#868

REVIEWED BY
JUN 2 2 2004
CO 6-22-04
GRIEVANCE COORDINATOR

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

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

Grievant: Nancy Masterson

Case No. 27-05 (20031010) 1141-01-03-T

Date of Hearing: April 26, 2004

Place of Hearing: Orient, Ohio

APPEARANCES:

For the Union:

Advocate: Dave Justice
2nd Chair: Jamie Kuhner

Witnesses:

Dan Alvarado
Nancy Masterson

For the Employer:

Advocate: Joe Trejo
2nd Chair: Cathy Merrick

Witnesses:

Jon C. Fausnaugh
Dan Alvarado (upon cross)

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: June 18, 2004

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003, through February 28, 2006, between the State of Ohio - Department of Rehabilitation and Corrections ("CRC") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator, is whether just cause exists to support removal of the Grievant, Nancy Masterson ("Masterson"), for violating Rule 24 – Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

The removal of the Grievant occurred on September 25, 2003, and was appealed in accordance with Article 24 of the CBA. This matter was heard on April 26, 2004, and is properly before the Arbitrator for resolution. Both parties had the opportunity to present evidence through witnesses and exhibits. Both parties submitted post-hearing briefs, with the record being closed as of May 10, 2004.

BACKGROUND

The Grievant, Nancy Masterson, was employed by the State of Ohio for eighteen (18) years. She initially worked for the Department of Liquor Control for approximately nine (9) years, then worked for the Department of Rehabilitation and Corrections ("DR&C") as a corrections officer (CO) at the Corrections Reception Center (CRC) in Orient, Ohio. At the time of her removal, she held the position of sergeant/counselor.

The Grievant was removed on September 25, 2003 for violating Rule 24 – *Interfering with, failing to cooperate in, or lying in an official investigation or inquiry*. In 2002, CRC received information, through an informant, that the Grievant was or had been involved in an inappropriate relationship with an inmate. DR&C policies prohibit any unauthorized relationship between employees and individuals under supervision of DR&C. In addition to the informant

data, a written statement was obtained from the mother of the inmate, which raised additional concerns regarding the Grievant's involvement with the inmate.

On April 3, 2003, an official investigation was initiated regarding the Grievant's alleged inappropriate conduct that same day, was informed by her immediate supervisor on about the investigation. On April 4, 2003, the Grievant reported off from work under doctor's care, pending a scheduled surgical procedure (Management ("M") Ex-2, p.17). On April 8th, Ron Vogt (Vogt), Unit Manager, contacted the Grievant at her residence and verbally ordered her to report to the facility on April 9th to be interviewed regarding the investigation. The Grievant attended the April 9th interview with Vogt where she was advised that follow-up meetings and/or questioning may be required.

On April 29th, Vogt attempted, by telephone, to contact the Grievant at her residence. The phone had been disconnected. That same day, Mark H. Saunders ("Saunders"), Warden, sent a letter [1] to the Grievant directing her to report to the institution on May 7, 2003 at 8:00 a.m. and to contact Vogt upon her arrival. (M Ex-2, p.22). The Grievant did not show up, but called the institution and spoke with Vogt around 2:30 p.m.

Vogt ordered the Grievant to come to the institution on May 8, 2003 by 12:30 pm. Candy Cain ("Cain"), Unit Manager Administrator, was present in the room during this conversation, which was conducted on a speakerphone. The Grievant did not show up on May 8, 2003. On July 14, 2003, a pre-disciplinary conference was held and the Grievant did not attend. Union representation was present. As a result of her failure to appear on May 7th and May 8th, the Grievant was disciplined for violations of Rule 6 – Insubordination and Rule 24, on July 22, 2003 (M Ex-2, p.1). According to the Union and the Grievant, they did receive the notice of the July 22, 2003, discipline.

[1] Two copies of Warden Saunders' letter was sent to the Grievant, one regular, first class mail and one certified, return receipt requested.

On July 31, 2003, Vogt, again, telephoned the Grievant to continue the investigation and was informed that her physician had instructed her not to have contact with the facility. Vogt offered to meet her off site from the facility, to no avail. Vogt also informed her that a doctor's statement was required to verify her current medical restrictions. As of August 15, 2003, no doctor's statement had been provided by the Grievant (Joint Exhibit "JX" 2, p.7) and the discipline process concerning the July 31, 2003, incident began.

On August 28, 2003, a pre-disciplinary conference was held regarding the Grievant's failure to cooperate in the investigation. While the Grievant did not attend, but Dan Alvardo ("Alvardo"), her union representative, was present. The Union urged that mitigation was appropriate in that she had a disability claim on file and a physician's statement dated July 22, 2003, which prevented her from having interactions with co-workers due to her medical condition. (Union "UN" Ex-1,p.3). Captain D. C. Justice, Hearing Officer, found just cause for discipline for violation of Rule 24, stating, "*...a request for disability claim that states she is to have no interaction with co-workers, however, that is no just cause to not fully cooperate in an investigation...*" (M Ex-2, p.9).

On September 25, 2003, the Grievant was removed for interfering with, failing to cooperate in, or lying in an official investigation or inquiry. (M Ex-3). The employer submits that removal was proper under Rule 24; however, the Union contends that just cause for removal is absent based upon the evidence and seeks reinstatement with back pay.

ISSUE

Was the Grievant, Nancy L. Masterson, removed for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA AND DR&C RULES
ARTICLE 24 – DISCIPLINE

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

DR&C STANDARDS OF EMPLOYEE CONDUCT
RULE 24

Rule 24: Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

OFFENSE

1st	2nd	3rd	4th	5th
2 or R	5 or R	R		

POSITION OF THE PARTIES

POSITION OF THE UNION

The Union contends that the Grievant, an eighteen (18) year employee, with good evaluations, was removed in violation of Article 24 of the CBA.

The Grievant admits receiving the April 29th letter from Warden Saunders on May 7, 2003. She claimed to have recently relocated, and only upon returning to her former location, did she receive the April 29th letter. She claimed that although she had a new telephone number, her cell phone number remained the same. The Grievant explained to Vogt that she was unable to come to the institution on May 7th due to the fact that she was caring for her grandchildren. Upon being ordered to appear on May 8th by 12:30 p.m., the Grievant stated that she was scheduled for pre-admission testing prior to a surgery, that had been scheduled for May 9, 2003.

The Employer held a pre-disciplinary conference on July 14, 2003, and alleged that the Grievant violated Rule 6 (Insubordination) and Rule 24 due to her failure to report on May 7th and 8th to the institution. Her union representative, Alvarado, indicated that he was present on July 10, 2003, when Capt. Justice held a speakerphone conversation with the Grievant in an effort to get her to attend the July 14th pre-disciplinary conference. The Grievant stated she was under doctor's care and faxed three (3) statements to verify her medical condition. (M Ex-2, pp.5-8). One medical statement indicated that, "*...patient not to return to work until released by me.*" (M Ex-2, p.5). Finally, the Union objected to the pre-disciplinary hearing occurring without the Grievant, but the hearing was held.

As a result of her conduct, the Grievant received a twenty (20%) percent fine for violating Rules 6 and 24. Alvarado testified that the Union did not receive notice of the discipline and no grievance trail exists to demonstrate verified proof of receipt by the Union or the Grievant. Had the Union received notice, a grievance would have been filed, and the imposition of the second discipline within weeks over essentially the same conduct, can not be deemed corrective, but punitive.

The second disciplinary matter that led to the removal, arouse pursuant to a telephone call on July 31, 2003. In attendance were Vogt, Alvarado, Jon Fausnaugh ("Fausnaugh"), Investigator, and the Grievant. Vogt ordered the Grievant to report to the institution, but she was unable to comply because her doctor told her not to come to the institution. As a result, a second pre-disciplinary conference was held on August 15, 2003, centering upon the same fact pattern as the prior discipline.

During the pre-disciplinary conference of August 15th, medical verification was provided to indicate that the Grievant was under her doctor's order not to have interaction with co-workers on the date of Vogt's request, but the Employer ignored the verification.

Overall, the Union argues that the Employer has acted unreasonably in pursing this matter from April until September 2003 while the Grievant was under doctor's care. Vogt made

numerous calls to the Grievant's home, and further that notices of corrective action and/or disciplinary conferences were intended to intimidate the Grievant.

Moreover, if the Grievant was not notified of the first discipline, then the Employer is estopped from progressing from the earlier discipline. Simply, the discipline that resulted in removal would be invalid under double jeopardy principles, or the subsequent discipline could have only resulted in a two (2) day fine under the grid for violation of DR&C's Rule 24.

POSITION OF THE EMPLOYER

The Employer submits that in late summer 2002, the employer received information that the Grievant was allegedly involved in an inappropriate relationship with an inmate. During the investigation, the Employer interviewed and/or was provided written statements from the inmate, the inmate's mother, co-workers, and the Grievant.

In April 2003, the Grievant's supervisor informed her that an investigation was occurring. (M Ex-2, p.17). From this date forward, the Grievant refused to fully cooperate other than by providing responses on April 9th to Vogt in a question and answer format. (M Ex-2,pp.25-27). The investigation of a CO regarding an inappropriate relationship with an inmate is a serious matter, due to the zero tolerance required of CO to always remain objective in the monitoring of all inmate activity while under supervision of the Department of Corrections. If a personal relationship exists with an inmate, a CO potentially compromises the safety of co-workers and the public.

Active discipline of record included violations of Rule 3, absenteeism (3-H), being absent without proper authorization on March 23, 2003, which resulted in a ten (10%) percent fine. Also, on April 3, 2003, she received a twenty (20%) percent fine for violation of Rule 3 – Absenteeism. Regarding the May 7th and May 8, 2003, incidents, the facts are relatively undisputed, in that Warden Saunders, on April 29, 2003 sent a letter to the Grievant which she

admitted receiving on May 7, 2003. The letter was unambiguous and clearly stated that the Grievant was required to report to the institution on Wednesday, May 7th, at 8:00 a.m. to meet investigator Vogt regarding the alleged, inappropriate activity. (M Ex-2,p.22). The letter further stated that, "...failure to comply with this order will result in disciplinary action being taken against you for violation of the Standards of Employee Conduct..." (M Ex-2, p.33). The Grievant alleged that due to her change of residence, she did not receive Saunders' letter until the afternoon of May 7th at which time she called the institution and spoke with Vogt. However, during that conversation, Vogt instructed the Grievant that her attendance was not an option and she was to report to the institution no later than 12:30 p.m. on May 8, 2003. Furthermore, Vogt told her that if she did not report, she would be subject to disciplinary action. Cain was present and provided a statement to verify the conversation that occurred on May 7th between Grievant and Vogt.

According to Vogt, the Grievant indicated that she was busy, and did not show up on May 8, 2003. (M Ex-2, p.20). As a result of the Grievant's failure to appear at the institution on May 7th and May 8th, the Employer started the corrective action. On July 22, 2003, the employer concluded that the Grievant had violated Rules 6 and 24, and issued a twenty (20%) percent fine. (M Ex-2, p.1). According to the Employer, the Grievant testified that she acknowledged receiving the discipline of July 22, 2003. Furthermore, the Grievant and the Union were involved in every step of the grievance process prior to the July 22nd discipline being issued. No grievance was filed on behalf of the Grievant as a result of the July 22, 2003, discipline.

On July 31, 2003, Vogt contacted the Grievant to continue the investigation. Vogt telephoned the Grievant in the presence of Alvarado and Fausnaugh. Both witnesses testified credibly at the hearing and both recall that the Grievant was ordered to come to the institution for an investigatory interview. At this time, the Grievant was informed Vogt that she was under loctor's orders not to come into the institution due to her health condition. A medical verification support the same was requested from the Grievant. As of August 15, 2003, no statement

was received by management, and as a result, disciplinary action for violation of Rule 24 was commenced on August 15, 2003. The appropriate pre-disciplinary packet was sent to the Grievant and a pre-disciplinary hearing was scheduled on August 28, 2003. Once again, the Grievant failed to show, but Union representative Alvarado was present. DR&C found just cause for a Rule 24 violation and the removal process commenced.

With respect to the Union's proposed mitigating circumstance, i.e. the Grievant filed disability papers prior July 31, 2003, the Employer submits that at no time from July 31 through August 15, 2003, was management aware of or had access to her disability papers. Moreover, the only medical condition the institution was aware of was an ankle surgery on or about, May 9, 2003, when the Grievant went off on workers' compensation. Furthermore, the Employer submits that even if management had knowledge of her disability leave, pursuant to Ohio Administrative Code: 123.1-33-10, discipline of an employee receiving disability leave benefits is appropriate under the provisions of ORC § 124.34. The Employer also points out that the Grievant's approved disability leave did not commence until September 5, 2003, and at best, on July 31, 2003, she was under doctor's care for her ankle surgery only.

Finally, the Employer submits that the Grievant demonstrated a pattern of refusing to cooperate at any step of these proceedings. The evidence supports that a direct and specific order was given and understood by the Grievant who intentionally disobeyed the order on two (2) separate occasions. Given the seriousness of the alleged violation involved in this matter and the Grievant's admitted refusal to cooperate, the Employer was left with no option but to remove the Grievant.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the Employer bears the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th Ed., 1997).

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the DR&C's burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and the Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of (the Grievant's) guilt. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After careful consideration of this matter, including all of the testimony and evidence of both parties, I find that the grievance must be denied. My reasons are as follows:

The Union presented evidence that the July 22, 2003, twenty (20%) percent fine for violation of Rules 6 and 24 did not comply with past practice in that the disciplinary action notice was not received by either the Grievant or the Union. (Union ("UN") Ex-2). The testimony of Alvarado indicated that the typical process is that the disciplinary action notice is signed by the Grievant or the Union. The Employer failed to demonstrate that this past practice was followed, so therefore, the July 22, 2003, discipline, is flawed. Furthermore, in the event the Union and/or the Grievant was aware of the July 22, 2003, discipline, the Grievant would have challenged this discipline in accordance with Article 25 of the CBA.

The Employer on the other hand, presented evidence to support that the Grievant received the July 22nd discipline. The Grievant acknowledged in her testimony that she received the disciplinary action notice of July 22, 2003. Moreover, if an employee is on leave, the institution mails a copy to the employee and provides a copy to the Union. There was no explanation offered by the Employer to rebut the Union's contention that the disciplinary action

notice of July 22, 2003, does not contain the signature of the Grievant nor a Union representative. However, the Employer points out that signatures would not appear on the July 22, 2003, notice because the Grievant was on leave and the Union's notice is simply placed in it's mailbox.

As a threshold inquiry, I find that the July 22, 2003, disciplinary action notice was properly provided to the Grievant and/or the Union, and the evidence supports this conclusion. The facts are not in dispute that all of the antidotal steps prior to the issuance of the discipline were followed properly, i.e., pre-disciplinary notice; pre-disciplinary packet; pre-disciplinary conference; and pre-disciplinary hearing, all of which occurred with respect to the alleged violation of Rules 6 and 24. From the Union's perspective, the divide occurs when the discipline was issued. What evidence supports that the Employer provided proper notice? Exhibits offered by management indicate that the July 22, 2003, disciplinary action notice was mailed to the last known address of the Grievant. Additionally, the Grievant testified that she was aware of the July 22, 2003, discipline, clearly suggesting to this Arbitrator that she had actual knowledge and notice of the July 22, 2003, discipline.

In support of the Employer's position of how notice is typically provided to employees on leave, the Employer points to the Grievant's prior discipline issued April 9, 2003, which was likewise mailed to her home unsigned. (M Ex-3,p.1) The facts indicate that the April 9th and July 22nd notices were mailed to the Grievant's address on record while she was on leave. The Employer's effort to notify the Union regarding the July 22, 2003, discipline is less clear. DR&C did not present evidence to demonstrate that the Union received a copy of the July 22nd discipline. Past practice indicates that a copy of the discipline should have been given to Alvarado, who credibly testified that the Union did not receive a copy.

In analyzing the relationship of the parties, in my opinion, an informal method existed as to the handling of discipline notices in the past. However, in the future, if the parties establish a rigid process that delegates procedural requirements as discipline notification to the Union, that

process must be followed and any deviation therefrom would result in a violation. However, at the present, based upon the attitudes of the parties, the evidence fails to justify a finding that the July 22nd discipline was invalid due to the inability of the DR&C to prove that actual notice was provided to the Union.

Additionally, to a certain extent, this case revolves around the concept of honesty with respect to the Grievant's refusal to participate in the investigatory interview process on May 7 and/or May 8, 2003. The rationale offered by the Grievant, i.e., taking care of her grandchildren, other things to do, did not resonate favorably with this Arbitrator regarding her ability to cooperate with the Employer at the earliest stage of the investigation. This Arbitrator is mindful that the Grievant contends that her May 9th surgery precluded her from coming to the institution on May 8, 2003, due to pre-admission testing. However, no evidence was offered to demonstrate the amount of time the pre-admission testing took on May 8, or the extent of time the Grievant was required to undergo other medical procedures on May 8, 2003. With respect to her receipt of Warden Saunders' letter, in the afternoon on May 7th, the Employer submitted evidence, and I concur, that it is the (employee's) obligation to notify the institution of a change of address and/or telephone number -- and not the Employer's responsibility. Simply put, the Grievant's excuses and refusal to participate or appear on May 7 and/or May 8, 2003, were not credible to this Arbitrator and clearly constituted a violation of Rule 6 due to the clear directives that were given to the Grievant.

The next issue in considerable dispute, concerns whether or not the Grievant's disability leave obviated Vogt's July 31, 2003, direct order. Basically, the Union opines that since the Grievant was on an approved disability leave and under doctor's care, either Vogt provided an illegal order or the medical verification requested by the Employer had already been provided to the institution.

The facts are undisputed that the Grievant applied for disability leave on July 21, 2003. (UN Ex-1, p.3). As a result of the disability leave application, the Grievant was under doctor's

orders and had directives not to interact with co-workers due to her medical condition. The Grievant, after receiving Vogt's directive on July 31st contacted Mavis Wingard ("Wingard"), Personnel Officer, and confirmed that her disability application had been received by the institution and contained the medical verification sought by Vogt regarding her inability to interact with co-workers at the institution. The Employer, on the other hand, presented testimony through Fausnaugh, that at no time was he or Capt. Justice ever made aware of the disability claim filed by the Grievant. Moreover, if the Grievant was medically restricted from interaction with co-workers at the institution, what medical reasons prevented the Grievant from meeting Fausnaugh at an off-site location to conclude the investigatory interview? Simply put, the Employer presented evidence that the Grievant refused to cooperate during the investigation under the guise of medical protection. Moreover, if the Grievant's health precluded any interaction with co-workers based on her medical condition, the Employer should have received additional medical documentation to supplement her disability claim to preclude any interaction with DR&C management regarding the investigation. (UN Ex-1, pp.1-7). In other words, the Grievant's disability application, dated July 21, 2003, fails to provide the mitigation to overturn her removal. Moreover, as of July 31, 2003, when Vogt had his conversation with the Grievant, she was receiving workers' compensation benefits as a result of an ankle surgery. (UN Ex-1, p.12). Her removal was because she failed to cooperate in the investigation and the medical justification opined to by the Union failed to provide justification for her refusal to comply with lawful directives.

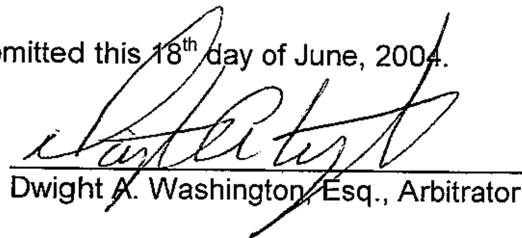
Given the Grievant's reluctance to participate at any stage of the investigation, and based upon the overall state of the evidence, I find that the Employer has met its burden in demonstrating that just cause existed for removal of the Grievant for violation of Rule 24. Moreover, the evidence supports the finding that the discipline imposed on July 22, 2003, upon the Grievant, satisfied the just cause standard as well. The Employer further submitted arguments that ORC § 124:34 would allow the discipline of an employee under Ohio

Administrative Code: 123:1-33-10 for violation of any of the prohibitions contained therein [2]. Based upon my prior ruling, I will not opine or analyze the correctness of the Employer's position with respect to this argument.

Therefore, based upon the reasons cited above, the grievance is denied.

AWARD

Grievance denied. Respectfully submitted this 18th day of June, 2004.



Dwight A. Washington, Esq., Arbitrator

[2] ORC § 124.34 states in pertinent part, "…no employee shall be reduced in pay or position, suspended, or removed, except as provided in Section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty…."