

ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: 1116

OCB GRIEVANT NUMBER: 22-09-950728-0010-03-08

GRIEVANT NAME: Felix Lazazzera

UNION: UFCW

DEPARTMENT: Lottery Commission

ARBITRATOR: Marvin Feldman

MANAGEMENT ADVOCATE: Scott Ford

2ND CHAIR: Michael Duco

UNION ADVOCATE: Anthony Sgambati

ARBITRATION DATE: March 1, 1996

DECISION DATE: March 8, 1996

DECISION: Modified

**CONTRACT SECTIONS
AND/OR ISSUES:**

The grievant, an 11 year employee, was removed for theft of State property, purchasing or cashing Ohio Lottery tickets or accepting prize award, and violation of section 124.34 of the ORC. The grievant cashed in winning tickets given to him by his supervisor in the amount of \$32.00. The supervisor told him the proceeds were going into a bereavement fund and that he would accept full responsibility.

HOLDING:

The Arbitrator found that the grievant cashed the tickets and gave the money to his supervisor and received no benefit whatsoever from the monies. Two other employees involved in the incident received ten day suspensions for scratching the tickets and were not charged as being violative of the code. The Arbitrator found that to evenhandedly apply discipline, the grievant should not receive any greater or lesser discipline than the other employees because they were all pawns of the supervisor. Removal was too severe where the supervisor directed an employee to engage in an impropriety and the employee had no personal gain. The grievant was reinstated with a ten day suspension and back pay.

ARB COST: \$874.05

VOLUNTARY ARBITRATION PROCEEDINGS
THE DISCHARGE OF FELIX LAZAZZERA

#1116

THE STATE OF OHIO (LOTTERY	:	
COMMISSION)	:	
	:	
The Employer	:	
	:	
-and-	:	<u>OPINION AND AWARD</u>
	:	
UNITED FOOD & COMMERCIAL	:	
WORKERS, AFL-CIO	:	
	:	
The Union	:	

APPEARANCES

For the Employer:

Scott Ford, Advocate
Michael P. Duco, Second Chair
A. Keith DeGardeyn, Witness
Andre Burton, Personnel Director
Julia A. Ault, Witness
Hernando Harge, Assistant Personnel Director
Christopher Tall, Assistant Legal Counsel

For the Union:

Anthony P. Sgambati, II, Attorney
Felix A. Lazazzera, Sales Representative
Michael A. Krzys, Local 880 Union Representative
Larry Fauver, Union Area Coordinator

MARVIN J. FELDMAN
Attorney-Arbitrator
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I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted at the conference facility of the union attorney in Youngstown, Ohio, on March 1, 1996, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should not be sequestered and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this Opinion and Award was thereafter rendered.

II. STATEMENT OF FACTS

The grievant at the time of hearing was an approximate eleven year employee of the State of Ohio being employed as a sales representative. He has been an exemplary worker and had received numerous awards during his tenure with the employer. During that period of time the grievant had not received any discipline.

At the outset of hearing the parties entered into some stipulations of fact. Those stipulations may be fairly stated as follows:

"A. STIPULATIONS OF FACT

1. On July 14, 1995, Felix Lazazzera attended a special promotion at the Giant Eagle Market in Poland, Ohio.

2. At the special promotion, Assistant Regional Manager Tony Centofanti and Sales

Representative Todd Stillerman and Teresa Irwin scratched several winning instant Lottery tickets. Mr. Centofanti then told Mr. Lazazzera to cash some of the scratched instant Lottery tickets. Mr. Lazazzera objected. Mr. Centofanti replied that there was nothing (sic) to worry about because the money would be used for the office bereavement fund.

3. Mr. Lazazzera cashed the winning tickets given to him by Mr. Centofanti, which amounted to approximately \$32, and received the proceeds. He immediately turned the proceeds of the winning tickets over to Mr. Centofanti."

Further facts revealed that the department in which Mr. Lazazzera worked had a bereavement fund. The grievant's immediate supervisor, Mr. Centofanti, was the keeper of that fund. On or about July 14, as the stipulated facts indicated, the grievant appeared as directed by his immediate supervisor at the Giant Eagle Market in Poland, Ohio. He arrived at approximately 12:30 p.m. after accomplishing some other work duties during the morning hours. He joined other sales representatives there by the name of Todd Stillerman and Teresa Irwin. During that promotion, certain instant lottery tickets were given away to various customers in and around the supermarket. Evidently, there were some tickets left over and Todd Stillerman and Teresa Irwin scratched several winning instant lottery tickets pursuant to the direction of Mr. Centofanti. Mr. Centofanti then asked the grievant to cash some of them and Mr. Lazazzera objected. Mr. Centofanti then told the grievant nothing would happen and that he, Centofanti, would take the blame if any problem occurred. The grievant cashed the tickets, took the money, never pocketing it and gave it to Mr. Centofanti who presumably later placed it in his desk drawer with a notation that it was bereavement fund money.

As a result of all of that, four disciplines occurred. Mr. Centofanti was terminated. The grievant was terminated and Ms. Irwin and Mr. Stillerman were suspended. Mr. Centofanti was a supervisor and his notice of separation from employment was not placed into the record. The separation of the grievant and of Ms. Irwin and of Mr. Stillerman were placed into the record and all of them revealed the following:

"Mr. Felix Lazazzera
4774 Pine Trace Drive
Youngstown, Ohio 44515

re: Separation from Employment

Dear Mr. Lazazzera:

You are hereby notified that your employment with the Ohio Lottery Commission is terminated. The termination is effective at the close of business on Friday, July 28, 1995, and is the result of violations of Lottery Work Rules.

This termination is based on documentation and evidence presented at the pre-disciplinary hearing conducted on July 25, 1995. You were found in violation of:

- A. Theft of State Property [Work Rule #25];
- B. Purchasing or cashing Ohio Lottery tickets or accepting prize award [Work Rule #32];
- C. Violations of Section 124.34 of Ohio Revised Code [Work Rule #34].

The Personnel Department will contact you concerning your benefits and final pay."

-and-

"July 27, 1995

Ms. Theresa Irwin
Sales Representative
Region 8, Youngstown

Dear Ms. Irwin:

You are hereby notified that your employment with the Ohio Lottery Commission is being suspended without pay for ten (10) days. Your suspension will take place from Monday, July 31, 1995 until Friday, August 11, 1995. You are ordered to report for your regular shift Monday, August 14, 1995.

The suspension is based on the documentation and evidence provided at the pre-disciplinary meeting held on July 25, 1995. You are found to be in violation of:

A. Work Rule #3c, [Failure to follow written policies of the agency];

B. Work Rule #25 [Theft of State Property];

C. Work Rule #34 [Violations of §124.34 of the Ohio Revised Code].

Any repeat violation of this nature will result in discipline, up to and including termination."

-and-

"July 27, 1995

Mr. Todd Stillerman
Sales Representative
Region 8, Youngstown

Dear Mr. Stillerman:

You hereby are notified that your employment with the Ohio Lottery Commission is being suspended without pay for ten (10) days. Your suspension will take place from Monday, July 31, 1995 until Friday, August 11, 1995. You are ordered to report for your regular shift Monday, August 14, 1995.

The suspension is based on the documentation and evidence provided at the pre-disciplinary meeting held on July 25, 1995. You are found to be in violation of:

A. Work Rule #3c, [Failure to follow written policies of the agency];

B. Work Rule #25 [Theft of State Property];

C. Work Rule #34 [Violations of §124.34 of the Ohio Revised Code].

Any repeat violation of this nature will result in discipline, up to and including termination."

The grievant protested and in a timely filed protest, stated the following:

"STATEMENT OF FACTS (WHO, WHAT, WHERE, WHEN?): I feel my termination July 28, 1995 is unjust."

He sought the following remedy:

"REMEDY SOUGHT: I wish to be returned to my job with full back pay for all lost time."

It might be noted that neither Ms. Irwin nor Mr. Stillerman protested. They accepted their ten day suspension. At Step 3, the grievance of the grievant was denied and the reasoning of the Lottery Commission revealed the following:

"Considering the evidence collected, including your free admission of cashing Lottery instant tickets, I cannot say the termination was imposed without just cause. For this reason, the grievance is denied."

The matter was appealed to Step 4 and the union in its presentation made the following statement in their filing:

"On July 14, 1995 Mr. Lazazzera, Todd Stillerman and Teresa Irwin were assigned to a sales promotion at Poland Giant Eagle in Poland, Ohio by Tony Centofanti, Assistant Regional Manager. At the end of the promotion, Mr. Centofanti instructed Ms. Irwin and Mr. Stillerman to scratch off any remaining tickets and to give any winners to him. They did as they were instructed by Mr. Centofanti. Mr. Centofanti then took the winning tickets he collected from the two sales representatives and told Mr. Lazazzera to cash them in at the sales agent (Poland Giant Eagle). Mr. Lazazzera strongly objected, telling Mr. Centofanti he did not want to cash in any tickets. Mr. Stillerman witnessed this exchange (Exhibit G). Mr. Centofanti again told Mr. Lazazzera to cash in the tickets. At this time Mr. Centofanti told Mr. Lazazzera not to worry because the money would be used for a bereavement fund at the Region 8 office and that he (Mr. Centofanti) would take full responsibility."

On November 28, the Ohio Department of Administrative Services denied the protest at Step 4 and stated the following:

"November 28, 1995

Felix Lazazzera
4774 Pine Trace Drive
Youngstown, Ohio 44515

Dear Mr. Lazazzera:

The Office of Collective Bargaining has reviewed the above referenced grievance in which you allege that management has violated Work Rule #25, Work Rule #32 and Work Rule #34. You claim that your termination of July 28, 1995, was unjust. As a remedy, you ask to be returned to your job with full back pay.

On July 14, 1995, you cashed in Lottery tickets at the Giant Eagle in Poland, Ohio, in violation of ORC3770.07 (A). You were terminated from employment for this violation, in accordance with the Rules and Regulations of the Lottery Commission.

There are no violations of the contract found.
Accordingly, your grievance is denied.

Sincerely,

/s/Robert E. Thornton
Chief of Operations"

On the basis of those series of events, the matter found its way to this arbitrator. The employer pointed out that the activity of the grievant was contrary to Ohio Revised Code, Section 3770.07, last paragraph of Section (A). That paragraph revealed the following:

"No lottery prize award shall be awarded to or for any officer or employee of the state lottery commission, or any blood relative or spouse of such officer or employee living as a member of such officer's or employee's household. Upon the payment of prize awards pursuant to this section the director and the commission are discharged from all further liability therefor."

It is also noted that the lottery commission had a policy notice number 92-05. The subject of the policy were the disciplinary guidelines and actions of the lottery commission. It is noted that under Section C of that guideline, the following language was found:

"It is of equal importance that disciplinary actions be administered fairly and consistently throughout the Ohio Lottery Commission. This Policy will give the supervisory staff the necessary guidelines that should be followed when disciplinary action is contemplated."

That language further revealed the following:

"The Ohio Lottery Commission is dedicated to the policy of progressive, constructive discipline. Disciplinary actions should be imposed at the lowest level possible, with the intent of giving the employee the opportunity to correct his/her behavior, so long as the discipline is commensurate with the infraction. If this does not occur, discipline should become more severe up to and including removal; certain offenses warrant severe disciplinary action on the first offense."

It might be further noted that at paragraph G of the preamble, the following language to those guidelines stated the following:

"G. PROGRESSIVE CONSTRUCTIVE DISCIPLINE

Uniform guidelines have been developed to assist in complying with this Policy. These guidelines will serve to notify employees of the type of discipline that will be given for specific violations of the rules and regulations of the the State of Ohio, and the Ohio Lottery Commission.

The degree of seriousness of the offense(s) will determine which appropriate disciplinary action will be imposed.

Disciplinary actions are placed in an employee's personnel file. Bargaining unit employees are to consult the Labor Agreement for when such records can be expunged from the file.

NOTE: THIS SECTION SHOULD BE VIEWED AS A GUIDELINE. THE DIRECTOR MAY IMPOSE LESSER OR GREATER DISCIPLINE AS THE SITUATION DICTATES."

As was indicated in the separation from employment letter dated July 27, 1995, and stated in full hereinabove, the grievant was found guilty by his employer of three work rules. The first rule that the grievant was found violative of was work rule 25. That work rule and penalty under that work rule revealed the following:

"25. Theft of state property, property of visitors to commission facilities, or property of another employee during work hours.

FIRST: Suspension or Removal"

The grievant was also found to be violative of work rule 32 and work rule 34. Work rule 32 and its discipline revealed the following:

"32. Purchasing or cashing Ohio Lottery tickets or accepting prize award; or attempt to purchase or cash any Ohio Lottery ticket; or any violation of Section 3770.07(A) of Ohio Revised Code.

FIRST: Removal"

Work rule 34 and its discipline revealed the following under those work rules:

"34. Violations of Section 124.34 of Ohio Revised Code

FIRST: The appropriate discipline depends on the severity of the incident"

It might be noted that if the discipline of Mr. Stillerman and Ms. Irwin were reviewed, Mr. Stillerman and Ms. Irwin were also found guilty of work rule 25 and work rule 34. However, Ms. Irwin and Mr. Stillerman were found guilty of work rule 3 and not guilty of work rule 25. Work rule 3 revealed the following:

"3. Insubordination

a. Failure to carry out a work assignment

Reprimand or Suspension

b. Willful disobedience of a verbal or written order issued by a supervisor

Reprimand or Suspension

c. Failure to follow written policies of the agency or offices, director, division chiefs or supervisors

Reprimand or Suspension"

It might be noted that under the terms of the contract, Section 10.05, that the employer is committed to follow the aspects of progressive discipline. It might be further noted that the steps indicated are verbal reprimand, written reprimand, fine up to and including two days pay, suspension and removal. It might be further noted that under Article 10.03 that no employee shall be disciplined or discharged without just cause. It is further noted under the terms of the contract at Section 13.04 that the employer may promulgate unilateral work rules and that such rules should be reasonable and uniformly implied. The language of the contract in that particular section revealed the following:

"§13.04 - Work Rules

Employer rules are to be posted or available and copies to be sent to the Union. Such rules shall be reasonable and uniformly applied."

From all of that, the employer has maintained that the grievant was guilty of a violation of the code, a violation of the rules, that the grievant's activity was different than that of Mr. Stillerman or Ms. Irwin and that there was sufficient just cause, therefore, to sustain the discharge of the grievant. The employer further argued that

progressive discipline does not lie in this matter since the act was so grossly substandard that removal may be invoked without the use of progressive discipline. The employer further stated that the grievant was cognizant of the rules, cognizant of the code and knew the consequences of the acts that he committed.

The union on the other hand revealed in the defense of the grievant, several items. The first activity that the union stated was that the grievant was acting pursuant to the mandate of a supervisor. The union further stated that the contract demanded that all discipline be evenhandedly applied and in this case there was unevenhanded treatment. Thirdly, the grievant had an impeccable record at the facility and when considering discharge, the mitigation of the termination should be considered when the record is superimposed upon the alleged sub-standard conduct. From all of that, the union argued that there was an insufficient just cause for any discipline whatsoever.

Based upon that bevy of evidence and upon the stipulations of the parties, and the conclusions drawn therefrom, this matter was heard and submitted for Opinion and Award.

III. OPINION AND DISCUSSION

The grievant in this particular matter, it appears, was an employee of eleven years who had an impeccable work record. He received award after award for excellent service from his agency during the course of that eleven years. He testified in an apparently candid manner and made a good appearance at hearing. The facts of this case are not in substantial conflict.

The grievant worked as a sales representative of the Lottery Commission and was told to appear at a promotion at the Giant Eagle Market in Poland, Ohio. He appeared about an hour and one-half after it began because he was involved in other duties of his job. At the time he appeared, he took care of the business of the promotion. He was given some scratched off winning lottery tickets by his supervisor. He was told that the others had scratched off the tickets. He testified that in fact, he saw the others (Irwin and Stillerman) scratch tickets. He was told to cash in the tickets and at first he refused and then was told again and he stated he considered that a mandate from his supervisor to cash in the tickets.

He cashed in the tickets, gave the money to his supervisor and received no benefit whatsoever from the monies. A citizen of Ohio saw the event and reported it. Based upon the report of the person, the matter was investigated by the security department of the Lottery Commission and the grievant was found guilty of activity contrary to statute and rule and was terminated by his termination notice, a copy of which was placed into the record. Mr. Stillerman and Ms. Irwin received a ten day suspension and was not charged as being violative of the code. The contract demanded that the activity of discipline be evenhandedly applied and be made pursuant to the guidelines of memo under policy number 92-05, all of which is quoted hereinabove.

There is no doubt in my mind that the activity of the grievant was part of a conspiracy triggered by the supervisor to scratch out some winning tickets and obtain funds for the bereavement fund of which the

supervisor was in charge. Mr. Stillerman and Ms. Irwin scratched the tickets, received the winning numbers and those winning numbers were cashed in by the grievant. It is apparent that all of this occurred pursuant to the mandate of the supervisor and the supervisor is responsible for this entire event. There is also no doubt in my mind that the grievant should not receive any greater discipline or lessor discipline than Mr. Stillerman and Ms. Irwin. After all, all three of them were pawns of Mr. Centofanti. Mr. Centofanti had Mr. Stillerman and Ms. Irwin scratch the tickets and had the grievant cash in the winning tickets. How there can be a separation of activity by their employer?

All of these individuals had the same classification, all of them were involved in the same improper direction by supervisor, all of them participated in inappropriate conduct, all of them were involved in receiving funds that did not belong to them and all of them acted contrary to rule and contract and code. Even though only one person went to the window, all three were involved in the same type of substandard conduct. Under the facts of this case, it is apparent that the grievant's termination was somewhat harsh especially in light of the fact that Mr. Stillerman and Ms. Irwin only received a ten day suspension and especially in light of the fact that the contract demands evenhanded treatment and corrective progressive discipline. Further, policy number 92-05, while it is indicated to be rules and guidelines for discipline, those rules and guidelines should be viewed as a guideline and not something that is poured in concrete. As a matter of fact, Section G which was stated in full hereinabove, is again restated and it revealed the following:

"G. PROGRESSIVE CONSTRUCTIVE DISCIPLINE

Uniform guidelines have been developed to assist in complying with this Policy. These guidelines will serve to notify employees of the type of discipline that will be given for specific violations of the rules and regulations of the State of Ohio, and the Ohio Lottery Commission.

The degree of seriousness of the offense(s) will determine which appropriate disciplinary action will be imposed.

Disciplinary actions are placed in an employee's personnel file. Bargaining unit employees are to consult the Labor Agreement for when such records can be expunged from the file.

NOTE: THIS SECTION SHOULD BE VIEWED AS A GUIDELINE. THE DIRECTOR MAY IMPOSE LESSER OR GREATER DISCIPLINE AS THE SITUATION DICTATES"
(Emphasis ours)

It is noted in that paragraph that the section should be viewed as a guideline.

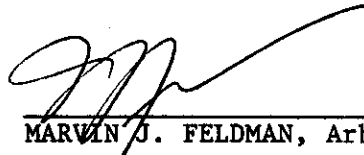
The disturbing factor in this particular case is that the supervisor caused all three of his sales representatives to be contemptuous of the rules and the statute and the contract. For that, there should be some discipline because the sales representatives should have known better. However, where the supervisor directs an employee to accomplish an inproprietary, and where the employee has no personal gain from that activity, it is apparent that a first time event of that sort should not be subject to the capital punishment of the industrial society. This is especially true in this particular case in which the grievant was an exemplary employee.

Further, the contracts demands that there be evenhanded treatment

and that was not accomplished in this particular case. Rules, in order to be proper, must be published, must be reasonable, and must be evenhandedly applied. Failure to evenhandedly apply the rule is inappropriate.

IV. AWARD

The grievant's termination shall be expunged from his record and the grievant shall receive the same discipline as Mr. Stillerman and Ms. Irwin. The grievant shall receive back pay forthwith less any monies earned elsewhere during the period of termination. He shall not lose seniority or other benefits.


MARVIN J. FELDMAN, Arbitrator

Made and entered
this 8th day of
March, 1996.