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STATE OF OHIO
LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION BETWEEN:

State of Ohio, Office of Collective Bargaining and the Department of Rehabilitation and Correction,

Employer,

-and-

OPINION AND AWARD

District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO,

Union.

Case No. 27-26-11-23-92-355-02

Appearances: For the Employer -- Joseph B. Shaver
For the Union -- Charles Lester

ONE-DAY SUSPENSION OF ROBERT LUKEN

ISSUE

The parties stipulated to the issue at the hearing. It is as follows:

Was the Grievant given a one-day suspension for just cause?

If not, what should the remedy be?

The issue arose out of a grievance filed by Mr. Robert Luken on November 17, 1992. (Joint No. 2)

It reads as follows:

Statement of Grievance. Grievant was improperly given a one day suspension for violation of dress and grooming standards. Such standards were issued in violation of collective bargaining laws. Therefore any discipline is without just cause.

Contract Article(s) and Section(s). Including, but not limited to Article 1, Article 5, Article 6, and Article 8.01.

Resolution Requested. The grievant shall be made whole in every way, including, but not limited to the following:

1) All records of discipline in this matter will be held for naught, and removed from grievant's records.

2) The Department of Rehabilitation and Correction will cease from any and all attempts to enforce an improperly issued standard.

3) Grievant will receive pay for November 10, 1992.

This grievance is individual to Mr. Luken. However, it is also a class action grievance. It is a blanket challenge to the Employer's dress and grooming standards. (Joint Exhibit No. 5)

The grievance alleges violations of ARTICLE 1 - PURPOSE AND INTENT OF THE AGREEMENT, ARTICLE 5 - MANAGEMENT RIGHTS, ARTICLE 6 - NON-DISCRIMINATION and ARTICLE 8 - DISCIPLINE, Section 8.01 Standard. Those contractual provisions read as follows:

ARTICLE 1 - PURPOSE AND INTENT OF THE AGREEMENT

It is the purpose of this Agreement to provide for the wages, hours and terms and conditions of employment of the employees covered by this Agreement; and to provide an orderly, prompt, peaceful and equitable procedure for the resolution of differences between employees and the Employer. Upon ratification, the provisions of this Agreement shall automatically modify or supersede: (1) conflicting rules, regulations and interpretive letters of the Department of Administrative Services pertaining to wages, hours and

conditions of employment; and (2) conflicting rules, regulations, practices, policies and agreements of or within departments/ agencies pertaining to terms and conditions of employment; and (3) conflicting sections of the Ohio Revised Code except those incorporated in Chapter 4117 or referred to therein. All references to the Ohio Revised Code within this Agreement are to those sections in effect at the time of the ratification of this Agreement.

This Agreement may be amended only by written agreement between the Employer and the Union. No verbal statement shall supersede any provisions of this Agreement.

Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement and which are not specifically provided for or abridged by this Agreement, will continue in effect under conditions upon which they had previously been granted throughout the life of this Agreement unless altered by mutual consent of the Employer and the Union.

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08(C)(1)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this Agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

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 orientation, 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. In addition, the Employer shall comply with all the requirements of the federal Americans with Disabilities Act and the regulations promulgated under that Act.

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

Section 8.01 Standard

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

There is another section of this collective bargaining agreement that is directly involved in the case at bar. It involves Agency Professional Committees. It reads as follows:

31.02 Agency Professional Committees

There shall be an Agency Professional Committee at each agency which has fifteen (15) or more bargaining unit members. There shall be regional professional committees within the Adult Parole Authority.

The Committees shall address any agency-wide issue they deem appropriate, including but not limited to: client care, staffing levels, health and safety issues, professional development, evaluations and inservice education.

The agency shall inform the Union thirty (30) days prior, where possible, of any additions to or changes in work rules which are applicable to employees in these bargaining units.

Work rules may be discussed at the initiative of either party in the Professional Committee meetings. The Union may make such comments as it feels necessary to the issuing authority about the proposed rules.

STATEMENT OF THE CASE

The determination of the issue involves, inter alia, a recognition of certain facts as they existed in 1992. The pertinent facts appear to be as follows:

1. The Department of Rehabilitation and Correction (hereinafter sometimes referred to as "DRC" or the "Department") has about 9000 employees in 24 institutions within the State of Ohio. It is a para-military organization.

2. The Department has some unionized and some non-unionized employees. It has four bargaining units. Therefore, it has four collective bargaining agreements with four different unions.

3. District 1199 represents some non-uniformed personnel in one bargaining unit. The employees include parole officers, psychology assistants, etc. The guards and possibly some other uniformed personnel are represented by OCSEA/AFSCME.

4. The DRC did not have a standard practice concerning uniforms in 1990. Therefore, a committee was appointed to study this situation. It would ultimately offer a recommendation on this subject. (Employer Exhibit No. 1)

5. The committee did eventually write a draft of a proposed policy on grooming standards and dress. This draft was sent to all four unions. It was sent to District 1199 on August 9, 1991. The Employer sought input from all unions. (Employer Exhibit No. 2)

6. There was an agency professional committee meeting on September 11, 1991. The Union was upset about the proposed dress code and the Department's attempt to promulgate a new work rule. It believed that DRC could not tell the employees how to dress or cut their hair unless a safety security hazard existed. (Employer Exhibit No. 3) The Union refused to offer any input into this policy.

7. The Employer did issue an Employee Grooming Policy on April 6, 1992. (Joint Exhibit No. 5) It was to be effective on and after June 1, 1992.

8. A portion of that policy concerned hair and non-uniformed personnel. It provides that male employees may not have hair that extends below the bottom of the collar in the back and not cover the entire ear on the sides. (Joint Exhibit No. 5)

9. Mr. Robert Luken is a Psychology Assistant II. He works at the Warren Correctional Institution. He signed for and received a copy of the Employee Grooming Policy on May 28, 1992. He had long hair. It was not in compliance with the new policy. He is also a Union official. He signed the 1989-1992 collective bargaining agreement and the 1992-1994 collective bargaining agreement.

10. Mr. Luken decided to challenge this policy. He refused to have his hair cut in a manner that would comply with the new policy. Consequently, he was involved in corrective counseling on June 22, 1992. He was issued an oral reprimand on August 27, 1992. He was issued a written reprimand on September 21, 1992. He was issued a one-day suspension. It was to be effective on November 10, 1992. (Joint Exhibit No. 3) It is this one-day suspension that is now in arbitration.

UNION POSITION

The Union believes that the dress and grooming code is violative of state law and the collective bargaining agreement. It is unreasonable. There isn't any safety security hazard. Therefore, it is unenforceable. The attempt to discipline an employee for violation of this unenforceable policy does not meet the just cause standard set out in the collective bargaining agreement.

EMPLOYER POSITION

The Employer believes that it has a right to issue an employee grooming standard and dress code. It did so. It formed a committee to study the subject. It sought input from the affected unions. It held an agency professional committee meeting. It redrafted parts of the policy as new information was brought to its attention. It drafted some differences in the policy for uniformed and non-uniformed personnel. The policy that it eventually issued was reasonable. It was not violative of the collective bargaining agreement.

Mr. Luken chose to violate the policy. He was properly disciplined. He had corrective counseling. He had an oral reprimand. He had a written reprimand. He had a one-day suspension. This suspension was lenient. It was in accord with the progressive discipline policy and meets the just cause standard in the collective bargaining agreement.

DISCUSSION

The first item to be considered is the Union claim that the promulgation of the Employee Grooming Policy violates a state law, i.e., O.R.C. 4117.08(A). This statute reads as follows:

> All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

There isn't any doubt that the Department has a statutory obligation to engage in collective bargaining with District 1199 before it could institute this grooming policy. The statute is quite clear on this point.

The record evidence is also quite clear that the Department did bargain with the Union prior to the institution of the policy. It appointed a committee to study this issue in 1990. There were several drafts. Then, the latest draft was sent to District 1199, plus the other affected unions, on August 9, 1991. The DRC sought input from all of the affected labor organizations. One of the affected unions did request a meeting. The parties bargained in good faith. The policy was changed in some areas. These negotiations would appear to be in accord with the requirements specified in O.R.C. 4117.08(A). The statute requires collective bargaining. It does not require that the parties reach an agreement or that the agreement be reduced to writing and signed by the parties.

District 1199 chose not to negotiate with the Employer. It refused to have any input into the drafting of the policy. It did attend an agency professional committee meeting on September 11, 1991. However, it again refused to offer any input into the drafting of the policy. If these weren't any good faith negotiations on the grooming issue, it was because the Union chose not to negotiate on this issue.

The Employer did issue an Employee Grooming Policy on April 6, 1992. It was to be effective on June 1, 1992. This action did comply with the 30-day requirement for work rule changes set out in Section 31.02 of the collective bargaining agreement.

The Union advised the Department of its belief that the dress code was violative of the Constitution, state law, federal law and the collective bargaining agreement. It also threatened to file a grievance. At the hearing, District 1199 indicated that it would not make any arguments concerning the Constitution and/or federal law. It would advance

arguments concerning a state law, specifically, O.R.C. 4117.08(A), and some sections of the collective bargaining agreement.

Mr. Luken did file a grievance. The Union challenged the dress code (specifically the hair length policy) by this means. It did participate in the grievance - arbitration procedure set out in the collective bargaining agreement. Consequently, there were good faith negotiations during this procedure even though the parties did not reach agreement on the issue.

The basic rule is that: when the parties are engaging in the grievance - arbitration process, they are engaging in collective bargaining. There isn't any allegation that either party did not process this grievance in good faith. Therefore, there was collective bargaining by the parties during the grievance - arbitration process. The grooming policy was subject to collective bargaining and the parties did bargain over this policy through the grievance - arbitration procedure. See General Motors Corp. v. Mendicki, 367 F.2d 66 (CA 10, 1966), 63 LRRM 2257; Community Motor Bus Co., 180 NLRB No. 105, 73 LRRM 1223 (1970); Arkansas Rice Growers Coop. Assn., 171 NLRB No. 14, 68 LRRM 1453 (1968); M.F.A. Milling Co., 170 NLRB No. 111, 68 LRRM 1077 (1968); Hackney Iron & Steel Co., 167 NLRB No. 84, 66 LRRM 1139 (1967); and Long Island Drug Co., 5 LRRM 627 (1939).

The Union claims that this grooming policy violates ARTICLE 1 - PURPOSE AND INTENT OF THE AGREEMENT. It never pointed out with specificity any language in this article that was allegedly violated by the Department. There does not appear to be any such language. It did not proffer any evidence on this point. The conclusion is obvious. The DRC did not violate ARTICLE 1 of the collective bargaining agreement in the case at bar.

Secondly, District 1199 claims that this grooming policy violates ARTICLE 5 - MANAGEMENT RIGHTS. It never pointed out with specificity any provision in this article that was allegedly violated by the Department. There does not appear to be any such provision. It did not proffer any evidence on this point. The conclusion is obvious. The DRC did not violate ARTICLE 5 of the collective bargaining agreement in the case at bar.

Thirdly, the Union claims that this grooming policy violates ARTICLE 6 - NON-DISCRIMINATION. It never pointed out with specificity any language in this article that was allegedly violated by the Department. There does not appear to be any such language. It did not proffer any evidence on this point. The Employer did proffer some evidence. It introduced an arbitral award upholding this grooming policy. (Employer Exhibit No. 10) The OCSEA/AFSCME challenge to the policy was based, in part, upon a claim of discrimination. The arbitrator was Nels E. Nelson. He discussed the possibilities that the policy may violate contractual prohibitions against discrimination based upon sex, race,

creed, religion or national origin. He rejected all union arguments on this point. This arbitrator is in accord with Mr. Nelson on these issues concerning alleged discrimination. The conclusion is again obvious. The DRC did not violate ARTICLE 6 of the collective bargaining agreement in the case at bar.

Lastly, District 1199 claims that this grooming policy, and its disciplinary application to the Grievant, violates ARTICLE 8 - DISCIPLINE. It alleges that the policy is unreasonable and, therefore, the one-day disciplinary suspension was not for just cause. This claim is based, in part, upon the fact that the Grievant spends most of his time inside the Warren Correctional Institution. He is working with inmates. He does not normally meet the public .

The Union premise is an oversimplification of the facts. Mr. Luken does meet the public. He speaks at schools and various other community activities. He attends seminars. The WCI has an employee assistance program and he is the EAP representative. These various functions do require that he meet the public. Also, this policy applies to parole officers. They are constantly meeting with the families of the inmates, and other people, in their daily duties. The DRC does have a legitimate interest in the appearance of its employees.

Is the grooming policy reasonable? It is clear that the policy has to be reasonable. The mere fact that the DRC does not violate the labor contract by promulgating a grooming policy does not automatically lead to the conclusion that the DRC can promulgate any policy. The grooming code still has to be reasonable. The employee grooming policy promulgated in the case at bar is reasonable. There is nothing unreasonable or offensive in this policy, specifically, V.B.2.b., which concerns the issue of the hair of male employees. The aforementioned arbitral award by Mr. Nelson held this policy to be reasonable. Furthermore, this policy is in accord with similar policies in Florida, Michigan and California. (Employer Exhibits Nos. 7, 8 & 9) There is also some arbitral case law in accord with this conclusion. American Buslines, Inc., 64 LA 471 (1975); Continental Southern Lines, Inc., 63 LA 467 (undated); and Missouri Pacific Railroad Co., 62 LA 357 (1974).

There is a tangential issue. Mr. Luken stated that he may file an unfair labor practice charge against the Employer with the State Employment Relations Board concerning one or more of the issues involved in this case. He has that right. This arbitrator did not take any evidence concerning any potential unfair labor practice charge. The evidence that was adduced at the hearing was proffered solely for consideration in determining the grievance that was filed on November 17, 1992. This opinion and award should not be construed in any way to be a ruling on the merits, or lack of merits, of any potential unfair labor practice charge. The tangential item was not considered. It is not a part of this opinion and award.

The conclusion concerning the grievance is clear. The Employer did not violate any contractual provision when it promulgated its Employee Grooming Policy on or about April 6, 1993. Mr. Luken chose to violate this policy and, eventually, received a one-day disciplinary suspension. This disciplinary action was not for unjust cause. Therefore, this arbitrator issues the following award.

AWARD

The grievance is denied.

Signed, dated and mailed this 6th day of August, 1993.

Richard E. Gombert

Richard E. Gombert, Arbitrator