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STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, CORRECTION RECEPTION CENTER

-and-

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

GRIEVANCE: Freda Cunningham (Discharge)

CASE NUMBER: 27-05-881004-0018-01-03

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: August 15, 1989

APPEARANCES

For the Employer	
Jon C. Fauskaugh	Correction Supervisor III
Lori Smith	Franklin Pre-Release Administrative Assistant
Nickoles G. Chibia	Employee Relations Manager
Sally P. Miller	Negotiating Service Staff
Robin Thomas	Advocate
For the Union	
Freda Cunningham	Grievant
Roy Davidson	Plumber
David E. Reay	Union President
Maxine S. Hicks	Observer
Carol Bowshier	Advocate/Staff Representative
Linda Fiely	Associate General Counsel

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Rehabilitation and Correction, Correction Reception Center, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on June 27, 1989 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus, as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

ISSUE

Was Freda Cunningham, the Grievant, terminated for just cause? If not, what shall the remedy be?

STIPULATION OF FACT

1. The case is properly before the Arbitrator.
2. The Grievant was removed during her probationary period from the Department of Administrative Services.
3. The investigation into the omission of the Grievant's prior employment began upon her request for vacation leave.
4. The Grievant was on approved disability leave from June 13, 1988 through September 14, 1988.
5. The Union is not alleging that the Grievant was removed in retaliation for her complaint of sexual harassment.

OCSEA/AFSCME	Office of Collective Bargaining

(Joint Exhibit 1)

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."

(Joint Exhibit 27, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 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."

Section 24.02 - Progressive Discipline

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

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

...

Section 24.04 - Pre-Discipline

"An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to

support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges."

...

(Joint Exhibit 27, Pgs. 34-37)

Section 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-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or

custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment."
(Joint Exhibit 27, Pgs. 34-37)

CASE HISTORY

Freda Cunningham, the Grievant, has been employed as a Correction Officer II since August 10, 1987. The Correction Reception Center, the Employer, receives the newly sentenced male adult offenders who have been recently sentenced by the court system. The Employer performs a diagnostic and assessment service which classifies inmates into security level categories and ultimately assigns them to appropriate institutions. Approximately three-hundred and twenty (320) employees supervise an inmate population which approaches a population of sixteen hundred (1600) inmates.

On or about April 15, 1988, the Grievant's check stub allegedly indicated that she had vacation time available even though she had only worked at the facility for approximately nine months. The Grievant testified that she spoke to a management representative who indicated that she could use this vacation time in lieu of sick leave days. As a consequence, she formally submitted a Request for Leave form (Union Exhibit 3) for vacation time; her request was officially approved on April 15, 1988. This transaction, however, raised some suspicion within the management ranks because the Grievant had not accumulated the requisite amount of facility specific seniority for vacation

leave; yet her payroll data disclosed conflicting information. This discrepancy was eventually brought to the attention of N. Chibia, Employee Relations Manager, who launched an investigation dealing with willful falsification of an official document.

On May 23, 1988, the Grievant received a Predisciplinary Conference Notice which indicated that a meeting was to be held on May 26, 1988. The purpose of the hearing dealt with an evaluation of the Grievant's alleged unauthorized absences (Employer Exhibit 4). Although there exists some uncertainty concerning the Grievant's availability on May 26, 1988 (Union Exhibit 8), the Union alleged that the Grievant worked on this date while the Employer asserted that she was absent, a hearing was never held.

On or about June 13, 1988, the Grievant went on disability leave for stress-related reasons. The Grievant stated that the leave arose out of a sexual harassment altercation initiated by a supervisor. As a consequence, she received disability payments for an extended period of time. She, moreover, emphasized that from April 15, 1988 to June 13, 1988 she was never confronted by the Employer about an alleged falsification claim.

The Grievant was still on disability status when she returned to the facility on July 15, 1988. She, more specifically, returned to fill out additional Request For Leave forms and to pick up an additional pay check. Chibia asked the Grievant to accompany him to another room where they met another management representative and the Grievant's representative. A

predisciplinary hearing ensued and a discussion concerning the Grievant's absenteeism problems took place. Once the Parties concluded their discussion dealing with the absenteeism-related misconduct, the Employer presented the Grievant with an additional Predisciplinary Conference Notice (Joint Exhibit 3). This notice indicated that a meeting was scheduled for July 20, 1988; the allegations dealt with an alleged falsification of an employment application and other documents connected with the Grievant's employment with the Department.

On July 19, 1988, the Grievant called the facility a number of times to discuss her inability to attend the predisciplinary conference scheduled for July 20, 1988. On one occasion she contacted Marty Thornsberry, the Hearing Officer, and stated that she could not attend because of a previously scheduled doctor's appointment. On another occasion she spoke to Chibia and re-emphasized her inability to attend the predisciplinary conference. She, moreover, purportedly recontacted Thornsberry and told him that her doctor advised her not to attend because of her emotional condition and disability leave status. Thornsberry allegedly noted that a delay or postponement would only be granted if the Grievant provided some substantiation of her inability to attend the hearing. The Grievant, more specifically, was told that her doctor had to call Thornsberry prior to the July 20, 1988 meeting or the Grievant had to provide a doctor's statement affirming his/her professional opinion concerning the Grievant's participation.

On July 20, 1988 a Predisciplinary Conference was held even though the Grievant was not present. The Grievant's physician, moreover, failed to contact the Employer prior to the hearing and a statement was not submitted in support of the Grievant's absence. Roy Davidson, the Union's President, represented the Grievant at the hearing although he did not converse with the Grievant prior to the hearing. Davidson maintained that the Employer granted a continuance to July 22, 1989. Davidson was to make an attempt to contact the Grievant and gather any information that would rebut the Employer's falsification allegations. Davidson, moreover, emphasized that the Employer told him that information designed to delay or postpone the hearing would not be considered (Joint Exhibit 3).

The Grievant failed to attend the July 22, 1988 meeting. Since the Employer was led to believe that the Grievant never received the offer to submit any additional information by July 22, 1988, the Employer decided to give her one additional opportunity to submit written information concerning her failure to appear at the conference and other information dealing with the falsification allegations. A letter containing these particulars including a deadline of July 28, 1988 was received by the Grievant on July 26, 1988 (Joint Exhibit 3).

The Employer received two documents in response to the above letter on July 29,1988. The Grievant, more specifically, submitted a letter attempting to rebut the falsification charge by providing the Employer with her rationale concerning certain

job application responses. She, moreover, submitted a physician's statement dealing with her lack of participation on July 20, 1988 and July 22, 1988 (Joint Exhibit 3).

Although the Employer received these documents one day beyond the specified deadline, it still accepted and evaluated them during the investigation stage of the discipline process. Additional statements were not requested and the Grievant's presence in a future hearing was not solicited by the Employer. Thornsberry's Hearing Officer's Report (Joint Exhibit 3) indicated that the physician's statement was accepted as justification for considering the Grievant's written response. An additional hearing, moreover, was never scheduled because the Employer felt that the Grievant was given considerable advance notice but failed to provide just cause for a continuation.

On September 9, 1988, the Employer issued a Notice of Disciplinary Action. It contained the following pertinent particulars:

> "...
>
> ...(t)his letter is to advise you that you are to be removed from the position of Correction Officer II effective: September 7, 1988. You are to be removed for the following infractions:
>
> Violation of Standard of Employe Conduct rule: #21 - Willfully falsifying...any official document arising out of employment with DR&C.
>
> ..."
>
> (Joint Exhibit 3)

In response to the above decision, the Grievant filed a grievance on October 4, 1988. It contained the following particulars:

"...

Contract Article(s)/Section(s) Allegedly Violated:

24 and any other sections of law or contract that may apply

Statement of Facts (for example, who? what? when? where? etc.):

On September 21, 1988 I became aware that I was being removed from my position of Corrections Officer from the Corrections Reception Center. I feel this removal was without just cause.

Names of Witnesses:

Remedy Sought:

To be reinstated to my position with back pay and to be made whole.

..."

(Joint Exhibit 2)

The Employer rejected the grievance by noting that the Grievant was disciplined for just cause and that the discipline was commensurate with the offense. The Parties were unable to resolve the grievance at the subsequent stages of the grievance procedure. No objection being raised by the Parties as to arbitrability, either on procedural or substantive grounds, the matter is before the Arbitrator for a final and binding decision.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it did have just cause to remove the Grievant because she violated a falsification

work rule contained in the Standards of Employee Conduct (Joint Exhibit 8). This premise was based upon a series of arguments which allegedly supported several pertinent just cause principles.

The Employer maintained that the Grievant was given forewarning or foreknowledge of the possible or probable consequences of her disciplinary misconduct. Proper notice was allegedly provided via a number of sources. Chibia testified that he distributed the Standards of Employee Conduct (Joint Exhibits 7 and 8) to all employees, including the Grievant, on the first day of employment. He also maintained that they were again distributed and discussed at the Corrections Training Academy. The Employer contended that an identical procedure was followed during the Grievant's initial training program. The Employer, more specifically, introduced a document signed by the Grievant indicating that she had been trained and understood the Standards of Employee Conduct (Joint Exhibit 9).

Even though the Grievant's job application (Joint Exhibit 4) and PERS form (Joint Exhibit 5) failed to state that any falsified information will be cause for termination, the Employer maintained that certain expectations surrounded the application process. The Grievant, more specifically, testified that she understood that she was under oath when she signed the documents, and was aware of the significance attached to the oath. Thus, she should be made accountable for the inaccurate

and false responses contained in the documents completed prior to and at the time of employment.

The Employer claimed that falsification offenses are not trivial because they reflect certain honesty dispositions. They are also related to the orderly and efficient operation of the facility. Officers are periodically asked to testify at Rules Infraction Boards and other court proceedings concerning inmates. Certain disciplinary attempts initiated by the Employer might be jeopardized or viewed suspiciously if an action was dependent upon the testimony of a dishonest officer. By requiring that application forms are sworn and notarized, the Employer reinforces the importance of truthfulness in a correctional setting.

The Employer emphasized that it did not engage in any due process violations regarding the conduct of the pre-disciplinary conference. Two time extensions were offered the Grievant so that she could provide information for postponement and/or mitigation purposes concerning the falsification charge. The first extension took place on July 22, 1988. The Grievant contacted Thornsberry and Chibia on July 19, 1988; one day prior to the previously scheduled pre-disciplinary hearing date. She was informed that a continuance would only be considered if she provided a physician's statement prior to the hearing and/or her physician contacted the hearings officer prior to the July 20, 1988 meeting. Neither of these preconditions were met by the

Grievant and a hearing was conducted without the Grievant's involvement; yet she was represented by a Union representative.

It should be noted that a two-day extension was granted the grievant on July 20, 1988. The Union was told to inform the Grievant that she had an opportunity to refute the charges or provide evidence, introduce mitigating circumstances, or provide any information relating to the charges or connected with her failure to appear at the July 20, 1988 hearing (Joint Exhibit 3).

Although the Grievant failed to take advantage of this opportunity, the Employer granted her an additional extension to present her version of the events (Joint Exhibit 3). The Grievant did eventually respond by submitting a document on July 29, 1988; one day beyond the deadline established by the Employer.

The Employer alleged that the Union's due process claims were specious based upon its degree of preparedness. Roy Davidson, the President of the Union, did not speak to the Grievant prior to the July 20, 1988 hearing, nor did he engage in any prior preparation. He, more specifically, noted that he was not initially involved in the case but took over representation responsibilities from another individual. The Employer, moreover, questioned Davidson's efforts to contact the Grievant prior to the July 22, 1988 meeting. He testified that he attempted to contact a friend of the Grievant to determine the Grievant's phone number; this attempt proved to be futile. He, moreover, failed to engage in additional efforts even though he

acknowledged that he was obliged to contact her based upon his responsibilities as a Union official; and the Parties' expectations regarding the import attached to the additional information.

The Employer claimed that it obtained substantial evidence of proof that the Grievant was guilty as charged. The Grievant, more specifically, was charged with violating Rule 21 of the Revised Standards of Employee Conduct which states in particular part:

> "...
>
> 21. Willfully falsifying, altering, or removing any official document, arising out of employment with DR&C.
>
> ..."

(Joint Exhibit 8)

It should also be noted that falsification of a notarized document is a first degree misdemeanor under Ohio Revised Code Section 2921.13.

Two related but distinct theories were proposed by the Employer in its attempt to establish its evidentiary burden. The first theory dealt with inconsistencies contained in personnel documents, while the second theory concerned credibility issues pertaining to the Grievant's varying and inconsistent testimony.

For a number of reasons, the Employer claimed that willful falsification of an employment application took place. First, the PERS form (Joint Exhibit 5) completed by the Grievant in 1987 never indicated that the Grievant had been employed by the Department of Administrative Services in 1985 (Joint Exhibit 6).

This information would have disclosed that the Grievant was removed during her probationary period for absenteeism-related misconduct. Second, the 1987 job application (Joint Exhibit 4) when compared against the 1985 job application (Joint Exhibit 6) did not contain consistent historic employment data. The data, more specifically, contained relevant gaps in the most recent application; and the reasons for separation were also clouded by prior removal decisions. Third, Lori Smith, a member of the selection committee which interviewed the Grievant prior to employment, noted that the Grievant never disclosed prior employment with the State of Ohio. She noted that if such a reference was made by the Grievant it would have been flagged on the original job application (Joint Exhibit 4) or the structured interview form (Employer Exhibit 7). This information would have resulted in a follow-up reference check; a check not undertaken in this instance. She, moreover, noted that the committee would never have recommended employment if a reference had remarked that the Grievant had been removed during her probationary period for absenteeism problems.

The falsification arguments were allegedly further bolstered by several credibility concerns. The Grievant, more specifically, provided varying versions regarding the inclusion versus exclusion standard she used to complete her application forms (Joint Exhibits 4 and 6); and the individuals who provided her with these varying standards.

The Employer maintained that it applied its rules, orders and penalties even-handedly and without discrimination. Chibia testified that four other employees have been removed, or their removal is pending, as a consequence of falsification activities. He, moreover, distinguished the Glass incident from the present one by focusing on a number of factors. First, Glass had an excellent work and attendance record. Second, Glass' supervisors recommended his retention because he worked so well with the inmates. Third, he was used as a training officer because of his prior experience. Last, Glass' application failed to disclose his prior employment with the State and his removal during the probationary period for sleeping on the job. He did, however, include his prior employment in the PERS form (Joint Exhibit 5) and was forthcoming during the orientation program which reviewed the Standards of Employee Conduct (Joint Exhibit 8). Also, Glass' version was confirmed concerning mixed signals communicated by personnel in the Dayton office regarding prior employment with the State.

The Employer argued that the degree of discipline administered was reasonably related to the seriousness of the Grievant's proven offense. The Employer, more specifically, alleged that falsification of an employment application is an extreme infraction; one that cannot be corrected by progressive discipline strategies. In other words, unlike other forms of falsification which deal with ongoing employment decisions, falsification of an employment application goes to the very heart

of the hiring process. By deliberately distorting her employment history, the Grievant prevented the Employer from predicting her eventual poor job performance based upon her earlier work record.

The Employer alleged that there were no mitigating circumstances suggesting that the Employer had any reason to overlook the falsification. Chibia testified that the Grievant was not removed during her probationary period solely because of an administrative error which allowed the expiration of the probationary period without timely action. He also noted that the Grievant's disciplinary history was clothed with absenteeism-related improprieties (Joint Exhibit 3). Reinstatement was also viewed as inappropriate because the Grievant emphatically stated at the arbitration hearing that she could be a good officer if she dealt only with inmates rather than dealing with supervisory personnel. This perspective allegedly tainted the Grievant's ability to interact constructively with supervision.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant for deliberate or intentional falsification of documents arising out of an employment relationship. This conclusion was based on a series of alleged procedural defects and a number of evidentiary concerns.

The Union claimed that the Grievant never received foreknowledge at the time of completing the application that lack

of complete information could result in her removal. The application form (Joint Exhibit 4) did not clearly indicate that falsification of the application would result in termination.

The specific work rule employed as justification for removal was viewed as misapplied in this particular instance. The misrepresentations contained in the PERS form (Joint Exhibit 5), occurred before the Grievant received the Standards of Employee Conduct (Joint Exhibits 7 and 8). The other violations, however, did not deal with documents arising out of employment but pre-employment.

Even if the Employer established the authenticity of the violations, the Grievant did not engage in intentional acts of deception. The Grievant, more specifically, through her actions, focused the Employer's attention upon her prior employment with the State. She did this when she disclosed her prior employment status during her job interview and when she was questioned about her vacation leave.

Certain ambiguities surrounding the disciplinary grid (Joint Exhibit 8) were raised by the Union. The range of potential penalties allegedly projects expectations of a lesser penalty because the band of penalties range from a five-day suspension to removal.

The Union maintained that Section 24.02 was violated because the Employer did not initiate disciplinary action as soon as reasonably possible. The Employer became aware of the Grievant's vacation leave on or about April 15, 1988. Yet, she was

eventually removed four months after this incident, while a pre-disciplinary conference took place three months later. This particular time interval was never fully explained to the Union's satisfaction.

The Union claimed that the Employer violated Section 24.04 because it did not conduct a fair and objective investigation. It was alleged that the Employer never truly gave the Grievant an opportunity for an extension because it failed to advise the Grievant until after the fact. The Employer, moreover, misplaced its responsibilities by assuming that the Union had the primary responsibility for contacting the Grievant about a forthcoming predisciplinary hearing.

The Union viewed the Employer's investigatory attempt as a pretext rather than a concerted attempt to gather all of the relevant facts. The Employer, more specifically, used the falsification charge as a pretext so that it could circumvent progressive discipline requirements for absenteeism. By failing to rely on the disciplinary action dealing with the absenteeism charge, the Employer clearly evidenced its desire to remove an undesirable employee.

The Union claimed that the Employer failed to apply its rules even-handedly and consistently. This argument was supported by offering a number of comparisons between the Grievant's and Glass' situations. First, Glass failed to give prior employment information regarding his probationary removal for a much more severe infraction. Second, when one compared

Glass' performance evaluations (Union Exhibits 1 and 2) they were quite comparable. Third, the Grievant also voluntarily disclosed her prior employment during her employment interview, and subsequently when she requested vacation leave. Last, the above comparisons did not result in similar charges because Glass received no discipline while the Grievant was removed. This disparity was viewed as especially egregious in light of testimony provided by Smith. She noted that if the interviewing committee had known of Glass' previous removal for sleeping on duty it would never have recommended his appointment. Thus, Glass and the Grievant should not have been treated differently but they were not treated in an identical manner.

The Union alleged that the very presence of a disciplinary grid (Joint Exhibit 8) implies, and raises expectations, that mitigating circumstances will be taken into consideration when determining a penalty. In this instance, however, the Union felt that the Employer did not consider any mitigating circumstances.

THE ARBITRATOR'S OPINION AND AWARD

It is the opinion of the Arbitrator that the Employer has obtained a substantial level of proof that the Grievant willfully falsified official documents arising out of employment with the Department. This Arbitrator concludes, however, that the Employer's failure to comply with several due process-related procedural requirements affects the degree of penalty which is

appropriate; but does not necessarily vitiate the disciplinary action in its entirety.

The Union's notice arguments are not viewed as well-founded. When an employee signs documents which have specific oaths affixed and this action is further documented via a formalized notary procedure certain expectations arise. These expectations, more specifically, should be shared by an applicant and an employer reviewing the applicant's qualifications. An applicant who swears or affirms that his/her answers are complete and true (Joint Exhibit 4), and/or that the statements made are complete and true (Joint Exhibit 5), should readily anticipate certain negative consequences if the material proves to be inaccurate. Although neither the PERS form (Joint Exhibit 5) nor the job application (Joint Exhibit 4) contained a specific statement warning the Grievant of possible termination consequences, the Grievant's responsibilities in this regard are not diminished. The notary and oath taking processes serve as identical or superior notification mechanisms and provide the Grievant with clear direction.

This analysis, moreover, indicates that the Grievant was legitimately charged with a violation of Rule 21 (Joint Exhibit 8), even though she was not specifically appraised of its contents at the time of her formal application. Such a formalized requirement seems overly artificial and redundant in light of the circumstances surrounding the incident and the

documents completed by the Grievant. This is especially true when the Grievant stated she read and understood the oath.

The Section 24.02 violation alleged by the Union was not sufficiently developed, and thus, this Arbitrator has a great deal of difficulty giving it much credence. The record is virtually void of any testimony regarding this argument. Those individuals conducting the investigation were never sufficiently queried regarding the timeliness argument.

The reported decisions dealing with falsification of application or other employment-related documents indicate that a number of varying factors may be considered by an Arbitrator when evaluating the legitimacy of a removal decision. The following factors are often cited:

1. the nature of the fact or item falsified (was it intentional, deliberate, and material?);
2. the number of items concealed;
3. the time between the occurrence and falsification;
4. whether the disclosure would have precluded hiring;
5. the time between falsification and disclosure;
6. the employee's overall job performance;
7. the reason or factor which triggered the discharge;
8. the employer's motivation (was it punitive in nature?);
9. special safety or security considerations; and

10. mitigating factors, such as the employee's marital status or age1

Probably the most critical facet that must be evaluated concerns the intent of the Grievant and whether the falsifications were willful. The intent element, however, is the most difficult to prove because it must be inferred from the facts or circumstances surrounding the altercation. Several glaring inconsistencies indicate that the Grievant willfully falsified his employment documents.

First, in certain instances employees have been reinstated where evidence has established that individuals in the personnel department assisted a grievant in filling out an employment application.2 The Grievant asserted that she was misguided by two individuals regarding the nature of her responses to specific questions contained on her employment documents. This assertion, without some additional form of documentation, has to be viewed as self-serving, and thus cannot be given much weight by this Arbitrator. Even if these individuals could not attend the hearing, documented attempts to contact these individuals, regardless of the results, might have swayed the Arbitrator's perceptions. A sworn deposition or statement might have filled this critical void in the Union's case.

1Tiffany Metal Products Mfg. Co., 56 LA 135 (Roberts, 1971); Brink's Inc., 79 LA 816 (Briggs, 1982); Kraft Foods, 50 LA 161 (Turkus, 1967).

2Gold Kist, Inc., 77 LA 569 (Statham, 1981).

Second, the data omitted from the job application (Joint Exhibit 4) and the PERS form (Joint Exhibit 5) seem glaringly clothed with material denials of a checkered past. The PERS form (Joint Exhibit 5) did not accurately characterize the Grievant's actual starting date as a State employee. When she was questioned about this discrepancy she said everyone inserted the same starting date. She also noted that she did not include her DAS employment because she never completed her probationary period. Again, this response seems contrived because at a minimum she should have asked someone for a clarification. Rather than relying on two individuals outside the immediate work site she should have asked for a clarification when she completed the PERS form (Joint Exhibit 5).

Certain suspicion is also raised by the conspicuous omission of the Grievant's prior State employment from the job application. It seems quite a coincidence that she omitted her prior employment which resulted in a removal during her probationary period. In a like fashion, she also omitted he prior employment at CPP from her job application (Joint Exhibit 4). It appears that the Grievant was removed from this position (Employer Exhibit 2) while she alleged that she voluntarily quit.

Third, the above incidents seem to establish a pattern of intentional deception. Deception perpetrated by the omission of material employment history. This pattern is further supported by an evaluation of Section II - Experience contained in the Ohio Civil Service Application (Joint Exhibit 4). This section

consists of a series of areas for past work experience beginning with the most recent employment. The directions do not indicate that an applicant must only provide relevant work experience but any work experience seems appropriate including volunteer work. Thus, the criteria employed by the Grievant, such as duration and type of employment, seem a bit misplaced and illogical.

Fourth, the Grievant's credibility is viewed as highly suspect because of a series of inconsistent and evasive statements. The Grievant waffled considerably when she discussed the decision rule she employed for inclusion or exclusion purposes. At one time she noted it was three months and then she changed her response to six months. Under cross-examination, however, she did not know why she excluded certain experiences which exceeded three months.

Clifton White's input also seems questionable from a timing perspective. The Grievant maintained that White helped her with her application. Yet, she was extremely evasive when asked whether she had a copy of the application at the time of the interview, and in terms of the subject matter under discussion. A Personnel Action form (Employer Exhibit 5) introduced at the hearing further dampened the Grievant's credibility. It indicates that White resigned on April 10, 1987; a full three months prior to the Grievant's formal application.

The above discussion clearly indicates that the above omissions were not mere oversights or due to memory lapses. These falsifications, moreover, could have precluded the hiring

of the Grievant because the falsifications relate to material features of an employee's job domain. Whether falsifications dealing with historical absenteeism-related problems would have automatically bumped the Grievant from contention is an empirical question. Regardless, it is highly probable some weight would have been given this predictor of future job performance. The Grievant's actions, moreover, prevented the Employer from factoring this information into the selection decision; and must not be condoned by this Arbitrator.

Arbitrators have taken various positions in discipline and discharge cases where the Employer has engaged in procedural defects. These approaches were summarized by Arbitrator Fleming in the following manner:

> "...(1) that unless there is strict compliance with the procedural requirements the whole action will be nullified; (2) that the requirements are of significance only where the employee can show that he has been prejudiced by failure to comply therewith; or (3) that the requirements are important, and that any failure to comply will be penalized, but that the action taken is not thereby rendered null and void."3

The third approach is the most prevalent. As this Arbitrator has previously noted, he concurs with this approach because it has the virtue of penalizing failure to comply with contractual requirements, but does not necessarily obviate all that has been done.

Here, the Employer engaged in several procedural violations which as a consequence force the Arbitrator to modify the

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3Fleming, R. W. The Labor Arbitration Process, Urbana: University of Press, 1965, Pg. 139.

penalty. These violations fall within three due process areas: predisciplinary hearing requirements, unequal treatment, and progressive discipline.

In this Arbitrator's opinion the Employer did not engage in a fair and objective investigation because it truly never provided the Grievant with an opportunity to justifiably postpone the predisciplinary hearing. As a consequence, it did not give the Grievant a fair opportunity to respond to the alleged falsification accusations. When the Grievant called on July 19, 1988 to explain her situation and postponement request, the Employer should not have evaluated her initial request in a vacuum. At that point in time the Grievant was on disability leave because of a work-related stress malady. Thus, on a threshold level, the Employer should have had some previous exposure to the Grievant's problem which should have sensitized the Employer to the existing situation. The Employer provided the Grievant with some benefit of the doubt when it established certain preconditions for a potential continuance. The Grievant eventually met the condition by providing the Employer with a physician's statement. Once produced, however, the Employer modified the rules to a certain extent by remarking that the statement did not justify an extension; it did allow the Grievant with an opportunity to rebut the falsification claims via a written document.

A certain portion of the Grievant's tardy response was a direct function of the Employer's mishandling of the incident.

It placed an inordinate amount of responsibility on the Union to get the Grievant to the July 22, 1988 hearing. One should not minimize the Union's notification role, but the majority of the burden rests with the Employer because it is the moving party; the party initiating the disciplinary action. Once the Employer recognized the Union's difficulty it sent a certified letter and the Grievant responded rather quickly. The certified letter in my view and the Grievant's response did not, however, fulfill the Employer's investigation requirement. This requirement has a twofold purpose. The first purpose deals with a determination of what the employee has done, while the second deals with why the employee might have engaged in the activity. The second purpose may potentially minimize the gravity of the activity which may bear directly on whether corrective action is appropriate.4

From the evidence presented at the hearing, the Employer was unable to adequately rebut the Union's unequal treatment claim. Successful disparate treatment claims, moreover, require that the Employer was aware of certain irregularities, condoned these irregularities, and treated like instances in a dissimilar fashion. These pertinent factors were sufficiently established by the Union.

The Employer based part of its argument on recent removals of other employees who allegedly engaged in similar falsification activities. All of these individuals, other than Glass, were removed during their probationary period. Such

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4United Telephone Co. of Florida, 61 LA 443 (Murphy, 1973).

comparisons are completely erroneous, however, because of standing differences enjoyed by different groups. Probationary employees are not subject to the terms contained in the Collective Bargaining Agreement (Joint Exhibit 1), nor are they represented by Union officials until they become formal members of the bargaining unit. Also, bona fide comparisons can only be made when one is able to evaluate the facts and circumstances surrounding any particular incident. Unfortunately, pertinent facts and circumstances were not introduced at the hearing.

The Employer attempted to distinguish the Glass fact situation from the present one but was unable to do so. In those areas where valid distinctions were raised, the discrepant procedures used by the Employer raised additional suspicions. The Employer maintained that Glass was forthcoming about his removal during a prior probationary period. He also volunteered that he was removed for sleeping on the job. Both of these realizations were disclosed when the Employer reviewed the Standards of Employer Conduct (Joint Exhibit 8) with the Grievant. The Grievant, however, was also forthcoming even though the degree of admission lacked a certain amount of timeliness.

Interestingly enough, Chibia noted that the Employer did not believe Glass' original admission regarding his prior removal. Yet, it initiated an investigation with Glass' prior employer in Dayton. This information disclosed that it was highly likely that Glass was getting mixed messages and was telling the truth.

One must wonder why the Employer failed to follow-up on the Grievant's assertions and what varying outcome might have resulted if the Employer was able to contact Mr. White and the DAS representation.

The Employer emphasized that Glass' performance evaluations exceeded the Grievant's. Without going into specific rating formats and individual scale comparisons, the Arbitrator finds this argument to be totally ludicrous. Chibia readily agreed that the Employer failed to follow through on a series of special thirty-day evaluations (Employer Exhibit 7). Chibia testified that personnel dropped the ball because it failed to issue these evaluations. Thus, comparisons on this measure of performance cannot be accurately assessed because the Grievant's record is incomplete at best. By retaining the Grievant after the probationary period, the Employer certified that she could perform her duties at an appropriate level of proficiency.

Another faulty distinction raised by the Employer concerned Glass' training and experience. Chibia noted that these two factors were weighted heavily in Glass' favor when his credentials were reviewed for retention purposes. It seems quite unusual but these factors greatly influenced the retention decision. Chibia maintained that Glass enjoyed prior experience in the corrections area and was used as a trainer. In this Arbitrator's opinion, these factors should never play a role in a retention decision involving the falsification of documents; such a decision seems faulty on an independent basis. It becomes even

more onerous when an Employer is forced to disclose the rationale behind some extreme managerial decisions. These types of circumstances should never be used to distinguish removal and retention decisions.

This Arbitrator is also quite concerned with several progressive discipline defects which surfaced during the course of the hearing. The Employer argued that falsification is an extreme infraction; one that cannot be corrected by progressive discipline. This assertion, however, is not necessarily reflected in Rule 21 which shows penalties ranging from 5 days to removal (Joint Exhibit 8). This work rule, moreover, does not indicate that certain types of falsification should automatically result in removal while lesser penalties are deemed appropriate in other circumstances. If the Employer views this distinction as highly material it should: specify such a distinction in its wok rules; argue the distinction more vigorously and consistently at the hearing; apply the distinction consistently across similarly egregious circumstances.

The latter point deserves some elaboration. Again, the Employer claimed that the Grievant via her intentional falsification efforts prevented the Employer from predicting her poor performance. The exact argument, however, can be asserted when one evaluates the circumstances surrounding Glass' incident. Yet, he was not reprimanded for his actions and the Grievant was removed from her position.

The extent of the discrepancy in terms of the administered penalty does not seem equitable or reasonable in light of the circumstances and work rule. This was factored into the remedy fashioned below.

AWARD

The grievance is sustained in part and denied in part. The Employer is directed to reinstate the Grievant to her former position. The Employer, moreover, is directed to pay the Grievant back pay covering a six month period from the date of the Award. This sum shall not include normal deductions and all other earnings realized by the Grievant for the above mentioned time period. Both Parties should be placed on notice that this Opinion and Award find both Parties partially at fault. The six month unpaid suspension should put the Grievant on clear notice of the seriousness of her offense. At the same time, the Employer should be placed on clear notice that procedural defects are viewed with great apprehension by this Arbitrator and on some occasions such as the present matter such defects may require a modification of an administered penalty.

8/15/89