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UNITED STATES OF AMERICA
VOLUNTARY LABOR ARBITRATION

CHARLES F. IPAVEC
PANEL ARBITRATOR

IN THE MATTER OF THE ARBITRATION BETWEEN:

OHIO CIVIL SERVICE EMPLOYEES)	OPINION AND AWARD
ASSOCIATION, LOCAL 11,)	GRIEVANCE NUMBER:
AFSCME, AFL-CIO)	02-000-(11-1-93)-406-01-09
)	AS FILED BY:
- and -)	MAXINE MILLER, ON BEHALF
)	OF THE OCSEA, ET.AL.
STATE OF OHIO)	
DEPARTMENT OF ADMINISTRATIVE)	
SERVICES)	

The oral hearing for this matter was held in a conference room of the office of Collective Bargaining, Columbus, Ohio, 7/12/95 before Charles F. Ipavec, the panel arbitrator to whom this matter was assigned pursuant to Article 25 of the Contract between the parties.

Shirley Turrell, Labor Relations Officer presented the case on behalf of the Agency. She was assistant by Georgia Brokaew, from the Office of Collective Bargaining. Also present was Stephanie Sommer, observer, and James Bryant, Lieutenant, State Highway Patrol.

Jenny Worden, Staff Representative, presented the case on behalf of the Union. Also present were Kathleen Stewart, Chapter President; Maxine Miller, the Grievant and Steward; and Danielle Graden, Steward.

Appearing as witnesses: Kenneth E. Marshall, EEO Contract

Compliance Officer and a member of the Bargain Unit; and Carolyn R. Harper, formerly Deputy Director Employment Opportunity Center.

Arbitrability was challenged on the procedural ground of timeliness and it was agreed that the arbitrability issues would first be addressed and if it was found that this grievance should proceed to the merits then the issues on the merits would be addressed. There was no stenographic record made of the proceedings at the hearing; however both parties filed prehearing briefs and post-hearing briefs. Such briefs of the parties, the documents submitted into evidence, and this Opinion and Award constitute the entire record for this case.

GRIEVANCE

On October 29, 1993, Maxine Miller, acting on behalf of the entire Bargain Unit, filed a Grievance form in which the statement of facts are as follows:

Effective October 25, 1993 Kenneth Marshall was suspended for 10 days for violations that occurred over a year ago. Management failed to show just cause for the suspension and failed to initiate discipline in a timely manner.

The foregoing grievance was denied and the third step answer was as follows:

Kenneth Marshall, EEO Contract Officer, Division of EOC, received a ten day suspension, effective October 25, 1993, for the following infractions:

Failure of good behavior: Misuse of the State of Ohio Vehicle assigned, by use for personal business on the following dates:

1. Sunday, October, 1992 - Observed in a food store parking lot.
2. July 3, 1992 (State holiday) - Observed near the Richfield Coliseum parking lot.

3. November 26, 1992, Thanksgiving Day, involved in an automobile accident resulting in the vehicle being declared a total loss.

(Formal notice of suspension is appended.)
Discipline followed a pre-disciplinary conference scheduled on September 13, 1993. Mr. Marshall declined to attend the pre-disciplinary conference, and submitted a written waiver of the right to a conference which also indicated his willingness to accept the disciplinary action deemed appropriate by the appointing authority. (Waiver letter is appended.)

Prior to the scheduling of the pre-disciplinary conference, Mr. Marshall's use of his State Vehicle was investigated by both the Inspector General's Office and the Ohio Highway Patrol; and Mr. Marshall was questioned by the Patrol. No criminal charges resulted. However, Mr. Marshall was directed to correct inaccurate accident reports to include such information as the number of family members present with him in the State vehicle involved in the November 26, 1992 accident; and to properly report another State vehicle accident occurring on January 24, 1992.

STEP 3 GRIEVANCE:

On November 1, 1993, a union grievance was filed on Mr. Marshall's behalf, by steward Maxine Miller. A step 3 meeting was conducted on December 17, 1993, attended by staff representative Jenny Worden and Chapter President Kathleen Stewart. Mr. Marshall did not attend.

Union Contention:

Violation of Contract Articles 24.01; 24.02.

The union contends that the ten day suspension fails the just cause standard and violates the Article 24.02 timeliness requirement by imposing discipline for events which occurred over one year prior to the discipline.

Although presented with Mr. Marshall's letter indicating his acceptance of discipline as deemed appropriate by the Appointing Authority of DAS; the union maintains that the contract offers authority for a union grievance over individual discipline even in the absence of an individual grievant.

The union seeks expungement of the disciplinary record and restoration of ten days' back pay as remedy.

Management Position:

Management asserts that just cause existed for the ten-day suspension.

Management asserts that the procedural objection raised over the timeliness of discipline is spurious. The Article upon which the union relies, Article 4.02, states:..."Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article...."Management asserts that Articles 24.04 and 24.05 provide authority for unilateral management discretion to delay disciplinary proceedings or decisions until after the resolution of pending criminal investigations or disposition of pending criminal charges. Article 24.04 states, in part: .."At the discretion of the Employer, in cases where criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges." Article 24.05 states, in part:" ..At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.." Management asserts that it has properly invoked its discretionary authority to delay disciplinary proceedings until the criminal investigation of Mr. Marshall was complete.

Management asserts that certain of the infractions with which Mr. Marshall is charged were not known of until sometime after the date of occurrence. Management asserts that it acted timely in initiation of a broad investigation, including outside agencies such as the Ohio Highway Patrol and the Ohio Office of Inspector General.

Management asserts that Mr. Marshall has submitted written waiver of his right to grieve the instant suspension and written waiver of his interest in remedy, as available.

In consideration of any residual right of the union to file on its own behalf; management asserts that the filing presents a threshold issue of arbitrability. Management asserts that any remedy available to the union in the instant grievance is limited to instructive relief only, on the issue of timeliness of discipline.

Management records reflect other disciplinary suspensions of DAS bargaining unit employees which have not been grieved by the union:

David Simmons - 5 days, written waiver submitted by Mr. Simmons
Leroy Trout, Jr. - 1 day
James Mitchell, - 1 day
Dixie Thompson - 1 day
Margaret Stone - 3 days
(list is not exhaustive)

Management asserts that the union having failed to file on behalf of these employees or on its own behalf, previously; has

relinquished a claim to timely filing of this instant grievance.

Management observes that in the absence of a union grievance filed for remedy on behalf of the above employees, the union appears to establish an appearance of unequal representation of the relative interests of the above employees.

ISSUES

The parties stipulated an issue concerning arbitrability as follows:

Where an employee voluntarily accepts discipline and waives a right to pursue remedy, can the union independently pursue back pay or other remedy on his behalf?

The Agency also proposed three additional issues concerning arbitrability and they are as follows:

1. Where the union has previously failed to file for similar remedy on behalf of similarly situated employees, or on its own behalf; has the union relinquished a claim to timely filing of the instant grievance?

2. Where the union has failed to raise procedural issues at the pre-disciplinary level, are procedural issues arbitrable in the instant case?

3. Where an employee waives due process, does such waiver preclude procedural arguments on the employee's behalf and/or instructive relief?

Each of the parties presented an issue concerning the merits of this case. The Agency stated that the issue on the merits are as follows:

Where an employee admits to the conduct alleged, agrees to accept a ten day suspension, and waives the right to grieve, does

the imposition of discipline violate the express terms of the collective bargaining agreement?

The Union stated issue on the merits was as follows: Was Kenneth Marshall disciplined for just cause? If not, what should the remedy be?

BACKGROUND

The operative facts in this case are not in dispute. Mr. Kenneth A. Marshall who was employed as an Equal Employment Contract Compliance Officer was hired in July, 1991.

By memorandum dated August 20, 1993, Mr. Kenneth E. Marshall was notified that a disciplinary process was proceeding involving his misuse and abuse of his privilege of operating a state vehicle. Specifically the dates of October 6, 1991; July 3, 1992; and November 26, 1992 were cited. The foregoing action by the Deputy Director was undertaken after an investigation by the Ohio Highway Patrol into alleged misconduct on the part of Mr. Kenneth E. Marshall, the then Deputy Director Mr. Booker Tell and others in the Employment Opportunity Center. Deputy Director Tell was criminally indicted for administrative irregularities in office and is now deceased. Although Deputy Director Tell was made aware that the misuse and abuse of the privileges of operating a State Motor Vehicle on the part of Mr. Kenneth E. Marshall, the Deputy Director did not take any disciplinary action against Mr. Marshall.

In addition to Deputy Director Tell, other employees in the Employment Opportunity Center were indicted; however, Mr. Marshall was not.

The new Deputy Director, Ms. Harper, formulated the opinion that there was just cause to discipline Mr. Marshall and accordingly then, on October 18, 1993 Mr. Marshall was disciplined with a ten day suspension effective from October 25 to November 8, 1993.

Prior to the imposition of discipline the agency was to conduct a predisciplinary conference which was scheduled for Monday, September 30, 1993. After the predisciplinary conference was scheduled Mr. Marshall advised the agency as follows:

I appreciate your efforts in bringing to my attention the tenants of this issue and my rights pertaining to this scheduled disciplinary conference. I would prefer to invoke my option at this time not to move forward with a conference. I understand that by utilizing this option I waive my right to be heard on this issue and further that I accept the disciplinary action that the Department deems appropriate.

I would only trust that the true measure of my worth to and labor for the Department of Administrative Services has not been completely deminished during the course of one event resulting from poor judgement.

For the record i'd like to add that the Governor, the Director, the Deputy Director or the citizens of Ohio will never again have to be concerned about me as it relates to following procedures or the latter of the law.

Since Mr. Marshall did choose not to file a grievance, and because the Union felt that the Contract had been violated by the Agency, the Union, in the person of Maxine Miller, a steward, filed an et.al. grievance.

DECISION

The Agency has alleged that once an employee accepts the discipline which was imposed and does not file a grievance, that such conduct on the part of the employee constitutes a closure on

the merits and if the merits are decided, then the matter is no longer arbitrable; so that the arbitrator does not have authority to rule on either a question of arbitrability or a question of the merits.

In the opinion of the arbitrator, the ultimate control of a grievance rests with the Union. This case involves the interpretation of the Contract between the parties and the definition of a grievance, in Article XXIV, encompasses the dispute involved in this case. The union is of the opinion that the grievant was not treated fairly, particularly on the procedural ground that the agency waited an inordinate amount of time after the three alleged infractions before any discipline was given to the grievant. Such a dispute is clearly the proper subject of a grievance and maybe carried forward by either an employee or the union on behalf of an employee and on behalf of the entire bargaining unit. If the agency violated due process in imposing the discipline upon Mr. Marshall, the union has a right to challenge such discipline including a back pay remedy; for the reason that if the discipline was procedurally deficient in that the requirements of due process were not followed, then, ab initio, from the beginning, initial the discipline should be revoked.

The agency has alleged that in previous similar situations, where the employee did not file a grievance on their own behalf, and pursue such grievance; therefore, the Union then cannot interject itself in this case because the Agency was led to believe, by the prior conduct of the union, that the union would

not proceed in such instances where the employee admitted the action of the Agency was proper and did not file a personal grievance.

The contention of the Agency that the failure of the Union to file for a remedy on behalf of other employees who were disciplined and reacted in a manner similar to that of Mr. Marshall constitutes unequal representation of its members, is not, in the opinion of the arbitrator, well taken because the reasons which the Union may have to pursue some Contract violations and not others, is a private matter within the Union. Should any employee feel that the Union has not fulfilled its duty of fair representation, such employee would so advise the Union; however the Agency would have no part in deciding whether the Union in fact did breach its duty of fair representation.

In the opinion of the arbitrator, when the issue involves an interpretation of the language of the contract between the parties the fact that an employee, or the union, sat on such rights and did not challenge the agency, does not constitute a waiver of the contractual right and an employee, or the union, may challenge for the first time, any violation of the contract between the parties even though such a violation may have occurred many times in the past without a challenge. Just as the arbitrator cannot change the language of the Contract between the parties so the parties by inaction upon any particular right or obligation, without challenge from the other party does constitute a waiver of such right because such a waiver would in fact then change the language of the

Contract.

The union filed a grievance form on October 29, 1993 and the event which was being grieved was a violation of the contract in that Mr. Marshall was improperly suspended and since the suspension was to begin on October 25, 1993, the filing of the grievance by the union was clearly within the ten working days as provided for in Article XXIV of the Contract between the parties and the filing of the grievance by the union was a timely filing.

The Union alleges that the imposition of the discipline was untimely in that the first occurrence of misconduct for which Mr. Marshall was being disciplined occurred on October 6, 1991 and that Article XXIV of the Contract between the parties provides, in Section 24.02 that, "disciplinary action shall be initiated as soon as reasonably possible consistent with their requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employers decision to begin the disciplinary process" and waiting from October 6, 1991 until October 18, 1993 is an untimely and excessively long period of time before discipline is imposed; especially considering the fact that, the Deputy Director Tall, who was the supervisor to Mr. Marshall, was aware of all of Mr. Marshall's misconduct and chose not to impose a discipline.

The Agency alleged that the language cited by the Union from Article XXIV is a correct citation, and is contained in Section 24.02; however, in section 24.05 it is provided that, "at the discretion of the Employer, the 45 day requirement will not apply

in cases where criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges."

In early August, 1993, the then Deputy Director, Ms. Harper was informed that the criminal investigation, concerning Mr. Marshall, had been completed and that he would not be indicted. She then began the disciplinary process to determine whether or not Mr. Marshall should be disciplined since the Agency retained for itself the right to wait until after the criminal investigation was concluded before imposing any discipline upon the employee; even though it would appear that from the time of the first misconduct of Mr. Marshall until the time he was disciplined, was an unseemingly long period of time; but nevertheless it must be concluded, in the opinion of the arbitrator, that the agency acted with reasonable diligence to investigate on its own and conclude that disciplinary action against Mr. Marshall was proper. The disciplinary process was begun soon after the criminal investigation was concluded. The agency acted in a timely manner considering the language contained in the Contract between the parties and although the Deputy Director who was a part of management was aware of the misconduct of Mr. Marshall, soon after the first misconduct in October, 1991, because no disciplinary action was taken as a result of collusion between Deputy Director Tell and Mr. Marshall the Agency should not be considered as having knowledge of the misconduct of Mr. Marshall until after the Ohio Highway Patrol made their investigation.

In this case, as evidenced by the Step 3 answer to the grievance given by the Agency, the issue of arbitrability was raised within the grievance procedure; and since the issue of the arbitrability of a grievance cannot precede the filing of a grievance, then it would follow, in the opinion of the arbitrator, that the due process issue need not be raised, at the predisciplinary level. It could be viewed cooperative effort, on the part of the union, if procedural and due process questions were raised at the predisciplinary level; however, not having raised such issues at the predisciplinary level, does not preclude the union from raising those issues during the grievance procedure.

An employee always has the right, to admit that they engaged in the misconduct as alleged by the Agency and Mr. Marshall has done so in this case; however, an employee cannot waive procedural due process because such waiver would impact upon the entire bargaining unit. When an employee admits misconduct they in effect are making an admission which concerns only them; when procedural due process is waived, it must be done so by the Union because procedural due process issues involve all of the members of the bargaining unit.

If it would have been found in this case that the Agency did not follow procedural due process in imposing the ten day disciplinary suspension upon Mr. Marshall; then, the arbitrator would have the authority to consider a remedy which would be appropriate and such remedy could include a complete withdrawal of the discipline with backpay, a reduction in the discipline with

some backpay or instructive relief as to how matters of this nature should be handled in the future. In this case, the arbitrator found that the Agency did not violate procedural due process in that they acted in a timely, reasonably diligent, manner in imposing the discipline on Mr. Marshall, after the criminal investigation by the Ohio Highway Patrol was concluded.

The question of timeliness, as to the time in which the grievance was filed by the Union, is found to be within the ten working day limit prescribed by the contract between the parties; and the timeliness of the Agency imposing discipline upon Mr. Marshall, is found to be timely and within reasonable diligence requirements after the Ohio Highway Patrol concluded its investigation, in accordance with the provisions of the contract between the parties.

As to the merits, the Union questions whether Mr. Marshall was disciplined for just cause and the Agency questions the right of the Union to grieve the disciplinary action after the employee has accepted the ten day suspension and has waived his right to file a grievance.

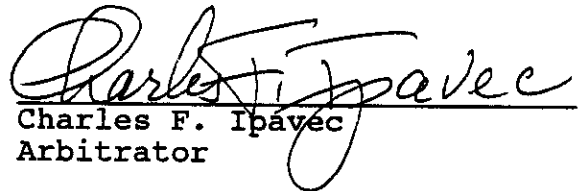
Once an employee has been charged with misconduct and discipline and accepts such discipline it becomes incumbent upon the arbitrator to accept such admitted fact of misconduct. The admission of misconduct by an employee does not waive the right of the employee or the Union to file a grievance on an issue such as has been presented by the Union in this case; notably that the Agency waited too long from the time they knew of the misconduct of

Mr. Marshall until the time the discipline was imposed because, as was stated earlier, such an issue impacts upon the entire bargaining unit. In addition, there may be other issues raised by a grievance, under circumstances similar to those in this case. It should be noted that the employee and the union did not argue the severity of the discipline.

Since Mr. Marshall admitted to his misconduct, and since the Union did not challenge the severity of the discipline, and since the arbitrator has found that the Agency acted in a timely, and reasonably diligent manner from the time they were informed by the Ohio Highway Patrol that the criminal investigation had ended; as evidenced by the fact that the disciplinary process was started on August 20, 1993 and the disciplinary time off to started on October 25, 1993; therefore, it must be concluded that, in the opinion of the arbitrator, that the Agency had just cause to impose the discipline of a ten day disciplinary suspension upon Mr. Marshall.

AWARD

Grievance No. 02-000-11-1-93-406-01-09, as filed by Maxine Miller on behalf of the entire bargaining unit is found to have been timely filed by the Union and is denied on the merits for the reason that the Agency disciplined Mr. Marshall in a timely fashion, with reasonable diligence, after the Ohio Highway Patrol concluded it's investigation, and that there was no violation of the Contract between the parties and no violation of due process occasioned by the delay while the Ohio Highway Patrol was conducting it's criminal investigation


Charles F. Ipavec
Arbitrator

Dated February 1, 1996 and made effective in the City of Columbus,
County of Franklin, Ohio