

ARBITRATION DECISION

June 19, 1993

In the Matter of:

Ohio Civil Service Employees)	
Association, AFSCME Local 11)	Case No.
)	27-08-(6/5/92)-119-01-03
and)	Rosemary Richendollar,
State of Ohio, Department of)	Grievant
Rehabilitation & Correction,)	
Franklin Pre-Release Center)	

APPEARANCES

For the Union:

Brenda Goheen, OCSEA Advocate
Rosemary Richendollar, Grievant
Arthur Gooden, Jr., Steward

For the State:

Rodney Sampson, Advocate, Office of Collective Bargaining
Barbara Brown Nichols, Warden
Teri Decker, 2nd Chair, Office of Collective Bargaining
Pauline M. Boyer, Personnel Officer 3
Linda C. Coral, Assistant to the Warden
Mary Arnett, Lieutenant
Charles Sellars, Safety & Health Officer and Food Manager
Wilfred Gilliland, Administrative Assistant to the Warden
Pamela L. Means, Maintenance Repair Worker 3

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Rosemary Richendollar, was hired by the Department of Rehabilitation and Corrections on July 17, 1989. At the time of her removal the grievant was working at the Franklin Pre-Release Center. It has 430 beds for minimum and light security female prisoners. It also houses all pregnant prisoners in the state regardless of their security level.

The events leading to the grievant's removal began on February 5, 1992. On that day the grievant was injured while practicing handcuffing techniques during unarmed self-defense training. She complained of pain in her neck and left shoulder. The grievant was sent to the nurse who put her left arm in a sling and instructed her to go to the emergency room or her own doctor.

Lieutenant Mary Arnett took the grievant to the emergency room at the Ohio State University Hospital at 4:20 P.M. The doctor advised her to keep her arm in a sling for 48 hours, to use ice or heat for pain and swelling, and to begin range of motion exercises after 48 hours. He or she told the grievant to see her own doctor if she did not improve.

At the emergency room the grievant indicated that she was in a hurry because a male friend was picking her up at 9:30 P.M. for their regular bowling engagement. When Christine Mooney, the warden, learned that the grievant planned to go bowling that evening, she assigned Tom Lee, the

operations assistant, and Charles Sellars, the food manager and safety and health officer, to go to the bowling alley to observe. Sellars testified that he arrived at the bowling alley at 12:30 A.M. and watched the grievant bowl four or five frames. He stated that the grievant said to him and Lee "you didn't see me here -- right" which he interpreted to mean that the grievant felt that she should not be there. Lee's written statement confirms Sellar's testimony.

The grievant visited her own doctor -- Lea Aharony -- on February 10, 1992. She found that the grievant sustained an injury to her neck, upper back, and left shoulder. Dr. Aharony indicated that she should remain off work and be treated by a physical therapist. She prescribed Naprosyn and Flexerel.

While the grievant remained off work, she was observed bowling on two more occasions. Lee reported that at 12:10 A.M. on February 13, 1992 he observed the grievant bowl seven frames and noted that the grievant did not appear to have any problems using either arm, hand, or shoulder. On February 21, 1992 Wilfred Gilliland, an administrative assistant to the warden at the Pickaway Correctional Institution, watched the grievant bowl steadily from 1:05 A.M. to 2:45 A.M. without any problems.

On February 21, 1992 Linda Coval, the assistant to the warden, conducted an investigative interview of the grievant. Coval testified that she started the interview by telling the grievant that she must be honest and thorough in answering

questions and that if she was not, she would be subject to discipline. The grievant stated that she had been a "couch potato." When she was asked about bowling, she initially indicated that she watched her friend bowl and later revealed that she probably bowled one game herself.

Coval forwarded a report to Mooney on February 25, 1992. The report reviewed the background to the case and the reports of Lee, Sellars and Gilliland. It accused the grievant of lying during the investigatory interview, failing to follow the doctor's advice, and engaging in deceptive behavior regarding the extent of her injury and her disability claim. Coval recommended that the grievant be examined by a doctor selected by the state.

The grievant was examined by Dr. James Powers from the Department of Physical Medicine at Grant Hospital. His report dated March 3, 1992 indicates that the grievant suffered some muscle strain; that the self-defense class could have caused the injury; and that she should be able to return to work on March 23, 1992.

Upon receipt of the report Coval submitted a number of specific questions to Dr. Powers. The state quotes from his responses as follows:

1. "it is possible that she [the grievant] might have, over a period of time, developed some deconditioning or weakness in the shoulder and with the stress of activities through the day, progressively got into trouble."
2. "I suppose that it is possible that this was not work related but I really do not see any way that we could prove that and from everything that I can get from her and reviewing the data sent me, it

would seem that the activities of February 5, 1992 led to her present symptoms."

3. "the patient specifically told me that she was not bowling and could not bowl because of her injury. Certainly, the bowling primarily uses your dominant hand and I would agree that early on after an injury, it is not wise to over stress the arm and, in fact, that could aggravate the problem."
4. "I really cannot condone bowling in someone with an acute injury like this. Her problems involve not only the arm but extends into the muscles that go up the shoulder and so that bending forward or holding a bowling ball in the other arm would still stress the shoulder muscles and I would say that bowling is an activity which would aggravate her injury and perpetuate the time off."
5. "If in fact she was bowling, then her present level of discomfort and disability is, in my opinion, at least partially related to all activities and in fact if she was bowling, that is a partial reason for her present disability."
(Joint Exhibit 13, page 6)

Coval reported to Mooney on March 16, 1992. She stated that the grievant was dishonest in telling Dr. Powers she had not bowled; that it was possible that she lied about her medical history; and that she may have aggravated her injury by bowling resulting in more time off work. She found the grievant in violation of rules #1 and #26 of the Standards of Employee Conduct. Rule #1 states:

- #1. Any violation of ORC 123.34 - ...and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, nonfeasance in office.
- #26. Interfering with or failing to cooperate in an official investigation or inquiry.

On the basis of Coval's report the state proceeded with discipline. A pre-disciplinary hearing was held on April 8, 1992 and the grievant was removed on May 6, 1992 for the violations of Rules #1 and #26. A grievance was filed June 1, 1992 charging that the state had violated sections 2.01, 2.02, 24.02, and 24.05 of the collective bargaining agreement. It asked that the grievant be reinstated with full back pay.

The step three grievance hearing was held on September 3, 1992. The response is dated February 22, 1993. It states that there was just cause for the grievant's removal; that the penalty was commensurate with the offense; and that there was no violation of the collective bargaining agreement.

The union appealed the case to arbitration on February 25, 1993. The hearing took place on April 19, 1993 and the record was closed at the conclusion of the hearing.

ISSUE

The issue as agreed to by the parties is as follows:

Was the grievant removed for just cause? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 -- NON-DISCRIMINATION

2.01 -- Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83--64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation.

2.02 -- Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

ARTICLE 24 -- DISCIPLINE

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

24.05 -- Imposition of Discipline

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

STATE POSITION

The state argues that the grievant violated rules #1 and #26 of the Standards of Employee Conduct. It points out that rule #1, which refers to Section 123.34 of the Ohio Revised Code, includes dishonesty as an offense. The state notes that rule #26 indicates that failing to cooperate in an official investigation violates the code. It indicates that

the penalty for a first offense under either rule ranges from a written reprimand to removal.

The state charges that the grievant lied at the investigatory interview. It claims that after the grievant was told to be honest and thorough, she reported that she had been a "couch potato" since she was injured. The state indicates that when she was asked about bowling, she stated three times that she had only watched others bowl. It stresses that after she was reminded to be honest and thorough or she might be subject to discipline, she claimed that she might have thrown a ball a few times and ultimately stated that it was possible that she bowled one game.

The states contends that the grievant also lied to Dr. Powers. It points out that his report states that the grievant specifically told him that she did not bowl and could not because of her injury. The state maintains that it is possible that the grievant also lied to him about her medical history.

The state asserts that the grievant tried to enlist others in covering up the fact that she was bowling. It notes that Lee and Sellars reported that when they spoke to the grievant at the bowling alley on February 6, 1992, she said "you didn't see me tonight, okay?" The state emphasizes that Sellars testified that he thought that this meant that the grievant knew she should not have been there.

The state accuses the grievant of failing to follow medical advice. It points out that the emergency room doctor

told the grievant to use a sling for 48 hours and not to engage in any physical activity but the grievant did not use the sling and went bowling that same night. The state notes that Dr. Powers reported that if the grievant bowled, her disability on March 3, 1992 was due at least in part to bowling. It stresses that either the grievant's injury was not so severe as to require her to miss work or she aggravated her condition by her negligent behavior.

The state indicates that the grievant has been disciplined in the past. It maintains that on July 23, 1991 the grievant received a written reprimand for violating rule #9 -- failure to carry out a work assignment or the exercise of poor judgement in carrying out an assignment -- and rule #26 -- failing to cooperate in an official investigation. The state indicates that on September 25, 1991 the grievant received a written reprimand for the violation of Rule #13 -- making a false or abusive statement toward a supervisor and employee. It states that on September 29, 1991 the grievant received another written reprimand for violation of rule #8 -- failure to follow posted orders. The state reports that none of this discipline was grieved.

The state observes that the grievant's disability claim was denied on March 16, 1992. It maintains that the claim was denied by the Department of Administrative Services for three reasons. First, the department states that the medical evidence received did not show how the grievant's condition allowed her to bowl but prevented her from working. Second,

it indicates that it disqualified the grievant for failing to comply with the doctor's order to keep her arm in a sling. Third, the department accused the grievant of fraud or misrepresentation by submitting a report dated February 17, 1992 from Dr. Aharony prohibiting any activity requiring unrestricted performance after having bowled on February 20, 1992 from 1:05 A.M. to 2:45 A.M.

The state rejects the union's contention that the investigatory interview was improper because the grievant was not informed of the charges against her prior to the meeting. It maintains that the purpose of an investigatory interview is to collect the facts to see if charges are warranted. The state notes that this is in contrast to a pre-disciplinary meeting where the contract requires that the employee be informed of the charges prior to the meeting.

The state points out that Barbara Brown Nichols, who was warden at the time of the grievant's removal, testified that the grievant's removal was justified. It notes that she stated that the grievant was bowling when she claimed that she could not work because of an injury; that the grievant lied in an investigatory interview and at the workers' compensation hearing; and that the grievant's past discipline for lying has not corrected her behavior. The state observes that Nichols asserted that if the grievant had come forward and said that she was wrong, her decision might have been different.

The state argues that the Arbitrator should not reduce

the penalty. It contends that the fact that the grievant expected a suspension should not determine the penalty. The state further claims that the grievant's admissions in the face of overwhelming evidence does not call for the reduction of the penalty.

The state asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that the grievant's alleged violation of rule #1 of the Standards of Employee Conduct is not an issue because there was no fraudulent medical claim submitted by the grievant. It points out that the state's doctor examined the grievant and indicated that she had an injury. The union notes that the Industrial Commission awarded the grievant compensation. It stresses that the Industrial Commission is the proper forum for deciding medical claims and that the Arbitrator should not substitute his judgment for that of the commission.

The union acknowledges that the grievant used bad judgment in bowling after her injury. It states that although she was able to bowl with her right arm, she was unable to return to work because due to the nature of her job the doctor required that she be 100% fit. The union claims that the grievant quit bowling when she learned that she would be off work for a period of time. It notes that the grievant testified that she lied because she was afraid that she would lose her benefits if she admitted bowling.

The union contends that there was no reason for the grievant to appeal the denial of disability benefits. It states that disability benefits are only a loan which must be paid back when an employee gets workers' compensation. The union maintains that when the Industrial Commission granted the grievant's claim, it was pointless to contest the denial of disability benefits.

The union argues that the only issue for the Arbitrator is the charge that the grievant hindered an investigation in violation of rule #26. It points out that in the investigatory interview the grievant ultimately did admit that she had bowled. The union further notes that at the pre-disciplinary hearing the grievant acknowledged that she had bowled.

The union charges that the investigatory interview was not of the highest caliber. It maintains that Coval failed to inform the grievant of the exact allegations against her. The union contends that this is like leaving the keys in a car to tempt theft. It further asserts that knowing the charges in advance is part of an employee's Weingarten rights.

The union maintains that the grievant's prior discipline does not justify the grievant's removal. It states that the September 23, 1991 written warning was not for lying but for failing to follow post orders or written procedures. The union claims that the September 25, 1991 written warning is for abusive language rather than for giving a false

statement.

The union charges that the state failed to use progressive discipline. It maintains that the goal of discipline is to correct behavior. The union stresses that in the instant case the state went from a written warning to removal skipping the intervening forms of discipline under Section 24.02 of the collective bargaining agreement.

The union asks the Arbitrator to reinstate the grievant with full back pay minus any earnings received. It acknowledges that at step three of the grievance procedure it asked that the grievant be reinstated without back pay but points out that the grievant had received workers' compensation benefits. The union stresses that the state carried on the liability for back pay when the grievant's workers' compensation benefits were exhausted.

ANALYSIS

The basic facts in the instant case are not in dispute. On February 5, 1992 the grievant hurt her neck and left shoulder in a self-defense class. She visited the emergency room at the Ohio State University Hospital at approximately 4:30 P.M. where she was instructed to keep her left arm in a sling for 48 hours and to use ice and heat as appropriate. Instead of following the doctor's instructions the grievant went bowling. Although the grievant bowls with her right arm, it would appear that bowling might cause some strain to the left shoulder and/or neck and in any event the grievant failed to use the sling for her left arm.

On February 10, 1992 the grievant visited her own doctor -- Lea Aharony. She diagnosed the grievant as having an injury of her neck, upper back, and left shoulder. She prescribed two medications and physical therapy and estimated that the grievant could return to work on March 1, 1992. Despite the diagnosis and treatment the grievant bowled on February 13, 1992 and February 20, 1992. On the later occasion the grievant bowled steadily from 1:05 AM to 2:45 A.M.

When the warden received reports regarding the grievant's bowling, an investigatory interview was conducted by Coval on February 21, 1992. Despite Coval's warning to the grievant that she must be honest and thorough, the grievant lied. At first she denied bowling at all claiming that she watched others bowl. Later she stated that she picked up a ball and tried bowling but was unable to do it. Ultimately, she claimed that she probably bowled one game. On May 6, 1992 the grievant was removed. The removal notice states that the action was taken for the violation of rule #1 which bars dishonesty and rule #26 which requires employees to cooperate in an official investigation.

The Arbitrator does not believe that the removal was justified. First, he believes that when the removal took place on May 6, 1992, part of the reason was the suspicion or belief that the grievant was engaged in fraud. This is reflected in the removal notice which states that "you claimed you were disabled when, in fact, you were observed

bowling." This allegation, however, appears to be contrary to the indications of the emergency room doctor, Dr. Aharony, and Dr. Powers that the grievant did suffer an injury and since she had to be 100% fit to return to work, she was not able to work. Furthermore, the judgment of the hearing officers for the Industrial Commission was that the grievant was entitled to workers' compensation benefits so that any allegation of fraud is no longer a part of the case.

Second, the Arbitrator feels that in the instant case it would be inappropriate to go from a written reprimand to removal. He recognizes that rules #1 and #26 provide for a written reprimand to removal for the first offense. However, the grievant's dishonesty and failure to cooperate in an investigatory interview are not the sort of offenses that justify immediate removal. It did not involve fraud with respect to workers' compensation and had nothing to do with prisoners or the conduct of other employees.

Third, the grievant's three prior written warnings are not sufficient to justify the removal. The prior offenses involve very different circumstances than the instant case. In fact, only one involves a violation of either rule #1 or rule #26.

The remaining issue is the proper remedy. The Arbitrator does not believe that the grievant is entitled to back pay. First, the grievant's lying during an official investigation is a serious matter especially in a corrections setting. As indicated above, if the grievant's dishonesty

involved different circumstances, her removal very well could have been upheld. It is only the particular facts of the case that save the grievant from removal.

Second, if the grievant had not lied during the investigatory interview, she may not have been removed. Had she admitted bowling, her ability to bowl and not work could have been considered by a doctor and the dispute speedily resolved. The grievant's dishonesty prevented the issue from being resolved and resulted in potential back pay liabilities.

Third, the Arbitrator is convinced that the grievant's bowling well could have aggravated her injury and delayed her return to work. This is indicated by Dr. Powers. He stated:

I really cannot condone bowling in someone with an injury like this. Her problems involve not only the arm but extends into the muscles that go up to the shoulder and so that bending forward or holding a bowling ball in the other arm would still stress the shoulder muscles and I would say that bowling is an activity which would aggravate her injury and perpetuate the time off. (Joint Exhibit 13, page 6).

Where the grievant's conduct very well may have contributed to her being off work, it would be inappropriate to grant back pay.

Finally, the grievant has not gone without any income. She received workers' compensation benefits for part of the time she was off work. In January, 1993 she obtained other employment.

Based upon the above analysis the Arbitrator will order the state to reinstate the grievant with no loss in seniority but without back pay.

AWARD

The grievant is to be reinstated with no loss in seniority but without back pay.

A handwritten signature in cursive script, appearing to read "Neils E. Nelson", written in black ink.

Neils E. Nelson
Arbitrator

June 19, 1993
Russell Township
Geauga County, Ohio