

#143

VOLUNTARY LABOR ARBITRATION  
GRIEVANCE NUMBER G87-1938

IN THE MATTER OF THE ARBITRATION BETWEEN:

STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION

AND

STATE COUNCIL OF PROFESSIONAL EDUCATORS/OHIO EDUCATION  
ASSOCIATION/NATIONAL EDUCATION ASSOCIATION

(Grievance of Peter Medek)

DECISION AND AWARD OF THE ARBITRATOR

Arbitrator:

RICHARD H. SIEGEL, ESQ.  
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Three Commerce Park Square  
23200 Chagrin Boulevard  
Cleveland, Ohio 44122  
(216) 831-3282

I.

PROCEDURAL STATEMENT

The subject matter of this proceeding was submitted to the Arbitrator pursuant to the grievance-arbitration provisions (Articles 5 and 6) of the Labor Agreement between the STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION ("Employer") and the STATE COUNCIL OF PROFESSIONAL EDUCATORS/OHIO EDUCATION ASSOCIATION/NATIONAL EDUCATION ASSOCIATION ("Association"):

ARTICLE 5 - GRIEVANCE PROCEDURE

5.02 - Definitions

(B) Disciplinary Grievance - refers to a grievance involving a suspension,...

\* \* \* \* \*

5.05 - Grievance Procedure

(F) Request for Arbitration - If the Association is not satisfied with the answer at Step 4, it may submit the grievance to arbitration under the provisions of Article 6, by filing a written notice with the Director of the Office of Collective Bargaining and a copy to the employing agency Director within fifteen (15) days after receipt of the decision in Step 4.

ARTICLE 6 - ARBITRATION

6.04 - Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of the provisions of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify

any of the terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

6.07 - Arbitration Decisions

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The arbitrator's decision shall be submitted in writing and shall set forth the findings and conclusions with respect to the issues submitted to arbitration. The arbitrator's decision shall be final and binding upon the Employer, the Association and the employee(s) involved, except as provided in Chapter 2711 of the Ohio Revised Code.

On July 27, 1987, the Association filed a timely written grievance on behalf of bargaining unit employee Peter Medek ("grievant") alleging that he "was unjustly suspended for ten (10) days . . . effective July 22, 1987". The Association requested that the grievant be granted "back pay for ten (10) days wages lost, removal of any and all mention of the disciplinary action from his personnel file and all employment records, restoration or payment for any and all other employment benefits lost as a result of said suspension, and to be otherwise made whole relative to the suspension and resultant lost job benefits".

The Employer rejected the grievance at all steps of the grievance procedure and took the position that the grievant's ten (10) day suspension was reasonable and appropriate based upon his having violated the Employer's Standards of

Employee Conduct on August 15, 1986, by "giving preferential treatment" to correctional inmates "under his supervision", "knowingly allowing inmates to store contraband in your work area" and "closing your eyes to inmates trafficking in contraband".

The grievance was submitted to binding arbitration and an evidentiary hearing was conducted in Columbus, Ohio, on November 18, 1987. During the course of this evidentiary hearing, the parties waived all procedural objections and presented testimony, narrative statements, stipulations and exhibits in support of their respective positions. Upon each party having fully presented its case to the Arbitrator, including the submission of post-hearing briefs on or before December 19, 1987, the hearing in this proceeding was declared closed on that date and the Arbitrator was authorized to submit his Decision and Award on or before January 19, 1988.

## II.

### FINDINGS OF FACT

The testimony, exhibits and narrative statements presented by the Employer and the Association revealed significant disagreement and contradictions as to the facts which resulted in the Employer's decision to suspend the grievant for ten (10) days effective July 22, 1987. For this reason,

the Arbitrator has made his own determination as to the weight and credibility of such evidence. What follows are the Arbitrator's findings as to those facts which are clearly supported by the evidence and determinative of the issues in this case.

The grievant was hired by the Employer (Department of Rehabilitation and Correction) in 1969 as a vocational meat cutting instructor for correctional inmates. In the eighteen and one-half (18½) years which preceded the July, 1987 incident which precipitated the instant grievance, the grievant had performed his employment tasks in a highly satisfactory manner without any references to discipline in his employment record.<sup>1</sup>

The Arbitrator finds on the basis of clear and convincing evidence that the grievant improperly engaged in preferential treatment towards inmates under his supervision by knowingly permitting them (1) to wrongfully store and conceal state owned food in the meat cutting department's freezer facilities and (2) to periodically consume these food items. During

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<sup>1</sup>Although the Employer introduced evidence of a minor non-disciplinary incident in 1985 in which the grievant's meat cutting students were found to have consumed an inordinate amount of sausage being produced in their class, no discipline was imposed for this occurrence. The Employer determined at the time that the situation was attributable to the death of a fellow teacher and a resulting "larger load (to be thrown) on the grievant". The Arbitrator finds that this 1985 incident was not disciplinary in nature.

the period of time in which these events occurred, Rule 20-A of the Employer's Standards of Employee Conduct contained the following provision "as a rule violation for off duty conduct" (Emphasis added by Arbitrator):

Inmate related offenses including: giving preferential treatment . . . to an inmate. 10 penalty points for each offense. If the accumulative total of penalty points is . . . 10 points . . . then the penalty is removal.

Based upon a full consideration of the entire evidentiary record before him, the Arbitrator finds that Rule 20-A of the Employer's Standards of Employee Conduct was intended to govern an employee's off duty conduct only and did not apply to the operative facts of the instant case which occurred while the grievant was on duty and within the scope of his employment.

Finally, the Arbitrator finds that at the time the grievant's ten (10) day suspension was imposed, the parties' Labor Agreement required the Employer to use progressive discipline within the bargaining unit:

ARTICLE 13 - PROGRESSIVE DISCIPLINE

13.01 - Standard

Employees shall only be disciplined or discharged for just cause.

\* \* \* \* \*

### 13.04 - Progressive Discipline

The following system of progressive discipline will be ordinarily followed:

1. Verbal reprimand (with appropriate notation in the employee's official personnel file);
2. Written reprimand;
3. Suspension without pay;
4. Demotion or discharge.

However, more severe discipline may be imposed at any point if, at the Appointing Authority's discretion, the infraction or violation merits more severe action.

## ARTICLE 14 - WORK RULES

### 14.01 - Work Rules

Work rules shall be all those written policies, regulations, procedures, and directives which regulate conduct of employees in the performance of the Employer's services and programs.

Work rules shall not conflict with any provision of the Agreement. . . . (Emphasis added by Arbitrator)

On the basis of these findings of fact and the applicable provisions of the Labor Agreement, this matter is before the Arbitrator for adjudication.

III.

ISSUES TO BE DETERMINED BY THE ARBITRATOR

(A) WAS THE GRIEVANT DISCIPLINED FOR JUST CAUSE?

D E C I S I O N

The Arbitrator rules in the affirmative (yes).

(B) DO CIRCUMSTANCES EXIST WHICH JUSTIFY AN ARBITRAL

MODIFICATION OF THE TEN (10) DAY

SUSPENSION PENALTY?

D E C I S I O N

The Arbitrator rules in the affirmative (yes).

IV.

O P I N I O N

(A) THE GRIEVANT WAS DISCIPLINED FOR JUST CAUSE.

The evidence before the Arbitrator is clear and convincing that at various times in 1987 the grievant knowingly and wrongfully permitted institutional inmates under his supervision (1) to wrongfully store and conceal state owned food in the meat cutting department's freezer facilities and (2)



to periodically consume these food items. The Arbitrator is convinced that such preferential treatment by the grievant was potentially dangerous to the inmate population and to those persons responsible for the management of the institution. In all respects, the Employer had a legitimate interest in discouraging such preferential treatment by disciplining bargaining unit employees who practiced it.

An institutional employee, such as the grievant, who knowingly permits inmates under his supervision to conceal state owned food in institutional storage facilities is acting improperly and in reckless disregard of his responsibilities. Such an offending employee must expect to be disciplined in a reasonable manner upon disclosure of his conduct. To this extent, the grievant's actions justified a disciplinary response by the Employer consistent with progressive discipline standards contained in the Labor Agreement.

The Arbitrator finds on the basis of clear and convincing evidence that the grievant in this case was disciplined for just cause.

(B) CIRCUMSTANCES EXIST WHICH JUSTIFY AN ARBITRAL  
MODIFICATION OF THE TEN (10) DAY  
SUSPENSION PENALTY.

In finding that the ten (10) day suspension which

the Employer imposed upon the grievant was neither appropriate nor reasonable based upon the facts in this case, the Arbitrator is responding (1) to the grievant's highly satisfactory work record and total absence of prior disciplinary incidents during his eighteen and one-half (18½) years of employment with the Employer and (2) to the fact that the wrongdoing attributable to the grievant resulted entirely from his poor judgment and misguided effort to motivate or placate the inmates he supervised rather than from any self-serving gain or advantage on his part. Although these factors do not completely exculpate the grievant, they suggest a lesser degree of culpability which is inconsistent with a ten (10) day suspension. To this extent, and without minimizing the grievant's poor judgment, the Arbitrator is unwilling to endorse the imposition of a ten (10) day suspension upon the grievant.

It is an established principle of labor arbitration that the provisions of the Labor Agreement must prevail where there is a conflict in progressive disciplinary standards between the Labor Agreement and the Employer's work rules or standards of employee conduct. Where such a discrepancy exists, a labor arbitrator must abide by the labor agreement particularly where, as in the present case, the Labor Agreement provides that "the Arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement" (Article 6, Section 6.04).

In the present case, Article 13, Section 13.04 of the Labor Agreement establishes a four step process of progressive discipline involving a verbal reprimand, written reprimand, suspension without pay and demotion or discharge. In addition, Article 14, Section 14.01 of the Labor Agreement gives this contractual progressive discipline priority over any other disciplinary standards used by the Employer:

Work rules shall not conflict with any provisions of the Agreement.

In imposing a ten (10) day suspension upon the grievant based solely upon Rule 20-A of its Standards of Employee Conduct, the Employer acted in disregard of Articles 13 and 14 of the Labor Agreement. The Employer was required to apply the progressive disciplinary measures established in Article 13, Section 13.04 of the Labor Agreement and to do so in a reasonable and appropriate manner. As stated previously, it is clear to the Arbitrator that the ten (10) day suspension imposed upon the grievant under the facts of this case was neither reasonable, appropriate nor in compliance with the spirit of progressive discipline mandated in Article 13, Section 13.04 of the Labor Agreement.

For the reasons herein stated, the grievance is sustained subject to the Arbitrator's authority to formulate an appropriate and reasonable remedy.

V.

R E M E D Y

The grievant's ten (10) day suspension is vacated and set aside and shall be replaced by a lesser form of discipline consistent with the Labor Agreement and the Arbitrator's findings and conclusions in this case.

An arbitrator has considerable discretion in fashioning a remedy which is appropriate to the facts and circumstances of the case before him. As stated by United States Supreme Court Justice William O. Douglas in United Steelworkers v. Enterprise Wheel & Car Co., 363 U. S. 593 (1960):

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen (of the contract) may never have thought that specific remedies should be awarded to meet a particular contingency.

Based upon a full consideration of the evidence, findings and arbitral conclusions in this case, the Arbitrator finds that the appropriate remedy is (1) a verbal reprimand with appropriate notation in the grievant's official personnel file and (2) making the grievant whole for all lost wages and benefits incurred during and as a result of the ten (10) day suspension.

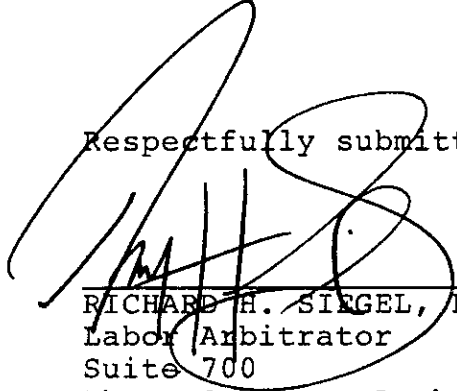
VI.

A W A R D

The grievance is sustained to the extent that the Arbitrator finds that the ten (10) day suspension imposed upon the grievant was unreasonable, inappropriate and in violation of Article 13 of the Labor Agreement. The aforesaid ten (10) day suspension is vacated and set aside and replaced with a verbal reprimand with appropriate notation in the grievant's official personnel file. The Employer is ordered and directed forthwith to make the grievant whole for all lost wages and benefits incurred during and as a result of the ten (10) day suspension.

Respectfully submitted,

Dated: January 19, 1988.



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