is obvious there was a breakdown in the

Grievant's ability to perform in such a manner. While she does do some of her tasks and accurately records what she does not do, there is nothing in the record indicating the basis for the choices she makes about what to do or not do in a given day. Because of the choices she made, there are at least two instances of food introduced into the food chain without proper inspection; this is not the first instance for this employee. This conclusion is based on her own and plant records, not her supervisor's records. The State submits that the Grievant has been inconsistent in her explanations, but the bottom line is that the tasks have to be performed in the order in which they are laid out and it is not sufficient to say "I was somewhere else; I was doing something else."

The State does believe that the Grievant honestly attempts to do the best she can, but also believes that she is one of those inspectors unable to make the transition to the HACCP program. The fact remains that the reports the State must rely upon reflect a level of performance that is unacceptable. For this reason, discharge is justified and the grievance should be denied.

Argument of the Union

The Union argues that the Grievant was removed without just cause. Management was not present while the Grievant was in these plants. As such, it can only speculate about her activities. The Union submits that the Grievant adequately explained what she did on the days in question, how she followed the things she was supposed to do with regard to the scheduled tasks and did everything she could complete within her allotted work time. She explained that she could easily have performed all the tasks on August 9 at Maher Poultry and that there had been a continual labeling problem at M&M Foods which her supervisor told her not to press.

She also explained that she was not at Blue Ribbon on August 10 when the first sausage was produced and that when the second was, she was occupied with the wieners and could not be in two places at the same time.

The Union further contends that there was no investigation. Management simply relied on records and did not talk to anyone at the plants. Moreover, the State did not follow progressive discipline, as required by the Contract and the Department's own rules. This type of violation calls for several written reprimands, and a short suspension followed by a larger one before removal. What is more, even if the Arbitrator finds the Grievant guilty on all counts, the violations do not rise to the level warranting discharge. The Union therefore asks that the grievance be sustained and that the Grievant be reinstated, granted all back pay plus benefits and seniority, and made whole.

V. OPINION OF THE ARBITRATOR

The Grievant is a long-term employee who evidently gave her employer good service until 1999 when she was still being trained in the HACCP system. The coincidence of HACCP implementation and the Grievant's performance-related difficulties do lend credence to the State's view that the Grievant was having difficulty transitioning to the new technology. The State argues that it has provided additional support to the Grievant, but to no avail, and so is left no alternative but a parting of the ways. While I do acknowledge that the State has given some additional support, my opinion is that termination is premature.

Looking first at the charges, I must give the Grievant the benefit of the doubt on the August 9 incidents. Her explanation of why she was able to perform the tasks in half an hour

was un rebutted by the State, as was her claim about the shipping labels at the other producer. Here is where an investigation would have been helpful. As for August 10, her supervisor erroneously read "5:10 a.m." as "6:10 a.m." and thus falsely concluded the first run of Italian sausage happened when she was in the plant. Since she was not there until 6:00 a.m., she could not have performed the associated task for this particular batch. However, the same does not hold true for either the 1:15 p.m. run on August 10 or the lamb racks produced by Blue Ribbon at 1 p.m. on August 8. The Grievant was on duty for both and was thus responsible for the PBIS tasks associated with their production. It appears to me that the Grievant needs to know how to find out what is being produced on her watch and perhaps also how to make better decisions.

Turning now to the level of discipline, the purpose of discipline is correction. To that end it must be progressive and give the employee a reasonable chance to reform. I have scrutinized the Grievant's discipline record and see that although both incidents are performance-related, neither discipline was for missing an inspection task. Moreover, this is the Grievant's third recorded performance-related violation (not her fourth), for which the discipline grid suggests a suspension. As a long-term employee she should be given another chance, but should receive some discipline to impress upon her the need to improve her performance. I also note that an earlier attempt to provide her with training via a transfer did not work out. The Grievant, herself, complains that her computer training was inadequate because she lacked a computer password until shortly before her termination, and the pre-disciplinary hearing officer, too, thought retraining was in order. Returning her to her job without providing for training would seem to be a futile act. Therefore, while I am converting

the removal to a ten-day suspension, I am conditioning her reinstatement on her submission to retraining.

VI. AWARD

The grievance is granted in part, denied in part. The Grievant was not removed for just cause. She will be reinstated to a Meat Inspector position forthwith. She is awarded all monies she would have earned less normal deductions including any earnings she may have had in the interim on account of her unjust dismissal, and made whole for lost seniority and benefits. The State may require reasonable proof of interim earnings. Given the finding of poor performance, the removal is converted to a ten-day suspension without pay. Further, this award is conditional upon the Grievant completing retraining in a manner and on a timetable as the State may reasonably determine. The Arbitrator retains jurisdiction for a period of ninety (90) days on the sole issue of remedy.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
June 19, 2001