

#185

In the Matter of the
Arbitration Between

Ohio Department of
Transportation,

Employer

and

Ohio Civil Service Employees
Association, Local 11, AFSCME,
AFL-CIO,

Union.

Grievance No. G-87-2316
(Sebree)

Hearing Date: May 5, 1988

Decision Date:
June 1, 1988

For the Employer: Rebecca Ferguson

For the Union: Lois Haynes

Present: John Porter, OCSE, Associate General Counsel, Sam Sebree
(Grievant), Tim Wagner, OCB, Ron Cameron, ODOT (Witness), Jerry
Smith, Ohio Industries for the Handicapped (Witness), David
Donley, ODOT (Witness), Jim Archer, Labor Relations Officer,
ODOT.

Introductory Matters:

Both parties agreed that the Arbitrator might tape record the
proceedings for the sole purpose of refreshing her memory and on
condition that the tapes be destroyed when the decision is
rendered. Both parties agreed that the Arbitrator could submit
her opinion for publication.

The parties jointly stipulated that the issue is properly before the Arbitrator (Joint Exhibit J-15). All witnesses were sworn.

Issue:

The parties agreed that the issue before the Arbitrator is as follows:

Did the Department of Transportation discharge Mr. Sam Sebree for just cause in accordance with Article 24 of the Contract? If not, what shall the remedy be?

Relevant Contract Section(s):

Article 24 (in part):

§ 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.

§ 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

§ 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

Stipulated Facts:

The parties jointly stipulated to these facts:

- 1) Mr. Sam Sebree was employed with the Department of Transportation from July 14, 1986 until September 18, 1987. Mr. Sebree was removed from employment with the Department effective September 18, 1987.
- 2) Mr. Sebree held the classification of Roadside Park Caretaker 1 during his employment with the Department.
- 3) Mr. Sebree received a Written Reprimand on March 4, 1987 for violating Directive A-301, Item #2c -- Insubordination, Failure to follow written policies of the Director, Districts, or offices.
- 4) Mr. Sebree received a Written Reprimand on March 10, 1987 for violating Directive A-301, Item #1b -- Neglect of Duty (minor).
- 5) Mr. Sebree received a five day suspension on July 13, 1987 for violating Directive A-301, Items; #1b - Neglect of Duty (minor), #2c - insubordination, Failure to follow written policies of the Director, District, or offices, #16 - Unauthorized absence, #32 - Willfully falsifying any official document, #34 - Violation of Section 124.34 of the Ohio Revised Code, and #36 - Other actions that could compromise or impair the ability of the employee to effectively carry out his duties.
- 6) An A-302, pre-suspension and/or removal meeting, was held at the District Two office complex on July 21, 1987. Prior to any discipline being issued from this hearing a second A-302 hearing was requested. The second A-302 hearing was held on August 27, 1987. Mr. Sebree's removal was based on alleged violations presented at both hearings. Mr. Sebree was represented by OCSEA/AFSCME at both hearings.

Facts:

On June 21, 1987, the Grievant failed to report for work and failed to "call-off." As a consequence of his failure to "call-off", no supervisory personnel were aware of his absence. As the Park Caretaker, the Grievant carried keys to various park building areas. As a consequence of his absence and hence the absence of the keys, 4 other park workers were locked out of their work areas. Moreover, restrooms on a busy Sunday were unattended.

In its opening, the Union on the Grievant's behalf, admitted his absence. Subsequently, the Grievant testified that he "wasn't aware that he was supposed to work that day". Mr. Cameron, the Grievant's supervisor, testified that work schedules were prepared a month in advance and posted conspicuously at the work site and are also given to the individual workers.

On July 14, 1987, the Grievant was given written notice of an "A-302 Pre-Suspension and/or Removal Meeting." This Notice specified that "Your Supervisor has decided that you should be suspended or removed." This Notice stated in the third paragraph "The evidence on which this charge is based is that on Sunday June 21, 1987 you did not report to work, nor did you inform your supervisor that you would not be in. Therefore, the summer TIC employees could not perform their duties and the parks were unattended until another caretaker could be notified . . ."

The Grievant was charged with the following violations of

Directive A-301:

- Item 1 - Neglect of Duty Minor
- Item 2(c) - Insubordination (Failure to follow Written Policies)
- Item 16 - Unauthorized absence
- Item 34 - Violation of ORC § 124.34
- Item 36 - Other actions that could compromise or impair the ability of the employee to effectively carry out his or her duties as a public employee.

(See J-11)

On July 28, 1987, a A-302 meeting was held on the June 21st incident. The Impartial Administrator, Mr. Randolph, wrote in an IOC describing that hearing that the Grievant "acknowledged being served notice of the meeting." After the notice was read to him, he stated "that he understood the purpose of said (sic) meeting." (See Union Exhibit #3)

The next alleged incident took place on August 16, 1988. Mr. Jerry Smith is a supervisor with Ohio Industries for the Handicapped (OIH). The Ohio Industries contracts with ODOT to provide certain janitorial services to the park in question. Mr. Smith stated that he worked for OIH because he was disabled. He is blind in one eye and has a weak leg from a prior injury. His duties are to supervise OIH personnel who are to clean the rest rooms, do the windows, and resupply the bathrooms. He said that the park caretaker normally leaves out the necessary cleaning

supplies and the toilet paper and paper towels. Mr. Smith has no keys to obtain supplies. The job involves cleaning on both the northbound and southbound park restrooms.

Mr. Smith testified that on the evening of August 16, 1988 when he arrived at the northbound restrooms he found a) no supplies, b) the areas closed and locked, and c) the trash truck was locked up behind the gate. No caretaker was evident. Mr. Smith indicated that he usually arrived at the northbound area between 10:15 p.m. and 10:30 p.m., but no later than 10:45 p.m. He estimated that he arrived that night at 10:30 p.m. Mr. Smith said that he then called over to the southbound area, looking for the caretaker, but no one answered. Mr. Smith said he took 2 workers to the southbound area around 11:00 p.m. That area was also dark and secured. He did not see the caretaker. According to Mr. Smith, the restrooms in both areas were dirty. Under cross examination, Mr. Smith stated that he did not look for the caretaker around the park. Mr. Smith also said that he did not see the Grievant's car in the place where it usually was parked, i.e., near the door.

The Grievant testified about the same evening. He said that at 10:30 p.m. he was on the northbound side. He began at about 10:30 picking up trash from trash barrels in front of the buildings and then around the parking lot. He said that this took about one-half hour. Then he drove the truck up the northbound lane to the next exit and came down the southbound lane to the south side rest area. According to his testimony, he then

collected trash in a similar fashion on the south side, drove around to the garbage bin on the south side, deposited the garbage. He then, as he stated, drove down the south lane, crossed over to the north lane and returned to the north side. He then, he said, locked up the truck, went into the office on the north side, signed out, and went home. His time sheet shows a 11:30 p.m. sign-out (J-13).

The Grievant stated that he had parked his car back near the place where the truck was parked. Moreover, he said that he had left out the supplies properly.

On cross examination, the Grievant first stated that he left at 11:40 p.m. but amended his words to 11:35 p.m. He stated that he filled out his time sheet after the trash work and after putting the trash truck away. He said he was probably filling out his time sheet at 11:35 in the office in the northbound park building.

Rebecca Ferguson, Labor Relations Officer for ODOT testified that she was familiar with safety procedures. She indicated that persons driving trash trucks were mandated to have flashing at all times the "cat eye" lights on the top of the truck.

The next incident took place on August 17, 1988 on the same shift. The Grievant called Mr. Smith of OIH. Mr. Smith stated that the Grievant called at approximately 11:00 p.m., while they were both at work. According to Mr. Smith, the Grievant wanted to know why Mr. Smith had reported that the Grievant was not at work. Mr. Smith said that he reported the missing supplies and that when

asked by Mr. Myers had indicated that the caretaker (i.e., the Grievant) was not there. According to Mr. Smith, the Grievant accused Mr. Smith of trying to get his job (the Grievant's). Mr. Smith testified that the Grievant said that if he (the Grievant) lost his job because of his (Mr. Smith's) statements, "he would beat my ass to a pulp".

The Grievant admitted that he had called Mr. Smith because he was curious about Smith telling Myers. The Grievant denied threatening Mr. Smith with bodily harm. He said "I never meant to harm anybody."

Lois Haynes, OCSEA Staff Representative, testified (examined by John Porter, OCSEA Associate General Counsel). Haynes testified that the Grievant received no discipline for the June 21st hearing until more than 45 days (52 days) after the pre-disciplinary hearing of July 21, 1987. Ms. Haynes also testified that as OCSEA Staff she had agreed to the reconvening of the July 21st pre-disciplinary hearing; however, she qualified her answer by saying that her agreement was "before we realized what the second hearing encompassed". On cross-examination, Ms. Haynes said 1) that she had not asked for an extension at the July 21st hearing, 2) that she had asked previously for extensions, and 3) that they were normally granted. She also agreed that the grievance had "joint time problems". She admitted that the 45 day problem was not raised at the Step III hearing, because "things were so confused".

Rebecca Ferguson, ODOT Labor Relations Officer, (examined by

Tom Wagner, OCB) testified in rebuttal. She stated that she informed Ms. Haynes by phone on 8/24/87 of the re-convening to consider additional charges. She said Ms. Haynes did not object and that she believed the 45 day limit was extended. She also indicated that much confusion surrounded the grievance.

On August 24, 1987, the Grievant received a notice of the A-302 Pre-Suspension and/or Removal Hearing (J-12). The first sentence said "Notice is hereby given that your Supervisor has decided that you should be suspended or removed from employment. . . ." The third paragraph stated "The evidence on which this charge is based is that on August 16, 1987 (Sunday) the contract supervisor for the janitorial contract, Jerry Smith, noted that you had left no supplies out for the janitorial people to do their job. . . . Mr. Smith looked for you at approximately 10:45 p.m. and you could not be found in either park. Also he found both parks to be extremely dirty. On August 17, 1987 (Monday) you telephoned Mr. Smith and threatened him with bodily harm. . . ."

The IOC listed the following alleged violations of A-301:

- | | |
|-----------|--|
| Item 1(a) | Neglect of Duty - Major
(endangers life, property, or public
safety) |
| Item 2(c) | Insubordination - Failure to follow
written policies |
| Item 13 | Leaving work area without permission of
the supervisor |

- Item 21 Willfully falsifying any official document
- Item 34 Violation of ORC § 124.34
- Item 35 Other actions that could harm or potentially harm the employee, a fellow employee . . . etc.
- Item 36 Other actions . . . etc.

This notice is "cc"d to the Union Steward.

On August 27, 1987, the Pre-disciplinary Hearing was re-convened (U-3).

On September 11, 1987, the Grievant was removed. The violations charged were Items 1(b), 2c, 16, 34, 36.

On October 27, 1987, a Step III Meeting was held. The first sentence states "The parties agreed we were properly constituted and there were no procedural objections."

Union's Position

The Grievant was not removed for just cause (Art. 24.01). Grievant admits his absence and failure to "call-off" on June 21, 1987. Grievant denies his absence on August 16, 1987 and denies threatening Mr. Smith.

The removal should be dismissed because ODOT failed to adhere to the 45 day limit imposed by Article 24.05 of the Contract.

The Union asserts numerous other procedural errors which violate the procedural fairness requirements of just cause.

- A. The employer failed to carry out a "fair" investigation because the employer did not contact the employee.
- B. The notice provided to the Grievant violates 24.04 in that it is not "meaningful" notice and hence unfair.
- C. The employer "stacked charges" against the Grievant to give the appearance of a more serious situation.

Employer's Position

The removal was for just cause. The Grievant had two written reprimands and a 5 day suspension prior to these incidents. The incidents of June 21st and August 16th and 17th merited removal under the discipline grid.

With regard to the violation of the 45 day rule, the employer argues that the issue is unfairly raised for the first time at the Arbitration hearing and that lack of notice is procedurally unfair. Secondly, on the merits the employer maintains that the union implicitly waived the 45 day notice.

With regard to the other alleged procedural violations, the Employer argues as follows:

- A. A "fair" investigation does not require that the Grievant be interviewed.
- B. The notice is sufficient to put any grievant on "fair notice" as to the issues and the possible results any further specification of possible penalties would pre-judge the case.

Procedural note: The Union sought to introduce as evidence the Pre-Disciplinary Hearing Officer's Report. The Employer objected on "relevance". The Union maintained that the Report was relevant for two reasons: First, the report was evidence as to the "fairness of the hearing". Secondly, the report was relevant to show that the report included statements of evidence which the Union claimed were not true.

The Arbitrator allowed the Report to be introduced on the issue of "fair investigation". The Arbitrator refused to admit the Report as relevant evidence as to untruthful statements. All the statements indicated by the Union as untruthful were on matters not raised nor testified to at the Arbitration hearing. If they had been, then the Report was relevant evidence for the purposes of impeachment. The Union maintains that the importance of the alleged untruthful statements is that the Director had them before him in making the final disciplinary decision. However, an Arbitration hearing is a de novo fact hearing. If the Employer's representatives do not prove the Director's decision to constitute just cause, the Arbitrator will set the decision aside. Alleged untruthful statements made to the Director but not raised at the hearing are irrelevant to the de novo decision (and may even be prejudicial). In summary, Hearing Officer's Pre-disciplinary Reports are discoverable and may or may not (case dependent) be relevant evidence.

Discussion

The Arbitrator finds that the Grievant was absent from work on June 21, 1988 without prior authorization and that he failed to "call-off". These violations were admitted by the Grievant. Failure to report constitutes the violation of Item 16 "Unauthorized Absence". Failure to "call-off" constitutes violation of Item 1(b) Neglect of Duty (Minor). Under the facts as stipulated to by both parties, this violation of June 21st is Grievant's third violation of Item 1(b) for which he could be suspended or removed (J-5, J-6).

The Arbitrator finds that the Grievant left work early on August 16, 1988 thus violating Item 15. The Arbitrator found the evidence of Mr. Smith credible and convincing. The Arbitrator found the Grievant's shifting testimony unbelievable. The Grievant's time scenario meant that if he had been where he claimed to have been, it was virtually impossible that Mr. Smith would not have seen him. Mr. Smith was on the northbound side of the park from 10:30 or 10:45 until 11:00 p.m. The Grievant claimed that during that period he was emptying trash cans in front and around the building and in the northbound parking lot. Moreover if he was in the truck with lights flashing as required, again it is improbable that Mr. Smith would not have seen him. While all of the Grievant's descriptions were basically improbable, one was impossible unless Mr. Smith was lying. Smith testified that when he arrived at either 10:30 p.m. or 10:45 p.m.

at the latest that the trash truck was put away and locked. If the Grievant's story is to be believed, the truck had to be gone at that time.

The Arbitrator finds that the Grievant did threaten Mr. Smith. This decision is simply one of credibility. The Grievant admits calling Mr. Smith. He admits he wanted to discuss that Mr. Smith reported him for failing to put out the supplies and for leaving early. He denies that he was angry at all and that he said anything abusive. The Arbitrator believed Mr. Smith. His demeanor and testimony were credible. He had no motive to lie. By threatening to "beat Mr. Smith's ass to a pulp", the Grievant violated Item #3 "Using obscene, abusing, or insulting language towards another employee".

The Arbitrator also finds that the Grievant failed to place the supplies out on August 16, 1987 thereby hindering the work of other employees, a violation of Item 1(b) Neglect of Duty (Minor).

The Grievant's removal appears under the grid to have been proper. The fourth violation of 1(b) (on August 16, 1987) mandated removal. Added to these violations, his abusive language of August 17, 1987 makes removal just, unless procedural unfairness mandates a different result.

The violation of the clear language of the contract with regard to the 45 day rule is a serious procedural error which in most cases would cause this Arbitrator to overturn the dismissal (See Decision dated 8/25/87 Grievance 87-0351) (Gregory).

However, three factors mitigate against overturning this decision.

First of all, the Arbitrator finds that the time confusion around this grievance, admitted to by both sides, could have allowed the Employer in good faith to have believed that the Union had waived the 45 day rule.

Secondly, the Union failed to raise the issue at the Step III hearing or in any way put the Employer on notice before the Arbitration hearing itself. Thus the issue is not fairly raised.

Lastly, the discipline for 8/16/87 and 8/17/87 was within the 45 day rule. The Arbitrator finds that those violations alone without the June 21, 1987 incident were sufficient to justify removal. Thus, the violation of the 45 day rule for the June 21, 1987 incident is moot.

With regard to the other procedural issues raised by the Union, the Arbitrator finds as follows:

- A. A "fair" investigation is contextual, and no specific behavior is required. A "fairer" investigation might have been had if the Grievant were asked for his side. However, the evidence indicates that if the behavior was in error, it was in this case "harmless error".
- B. The Arbitrator finds the Notice provided to the Grievant fair and adequate. A review of the grid and the charges reveals that suspension/removal were at stake. Secondly, the notice details the date, the alleged behavior, and the alleged violations. The Arbitrator

finds well-taken the employer's point that any more specificity might indicate pre-judgment.

- C. The Arbitrator finds persuasive the Union's allegation that the Employer "stacks" violations. The fair method would be to look at each behavior and determine the most serious violation and presume that other less serious violations are included. This error is harmless in this case because this Arbitrator operates on that principle (see findings above) regardless of the paper allegations. The Employer's case might be more persuasive without such apparent "stacking".

(Note that the employer in her closing did not speak to this last issue.)

Decision

Grievance denied.

June 1, 1988

Date

Arbitrator