

In the Matter of the
Arbitration Between

#614

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio
Ohio Veteran's Childrens Home

Employer.

Grievance No. 32-00-(8-14-90)-
201-01-05

Grievant (Dennis Berry)

Hearing Dates: May 22, 1991
May 28, 1991

Award Date: June 12, 1991

Arbitrator: R. Rivera

For the Union: Micheal Muenchen
Michael Temple

For the Employer: Rodney Sampson
Valerie Butler

Present at the hearing in addition to the Grievant and Advocates were Edward Ramey, Maintenance Administrator (witness), Ron Camic, Assistant Superintendent (witness), Hazel Fyfe, Personnel Officer (witness), Leon Huff, Former Superintendent (witness), Sherrie Murray, Personnel Officer (witness), David Fisher, Education Administrator (witness), Philip Martin, Food Service Manager (witness), Charles Varney, Electrician (witness), Tonya Berry, (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition

that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

1. Contract
2. Pre-disciplinary Hearing Letter
3. Letter of 8/6/90: Notice of Pre-disciplinary Conference
4. Discharge Letter dated 8/6/90
5. Grievance dated 8/14/90
6. Step Three Response dated 9/14/90
7. Arbitration Request dated 10/16/90
8. OVCH Work Rules and Disciplinary Policy dated 11/27/89
9. Personnel Action -- Appointment of Grievant dated 4/18/88
10. Personnel Action -- Removal of Applicant dated 8/24/90
11. Letter from Director of ODRC dated 7/9/90 re Grievant's prison record
12. Personnel Action of Employee C.V. -- appointment with copy of application attached showing prison record
13. Personnel Action -- showing suspension of employee E.R. with disciplinary records attached
14. Evaluations of Grievant for 3/14/88, 7/11/88, 3/14/89, 3/14/90

Employer Exhibits

1. Opening Statement
2. OVCH Application of Grievant
3. Ohio Civil Service Application of Grievant (faxed from DAS on microfiche taken from original which has been destroyed)

Union Exhibits

1. Opening Statement
2. Grievant's classification specifications
3. Letter of Commendation dated 3/10/89 from Superintendent to Grievant
4. Position Description Authorization of Grievant's PCN dated 2/10/88
5. Memo from J. Bell to L. Huff recommending that Grievant be chosen for position
6. Personnel Action showing suspension of Employee A.W. with supporting documentation of discipline
7. Personnel Action showing suspension of employee C.O. with supporting documentation of discipline
8. Memo from R. Camic to L. Huff on Grievant's Pre-Disciplinary meeting dated 7/13/90
9. Letter from S. Murray, Personnel Aids OVCH to Greene County Welfare Department verifying the Grievant's status dated 6/29/90
10. Grievant's OCS application
11. Certificate of Achievement to Grievant for Asbestos Abatement Course and Examination dated 11/13/89
12. Copies of deposit tickets showing Grievant's current rental
13. Additional copies of rent receipts
14. Copy of Move-in list, Grievant's current rental

15. Additional copy of a rent receipt
16. Pet Deposit -- current rental
17. Grievant's OCS Application

Employer's Statement of the Issue

Was the Grievant discharged for falsification of employment applications for just cause, if not, what shall the remedy be?

Union's Statement of the Issue

Did the Employer violate the Contract by removing the Grievant for alleged falsification of an employment application: If so, what is the remedy?

Stipulated Facts

1. The Grievant was a good worker during his tenure at O.V.C.H.
2. The Grievant was removed effective 8/6/90.

Contract Sections

§ 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.

§ 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. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- 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.

§ 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. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. 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. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at 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 ask questions, 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.

§ 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. At the discretion of the Employer, the forty-five (45) day 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 employer 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. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. 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.

Facts

Mr. Leon Huff was Superintendent and Appointing Authority of the Ohio Veterans Children Home (OVCH) at the time of the incident. OVCH is a home for 230 young people who are either orphans or children with behavioral problems. They are housed, fed, and schooled at OVCH. Mr. Huff said that immediately prior to July 4, 1990, Mary Black, President of the OVCH Alumni, said to him during a meeting "I understand that you have three (3) felons on your staff." Mr. Huff said he did not reply directly to her statement, nor did he take any action as a result of the statement. (The Union objected to this testimony on the grounds that never prior to that moment during the arbitration hearing had Ms. Blake's statements been part of the record. Mr. Huff claimed that he had "just remembered" the incident.) He said that subsequently, he received an anonymous phone call, a female voice, which alleged that the Grievant was a felon. Huff said he checked with Personnel Department which reported that they had no record of a felony record for the Grievant. Mr. Huff then called Ohio State Patrol (OSP) who said they did not have authority to check Grievant's record. Huff indicated that he knew that furnishing such information was improper for OSP but that the lieutenant was fairly new and, therefore, might give out the information. Mr. Huff testified that George Wilson, Director of

ODRC, was a personal friend, so he called Wilson who told Huff over the phone, after checking, that the Grievant was a felon. Wilson confirmed the felony record by letter dated 7/9/90 (see Joint Exhibit 11). That letter indicated that the Grievant had served prison time for "Violation of Drug Laws," a 2-10 year offense, from 8/1/80 to 9/23/82. Then Mr. Huff looked at the copy of the Ohio Civil Service Application in Grievant's Personnel file and found that the Grievant had checked the "no" box in answer to Question "4. Have you ever been convicted of any felony." The Grievant had signed the application under oath before a rotary. The material preceding his signature read as follows:

I solemnly swear or affirm that the answers I have made to each and all of the questions in this application are complete and true to the best of my knowledge and belief. I hereby waive all provisions of law forbidding my physician or other person who has attended or examined me or who may hereafter attend or examine me, colleges or universities which I attended, or past employers, from disclosing any knowledge or information which they thereby acquired relevant to my employment and I hereby consent that they may disclose such knowledge or information to the Division of Personnel, Department of Administrative Services.
(Employer's Exhibit No. 3)

Mr. Huff only vaguely remembered the details of the hiring of the Grievant. He did remember that Mr. Butts, a then current employee, recommended the Grievant; Mr. Butt's was Grievant's cousin. Mr. Huff said that the Ohio Civil Service (OCS) application was unavailable to him when he chose the Grievant. Huff relied upon the OVCH application (See Employer's Exhibit 2).

In that application, as well as in the OCS application, the Grievant claimed to have worked for Ehling Cleaning from 2/77 to 1/87. Mr. Huff concluded that the grievant had been in prison during two years of this alleged employment. On both the OVCH application and the OCS application, the Grievant indicated that the Ehling Cleaning Service had gone out of business. The Grievant also signed the OVCH application. His signature was preceded by these words: "The facts set forth above in my application for employment are true and complete. I understand that if employed, false statements on this application shall be considered sufficient cause for dismissal." (Employer's Exhibit No. 2)

On July 9, 1990 Huff wrote to the Grievant. The letter said

It has been alleged that on your Ohio Civil Service Application for Employment you falsified the application in two places. One had to do with the time of your employment with Ehling Cleaning Services and the second had to do with your checking on your application that you had not been convicted of any felony.

There will be a pre-disciplinary hearing on Thursday, July 12, 1990, at 10 a.m. in the Assistant Superintendent, Ron Camic's, office. This is your opportunity to be able to respond to these allegations.

If it is found that you have falsified the Ohio Civil Service Application, you will be terminated from employment at the Ohio Veterans' Children's Home. (Joint Exhibit No. 11)

The Pre-Disciplinary Meeting was held on 7/12/90 with Mr. Camic in the Chair. Mr. Huff did not attend, even though he was on the grounds and available. The Union representative

specifically requested a statement from Mr. Huff (see Union Exhibit 8).

Mr. Camic subsequently recommended dismissal. At the end of his memo, Mr. Camic stated:

In my opinion, the Union will challenge management at the arbitration (assuming it goes that far) on procedural grounds by claiming that management staff actually recommending dismissal were not present at the pre-d meeting (although Ed Ramey was present); and that the employee therefore was not provided an opportunity to "confront his accusers." (Union Exhibit No. 8)

On August 6, 1990, the Grievant was dismissed (Joint Exhibits 3 and 4).

Mr. Huff was asked on cross examination why a dismissal was chosen when the Work Rules and Discipline Policy (Joint Exhibit 8) recommended suspension for the first offense of falsification of documents. Mr. Huff said that the penalty was clearly stated on the OVCH application. Moreover, lying on the application violated the essence of the trust obligation of the employee. Mr. Huff said that since the felony was for drugs and since the institution was a facility for troubled youth often with drug problems, he would probably not have hired the Grievant if he (Huff) had known of the felony. Huff maintained that since the Grievant lied on the application and but for the lie would not have been an employee, the work rules dealing with "falsification of documents" did not speak to falsification of the application but rather to the falsification of work related documents subsequent to employment.

Mr. Huff stated that the Grievant had been a good worker (see Joint Exhibit No. 14) and had been commended (see Union Exhibit 3).

Mr. Huff was shown the disciplinary materials of employee "A.W." Mr. Huff said that while he did not remember the specific details, the employee was suspended under the work rules for the falsification of documents but that the conduct occurred after and during employment, not at the application stage. Mr. Huff said the suspensions of employee "C.O." (Union Exhibit 7) and "R" (Joint Exhibit 13) were similar to "A.W." and hence distinguishable from the grievant's situation.

Mr. Huff testified that he had removed an employee "D.H." when his felony record was discovered but that employee "V" (Joint Exhibit 12) was hired and kept. Employee "V" made full disclosure of his prison record at the time of his employment.

Ms. Hazel Fyfe, Manager of the Human Resources Department, testified that the Grievant's hiring followed normal procedure at that time. Applicants first filled out OVCH applications. The applicants were interviewed; the department head recommended one or more persons to the Superintendent. The Superintendent chose the person for the job. The applicants then filled out an Ohio Civil Service (OCS) Application under oath. The original OCS application was sent together with a personnel action form to DAS. The DAS Director signed off on the personnel action, and the person was then "officially" hired. Ms. Fyfe said she checked the Grievant's employment record but did not check with

the Ehling Cleaning Company because the applicant indicated that the company had gone out of business. She said no procedure existed then for checking criminal records of applicants. She said she knew of no stated policy to not hire felons.

Sherrie Murray, Personnel Aide, testified as part of the Union case. In essence, she confirmed the testimony of Ms. Fyfe.

Mr. Muenchen, Union Advocate, was sworn and questioned by Mr. Temple. Mr. Muenchen testified that shortly before the Pre-Disciplinary meeting of July 12, 1990, he and the Grievant reviewed the Grievant's personnel file and found an OCS application with the felony question box marked in black ink in the no box and blue ink in the yes box. This document was raised by the Union at the Pre-Disciplinary meeting and given to Mr. Camic (see Union Exhibit 8).

The Grievant testified that he neither read well nor was capable of filling out applications. He said he was told of the job originally by Ricky Butts, his cousin, who already worked for OVCH. His cousin told him to use a different work history because he (the Grievant) was overqualified. Mr. Butts created a work history for the Grievant and wrote it out for him in detail. When the Grievant filled out both the OVCH application and the OCS application, he essentially copied into the applications the written description furnished by Mr. Butts. He also checked the "no" box for a felony at Mr. Butts' direction. He said he did not realize at the time that the OCS application would be notarized. He said he did not read carefully various parts of

the application. However, he stated that he "knew his statements were false" and that he "knew it was wrong to lie on the application." Some months after taking an oath for the DCS application, the Grievant said he became very nervous about the notarized application and sought to resign. His supervisor refused to accept his resignation because she liked his work. His cousin, Ricky Butts, went into the Personnel Office and checked the "yes" box opposite the felony question (so two boxes were now checked). Ricky Butts told the Grievant that "it" was all taken care of now, and he could stop worrying. The Grievant also testified that during his employment he lived at reduced rent on a OVCH facility in return for maintenance (see Union Exhibits 12-16).

The Grievant's ex-wife testified and confirmed that Ricky Butts had provided the Grievant with a written sheet of a false work record for the Grievant to use on his application.

Mr. Philip Martin, testified about the suspension of employee "E.R." for falsification (see Joint Exhibit 13). Mr. David Fisher testified about the suspension of employee "A.W." for falsification (see Union Exhibit 6).

In rebuttal, Mr. Camic for the Employer testified that living at the OVCH facility was not a job benefit specifically attached to the Grievant's job but was a special arrangement.

Employer's Position

The case involves the discharge of the Grievant, formerly a custodial work at the Ohio Veterans Childrens Home, for falsification of an Ohio Civil Service Employment application. The application was completed and taken under oath. Management contends the application was falsified in two places: The Grievant indicated on the Civil Service application that he had not been convicted of a felony and indicated he had been employed by Ehling Cleaning Service from February 1977 to January 1987.

Management contends the Grievant's false reporting of his prior criminal conviction and falsification of his past employment record was a deliberate and willful misrepresentation. It precluded management from properly evaluating him for employment, given the special mission of the Ohio Veterans Childrens home. Had it been known, he may not have been hired. Management rights include its right to full and honest disclosure on job applications. The Union will argue the employee was a good employee and had worked two years at OVCH. When the employer became aware of the misrepresentation, it acted promptly and in good faith. The passage of time and the employees' satisfactory work record does not diminish the seriousness of the offense. The misrepresentation would have been material to his employment and was material and relevant at the time of the discharge. After Superintendent Huff received the phone call, an investigation was conducted, and management made a good faith determination given the nature of the conviction and the mission

of the home, that the continued employment of the employee was an unwarranted risk that could and would have been made initially had the employee been honest in filling out the application, which was taken under oath.

The Home's mission as stated in the Ohio Revised Code is a residential care facility for eligible children of Ohio residents with first priority for admission given to Veterans' children. Approximately two hundred children reside at the Home from pre-teen age through high school age. Historically, children residing at the Home were orphans in the classic sense of the word. Over the past two decades children at OVCH are predominantly from dysfunctional families, and, as a result, are generally somewhat troubled and vulnerable to negative influences. Many of the children at the Home have drug problems.

Management contends the nature of the Grievant's felony offense rendered him a potential threat to the children around whom he performed his duties as custodian. In addition to working in locations which invariably put him in close proximity to children, Grievant also lived on the grounds of a summer camp owned by the home and frequently used by its children during the summer months.

Management has proven that the misrepresentation was willful and deliberate and that the misrepresentation prevented a full investigation of his application before he was hired. Management contends the action taken was neither arbitrary, capricious, or discriminatory.

Union's Position

The Grievance before the Arbitrator appeals the termination of the Grievant from his position as Custodial Worker at the Ohio Veterans Childrens' Home (OVCH). At the time of his removal, August 6, 1990, the Grievant had no prior discipline, exemplary performance ratings, and two and one-half years of seniority. Prior to becoming employed at OVCH, the Grievant had considerable experience in the custodial, maintenance, and light construction fields.

On or about July 13, 1990, a pre-disciplinary meeting was held to discuss an alleged falsification of an employment application by the Grievant. The discussion was limited because the Management Representatives present at the hearing had no knowledge of how the investigation was conducted.

On August 6, 1990, the Grievant was removed for falsification of an employment application. The removal of the Grievant was not for just cause in violation of Article 24.01. The action was punitive in violation of Article 24.05 and 24.02. The pre-disciplinary hearing was not held in compliance with Article 24.04.

The Union has demonstrated that similarly situated OVCH employees have falsified official documents and have received minor suspensions as a result.

The Grievant admitted that he falsified one of two employment applications. He admitted he was wrong. However, his offense was treated more severely than the two-year employee who

was found to have forged reports about the care and treatment of youth--reports that bear a direct and substantial relationship to the central mission of the Employer--and who received a 5-day suspension. His offense is less egregious than the two-year employee who falsified leave forms (ADM 4258 forms) and court documents in order to receive pay for time not actually spent in court. That employee received a two-day suspension. Grievant presented himself during the hiring process as a qualified, hard-working individual, and that is exactly what he was and that is exactly what his superiors have determined that he is today.

Testimony has shown that the Grievant had negative notice of the severe consequences of his actions. The existence of a felony took on no significance during the hiring process. The employment interviews with the Department Head and with the Appointing Authority contained no questions about a felony record. The first application, the OVCH employment application, contained no question about a felony conviction. Much later, the Grievant was asked to complete a second application, the Ohio Civil Service Application, which does ask, "Have you been convicted of a felony?" By the time the Grievant completed this application, he had already been informed by the Appointing Authority that he was hired.

The record will further show that the OVCH currently employs at least one other felon. This employee is still employed.

The discipline was not commensurate with the offense. The penalty for this offense must be distinguished from repenalizing

the Grievant for a felony offense which occurred ten years earlier for which he has already paid the price. Furthermore, the Employer's own Discipline Policy calls for a suspension for the first offense of falsification of records. (Work Rule violation #13)

Discussion

The Grievant knowingly misrepresented his work history on the OVCH application. That application stated clearly over the signature line where the Grievant signed the application that dismissal was the penalty for falsification. The Grievant then again knowingly misrepresented his work history on the OCS application and then deliberately lied about his felony record. He then signed the OCS application under oath. The Grievant testified repeatedly that he knew he was lying and that he knew he was "doing wrong." The Grievant's writing and reading skills are minimal. However, he was able to read the documents and knew what he was doing. The Arbitrator found the Grievant to be quite "street smart" and capable of judging right from wrong.

The OVCH application clearly placed the applicant on notice of the potential for dismissal. The OCS application clearly placed the Grievant on notice as to the seriousness of the application by requiring the oath. Grievant testified that in retrospect he worried because he knew the meaning of an oath.

The Arbitrator finds that the Grievant perjured himself on the OAS application. Moreover, the Grievant had sufficient

notice to be fairly apprized that dismissal might result. Moreover, dismissal in such a case is commensurate to the offense. Falsification of the information on an application destroys the basis of the employment relation itself. The offense is so serious that progressivity is irrelevant.

The Union points to the suspension of other employees for falsification as evidence of disparate treatment. The Arbitrator finds that the offenses were not comparable and therefore, disparate treatment does not apply. The other employees committed serious offenses; however, their offenses did not destroy the basis of their very employment itself. They were legitimately employed and committed the offenses subsequently.

The Union offers in mitigation the Grievant's fine work record over the two year period. The Employer acknowledges this work record. The Arbitrator is saddened but cannot find that the work record lessens the severity of the offense nor justifies its abeyance.

The Grievant knowingly falsified his application and perjured himself. He was on notice of the severity of his action and dismissal is commensurate to that act.

However, the correctness and fairness discipline in question is clouded by the questionable conduct of the Superintendent.

First, the Superintendent failed to disclose to all parties until the arbitration hearing, the information about the alumnus who first brought this issue to his attention.

Second, the Superintendent used a "personal" source to obtain information about the Grievant's record rather than seeking an appropriate official source. The evidence is unclear as to the legality of the Superintendent's source. Moreover, the legality of seeking that information without the prior consent of the applicant is unclear. Leaving the legality issues aside, the Arbitrator cannot understand why the Superintendent did not use the best source available -- call in the Grievant and ask him. If the Grievant refused to answer, the Superintendent could then have told the Grievant that he would officially and appropriately seek the information elsewhere.

Third, the Superintendent failed to carry out a full and fair investigation. No evidence was adduced that anyone but himself (and he was also the appointing authority) checked into the circumstances surrounding this incident.

Fourth, the Superintendent failed to attend without excuse the pre-disciplinary meeting. This failure was an express violation of the contract. Section 24.04 says "The Employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend." In this case, the Union representative requested such attendance, and the Superintendent failed to respond.

Putting aside all other procedural anomalies, the express violation of Article 24.04 is a serious procedural defect.

In essence, the Grievant never received his 24.04 procedural rights, i.e., confronting his accuser, until the arbitration

hearing itself. The procedural error was not harmless. However, its severity does not overcome the Grievant's conduct. The dismissal was for just cause.

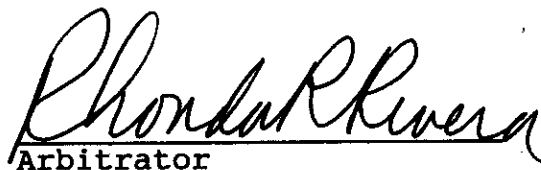
Award

The grievance is affirmed in part, denied in part.

The Grievant is dismissed; however, his dismissal date is the date of this Award (at which time, he has finally had his 24.04 rights). Grievant shall be awarded back pay (with appropriate deductions) from his dismissal date of 8/6/90 until 6/12/91. Grievant shall not be reimbursed for loss of housing during that period.

June 12, 1991

Date


Arbitrator