

In the Matter of:

STATE OF OHIO, DEPARTMENT OF  
REHABILITATION AND CORRECTION

and

OHIO HEALTH CARE EMPLOYEES UNION,  
DISTRICT 1199

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OCB Gr. No. 28-02-(4/19/88)-  
04-02-12  
Gr.: Tony A. Calabria

Appearances:

For the Union: Bob Callahan, Secretary- Treasurer

For the Employer: Joseph B. Shaver, Ass't Director Labor  
Relations

ARBITRATOR'S DECISION AND AWARD

This matter came on to be heard on November 30, 1988. The parties were afforded full opportunity to adduce evidence, to cross-examine witnesses and to argue orally. They waived the filing of post-hearing briefs and agreed that the arbitrator's time in which to file his decision be extended to January 15, 1989.

I.

The grievant was first employed in the Adult Parole Authority in December, 1972, starting as a Parole Officer II in the Athens office. He performed well and was transferred to Dayton in 1975 as an Investigator II and his performance in that position was more than satisfactory. In 1978 he was promoted to Investigator III. His annual evaluations in that position were better than adequate although his 1980 evaluation contained the comment that "he has been somewhat behind in his record keeping" and the 1983 evaluation stated that with the addition of one staff member the grievant would be allotted more time to proofread his reports before they were sent to the Toledo district office"since his

dictation needs improvement".

The grievant incurred his first disciplinary action in 1985 when he was given a one step demotion for neglect of duty and failure of good behavior. On appeal to the Board of Review this was reduced to a thirty day suspension. Thereafter his problems multiplied because of his inability to perform the paper work, a very important part of his position, accurately and in timely fashion. As a result, on September 17, 1986 he was demoted to Parole Officer I for "neglect of duty and/or inefficiency and insubordination", although the substance of the charges against him all related to incorrect and tardy report writing and record keeping. He grieved his demotion and the Union took his case to arbitration. In a decision dated February 10, 1987 Arbitrator Jonas B. Katz found that although the facts fully justified the demotion it was necessary for him to sustain the grievance because the Employer had unilaterally promulgated a policy which precluded demotions as a proper form of discipline for Union-represented employees. He therefore converted the demotion to a suspension and, as a condition to reinstatement, placed the grievant on probation for one year, stating:

"should he be unable to perform the duties and correct the deficiencies which gave rise to the demotion, the employer may institute additional disciplinary action against the grievant - - - at the final step of progressive discipline as set forth in Article 8.02 of the collective bargaining agreement."

The parties unsuccessfully sought clarification of the above-quoted excerpt.

The grievant was unable to correct his performance as a Coordinator/Supervisor III, or Senior Officer; although he showed improvement in some areas these were offset by deficiencies in others.

His unit supervisor, Sands, testified at length about the grievant's inability to prepare accurate reports and keep proper records. Although the Union argued that the grievant's mistakes were minor, I found Sands to be a credible witness with respect to the grievant's performance. He gave the grievant every opportunity to improve, to no avail. It would serve no useful purpose to rehearse Sands' voluminous and detailed testimony concerning the grievant's inadequate performance as a Coordinator/Supervisor III. Suffice it to say, the record clearly establishes that the grievant was unable to give the Employer an acceptable level of performance despite his efforts to do so. Indeed, the grievant, who impressed me as a decent and conscientious person, admitted that he was "a good parolee man but not a good paperwork man."

On this record I conclude that the Employer had just cause to remove the grievant from the position of Coordinator/Supervisor III. However, that is not dispositive of the grievance. When a long service employee has demonstrated, over a period of years, his ability to perform satisfactorily in a lesser position, does the Employer have just cause to discharge him because he is unable to meet the requirements of a higher position? The grievant is not charged with wrongdoing, dishonesty, immorality or any improper conduct that might call for his dismissal from the service of the state. The Employer originally charged the grievant with insubordination but that charge was withdrawn during the grievance process. The evidence compels the conclusion that he is simply unable to perform satisfactorily the supervisory and paper work required of a grade III employee.

Under these circumstances, in order to justify a dismissal rather than a demotion the Employer must prove that the grievant cannot, or should not be permitted to, fill a lesser position. Such proof is completely lacking. To the contrary, the last annual performance evaluation of the grievant as an Investigator II, made in December, 1977, states:

"Mr. Calabria's performance as an Investigator II at this time more than meets the job requirements of the job which he holds. His performance at this time is satisfactory. He has continued to improve with each annual performance evaluation".

His annual evaluations as a Parole Officer II between 1973 and 1975 were all favorable. Even when he was demoted to Parole Officer II in 1985 his performance evaluation in that position shows that the quality of work "meets requirements", that the quantity of work was "moderate", that his knowledge of work was between "adequate" and "good", that his adaptability was between "satisfactory" and "adapts readily", that he was "usually dependable", that he "gets along well" with other employees, that he "plans well", that his initiative was "considerable" and that his personality was "polite and courteous". All this despite the observations by the reviewer of the evaluation that:

"It should be remembered he came to the Parole section not by choice, therefore his adjustment was more difficult. He was under a lot of stress and somewhat negative due to his situation. He had also lost his supervisory powers".

On this record it seems clear and I find that the Employer has not proved that the grievant is not competent to serve as a Parole Officer II or an Investigator II. To be sure there are situations in which an employee is unable to accept a demotion gracefully, or is unable to perform acceptably because of

psychological problems resulting from his or her reduced status, but there is no proof that this is such a situation. The grievant's admission at the hearing that he is not a paperwork man would tend to indicate that he now recognizes that in the position of Supervisor/Coordinator III he was a square peg in a round hole and that he is emotionally prepared to accept a lesser position. However, it would be sheer speculation for me to anticipate how the grievant would perform. Suffice it to say that he has performed acceptably at grade II and, absent proof to the contrary, I must presume that he can do so again. After a reasonable period for readjustment he would be expected to meet the same requirements of job performance as other employees. I conclude that the grievant's discharge was not for just cause and that the appropriate action was a one grade demotion to Parole Officer II or Investigator II.

One other matter requires comment. The Employer construed the decision of Arbitrator Katz as authorizing the grievant's discharge if he failed to perform satisfactorily at grade III after a one year probationary period. As noted above, Katz stated that if the grievant was unable to perform acceptably the Employer might institute additional disciplinary action

"based on the Standards of Conduct then in effect at the final step of progressive discipline as set forth in Article 8.02 of the collective bargaining agreement".

The final step of progressive discipline as set forth in Article 8.02 is "Demotion or Removal". There is nothing in Katz's decision to indicate that he was authorizing the latter rather than the former. I construe the language above quoted to mean that if the grievant failed to perform acceptably during the probationary

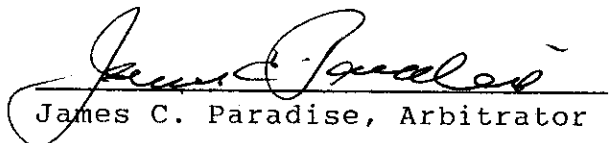
period the Employer would be deemed to have satisfied the contractual requirement of progressive discipline and <sup>might</sup> proceed with either demotion or discharge, as the facts might warrant. There is no basis for believing that Katz would have pre-ordained a greater penalty, i.e. discharge, than the grievant had be subjected to by the Employer in the case that Katz was adjudicating.

#### AWARD

To the extent that the grievance alleges that the grievant's removal from his position of Supervisor/Coordinator III was not for just cause, it is denied. To the extent that it alleges that the grievant's discharge was not for just cause, the grievance is sustained. The discharge is set aside and is replaced by a one step demotion to Parole Officer II or Investigator II. The grievant shall be made whole for the losses sustained by him as a result of the Employer's failure to demote him by payment of the salary and other benefits he would have earned as a grade II employee from the date of his discharge to the date of his reinstatement, less any earnings and/or unemployment compensation he may have received. His reinstatement at grade II shall become effective not later than the beginning of the first payroll period following the receipt of this decision by the Employer.

Dated at Cincinnati, Ohio

January 3<sup>rd</sup>, 1989

  
James C. Paradise, Arbitrator