1097

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between:	*	
	*	Case No 25-12-940705-0006-01-04
	*	Arbitrator's File No. O:95-10-24
THE STATE OF OHIO	*	
Department of Natural Resources	*	
Deer Creek Park	*	
	*	Hearing Closed:
-and-	*	October 24, 1995
	*	
OHIO CIVIL SERVICE EMPLOYEES	*	Decision Issued:
ASSOCIATION, OSCEA/AFSCME	*	November 20, 1995
Local Union 11	*	

APPEARANCES

FOR THE STATE

Blaine P. Brockman	Chief Advocate
Rodney Sampson	OCB Teamleader
Shelly Ward	Labor Relations Officer
Jerry Boone	Park Manager
Darvin Conley	Maintenance Supervisor
Michael J. Emmons	Witness

FOR THE UNION

J. Worden	Staff Representative
K. J. Hilliard	Grievant

ISSUE: Article 24: Discharge for falsifying time and payroll records.

Jonathan Dworkin, Arbitrator
101 Park Avenue
Amherst, Ohio 44001

DISPUTE SUMMARY

Did the Ohio Department of Natural Resources (DNR) have just cause to remove a twenty-year Employee? The Removal Notice, issued June 15, 1994, recited a laundry list of charges and justifications for the penalty:

> This is to notify you that you are hereby removed from your position as Treatment Plant Aide with the Division of Parks and Recreation. The reason for this action is that you have been found guilty of *Falsification of Official Documents, Dishonesty, Absent Without Official Leave, Neglect of Duty, Insubordination and Failure of Good Behavior*. [Emphasis added.]

These accusations spring from only one factual claim of misconduct. According to the Employer's evidence, Grievant was observed doctoring his time sheet Sunday, March 13, Saturday, March 19, Sunday, March 20, Saturday, March 26, and Sunday, March 27, 1994. On those days, he allegedly falsified the times he arrived and left. A Supervisor and Bargaining Unit employee set up the five-day observation and handled it jointly. They found the following discrepancies:

	ARRIVAL TIME (A.M.) Actual/Recorded	QUITTING TIME (P.M.) Actual/Recorded
Saturday, March 13	9:45/9:00	unobserved/1:00
Saturday, March 19	9:27/9:00	12:40/1:00
Sunday, March 20	10:22/9:00	12:56/1:00
Saturday, March 26	9:40/9:30	1:20/1:30
Sunday, March 27	10:00/9:55	1:40/2:00

Also, State regulations required Grievant to verify his hours worked by signing Activity Reports when receiving paychecks. For the five days at issue, he signed Reports certifying twenty hours. This was another falsification, according to the Employer. He received pay for twenty hours according to his certification, but was at work only 15½ hours.

* * *

The Employee denied the allegation and initiated this grievance. At the arbitration hearing on October 24, 1995, he said he was victimized by Supervision's ongoing hostility toward him. He believes the Agency had been out to get him for years, and this unwarranted discharge accomplished that purpose. In Grievant's and the Union's view, the removal action, founded on distortions, was entirely without just cause.

Just cause is the contractual standard regulating the Employer's disciplinary authority. Article 24 of the Collective Bargaining Agreement provides:

ARTICLE 24 - DISCIPLINE

§24.01 - Standard

> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

FACTS AND CONTENTIONS

When the removal occurred, Grievant was a part-time Water Treatment Plant Aide at Deer Creek State Park. He transferred there November 1991, when the State abolished his full-time job. At first, he worked sixteen-hour weeks at Deer Creek -- eight hours Saturday and Sunday. Later, the Agency cut his schedule in half. In the arbitration hearing, the Employee commented bitterly that the reason Supervision gave for the reduction was that his sixteen-hour-per-week schedule was "too costly." The State denied that was the reason. Supervisory witnesses testified that the hours were reduced because Grievant "quit trying to do the work that justified that amount of time budgeted to his position."[1]

The Plant Aide job description calls for working under "immediate supervision" and assisting the Plant Operator "in operation & maintenance of water &/or sewage treatment plants." In truth, Grievant was not under immediate, day-to-day supervision, and had negligible direct contact with the Plant Operator. His main assignment was to monitor and carry out water plant procedures weekends when the Operator was off. In other words, he acted as the Operator's temporary replacement.

Located on five thousand acres in Central Ohio, Deer Creek is among the largest, most used of the State's seventy-two public

[1] Employer's opening statement, 2.

parks. Its lodge has restaurant facilities and one hundred ten rooms. Also, there are twenty-six overnight rental cabins and two hundred thirty-two campsites.

Significant to this controversy is that the park has no outside water source. Every drop of water for drinking, cooking, and cleaning comes from Park wells; waste water is treated and recycled at four on-site DNR plants that process twelve million gallons each year. It is reasonable to suppose that park usage was highest on weekends when Grievant attended the plants. It follows logically that his obligation to assure water safety was critical. Given the amount of water usage on weekends, his responsibilities may have been even greater than the Plant Operator's.

From the day Grievant arrived at Deer Creek, the Agency was justifiably troubled by his attitude toward his job. The Employee's resentment over the former job elimination was unmistakable. He believed he had been exploited and was not reluctant to express his feelings to supervisors and coworkers alike. At one point, the Park Superintendent offered him Operator training at State expense so that he might increase his skills and eventually bid into a better job. Grievant refused, candidly saying he was not interested in water treatment and "didn't give a shit for Deer Creek."

Though he reported for work only two days per week, Grievant had a high rate of absenteeism. This was worrisome to the Plant Operator who appreciated the need to keep the plants running and

assuring a regular supply of safe water. The Operator lived in one of three private residences on park property, just one-half mile from the treatment plants. He fell into the habit of going to the plants on his days off (without compensation) to make sure Grievant's work was being done.

The Operator was also the Deer Creek Union Steward. It is odd, therefore, that he was the one who turned the Employee in for time-sheet falsification. The first or second weekend in March 1994, while checking the water plants, he saw Grievant beginning rounds. He happened to look at the sign-in sheet in the maintenance shed, and noticed that the recorded starting time did not correspond. He reported the inconsistency to the Maintenance Supervisor.

Together, the Supervisor and Steward devised a surveillance plan. Every weekend, March 13 through 27, the Supervisor waited in the parking lot to record Grievant's arrival and departure times. Then he checked those times against the sign-in sheet. The Steward was the Supervisor's backup. Stationing himself in the maintenance shed area, he watched Grievant sign in and out. Their findings matched their suspicions. On each observed occasion, the Employee came in later and left earlier than the times he recorded. The discrepancy amounted to at least two hundred eighteen minutes in twenty paid

workhours.[2] In other words, Grievant's time sheet, the Activity Report verified by his signature, and his paycheck, overstated hours worked by more than 18 percent.

These findings were reported to the Park Manager who started the process leading to the discharge. He scheduled and rescheduled an investigative interview that did not proceed either time because Grievant could not attend (for valid reasons). The Manager followed up by sending a removal recommendation to the Agency, and the DNR Labor Relations Coordinator set up a predisciplinary hearing. It too had to be rescheduled because of the Employee's unavailability. Finally, on June 2, 1994, the hearing went forward without Grievant.[3] The Hearing Officer recommended dismissal; the Agency acted on the recommendation June 15, 1994, and this grievance resulted.

* * *

The Employer produced witnesses who verified the facts behind the discharge. Most important of those witnesses were the Union Steward and Maintenance Supervisor. They testified at length about

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[2] As noted earlier, the observations did not cover the Employee's real clock-out time on March 13. Therefore, the divergence might have been greater than 218 minutes.

[3] At the arbitration, the Agency Advocate emphasized that Grievant did not give notice that he would not attend the rescheduled hearing until one minute before it was to start. The Arbitrator finds this point to be immaterial. The Union does not contend that the Agency violated due-process rights, and nothing in the Agreement says that the Employee had to submit to a predisciplinary hearing.

the surveillance and confirmed that Grievant did in fact distort sign-in and sign-out times on the days they watched him. However, there was more to the Agency's case. Apparently recognizing that just cause for dismissal ordinarily requires more than proof of misconduct, the Employer went to great lengths to establish that Grievant's deportment could not have been corrected through less extreme discipline. It produced a volume of evidence disparaging his attitude, ethics, and job dedication. By his own unsolicited comments to supervisors and coworkers, Grievant showed plainly that he hated his job. His miserable attendance record revealed indifference to the enormous responsibility he had for water safety. Especially noteworthy from the Employer's point of view was that he often reported off on holidays when the park was full -- when Management needed him most. On one holiday he asked for and was denied time off; still, he did not report for duty. He covered the absence with a doctor's excuse that the Agency believes to have been a sham.

The Agency concludes that this Employee was unredeemed and unredeemable from the beginning of his time at Deer Creek. This was not really a discharge, according to the Employer; effectively, it was a voluntary quit:

> . . . management will demonstrate that [Grievant], for all intent and purposes, quit. He quit working, he quit showing up on time, he quit telling the truth, and he quit

> caring about his job. [W]e fired him, we made it official, but [Grievant] quit.[4]
>
> . . .
>
> We fired him, but he quit. He just didn't care. So critical is the operation that removal was the only option. We needed someone who was trustworthy. He wasn't. He couldn't even work eight hours a week.[5]

* * *

Grievant flatly and unequivocally denied the charge that he falsified time sheets. He declined to speculate on how the Supervisor and Steward came up with their "facts," but asserted that their so-called findings were completely wrong.

Aside from denying the chief allegation, the Union did not try to answer the charges. In the Union's (and the Arbitrator's) judgment, the charges were repetitious, largely irrelevant, and did not require responses. Instead, the defense was primarily an affirmative one. The Union designed its case to show that Grievant was Supervision's scapegoat. From the time he transferred to Deer Creek, he was subjected to severe mistreatment and put through a deliberately antagonistic working environment.

Before his transfer, Grievant was an outstanding sixteen-year Employee of DNR. He received many evaluations; all were approving.

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[4] Employer's written opening statement, 1.

[5] Employer's closing argument.

With few exceptions, he perpetually scored high ratings for production, job knowledge, adaptability, reliability, cooperation, judgment, initiative, courtesy, appearance, and public demeanor. He received promotions during his tenure and several letters of commendation. One that is especially noteworthy was from the DNR Director on May 8, 1987:

> I would like to take this opportunity to personally congratulate you for a job well done on April 4 and 5, 1987.
>
> Your professionalism, dedication, and fortitude were evident to the numerous visitors at Hocking Hills and those of us that only heard about the hard work you extended to keep our visitors comfortable and safe. I understand this was accomplished by the foresight of yourself and your counterparts who had firewood cut, blankets out and candles ready for the imminent power outage. Many cabin guests stayed in the lodge overnight after the cabins lost power, and to date we have received only one letter requesting a refund. Considering all 40 cabins were rented it proves you handled the situation in a professional and courteous manner.
>
> Under those treacherous conditions you were so dedicated that you found a way to get to work to help those that stayed all night and assist the visitors by clearing the way for them to leave the park and return to their homes.
>
> With over 1,000 trees downed by the storm I know your work continues. Many visitors are not even aware of the severity of the storm due to the quiet and professional manner in which you have cleared the roads and trails of debris.
>
> It is an honor to be the Director knowing that our employees are willing to give of themselves in extremely adverse conditions to help their fellow man and who reflect so positively on the Division of Parks and Recreations and the Department of Natural Resources.

My sincerest thanks for a job well done.

Grievant obviously was a good Employee for many years. How did his conduct deteriorate in fewer than three years to the point where "the only option was discharge?" The Union strongly suggests that it was not he who deteriorated, it was his working conditions. It claims that Management set Grievant up throughout his last two and one-half years. Its objective was removal. If the Employee's use of sick leave was considered "abusive," why did the Employer allow it to continue without exercising its obligation to help him improve? The answer, according to the Union, is that the Employee used sick leave according to his contractual right. He committed no violation even remotely justifying discipline.

The Maintenance Supervisor, who the Union believes was the principal actor in the vendetta, rarely spoke to Grievant and never counseled him. In the last sixteen months, Grievant received no face-to-face work instructions. Instead, the Supervisor exhibited his disregard for the Employee by leaving terse notes. At one point, he instructed Grievant to keep work logs -- something no other Deer Creek employee was asked to do.

In summary, the Union charges that Management did not advise Grievant of his alleged defects, failed to discipline him progressively, and generally mistreated him in the following particulars:

1. Instead of discussing projects and work assignments with Grievant, as he routinely did with his other employees, the Maintenance Supervisor avoided talking to him, leaving brusque notes instead.

2. Management instructed Grievant to fill out a log for each workday; no one else had the same accountability.

3. Throughout his short term at Deer Creek, Grievant received "unnecessary and inexplicable" work schedule reductions.

4. There were no performance evaluations on file for Grievant's time at Deer Creek. Evaluations were done, but none made it to the file. When asked about this on cross examination, Management witnesses had no explanation.

The Union urges that the discharge must be set aside because it absolutely lacks just cause:

> The union asserts that Grievant's removal is the culmination of an ongoing attempt to squeeze him out of employment with the state through the abolishment of his full-time job, several reductions in his part-time work schedule, moving him from park to park (which resulted in Grievant driving 50 miles one way for a four hour shift), and the treatment he received at the hands of his supervisor. The union believes management wanted to be rid, once and for all, of Grievant since he was a union activist who participated in a grievance arbitration action against the employer some years ago and was a member of the ODNR statewide labor/management committee. Plain and simple, management didn't like Grievant or his attitude and they wanted him gone. They couldn't discipline him because he didn't break the rules and he performed his job according to the expectations. What we're left with . . . is management's ineffectual and desperate attempt to support a removal charge that cannot be supported because it is not based in fact and is rife with management error -- including the fact that discipline was not initiated until eight weeks after the alleged infraction (a month after

> his time had been docked), the discipline is not progressive, and the discipline is based solely on cartoonish super-sleuthing abilities of [the Maintenance Supervisor].[6]

OPINION

The Agency went into the predisciplinary meeting with a deluge of charges against Grievant. Summarizing the allegations in his report, the Hearing Officer noted:

> Management is requesting that [Grievant] be disciplined in the form of removal from his position of Treatment Plant Aide for Falsification of Official Documents, Dishonesty, Absent Without Official Leave (AWOL), Insubordination, Misuse of Sick Leave, Neglect of Duty, and Failure of Good Behavior. Specifically, Management contends that [Grievant] has falsified sign-in and sign-out sheets, as well as payroll documents from on or about March 13, through March 27, 1994. Further, failure to report this time off as leave resulted in [Grievant] be[ing] considered absent without official leave.
>
> Lastly, [Grievant's] excessive use of sick leave has caused an undue hardship on park operations and has caused a general concern for the health and safety of the public at the park as it relates to the safe application of drinking water.

This collection of charges came about not because Grievant committed six acts of misconduct, but because the Employee's single act fit five or six different predefined categories of employee offenses. To clarify the point, it is obvious that lying on time sheets and payroll reports is "falsification of official documents." In the

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[6] Union written argument.

Agency's judgment, however, it is more than that. It is a dishonest act and, therefore, violates the rule against "dishonesty." Arguing that Grievant should have been working at 9:00 a.m. when he clocked in at 9:00 a.m., the Employer contends that his failure to be at his work station until he actually arrived at work made him "AWOL." Also, it was "neglect of duty" for the Employee to be away from his work-station at his sign-in time. What Grievant did was "insubordination" as well, according to the Agency, since it violated directives requiring employees to obey rules. The same reasoning squeezed Grievant's single act of misconduct into the rule proscribing "failure of good behavior."

These allegations derive from a list of conduct rules and disciplinary grids that DNR has distributed to the workforce. The list is a unilateral declaration of Management's expectations. It advises employees of what penalties they may anticipate if they commit violations. Such rules can be helpful. By giving notice to employees, they fulfill some of the Agency's just-cause obligations. Also, they tend to lock the Employer into self imposed disciplinary responses and, to an extent, protect employees against arbitrariness. But unilateral rules and penalties do not override the bilateral contractual ban on discipline without just cause.

Determinant questions are: Did Grievant commit misconduct? If he did, was his dismissal for just cause? The plethora of matching charges provided no practical assistance for answering these questions.

In the Arbitrator's judgment, they tended more to cloud than clarify the real issue and added no appreciable force to Management's position.

The DNR Advocate eased the situation somewhat. When the arbitration hearing started, he reduced the charges from six to four: Falsification of Official Documents, Dishonesty, Absence Without Official Leave, and Neglect of Duty. There were still too many. The Employer produced no proof that, apart from falsifying time sheets and payroll reports, that Grievant failed to carry out his work duties. Accordingly, the neglect-of-duty charge is dismissed. Likewise, the AWOL allegation found no support in the evidence. The Union gave unrefuted testimony that this Employee had no specified starting time. As long as he reported in at a reasonable hour and put in four hours' work, he was not "absent." Admittedly, his unauthorized early quits might have been construed as AWOL's, but it is unnecessary to indulge that kind of speculation here. AWOL is a minor offense under Agency Rules. It calls for moderate progressive discipline. The same rules classify document falsification as major misconduct that can result in discharge for a first offense. Grievant obviously was not removed for AWOL's, and it is his removal that was appealed to arbitration. The AWOL charge, therefore, stands out as a distraction rather than a true issue.

Finally, the "Falsification" and "Dishonesty" charges are redundant, at least for the purposes of this dispute. The second is an unnecessary duplication of the first. For these reasons, the

Arbitrator will narrow his examination to whether the Employer sufficiently proved that Grievant falsified time and payroll records, and, if so, whether his actions justified summary removal. Consistent with just cause, the Arbitrator will consider not only the Employee's conduct, but also such surrounding factors as may prove to be mitigating or aggravating.

* * *

The Maintenance Supervisor and Union Steward testified that they monitored Grievant's comings and goings, compared their observations against his sign-out times and collected solid proof that he cheated on his time sheets.[7] The Employee's only response was that he was innocent. When given an opportunity to explain and account for the evidence against him, he said was it was inaccurate. He scornfully declared: "They weren't there enough to know *when* I arrived." Maybe that was so for most of Grievant's tenure at Deer Creek. However, the evidence plainly confirms that they were there March 13, 19, 20, 26, and 27. They knew when he arrived and departed on those days. They knew when he signed in and out.

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[7] In the hearing, the Union Advocate complained that it was wrong for Management to make the Steward spy on a Bargaining Unit member. That argument might have force in another case, but not here. The record confirms that the Steward acted voluntarily. In fact, it was he who brought the falsification to Management's attention in the first place. He initiated the whole investigation and participated in it of his own free will, without coercion.

Which is true, the Supervisor and Steward's accusation or Grievant's denial? No arbitrator has special insight into truths. Indisputable truth seldom emerges from arbitration. The best the parties can expect is that an arbitrator will exercise his/her judgment and experience to reach a decision based on probabilities. The probability here is that Grievant did falsify the records. It is the only finding grounded on believable evidence. A decision in Grievant's favor might come about from sympathy, bias, or unsupported guess, but not from rational assessment of probabilities. In short, it is ruled that Grievant did falsify official documents as charged.

* * *

This Arbitrator has held that just cause rarely (if ever) sanctions a mechanical removal based solely on an offense. Just-cause principles require an employer to weigh the factors attending misconduct judiciously before making a disciplinary decision. An employer must carefully evaluate an offending employee to assess his/her chances of rehabilitation through corrective discipline. Where just cause stands alone as the governing criterion, summary dismissal will not be upheld except in cases of extraordinarily severe misconduct.

Grievant's offense arguably meets the definition of "extraordinarily severe misconduct." The evidence confirms that he consciously cheated on his time records and generated pay for hours that he did not work. That was theft. The Union pointed out that after

the Agency discovered the "theft," it docked Grievant's pay for the unearned hours. That is not a viable defense. The fact that the Employer secured restitution for wrongfully induced wage payments is of no meaningful consequence.

Nevertheless, the Arbitrator believes that Grievant deserves the benefit of any mitigating factors. The Union asserted two arguments for mitigation: First, that Grievant was subjected continually to antagonistic, inhospitable working conditions; second, that the Employee had twenty years' service, sixteen of which were commendable. The first allegation is irrelevant. Grievant's hostile working environment, if his testimony on that score was to be believed, was regrettable and should have been remedied through the grievance procedure. It did not however give him license to steal from the Employer. It did not excuse his deliberate falsifications of time/payroll records.

Grievant's length and quality of service, on the other hand, deserves careful consideration. Arbitrators frequently say that a long-term employee earns a reservoir of disciplinary leniency. That does not mean an older employee always can avoid discharge despite his/her misconduct. Tenure is not insulation against removal. It is only evidence of an individual's adaptability to rules -- the likelihood that he or she will behave appropriately and give acceptable service if accorded a chance to save his/her job.

Although he is a long-term employee, Grievant gave no such assurance. Whatever hostility exists here, it is apparent that this Employee harbors immutable anger toward the Agency. He has no regrets for what he did, and it seems he has no understanding that he did anything wrong. There is no demonstrated evidence that if reinstated, he will faithfully carry out his work requirements. In fact, his testimony and demeanor at the hearing gave no assurance that he would not falsify time records if given another chance.

The record is void of any evidence or justification to intrude on Management's judgment. The grievance will be denied.

AWARD

The grievance is denied.

Decision issued at Lorain County, Ohio November 20, 1995.

Jonathan Dworkin, Arbitrator

JONATHAN DWORKIN
ATTORNEY

101 PARK AVENUE, P.O. BOX 187
AMHERST, OHIO 44001
(216) 985-2100

November 20, 1995

Rachel Livengood
Arbitration Advocate
Ohio Department of Administrative Services
Office of Collective Bargaining
106 North High Street
Columbus, Ohio 43215

Re: OCB - OCSEA Arbitration
Case No.25-12-940705-0006-01-04
Arbitrator's File No. O:95-10-24

Dear Ms. Livengood:

Enclosed are the Opinion and Award and one copy along with my statement for services and expenses for the arbitration held October 24, 1995.

Cordially,

Jonathan Dworkin

JD:pb

Enclosure