

ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: 1250

OCB GRIEVANT NUMBER: 27-20-961224-2805-02-12-T

GRIEVANT NAME: Marsha Webb

UNION: 1199

DEPARTMENT: Ohio Veteran's Home

ARBITRATOR: Rankin Gibson

MANAGEMENT ADVOCATE: Dave Burrus
Teri Decker

2ND CHAIR: Mike Duco

UNION ADVOCATE: Janice Stephens

ARBITRATION DATE: November 19, 1997

DECISION DATE: January 8, 1998

DECISION: Modified

**CONTRACT SECTIONS
AND/OR ISSUES:** Article 24; Was Grievant removed for just cause

HOLDING: Arbitrator Gibson found that the falsification of the grievant's application did not cause any loss to the Employer. Since Management did not follow the rules of progressive discipline, the removal was modified to a 5-day suspension without pay. The Grievant was reinstated to her former position with back pay (minus the 5 day suspension) and benefits.

ARB COST:

In The Matter of the Arbitration Between

OHIO DEPARTMENT OF REHABILITATION :
& CORRECTION, MANSFIELD
CORRECTIONAL INSTITUTION, :

Employer, :

and :

DISTRICT 1199 HEALTH CARE AND :
SOCIAL SERVICE UNION, SERVICE :
EMPLOYEES INTERNATIONAL UNION, :
AFL-CIO :

Union. :

OPINION AND AWARD
OF
ARBITRATOR GIBSON

Case No. 27-20 (96-1224) 2805-
02-12

Appearances:

For the Employer:

David Burrus, Ohio Department of Rehabilitation & Correction, Labor Relations
Officer III
Michael P. Duco, Office of Collective Bargaining
Teri Decker, Ohio Department of Rehabilitation & Correction Chief, Bureau of
Labor Relations

For the Union:

Janice D. Stephens, Administrative Organizer, Northeast Ohio, District
1199/Service Employees International Union, AFL-CIO
M.G.W., Grievant

OPINION

A. Introduction

Pursuant to §7.07 of Article 7 of the 1994 labor contract, Rankin M. Gibson was selected from a panel of arbitrators to hear and determine Grievance No. 27-20 (96-1224) 2805-02-12 protesting the removal of M.G.W. on December 23, 1996 for violation of Rule 22 of the Standards of Employee Conduct. Having exhausted the internal grievance procedure the grievance was referred to arbitration for a final and binding decision. The parties agree to share equally the arbitrator's fees and expenses.

The Employer's Step Three Response dated January 21, 1997, provides in pertinent part:

"UNION CONTENTION: ***

DISCUSSION AND DECISION: A systemic review of employment applications has been undertaken to verify education levels claimed by employees. This grievant filled out an application for her current position which indicates that the highest academic degree or level attained by her is a Bachelor of Science in Business Administration. A check of records at the university where the degree was allegedly earned revealed that the grievant did not take several of her final examinations therefore the degree was not conferred.

The grievant related at this meeting that from her understanding she had earned the degree in question. While she was unable to take her final examinations due to financial constraints she was allowed to participate in graduation as a graduate. It was her understanding that once she fulfilled her financial obligations to the university and completed the final examinations, she would receive the degree that was being held. Even though she did not receive the degree the grievant was granted membership in the university's alumni association and has been asked to return for functions as a graduate. As a result of this situation the grievant related that the university has changed its position on this type of issue. The grievant further related that based upon her understanding of the employment application she did not falsify anything. It is her belief that she attained the degree as well as the level of a degree. She indicated that she had attained a level, not that she possessed a degree."

The grievant indicated that based upon her performance as an employee, management should not have removed her. The standards of conduct stipulates a lesser penalty range for a first violation of the standard and this level should have been considered. The grievant indicates that she has an unblemished work record, excellent evaluations, and was encouraged to apply for the position she held. She does not believe that the Department would simply throw away the investment that has been placed in her. The grievant also feels that she may have been discriminated against on the basis of her race. She was among three employees who

A hearing was held at the State Office of Collective Bargaining in Columbus, Ohio on November 19, 1997, before the undersigned arbitrator, between the hours of 9:00 a.m. and 6:45 p.m. Ample opportunity was afforded both parties to offer proofs and make arguments. Both parties filed post hearing briefs on December 22, 1997.

B. Background Facts

Pursuant to certification of the State Employment Relations Board the Employer recognizes District 1199 of the Service Employees International Union, AFL-CIO as the sole and exclusive bargaining agent for all employees employed in classifications listed in appendix A of the contract with respect to all matters pertaining to wages, hours, terms and other conditions of employment.

On December 3, 1996, the Warden of the Mansfield Correctional Institution notified M.G.W.:

"*** You are to be REMOVED from the position of Case Manager. There is substantial evidence that on your civil service application dated 2/21/96, you stated that you had obtained a B.S.B.A. from Ashland University. After investigation it was found that you did not possess a Bachelor's Degree from Ashland University. This clearly is a violation of Rule #22 of the 1996 Standards of Employee Conduct - Falsifying, Altering, or Removing any official document."

On December 23, 1996, M.G.W. filed Grievance No. 27-20 (12-24-96) 2805-02-12, reading in pertinent part:

"STATEMENT OF GRIEVANCE: Grievant was terminated per Rule #22 of Employee Conduct, with false and erroneous information. Sect III - Education - Level attained is bachelor level - OATH - True to best of knowledge and belief.

RESOLUTION REQUESTED: Reinstatement in full with all benefits and pay and to be made whole in everyway."

were investigated for falsification. Two were removed and one was not. The one who was not removed was a white male employee. There are also other employees state wide who have not been removed for this action.

On the basis of the above the following represents my findings as the hearing officer. The employment application is quite clear when it address the area of education. There is a line for an employee to list highest academic degree or level attained. That language is quite clear and does not appear to be ambiguous. Three lines below this is a line that reads, "Major subject area for undergraduate degree, if any." On this line the grievant indicated Marketing. The next line reads, "Major subject area for undergraduate study without a degree, if any". This line was left blank by the grievant. The grievant also indicated that she possessed a minor subject area for an undergraduate degree when no such degree had been awarded. There are lines on the application that would allow an applicant to indicate that they had completed study in an area without a degree being awarded. The grievant failed to take advantage of that fact but rather completed the application in a manner that would lead any reasonable person to believe that she had earned a degree. In addition, it would have been just as simple to have indicated on the application that the degree was being held pending the payment of the tuition in question. There has been no adequate explanation offered that would excuse this exclusion.

While the grievant's work record may be unblemished the fact remains that she put false information in the employment application. This information cannot be considered a simple exaggeration of the facts by the grievant. The Department considers it an outright falsification of the facts. While the standards of conduct may indicate that a lesser degree of penalty may be meted out for a first violation of rule # 22, the penalty range also indicates that an employee may be removed for such a violation. This is not considered a minor type of falsification by the grievant of a routine document. This was an employment application upon which a decision was made to promote the grievant over other employees.

The grievant has asserted that among the three employees she is aware of that have falsified employment applications one was not removed. The two employees who have been removed are black and management's actions appear to be discriminatory in nature. It is the opinion of the hearing officer that the grievant is not similarly situated with the employee in question, therefore management's action is not considered disparate in nature. The grievant's removal was based upon management's consideration of all the facts surrounding the incident."

To obtain initial employment or a promotion in the classified civil service with the Ohio Department of Rehabilitation and Correction, applicants must complete and submit an Ohio Civil Service Application Section III - Education and Training is an integral part of this application. Section III contains several lines upon which an applicant should indicate the level of education possessed by the applicant. The lines indicate whether or not the applicant has completed a major course of study with or without a degree and of course work areas completed at the undergraduate or graduate level.

The record shows that on June 26, 1991, M.G.W. completed an application for a Clerk 3 position. On August 12 she was hired as a Medical Records Clerk. In September, 1992, she was laterally transferred to Rules Infraction Board Secretary. In January, 1994, she was laterally transferred to Unit 4 Secretary. On February 21, 1996, M.G.W. completed an application for Correctional Program Specialist. On June 23, 1996 she was promoted to Correctional Program Specialist and Case Manager.

On November 18, 1996, the Regional Directors of the Ohio Department of Rehabilitation & Corrections issued a Memorandum to all Wardens, reading in part:

"In a July 16th memo we advised you of the experience of one institution which found that two employees had falsely claimed to have received college degrees, and have resigned under duress. We advised you to require verification for all staff who had claimed to have received post-secondary educational achievement.

Since that time, a second institution has discovered that a deputy warden falsified his educational credentials. A third discovered that a current employee in applying for a promotion, falsely claimed a college education.

It has become apparent that the recommended verification process must be a mandatory requirement. If you have not yet, immediately institute a procedure to verify the academic credentials of any employee who claims to have achieved a post secondary education. In all positions requiring a license, obtain a copy of the required license and maintain that copy in the

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

8.02 Progressive Discipline

The principles of progressive discipline shall be followed.

These principles usually include:

- A. Verbal Reprimand
- B. Written Reprimand
- C. A fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB [Office of Collective Bargaining]
- D. Suspension
- E. Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

The employees authorization shall not be required for the deduction of a discipline fine from the employee's paycheck.

8.03 Pre-Discipline

Prior to the imposition of a suspension of more than three (3) days, demotion or termination, the employee shall be afforded an opportunity to be confronted with the charge against him/her and to offer his/her side of the story. This opportunity shall be offered in accordance with the "Loudermill Decision" or any subsequent court decisions that shall impact on pre-discipline due process requirements." (Emphasis added.)

The Grievant, M.G.W. , was confronted with the charges against her and afforded an opportunity to offer her side of the story in accordance with the "Loudermill Decision". Thus, the basic issue, as stipulated by the parties and in accordance with §8.01 is whether the discharge or removal of the Grievant was for "just cause", and "if not, what shall the remedy be?".

The term "just cause" has no fixed meaning. The best an arbitrator can do is to determine what a reasonable person, mindful of the habits and customs of industrial life and the standards of justice and fair dealings prevalent in the community ought to have

employee's personnel file. Unfortunately, submission of verification for any claimed educational credentials must also become a requisite prior to selections for promotions or new hires where the claimed educational achievement is a factor in the selection process.

C. Analysis - Management Rights

At common law, the owners of a private business enterprise and their managers have rights that were and still are based substantially upon their ownership of business property. The rights and powers of public employers are based upon the consent of the governed as delegated by elected representatives to Congress, to the General Assembly, to the City Council, to the Board of Education, etc. In each case, numerous limitations are imposed by law, and sometimes by contract, upon the exercise of so-called "management rights."

The General Assembly of Ohio in enacting the Public Employees Collective Bargaining Law in 1983 set forth extensive "management rights" of a public employer in R.C. §4117.08. That such rights are not unlimited, see Lorain City School District Board of Education v. State Employment Relations Board, et al., 40 Ohio St.3d 257, 533 N.E.2d 264 (1988).

Acting pursuant to the foregoing authority the State of Ohio on behalf of the Department of Rehabilitation and Correction negotiated an agreement with the Union containing Article 5, entitled "Management Rights", which states:

"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. (Emphasis added.)

By Article 8 entitled "Discipline", the parties specifically provide:

"8.01 Standard

done under similar circumstances. See Arbitrator Platt in Riley Stoker Corp., 7 LA 764; Arbitrator McGoldrick in Worthington Corporation, 24 LA 1; Arbitrator Harris in RCA Communications, Inc., 29 LA 567.

Work rules frequently give meaning to "just cause" by setting forth standards of conduct and sanctions applicable when a rule is broken.

Effective February 18, 1996 the Employer revised its unilateral Standards of Employee Conduct stating 46 rules, some consisting of one or more subdivisions, which set forth a schedule of penalties ranging from oral - written reprimand to removal or termination of employment. The Grievant is charged with violating Rule 22 (Joint Exhibit 4), which provides:

Offenses				
1st	2nd	3rd	4th	5th
<hr/>				
*22. Falsifying, altering, or removing any official document	3-5/R	5-10/R	R	

The Grievant acknowledges receipt of the Employer's Standards of Employee Conduct.

D. Applicable Quantum of Proof

The Union concedes that charges of falsifying, altering or removing any official document are among the most serious charges that can be made against an employee in the Rehabilitation and Correction field, and that the removal of an employee, as here, with more than 6 years of service is a grave matter. Hence the Union contends that the Employer must be held to a "clear and convincing" quantum of proof.

In disciplinary cases, the Employer is required to prove employee guilt or wrongdoing. Arbitrator Bothwell in St. Joseph Lead Co., 29 LA 781; Arbitrator Cahn in Jones & Laughlin Steel Corp., 29 LA 525; Arbitrator Pollack in F.J. Kress Box Co., 4 LA 401. In cases involving moral turpitude or where the charges are in their nature criminal, there is a division of opinion among arbitrators of the degree of proof required. That the common law standard of "proof beyond a reasonable doubt" is frequently required. See Arbitrator Bothwell in St. Joseph Lead Co., 29 LA 781; Arbitrator Babb in United States Steel Corp., 29 LA 272; Arbitrator E. Jones in Cannon Electric Co., 28 LA 878; Arbitrator

Holly in Aladdin Industries, Inc., 27 LA 463; Arbitrator Somers in Marlin Rockwell Corp., 24 LA 728; Arbitrator Warns in American Saw & Tool Co., 23 LA 534; Arbitrator Murphy in Fruehauf Trailer Co., 21 LA 832; Arbitrator Keefe in American Motors Corp., 52 LA 79; Arbitrator Koven in Atlas Freight Lines, 39 LA 352 and this arbitrator's award in Imperial Glass Corporation, 61 LA 1180, 73-2 ARB ¶8504 requiring the Employer to prove employee theft of property by proof beyond a reasonable doubt. Also see Arbitrator Aaron in Armour-Dial, 76 LA 96.

In Elkouri & Elkouri, How Arbitration Works (5th Ed. 1997) p. 413-414 it is reported that there is a trend in certain kinds of cases, i.e., drug testing cases and sexual harassment cases to require "clear and convincing proof of wrongdoing". "Clear and convincing evidence" is a quantum of proof greater than a preponderance of the evidence "but not to the extent of such certainty as is required by beyond a reasonable doubt" in criminal cases. See 3 Am.Jur.2d, Evidence, §1167; 44 O.Jur. 3d, Evidence and Witnesses, §1032.

Based on the nature of the charges made against the Grievant, the arbitrator finds and believes that proof by a preponderance of the credible evidence will be sufficient.

E. Analysis - Falsification of Records

Arbitration reports are full of cases dealing with falsification of records. See table of offenses listed in Elkouri & Elkouri, How Arbitration Works (5th Edition, 1997) pp. 953-954. Whether an employer is justified in discharging an employee for falsification of records turns upon the particulars of the case. To justify a discharge for falsification of records depends upon such factors as (a) substantive nature of the falsification (b) the duties of job the employee holds (c) the length of the employee's service (d) how other similar falsifications have been handled by the employer (e) whether the falsification has caused any actual loss to the employer (f) whether the employer thinks the falsification was serious (g) whether discharge was immediate or did the employer delay (h) whether the falsification involved was a first offense or whether there were prior instances of falsification.

The parties are well-aware of the Standards of Employee Conduct and the proposed penalties in the event of an infraction. The Warden of the Mansfield Correctional Institution testified that credibility on the part of case managers is very important since such employees normally appear as witnesses before the Rules and Infraction Board and the Use of Force Committee. These duties and responsibilities are consistent with those contained in the job description for a Correctional Programs Specialist. The Employer contends that any person upon reading the Grievant's Applications for hire and for subsequent promotion would reasonably believe the Grievant had received and earned a bachelors degree from Ashland University. The

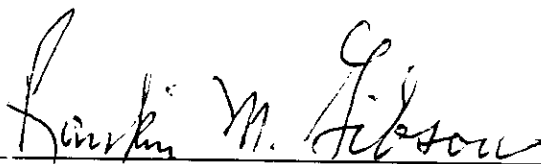
misinformation admittedly enhanced the Grievant's background in contrast to other applicants. Mr. Riddle, Unit Manager Administrator, and also a graduate of Ashland University recognized that the Exhibit offered by the Grievant was not the degree he held from Ashland University. Upon investigation, which culminated in pre-disciplinary hearings, the Grievant had not been awarded a bachelors degree for several reasons. She incurred a substantial financial obligation to the University. She knew that she would not be awarded a degree until her financial obligation was satisfied. She knew her grade point average was below that required for graduation and that she had not completed all course work as of December 16, 1996 when she filed for bankruptcy. The information contained on her application for employment in June of 1991 and for promotion in February, 1996 was not true. It created a false impression regarding her college education. Thus the Employer had cause to impose discipline.

No evidence was offered to prove that the false information conveyed by the Grievant's Application caused any loss for the Employer. The Employer believed the misrepresentation was serious. However, the investigation regarding falsified educational achievements was undertaken because of the Employer's embarrassment over other instances of falsely claimed post-secondary educational achievement. The difficulty raised in this case relates to the penalty asserted. The Standards of Employee Conduct as well as §8.02 call for progressive discipline. Admittedly, by Rule 22, removal is an option for the first offense which this is. In the absence of proof of loss to the Employer resulting from the falsification, in the arbitrator's view, discharge or removal from employment is excessive and violates the Employer's contractual commitment to follow the principles of progressive discipline. A 5 day suspension without pay would be warranted in this case.

AWARD

Having found that the Grievant's falsification of her employment application provides cause for discipline but not for removal or discharge, it is the arbitrator's award:

- (1) That Grievance No. 27-20 (96-1224) 2805-02-12 be granted to the extent that the Grievant M.G.W. be reinstated with back pay and all benefits, subsequent to December 28, 1996 for her violation of Rule #22 ; and
- (2) That the arbitrator's fees and expenses be shared equally by the Employer and the Union.



RANKIN M. GIBSON, ARBITRATOR

DECIDED AND ISSUED AT Columbus, Franklin County, Ohio this 8th day of January, 1998.

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