ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 664

OCB GRIEVANCE NUMBER: 28-05-901205-0026-02--02

GRIEVANT NAME: BRESLIN, MAURICE

UNION: 1199

DEPARTMENT: REHAB & CORRECTIONS, ADULT PAROLE AUTHORITY

ARBITRATOR: JOHNSON, MARGARET NANCY

MANAGEMENT ADVOCATE: COE, ROGER

2ND CHAIR: KITCHEN, LOU

UNION ADVOCATE: PARAMORE, EUGENE

ARBITRATION DATE: JULY 22, 1991

DECISION DATE: SEPTEMBER 11, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR NEGLECT OF DUTY, NEGLIGENCE, FAILURE TO FOLLOW POST ORDERS AND FAILURE TO CARRY OUT A WORK ASSIGNMENT.

HOLDING: GRIEVANT WAS DERELICT IN HIS DUTIES. EVIDENCE ESTABLISHED THAT HE HAD REPEATED WARNINGS AND CORRECTIVE DISCIPLINE TO IMPRESS UPON HIM HIS NEED FOR IMPROVEMENT. THE ARBITRATOR FINDS, HOWEVER, THAT THE GRIEVANT'S NEGLECT OF DUTY WAS NOT WILLFUL OR INTENTIONAL. HE WAS "DOING THE BEST HE COULD". REMOVAL IS CONDITIONALLY SET ASIDE PENDING AGENCY REVIEW OF THIS CASE. TERMINATION SHALL BE UPHELD IN THE EVENT THE AGENCY CONCLUDES WITHIN 30 DAYS THAT THERE ARE NO OTHER JOBS AVAILABLE FOR THE GRIEVANT WITHIN THE AGENCY.

COST: $ (BILL NOT RECEIVED AS YET)

STATE OF OHIO

LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

#664

Office of Collective Bargaining)
State of Ohio)
)
and)
)
Ohio Health Care Employees Union)
District 1199)
National Union of Hospital and)
Health Care Employees, SEIU)
AFL-CIO)

OPINION AND AWARD

GRIEVANCE OF
MAURICE BRESLIN

28-05-901205-0026-02-12

This matter came on for hearing on July 22, 1991, in a conference room at the Office of Collective Bargaining in Columbus, Ohio, before Margaret Nancy Johnson, member of The Arbitration Panel selected in accordance with the terms of the agreement between the parties.

Eugene J. Paramore, Organizer, presented the case on behalf of the Ohio Health Care Employees Union, District 1199, hereinafter the "Union." The grievant, Maurice Breslin, was also in attendance.

Roger Coe, Labor Relations Officer, appeared as the Management Advocate on behalf of the Department of Rehabilitation and Corrections, hereinafter "Employer," "State," or "Agency." Also present for the Employer were Lou Kitchen, Labor Relations Specialist; Ron Coakley, Unit Supervisor, Adult Parol Authority; and Joe Shaver, Chief, Labor Relations, Department of Rehabilitation and Correction.

There were no objections as to the arbitrability of the pending grievance, either upon procedural or upon substantive grounds. Accordingly, then, this matter is properly before the Arbitrator for a final and binding decision.

GRIEVANCE

On October 23, 1990, the aggrieved was issued a termination letter indicating his removal from the position of Parole Officer 2, effective December 7, 1990. This action was purportedly taken because of the following infractions:

> Rule #1: Violation of ORC 124.34 arises from the fact that you neglected your duty in completing your assigned tasks in a timely manner.
>
> Rule #5: Carelessness or negligence resulting in loss, damage, unsafe act, or delay in work production including state vehicles arises from your negligence in not completing assigned tasks in a timely manner as well as your loss of case files.
>
> Rule #8: Failure to follow post orders, administrative regulations, and/or written policies or procedures in that you are in violation of several bulletins used by the Adult Parole Authority that prescribe the manner in which reports should be completed as well as the timeliness for the completion of such reports.
>
> Rule #9: Failure to carry out a work assignment or exercise a poor judgment in carrying out a work assignment. The just cause on this charge arises from the same incidents described above.

A grievance protesting the termination was filed on December 5, 1990. It is alleged the removal was in violation of Articles 6 and 8 of the Agreement between the Union and the Agency.

On January 29, 1991 a Step 3 hearing at which the grievant was represented was conducted. Upon the conclusion of the

hearing, the grievance was denied. The Step 3 Response of the hearing officer sets forth the following:

> Facts
> The grievant was charged with violation of Rules 1, 5, 8, and 9 of the Standards of Employee Conduct for which he was removed from employment.
>
> Union Contention
> The grievant, through the Union, contends that:
> A. Management is discriminating against the grievant.
>
> The Union seeks as remedy:
> A. To be made whole in every way.
> B. Restoration to the position of Parole Officer with all lost benefits and wages, personal suffering or damages.
>
> Discussion and Findings
> Having reviewed the grievance, the discipline, and having heard Step 3 testimony, the following represents the findings of the Step 3 Hearing Officer.
>
> The Union alleged violation of Articles 6 and 8 of the contract. However, they did not specify which sub-articles of 8 were contested and no testimony was given for Article 8.
>
> The grievant argued the following:
>
> 1. That when transferred to Coakley's unit his office was placed in such a position that the Supervisor could know everything he did--job related or not.
>
> 2. He was never invited to lunch with the other members of the unit.
>
> 3. That he never had proper training in probation. His experience had been in parole.
>
> 4. The reports not done were not critical reports and did not require disciplinary action.
>
> 5. When the grievant was offered name cards, he wanted parole/probation officer on it. Instead management provided the cards with only parole officer on it.
>
> The Union requested copies of all preceding discipline and the pre-discipline material for this grievance.
>
> It is very clear to the hearing officer that the grievant will grab at any straw to encourage a hearing

officer to look at extraneous and unrelated conjectures of the grievant to cloud the issue of his failure to perform his job. The above charges are so lacking in substantive merit that the hearing officer can only label them as mud slinging.

The reports that the grievant was supposed to complete were not completed by the time he was removed. In fact, the supervisor had to do one of the reports himself because the grievant failed to do it.

The grievant and the Union must certainly recall the last chance agreement of April, 1989. Item #6 states "Mr. Breslin and the Union agree that if any future violations of a same or similar nature arise, the appropriate level of discipline shall be removal. The Union and Mr. Breslin may grieve the existence of just cause based on the facts, but the level of discipline shall not be in dispute."

The Union presented no testimony regarding just cause.

The Union requested copies of all previous discipline and the material presented at pre-discipline in this matter. The Union is advised that the delegate has received all material on all disciplines including this one and no further material is required to be copied.

Thereafter, the Office of Collective Bargaining reviewed the grievance and determined that just cause for the removal of the aggrieved existed. The March 26, 1991 response of the Office of Collective Bargaining denied the grievance as follows:

This office has reviewed your grievance alleging violation of Articles 6, Non-Discrimination, and 8, Discipline. You grieve that you were removed from your position as a parole officer. As a remedy, you seek restoration to the position of Parole Officer with all lost benefits and wages and to be made whole.

The Union argues in your behalf that the location of your office positioned your supervisor so that he could know everything you did, job related or not; that you never received proper training in probation--your experience was in parole; that the reports you failed to do were not critical reports which did not require a disciplinary action; that you wanted name cards with parole/probation on them, but got cards with only Parole Officer on them; and that you were never invited to lunch with the other members of the unit. The

arguments put forth fail to establish discrimination of any type described in Article 6 of the contract. The Union does not cite which subsection of Article 8 specifically it alleges violated, and offered no testimony other than its conclusion that no discipline was called for.

The Grievant and the Union signed a last chance agreement in April, 1989, which provides in part that Mr. Breslin and the Union agree that if any future violations of a same or similar nature arises, the appropriate level of discipline shall be removal. The Union and Mr. Breslin may grieve the existence of just cause based on the facts, but the level of discipline shall not be in dispute. This limits consideration to Section 8.01 of the contract. The facts indicate the Grievant failed again to perform his job by failing to do reports as required and in fact had not completed the reports by the time the removal was processed. Just cause does exist and the grievance is denied.

ISSUE

The issue in this proceeding is whether the Agency had just and proper cause to remove the grievant, and, if not, to what remedy, if any, the aggrieved may be entitled.

CONTRACT PROVISIONS

The following provisions from the Agreement between the parties are deemed to be pertinent to a proper resolution of the pending dispute:

ARTICLE 6 - NON-DISCRIMINATION

Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining units on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, union affiliation and activity, handicap or sexual preference, or discriminate in the application or interpretation of the provisions of this Agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with

the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio.

The Employer and Union hereby state a mutual commitment to affirmative action, as regards job opportunities within the agencies covered by this Agreement.

ARTICLE 8 - DISCIPLINE

§8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

§8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

A. Verbal Reprimand
B. Written Reprimand
C. Suspension
D. Demotion or Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

POSITION OF THE EMPLOYER

At the time of his removal the grievant held the position of Parole Officer with the Adult Parole Authority under the Ohio Department of Rehabilitation and Correction. The grievant had been employed by the Agency for eleven years.

The charges giving rise to the removal of the grievant include: neglect of duty; negligence resulting in delay of work production; failure to follow written policies; and failure to carry out a work assignment. The grievant in this proceeding has a history of failure to properly perform his job duties. The decision to terminate was made only after repeated attempts to counsel, train and discipline the grievant failed to effect any change in his job performance.

The job duty of the grievant is to maintain contact with convicted felons on release so as to ensure their continued

supervision and the protection of the public. The Agency has prepared Standards of Employee Conduct (Employer Exhibit #2) which informs the work force of policies and responsibilities as well as clarifies and standardizes rules of conduct. A copy of Standards in effect on June 17, 1990 was issued to the grievant (Employer Exhibit #3).

The Chief of Labor Relations testified as to the disciplinary history of the grievant. This evidence establishes that in 1987 the grievant incurred a five day suspension. Thereafter, a removal for threatening a supervisor was issued, but the grievant was reinstated through arbitration. The prior arbitration award specifically addresses the negligence of the grievant in carrying out job duties and provides notice to the grievant of the need to improve. In 1988 the Employer imposed a ten day suspension followed by a fifteen day suspension in 1989. Thus, the evidence clearly establishes the grievant has been adequately provided corrective penalties.

The mismanagement of four cases assigned to the grievant occasioned the decision to remove him. First, the grievant had failed to timely file a Violation of Probation Report. The grievant had been reminded of the report due March 23, 1990, on April 17, 1990 and told that if the report was not received discipline would ensue (Employer Exhibit #5). Again on May 25, 1990, the grievant was told to hand in the report by June 1, 1990 (Employer Exhibit #6). When the report was finally received, it required corrections, corroborations and rewriting. A memo dated June 8, 1990 (Employer Exhibit #4) enumerated directions to the

grievant regarding the case. This memo was resubmitted on July 25, 1990. In spite of the request of the sentencing judge to have the report by June 8, 1990, the report was not completed until November 1990.

A second example of the case mismanagement of the grievant was the failure to return a corrected report as directed by the supervisor on June 8, 1990 (Employer Exhibit #8). Indeed, the case file on this violator has never been returned by the grievant to the Agency and the file is deemed lost.

The difficulties of the grievant with these two cases were reviewed with him at a meeting on July 16, 1990. At a subsequent meeting on July 25, 1990 a third case involving an arrested parole violator was reviewed with the grievant and he was told of the need for a report by July 27, 1990 in order to meet due dates. On August 13, 1990 the supervisor received a call that the report had not been submitted. At that time the grievant was on a sick leave. When he returned on August 17, 1990, the grievant was questioned as to the missing report. The grievant told his supervisor he had taken the file home to work on it. Removal of files is contrary to Agency policy. Indeed, at a Unit Staffing Meeting which the grievant attended on December 17, 1988 (Employer Exhibit #13) the grievant was specifically told files could not leave the office without approval. In staffing notes dated August 17, 1990 (Employer Exhibit #12) the grievant was told to "do report" referencing the file he had removed without authorization.

Additionally, the grievant failed to submit daily contact sheets, travel vouchers or waivers, contrary to specific directions to do so given on July 17, 1990 (Employer Exhibit #14).

The evidence overwhelmingly establishes that inspite of repeated admonition to the grievant to rectify his job performance, he continued a pattern of neglect of duty. The unacceptable behavior of the grievant is contrary to the standards established by the Agency which retains the right to remove an employee in such situations.

The grievance should be denied.

POSITION OF THE UNION

The Union maintains that the removal of the grievant was an inappropriate penalty under the circumstances of this case. The aggrieved is a long-term employee who has witnessed many changes within the Agency. His inability to keep pace with improved technology is not willful. Rather, the grievant has been a loyal and faithful employee who deserves better treatment than that given by the Employer.

The Agency in this case has not endeavored to work with the grievant. He has never been trained in proper use of computers. Supervisory personnel have never reviewed the proper preparation of reports with the grievant. Nor has the Agency attempted to position the grievant in a job where he could succeed.

Previously, the grievant worked in a different unit. His work as a probation officer was very different from the work he was accustomed to, counseling parolees. The difficulties in job

performance arose only when the grievant was relocated in a new Adult Parole Unit with a new supervisor. Prior to the change in units and supervision, the grievant was able to satisfactorily perform.

The change in job positions occurred following the successful arbitration of the first attempt by the Agency to remove the grievant. In that case the Arbitrator found that the Agency had not proven the alleged neglect and insubordination.

In his new unit, the work load created a complex situation for the grievant. One-third of his cases were parole; one-third were probation; and one-third were inter-state. The grievant had difficulty adjusting to the different requirements for each type of case assigned to him. His case load was difficult, causing him to work long, arduous hours. In September 1990, the grievant had 103 cases.

There is no evidence that other employees had comparable case loads. Moreover, there is no indication that other employees who failed to keep pace with the case load were subjected to the same type of treatment as the grievant (Union Exhibit #4).

The grievant had worked his way up to a supervisory level with the Employer. A political change brought about a change in the job position of the grievant. He went from a supervisory position to a parole officer before he was finally removed. Whereas he previously received satisfactory evaluations, he began to receive undue and derogatory comments. In one evaluation he was referred to as an "old fashioned parole officer."

The Agency stressed prior discipline in presenting its case. However, the evidence establishes that the discipline assessed by the Agency has been repeatedly modified. A suspension and a discharge were previously set aside. Yet another suspension issued by the Agency was reduced. The Agency repeatedly referred to a "last chance agreement." The Union submits that there is no such valid and binding agreement in the pending dispute. The reliance of the Employer on prior discipline is both misleading and improper.

The Agency cites specific rule infractions. Yet, there is no indication how the alleged wrongdoing of the grievant adversely affected Agency operations. Indeed, the evidence indicates that the conduct of the grievant had no impact upon public safety.

The evidence pertaining to alleged case mismanagement is incomplete and sketchy. Although the Agency claims that a court required one of the reports due from the grievant, there is no documentary evidence of the alleged request. The grievant is also charged with losing reports which he testified he turned in on tapes.

Moreover, the Union contends that it was not provided with information it considered proper in preparing for this proceeding. Documents and information sought by the Union (Exhibit #3) were never received. The manner of the Agency in this case demonstrates a predisposition against the grievant and a deliberate effort to remove him.

The grievance should be sustained.

DECISION

At the time of his removal, the grievant in this proceeding was a Parole Officer 2 with the Department of Rehabilitation and Corrections for which he had worked for approximately twelve years. As a Parole Officer, the grievant was assigned to maintain contact with convicted felons under the supervision of the Adult Parole Authority. His job duties included the preparation and submission of reports detailing information on the individual probationers and parolees assigned to him. The significance of proper follow-up and performance in this position of public service is apparent.

To ensure efficiency of service and satisfactory employee performance, the Agency has issued Standards of Conduct. The rules and regulations contained therein establish a uniform code under which employees are expected to work.

The grievant has been charged with repeated violations of Agency rules giving rise to his removal in October 1990. The allegations against the grievant include neglect of duty, negligence resulting in delay of work production, failure to carry out a work assignment, and failure to follow written policies.

The operative facts occasioning the decision to terminate the aggrieved are substantially uncontested. The Arbitrator finds that the circumstances under which the grievant was removed may be readily set forth.

The mismanagement of three cases assigned to the grievant since April 1990 culminated in his termination in October 1990. The first of these is a "PV Report" which the unit supervisor

specifically directed the grievant to complete by April 20, 1990. On May 25, 1990, the aggrieved was directed to complete the report by June 1, 1990. A Probation Violation Report dated May 31, 1990 was submitted by the grievant. On June 8, 1990, the grievant was instructed to revise his report so as to include corroborations and corrections and submit the revision by June 15, 1990. This instruction was repeated on July 25, 1990. A completed revised report was not received until November, 1990, more than six months after the original due date.

A second case demonstrates a similar pattern of delay and procrastination. On June 8, 1990, the grievant was instructed to rewrite another deficient "PV Report." These instructions were reissued on July 25, 1990. At a staffing meeting with the grievant, his unit supervisor discussed the pending report with the grievant who indicated the report was on tape. The grievant, however, could not recall to whom he had given the tapes, or, indeed, where the file was located. The contention of the grievant who routinely hand wrote his reports was not corroborated. Nor were any taped reports prepared by the grievant ever located.

The third case involves yet another PV Report due by July 27, 1990 on an incarcerated individual. When the report had not been timely submitted, the Central Office made an inquiry concerning the missing report. At a staff meeting with the grievant on August 17, 1990, it was learned that the grievant had taken the file home. The report was not submitted until August 20,

1990. Removal of files without authorization is expressly prohibited.

In addition to the untimely submission of reports, the performance of the grievant includes his failure to turn in contact sheets. On July 26, 1990, the grievant was advised in writing to submit daily contact sheets on the Monday following respective pay days. The grievant failed to turn in any of the requested documentation.

In the opinion of the Arbitrator, the evidence submitted establishes the grievant was derelict in his duties. In spite of explicit instructions establishing due dates for reports, the grievant failed to accomplish assigned tasks in a timely manner. His work performance can only be described as neglectful.

The evidence further establishes that repeated warnings and corrective discipline had failed to impress upon the grievant the need for improvement. He failed to comprehend that the Employer could not condone or tolerate continued disregard for Agency procedures. Previous penalties include disciplinary suspensions for poor work performance.

The Agency satisfied the requirements for sufficient notice to an employee of deficiencies in duties. An ample opportunity was provided to the grievant to remedy the difficulties he was encountering on the job.

At the hearing on this matter, the grievant suggested that he had been singled out for failure to submit timely reports. The grievant alleged other officers, too, were backlogged without incurring removal from the job.

The Agency objected to the argument of disparate treatment being raised at the hearing. It was the position of the Agency that the failure of the Union to raise the defense during the grievance procedure precluded its consideration at the hearing.

The Arbitrator agrees that issues addressed at the Arbitration hearing ought to be limited to those mutually considered by the parties prior to the hearing. However, in the case now pending, the grievance papers specifically alleged discriminatory treatment. Insofar as disparate treatment is a form of discrimination, the Arbitrator feels compelled to respond to the contention made at the hearing.

The Arbitrator finds that the mere fact that other officers submitted late reports or had case backlogs is insufficient to establish disparity of treatment. There is no indication that any employee with the disciplinary record of the grievant continued to disregard explicit instructions and deadlines. The pending case loads of other officers including overdue reports are not probative evidence of disparate treatment absent a showing of comparable discipline for such neglect. Moreover, there is no evidence other employees received the explicit directives issued to the grievant.

The Union additionally alleges that the Agency failed to train the grievant in computer usage. However, the charges of neglect in this case do not stem from improper equipment use. There is no testimony linking the untimeliness of the reports of the grievant with insufficient knowledge of office equipment.

The late reports were hand-written pursuant to the practice of the grievant.

The grievant further testified that the change in his case-load created a complex and burdensome situation for him. Again, however, there is no evidence that the grievant did not know what was expected of him on the three PV Reports under consideration herein. Moreover, there is no excuse proffered as to why the requested daily contact sheets were never turned in.

The Arbitrator finds, then, that the failure to perform in this case is attributable to the inability of the grievant rather than to inadequacy of training. Accordingly, it is the grievant who must assume responsibility for being remiss in his work duties and not the Agency. In the opinion of the Arbitrator, the Agency herein has established cause for the removal of the grievant from his position as Parole Officer. For whatever reason, the grievant could not function in this capacity and was unable to focus on the matters requiring his attention. It is neither the duty nor the training of the Arbitrator to attempt to ascertain the cause for the failure of the grievant in this regard. It is, however, the obligation of the Arbitrator to ensure that the grievant is dealt with in a fair and just manner.

In this case, the Arbitrator notes that the neglect of the grievant was not willful or intentional. As the Union representative stated, the grievant was "doing the best he could." The failure to perform in this instance did not arise from a deliberate disregard of commitments.

The Agency stated that it could not retain employees on the payroll who were not doing their job. However, there is no evidence that the Agency attempted to determine whether there was another position which the grievant could fill. The record is devoid of any evidence or testimony pertaining to the unavailability of any other job for which the grievant could qualify.

Accordingly, the Arbitrator is of the opinion that the termination of the grievant should be conditionally set aside pending a review by the Agency of potential job vacancies which the aggrieved might occupy. In the event the Agency determines there are no such available positions, the termination of the grievant shall be affirmed. This opinion is not to provide the grievant with any right to replace another employee occupying a place within the bargaining unit. It is, rather, to entitle the grievant to remain employed should there be a vacancy he is qualified to fill. The Agency is, accordingly, directed to ascertain whether there are any positions for which the grievant may qualify. The termination of the grievant shall become final if, within thirty (30) days from the date of issuance, the Employer determines there are no such jobs available.

It remains to consider the contention of the Union that documentation needed to prepare for this hearing was not made available. The Arbitrator finds from the evidence presented that, indeed, the Agency supplied requested information to the Union. References to an alleged Last Chance Agreement were not given probative weight by the Arbitrator as the document was, itself, never proferred into evidence in this proceeding. Other

information and documentation upon which the within decision was based were known to the Union prior to the commencement of the hearing and there can be no serious objection to the procedural aspects of this case.

CONCLUSION

The Agency had just and proper cause to remove the grievant from the Parole Officer 2 position he held. The Arbitrator finds that as the Agency failed to consider whether there was another available position the grievant could occupy, such review ought to now occur.

AWARD

The grievance is sustained only to the extent that the termination is conditionally set aside pending the review directed in the above decision. The termination shall be upheld in the event the Agency concludes within thirty days that there are no jobs available for the grievant within the Agency.

Margaret Nancy Johnson
Arbitrator

Dated this 11th day of September, 1991.

Award #664

Margaret Nancy Johnson
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Post Office Box 06199
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October 22, 1991

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Eugene Paramore
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Re: Maurice Breslin Award

Gentlemen:

Please be advised that the review ordered by the Arbitrator in the above referenced case has been completed by the Agency and a determination made that there are no available positions within the agency for which the grievant is qualified. Accordingly, pursuant to the arbitration award dated September 11, 1991, the grievance is denied and this proceeding is declared closed.

A bill for services rendered in this matter is submitted herewith.

Thank you very much.

Truly yours,

Margaret Nancy Johnson