

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 694

OCB GRIEVANCE NUMBER: 28-05-900706-0018-02-12

GRIEVANT NAME: LATTA, DONALD J.

UNION: 1199

DEPARTMENT: ADULT PAROLE AUTHORITY - REHAB & CORRECTIONS

ARBITRATOR: JOHNSON, MARGARET NANCY

MANAGEMENT ADVOCATE: SHAVER, JOE

2ND CHAIR: KITCHEN, LOU

UNION ADVOCATE: REGAN, DAVID

ARBITRATION DATE: S E P T E M B E R 1 8 , 1 9 9 1

DECISION DATE: OCTOBER 17, 1991

DECISION: MODIFIED

CONTRACT SECTIONS

AND/OR ISSUES: 30 DAY SUSPENSION FOR 1) INSUBORDINATION, 2) USE OF ABUSIVE/OBSCENE LANGUAGE, 3) REPORTING TO WORK ALLEGEDLY UNDER INFLUENCE OF ALCOHOL OR ILLEGAL SUBSTANCE, 4) ACTIONS THAT COULD CAUSE HARM, AND 5) OTHER ACTIONS THAT COULD IMPAIR ABILITY TO CARRY OUT DUTIES. ALSO REMOVAL OF AUTHORIZATION TO CARRY A WEAPON CAUSING GRIEVANT TO LOSE HIS RISK SUPPLEMENT PAY.

HOLDING: EVIDENCE AND TESTIMONY SUPPORTED VIOLATIONS LISTED IN #'S 1, 2, AND 4, BUT FAILED TO SUSTAIN BURDEN OF PROOF IN #3 AND #5. THEREFORE, SOME MITIGATION OF THE PENALTY MUST OCCUR. SUSPENSION REDUCED TO 15 DAYS, MADE WHOLE FOR OTHER 15 DAYS AND EXPUNGE REFERENCE OF INTOXICATION FROM EMPLOYEE'S PERSONNEL RECORD. AS TO THE WEAPONS AUTHORIZATION, "THIS IS A MANAGERIAL PEROGATIVE WHICH IS LIMITED ONLY TO THE EXTENT ITS EXERCISE MUST NOT BE ARBITRARY OR CAPRICIOUS. IN THIS INSTANCE, THE ADMINISTRATIVE PRIVILEGE WAS REASONABLY AND APPROPRIATELY EXERCISED."

COST: \$ NO BILLING AT THIS TIME

STATE OF OHIO
LABOR ARBITRATION TRIBUNAL

#694

In the Matter of the Arbitration Between:

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
DONALD J. LATTA

28-05-900706-0018-02-12

This matter came on for hearing on September 18, 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.

Joseph B. Shaver, Chief, Bureau of Labor Relations, presented the case on behalf of the State of Ohio, Department of Rehabilitation and Correction. Also present for the State, hereinafter also referred to as the "Agency" or "Employer" were Lou Kitchen, Labor Relations Specialist; Peter Molnar, Regional Director, Adult Parole Authority; John Walker, Adult Parole Authority, Supervisor; Linda Stevens and Kim Smith, witnesses.

The case for the Union was presented by David Regan, Organizer. Also in attendance on behalf of the Union were Don Latta, grievant, and Mary Jane Latta, witness; and Larry Thorne, Union delegate.

The procedural propriety of the case at hand was stipulated by the parties. Accordingly, the matter is correctly before the Arbitrator for a final and binding decision.

GRIEVANCE

Subsequent to a disciplinary hearing on May 2, 1990, the aggrieved was notified he was to be suspended from his position from July 30, 1990 through September 7, 1990. The Agency charged the grievant with the following rule fractions:

6c: Insubordination: "Failure to follow post orders, administrative regulations, and/or written policies or procedures." To wit: You failed to immediately thereafter verbally notify the Unit Supervisor or the Deputy Superintendent of Parole of the unusual incident which occurred on March 13, 1990, as defined in the Procedure Section 1A of the Unusual Incident Bulletin #165. You failed to submit the required written report within one business day of the occurrence, as defined in the Unusual Incident Bulletin #165, Procedure Section B2B.

10: "Willfully making false, abusive, or obscene statements toward or concerning another employee, a supervisor, or a general member of the public." To wit: On or about March 13, 1990, you did make abusive statements toward Mrs. Kim Smith, a general member of the public.

29: "Reporting to work under the influence of any intoxicant, alcohol, or illegal drug other than for medical reasons." To wit: On or about March 13, 1990, while on duty, you are alleged to have been under the influence of alcohol.

34: "Other actions that could harm or potentially harm the employee, a fellow employee(s) or a member of the general public." To wit: On or about March 13, 1990, you did cause a member of the public, Mrs. Kim Smith, to believe that physical harm would come to her by means of pointing a handgun directly at her while you were on duty.

35: "Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee." To wit: On or about March 13, 1990, while on duty, you are alleged to have

been under the influence of alcohol, impairing your ability to effectively function as a Parole Officer.

On July 3, 1990 the thirty-day suspension was grieved as being unjust and "based on unsubstantiated allegations." A third step response, dated December 7, 1990, denied the grievance and concurred with just cause for discipline for each of the alleged rule violations. This decision was affirmed at the fourth step.

ISSUE

The issue in the present case is whether the Agency had just and proper cause to suspend the aggrieved for thirty days, and, if not, to what remedy, if any, is the grievant entitled?

CONTRACT PROVISIONS

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

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.

ARTICLE 43 - WAGES

§43.09 Risk Supplement

A special supplement equal to five percent (5%) of the class base shall be awarded to those parole and

probation officers who are authorized to carry a firearm and who encounter added risk by being required to do one or more of the following:

A. Arrest or transportation of parolees, probationers, or furloughees;

B. Enter a designated risk zone for the purpose of supervision or conducting of investigations.

STATEMENT OF THE CASE

The grievant herein is a long-term employee of the Department of Rehabilitation and Correction having been employed by the Agency for eighteen years. At the times pertinent to this proceeding, the grievant held the job of Parole Officer III. Additionally, the grievant was authorized to carry a weapon, entitling him to Risk Supplement pay pursuant to the provisions of the Agreement between the parties. The evidence is devoid of any prior disciplinary action against the aggrieved in the course of his employment with the Agency.

Although there is some discrepancy as to when the incident giving rise to the discipline occurred, it is acknowledged that on the evening of either March 20 or March 13, 1990, the grievant engaged in surveillance in an effort to apprehend a parole violator. It is the conduct of the grievant in this endeavor that occasioned the decision to suspend him for thirty days.

Having received a taped message providing a telephone number where the parolee, T.C., could be found, the grievant followed through in his efforts to establish the whereabouts of T.C. The grievant testified that he was anxious to locate him because of his propensity for violence. Thus, provided with a "tip," the aggrieved did not wish to delay in processing the information.

The grievant was seeking a woman, I.S., a girlfriend with whom it was believed the parolee could be found.

The grievant testified as to his actions on the night in question which he maintains was March 20, 1990 (Union Exhibit #1) and not March 13, 1990 as alleged by the State. A summation of the testimony of the aggrieved follows. He positioned himself outside a dwelling at an address to which the parolee, while incarcerated, had sent mail. The intent of the grievant was to ascertain whether or not T.C. was inside the home. Listening to conversations for approximately two hours, the grievant concluded that the only occupants were two women. He then enlisted the assistance of B.B., a resident at the apartment complex, to make a call to the telephone number provided on the taped message. The aggrieved was attempting to correlate the telephone number he had been given with the address.

Unable to do so, the grievant knocked on the door, introduced himself to an occupant and stated his business. Neither of the two women present at that time matched the description of I.S. Approximately ten minutes thereafter, a third female, resembling I.S., arrived at the home. When the woman learned of the presence of the grievant who had concealed himself, she began to request identification from the grievant, rejecting his Parole Officer identification card as something "anyone can make up." In an effort to identify himself as the Parole Officer of T.C., the grievant removed his gun from his coat pocket. A demonstration of how the gun was displayed was provided by the grievant and each of the witnesses present at the time. The grievant

testified that during this demonstration, he made no threats, did not use profanity or point the gun at anyone. The grievant learned the woman was K.S., the daughter of I.S. Thereafter, the grievant left his business cards with the women and encouraged them to contact him with any information on T.C. Regarding the evening as a routine investigation, the aggrieved did not deem it necessary to write an incident report.

The State presented the testimony of L.S., the resident of the address at which the encounter occurred, and K.S., the daughter of the woman the grievant was seeking. Both women also presented taped and written statements to the Agency (Employer Exhibits #8, #9, #10, #11, #12) during its investigation of the matter. At the Arbitration hearing, L.S. testified that the aggrieved "pulled a gun on K.S.," asserted that the women were lying about T.C., and used profanity. This testimony essentially corroborated a written statement issued on April 4, 1990 (Employer Exhibit #12) and a transcribed interview of the same day (Employer Exhibit #11).

Thereafter, L.S. offered a different version of what had happened indicating, "I did not see no kind of weapon" (Union Exhibit #5), and asserting she had implicated the aggrieved in a fabricated story to pursue a potential lawsuit with K.S. At the Arbitration hearing, L.S. recanted Union Exhibit #5 and asserted she had made the statement hoping to secure the release from jail of her boyfriend.

The testimony of K.S. described her encounter with the aggrieved who insisted she was I.S. A significant element in her

testimony was that the grievant "pulled a gun," stating he "was tired of games," and that he used profane language. Also relevant to the charges against the grievant is the testimony of K.S. that the grievant "smelled of liquor," was staggering and unstable on his feet.

Several times after the incident, K.S. tried to reach John Walker, the Supervisor of the grievant, to relate the occurrence to him. She never reported it to the police; however. On March 29, 1990, K.S. gave a taped statement to Unit Supervisor, John Walker (Employer Exhibit #8). Thereafter, on April 4, 1990, Mr. Walker interviewed K.S. which interview was transcribed (Employer Exhibit #9).

On behalf of the Agency, the Unit Supervisor testified as to his handling of the complaint made by K.S. The investigation is written up by John Walker as an "unusual incident report" dated April 20, 1990 (Employer Exhibit #1). The Supervisor directed the grievant on March 30, 1990 to write an unusual incident report concerning his activities. In spite of an additional request for it, by April 17, 1990, the requested incident report had not yet been handed in. When his Supervisor inquired as to why the report had not been submitted, he was advised that although the grievant knew the report was due, it was "a little late" and the grievant did not intend to turn one in. At the hearing, the grievant asserted he did not believe the situation warranted an unusual incident report. However, the grievant did submit an unusual incident report dated April 17, 1990 (Employer Exhibit #3).

The Employer Bulletin #165 concerning unusual incident reports was submitted into evidence as Employer Exhibit #5. This document defines unusual incidents requiring reporting. Additional personnel bulletins submitted into evidence include Numbers 410 and 450 relating to the use of force and weapons authorization (Employer Exhibits #4 and #6), and Bulletin #170 referring to on-duty status of Parole Officers (Employer Exhibit #7).

The issue before the Arbitration is the propriety of the thirty-day suspension. Additionally, the Union alleges the withdrawal of the weapons authorization was an improper penalization of the grievant.

POSITION OF THE EMPLOYER

The Employer maintains that it had just and proper cause to suspend the grievant for thirty days. Although the penalty is severe, the clear and convincing evidence establishes conduct by the grievant injurious to the Agency and its public image. Accordingly, the assessed penalty was appropriate.

The Agency maintains that when he engaged in surveillance at the home of a citizen, the grievant over-stepped acceptable practices and violated standards of conduct. First, the surveillance occurred during non-work hours; accordingly, the grievant was required to secure permission for his investigation. This he failed to do. Second, his actions during the interview were inappropriate. He used profanity when speaking to the woman who lived there and to the daughter of the woman he was hoping to

find. Third, he drew out his revolver in a manner to cause fear without there being reason to do so. Fourth, he failed to immediately report the incident involving the gun in an usual incident report, and he delayed in doing so even after he had been directed to. Finally, the convincing evidence indicates that during this episode, the bizarre behavior of the grievant was caused by a state of intoxication.

It is the position of the Agency that the evidence submitted convincingly and clearly proves the wrongdoing of the grievant. The testimony of the two women present at the time is forthright and objective. Although in an effort to assist in the release of her boyfriend, one of the witnesses recanted her original statement, at the Arbitration hearing she affirmed the version she had initially given the Agency.

The Agency conducted a thorough and fair investigation into these allegations. The grievant was afforded the due process rights to which he is by contract entitled.

The decision to remove the grievant's weapons authorization was properly and reasonably done. It was not a disciplinary act subject to due process requirements. Rather, the decision to remove weapons authorization is exclusively a managerial prerogative. The grievant has no basis upon which to challenge the decision.

The Agency maintains that the severity of the conduct of the grievant could have resulted in an even more serious form of discipline. The seniority of the grievant, however, was considered and a lesser penalty imposed.

The grievance should be denied.

POSITION OF THE UNION

The Union maintains that the evidence is insufficient to maintain the burden of proving each of the rule infractions with which the grievant is charged. Moreover, the Union contends that the description of the evening in dispute by Agency witnesses is factually inaccurate.

The grievant asserts that he did not pull out his revolver and point it at anyone. Rather, he testified he drew out his revolver to identify himself as a Parole Officer since the identification card presented by the Agency had been rejected by the woman. He made no threats to anyone; nor did he use profanity.

The Union submitted taped interviews by which it established that the complaint made against the grievant was concocted. The purpose of the allegations was to lay the foundation for a lucrative lawsuit against the aggrieved.

Credibility is clearly at issue in this case. The Union submits that the eighteen years of unblemished service to the Agency ought not to be marred by the conflicting testimony of self-serving individuals whose reliability and trustworthiness is questionable and severely undermined. The Union has demonstrated the involvement of the witnesses with law enforcement agencies.

The Union argues, too, that it is incumbent upon the Agency to prove each of the allegations against the grievant. This it cannot do. Two of the rule infractions with which the grievant

is charged arise from alleged intoxication. It is the argument of the Union that there is no probative evidence the grievant was under the influence of alcohol. Indeed, another citizen confirmed the assertion of the grievant that he was not intoxicated at the time.

The Union maintains that the removal of the grievant's weapons authorization was an improper disciplinary act. The grievant cannot be unilaterally deprived of a negotiated term of employment.

The Union further suggests that the investigation conducted by the Agency was flawed and unduly restrictive. The employee representative was improperly impeded at the predisciplinary hearing. Also the investigation conducted by the Agency was not thorough or complete.

Finally, the Union asserts that the Agency has improperly grouped together various rule infractions in assessing a thirty day penalty. There is no evidence as to how the Employer determined the discipline. Nor is the penalty consistent with the negotiated standard of progressive discipline.

The grievance should be sustained.

DECISION

A thirty-day suspension is the subject matter of the pending arbitration proceeding. The grievance requires the Arbitrator, first, to resolve the factual disputes as to what occurred and, then, to determine whether the probative evidence warrants the disciplinary penalty assessed by the Employer.

Undisputed in this case is the long-term and unmarred personnel record of the aggrieved, employed as a Parole Officer with the Department of Rehabilitation and Correction for eighteen years. At the time of the incident giving rise to his suspension, the grievant had a weapons authorization by which he was entitled to a 5 percent Risk Supplement pay. Also uncontested is the fact that on a Tuesday evening in mid March 1990, the aggrieved engaged in the surveillance of a home at which he anticipated he might find a parole violator, and/or his female companion.

It is his conduct during the surveillance that is in controversy and precipitated the disciplinary penalty in question. The Employer asserts that the grievant violated several Agency rules justifying the decision to suspend him for thirty days. The specific standards of Employer conduct which the grievant is alleged to have transgressed are as follows:

6c: Insubordination: Failure to follow post orders, administrative regulations, and/or written policies or procedures.

10: Willfully making false, abusive, or obscene statements toward or concerning another employee, a supervisor, or a general member of the public.

29: Reporting to work under the influence of any intoxicant, alcohol, or illegal drug other than for medical reasons.

34: Other actions that could harm or potentially harm the employee, a fellow employee(s) or a member of the general public.

35: Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee.

Although the alleged infractions arise from the same nuclei of facts, the elements involved in the charges differ. Accordingly, the incident in question must be analyzed as it pertains to a particular offense, and a determination made as to whether or not the established facts support a specific charge made by the Employer.

A. RULE 6(c)

The first charge against the grievant is his "failure to follow . . . administrative regulations, and/or written policies and procedures." The Agency cites the display of his gun by the grievant as a deviation from accepted procedures. Additionally, the delay in filing an unusual incident report is used to substantiate the alleged violation of Rule 6(c).

In order to determine whether Rule 6(c) was violated, reference must be made to written policies and regulations concerning weapons. Bulletin 450 submitted into evidence by the Employer is the document in which weaponry is discussed. A review of Bulletin 450 establishes that, indeed, the grievant did not act in accord with the policies and regulations set forth therein. For example, Safety, Rule 6 on page 7 specifically directs that the firearm is to be kept in the holster while not actually in use. The grievant was carrying his weapon in his coat pocket. Additionally, Carrying a Firearm, Rule c.2. on page 8 states "Firearms must be concealed at all times except when drawn for the use of deadly force or training purposes . . . " The grievant acknowledges that he drew out his weapon. Although

there are differing explanations for why he did so, it was not displayed for either of the authorized purposes. Finally, in Bulletin 450, Incidents, Rule A mandates: "Any use of a weapon while on duty will be reported immediately per the requirements of Bulletin 410, Use of Force. Use of force regarding a firearm is defined as follows:

1. Drawing the firearm from its holster.

. . .

4. Any other type of display."

In the opinion of the Arbitrator, there is no question that when he drew his gun from his pocket, the grievant had violated several policies set forth in Bulletin 450.

The grievant does not deny that he drew his gun from a coat pocket and displayed it to the women present. It is also admitted that the gun was not in a holster and that a report regarding the display of the gun was not immediately prepared. A point in dispute, however, is the manner in which the gun was displayed and the reason therefor.

The Arbitrator concludes from the demonstrations at the hearing that the gun was held in the palm of the grievant's hand and not pointed directly at anyone as alleged by the Employer. The Arbitrator also finds, however, that the purpose of drawing his gun was not for identification purposes but was rather to remain in control of the situation. As stated by the grievant, when K.S. arrived, the "atmosphere had changed" and he did not know what to expect. The drawing of his gun was in response to his subjective concerns.

The Arbitrator finds that the factual disagreement as to how the gun was held does not significantly affect the determination as to a violation of Rule 6(c). The administrative directives in regard to the proper use of a weapon are specific and unqualified. The firearm "must" be concealed, and is to be kept in a holster. Any use of a weapon "will be reported immediately . . . " Although the grievant did, subsequently, file an unusual incident report, it was not done promptly and only after repeated requests for the same from his supervisor.

The conduct of the grievant in the use of his weapon and the failure to file a report clearly deviated from the administrative policies set forth in the Bulletins issued by the Agency. There is no contention the grievant was unaware of these regulatory bulletins. Indeed, as a long-term employee, the grievant was fully cognizant of the regulations pertaining to use of weapons. In the opinion of the Arbitrator, the Agency properly found the grievant in violation of Rule 6(c).

B. RULE 10

The next rule infraction arises from the use of profanity at the home of a citizen. The grievant denied making offensive and profane comments. Witness K.S. testified, however, as to the use of vulgar and offensive language in reference to parolee T.C. Her testimony was corroborated by that of witness L.S.

The Arbitrator finds that the evidence conclusively establishes a violation of Rule 10. The obscenity of the

aggrieved at a private home while acting on behalf of the Agency is a direct infringement of Employer Standards.

The consistent and forthright testimony of K.S., corroborated by that of L.S., persuades the Arbitrator that the grievant used foul language in the course of his encounter.

Intent is insignificant in assessing this rule infraction. It is the spoken words, and not the purpose of their utterance, that establishes a violation of Rule 10.

C. RULE 29

The Agency asserts that the grievant was inebriated at the time of the incident under consideration, in violation of Rule 29, a contention the grievant denies. To establish this particular offense, the Agency relies on the testimony of K.S. who related the grievant was "staggering" and "smelled of liquor."

The charge of performing work duties in an intoxicated state is a serious allegation. The Arbitrator finds that to sustain its burden on this charge, the Agency must present sufficient evidence to outweigh that submitted by the Union. In this case, the subjective observation of K.S. as to symptoms of intoxication are balanced by the assertion of the grievant that he had not been drinking. In the opinion of the Arbitrator, it is the sufficiency of the evidence that fails in this charge. No direct testimony from L.S. was presented by the Agency in regard to Rule 29. Thus, there is no corroboration of the observations of K.S.

While the evidence is sufficient to support suspicions of intoxication, it is well established that suspicion

is not a proper basis for disciplinary action. Indeed, the Notice of Disciplinary Action states that the Agency determined to find a rule violation based on the allegation the grievant was under the influence of alcohol.

The Arbitrator finds that the Agency used an improper standard in concluding the grievant had violated Rule 29. In the opinion of the Arbitrator, the Agency has failed to establish a violation of this rule.

D. RULE 34

Rule 34 prohibits conduct which could physically harm the public. The evidence that a loaded gun was drawn on the evening in dispute is sufficient to find that the grievant created a potentially dangerous situation. His action in this regard warrants a disciplinary penalty. An infringement of Rule 34 can be established irrespective of the intent or design of the grievant. To hold the grievant in violation of Rule 34, the Agency is not obligated to prove he intended to cause harm or to endanger anyone. It is his actions per se that constitute the rule violation.

E. RULE 35

Rule 35 prohibits conduct which could harm the operation of the Agency. To sustain its burden of proof in regard to the infraction of Rule 35, the Agency relies upon the allegation of intoxication. The position of the Agency is that the physical

condition of the grievant impaired his ability to perform as a Parole Officer on the evening in question.

As previously discussed, however, the Arbitrator has found the evidence of intoxication to be conjectural rather than conclusive. Accordingly, in the absence of probative evidence the grievant was under the influence of alcohol, the Arbitrator concludes there is insufficient grounds to find a violation of Rule 35.

F. THE EVIDENCE

Prior to discussing the propriety of the penalty assessed, the Arbitrator deems it appropriate to address the evidence presented and its probative value. Much conflicting testimony was presented in this case requiring a determination as to credibility and reliability.

An interesting "twist" in this case was that after having made a statement implicating the grievant with rule violations, a key witness recanted her story and issued a second statement. At the arbitration hearing, the witness returned to her original version.

The grievant attempted to verify the second version with taped statements, including a statement by the parolee. Additionally, the Union attempted to attack the credibility of the witnesses presented by the Agency.

The Arbitrator finds that the evidence presented at the hearing on behalf of the Agency was reliable, credible and trustworthy. To the extent Union Exhibit #5 is at variance even with

the testimony of the grievant, it is deemed of little probative value in this case. Also, the effort to impugn the veracity of witness K.S. was not persuasive. Finally, the taped statements submitted by the Union and not subjected to cross examination are not sufficient to overcome the weight of the testimony presented by the Agency.

G. THE PROPRIETY OF THE DISCIPLINE

It remains, now, to consider the propriety of the penalty imposed. This Arbitrator has taken the position that when a single penalty is assessed for multiple rule infractions which are distinctive and unrelated in substance, it must be assumed that each violation contributed to the discipline. In the case at hand, the Arbitrator has found that while the evidence sustains the conclusion Rules 6(c), 10 and 34 were violated by the aggrieved, the Agency failed to sustain its burden in establishing violations of Rule 29 and Rule 35.

Accordingly, the Arbitrator is of the opinion that some mitigation of the penalty must occur. As the Agency failed to produce probative evidence of intoxication, a lesser penalty is in order. Nonetheless, a suspension of substantial length is justified given the severity of the proven offenses. The misuse of the gun and the failure to properly report its use are very consequential and cannot be minimized. Moreover, the vulgar language used by the aggrieved was unprofessional and inexcusable.

The Agency determined, given the severity of the situation involving members of the citizenry, it ought not to be limited to a written reprimand, the first step in the progressive discipline structure. The Arbitrator will not modify this judgment. The situation was serious and it does warrant a penalty more severe than a written reprimand. However, a thirty-day suspension given the failure to prove two of the allegations against the aggrieved is excessive.

Accordingly, the penalty is reduced to a fifteen (15) day suspension. The Agency is to make the aggrieved whole for the additional fifteen day penalty served by the aggrieved, and is to remove references to intoxication in the personnel record of the grievant.

H. RISK SUPPLEMENT PAY

The Union contends that as the removal of authorization to carry a weapon constituted discipline, it required compliance with just cause standards. Furthermore, the Union maintains the decision is a unilateral modification of a condition of employment. Therefore, the request of the Union is to have the revocation of the grievant's weapons authorization reversed.

The Arbitrator finds, first, that the decision to remove the grievant's authorization was not a unilateral modification of a condition of employment. Pursuant to Article 43, Section 43.09, the parties have agreed upon a 5 percent supplement "to those parole and probation officers who are authorized to carry a firearm" While the additional pay is a contractual right

which cannot be removed, the authorization to carry a weapon is not. Rather, weapons authorization is a managerial prerogative which is limited only to the extent its exercise must not be arbitrary or capricious.

Bulletin 450 sets forth the guidelines by which firearms authorization is granted or terminated. This bulletin clearly informs employees that authorization may be cancelled "for inappropriate use of force." As "use of force" includes "any type of display," the grievant ought to have known that he jeopardized his authorization when he improperly drew out his weapon.

In the opinion of the Arbitrator, the weapon authorization removal was not disciplinary. It was carried out pursuant to a retained managerial prerogative. In this instance the administrative privilege was reasonably and appropriately exercised.

I. DUE PROCESS


The Union alleged that due process rights were denied to the grievant in the investigation of this matter. The Arbitrator finds on the contrary, that the contractual requirements were complied with in this case. No evidence of a violation of such a right was elicited by the Union. Nor was a specific procedural requirement set forth in the contract cited by the Union.

On the other hand, the evidence establishes that the Agency endeavored to thoroughly and completely investigate this matter. The investigation included efforts to solicit information on behalf of the grievant. There can be no contention the grievant


was not afforded an opportunity to present his version of what occurred.

AWARD

The grievance is sustained only to the extent the suspension is reduced to a fifteen day suspension. The grievant is to be made whole for his lost earnings for the excessive fifteen days, and all references to intoxication are to be withdrawn from the file of the grievant. In other respects, the grievance is denied.


Margaret Nancy Johnson
Arbitrator

Dated and made effective this 17th day of October, 1991, in
Columbus, Franklin County, Ohio.


Margaret Nancy Johnson
Arbitrator

SECRET

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