

ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: 1280

OCB GRIEVANT NUMBER: 34-22-970415-0088-01-09

GRIEVANT NAME: David Gosiewski

UNION: OCSEA

DEPARTMENT: Bureau of Workers Compensation

ARBITRATOR: Nels E. Nelson

MANAGEMENT ADVOCATE: Kim Browne
2ND CHAIR: Rodney Sampson

UNION ADVOCATE: Steve Lieber

ARBITRATION DATE: March 11, 1988

DECISION DATE: May 5, 1998

DECISION: Sustained

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

HOLDING: Arbitrator Nelson ruled that the State did not prove its case against the Grievant. The Grievant was dismissed for insubordination, because he refused to answer questions during an administrative investigation conducted by Labor Relations Officers without the presence of his attorney. He was suspected of taking bribes from Workman's Compensation claimants' attorneys for favorable settlements. Arbitrator Nelson ruled that the State did not prove its case against the Grievant. The Grievant is to be reinstated to his position and granted back pay for a period of approximately 3 months.

ARB COST: \$ 856.16



#1280

ARBITRATION DECISION

May 5, 1998

In the Matter of :

State of Ohio, Bureau of Workers'
Compensation

and

Ohio Civil Service Employees Association,
AFSCME Local 11

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Case No. 34-22-970415-0088-01-09
David Gosiewski, Grievant

APPEARANCES

For the State:

Kim A. Browne, Director, Labor Relations
Roger A. Coe, Labor Relations Officer
Kathleen Raparelli, Labor Relations Officer
Thomas Sant, Staff Attorney
Sheilah Hampton, Manager, Local Customer Service Office
Eduardo Romero, Supervisor, Local Customer Service Office

For the Union:

Steve Lieber, Advocate
David Gosiewski, Grievant
June Smith, Steward

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, David Gosiewski, was hired by the Bureau of Workers' Compensation on June 27, 1993. He was hired as a Service Claims Representative 2 in the Cleveland Local Customer Service Center and was promoted to Service Claims Representative 4 or Customer Service Specialist on April 3, 1994. The grievant received good evaluations and had no prior discipline.

The events leading to the grievant's removal began in March 1995. At that time an injured worker requested a Bureau employee at the Richmond Heights Service Center to transfer his file to the Cleveland Service Center because his attorney had an "inside contact" in Cleveland who could guarantee a lump sum settlement of at least \$40,000.

When the employee reported the injured worker's comment, a criminal investigation was launched by the Cuyahoga County Prosecutor, the Highway Patrol, and the Bureau. The injured worker's file was transferred to Cleveland and the worker was told his file was moved. Shortly thereafter, the grievant used his employee identification number to remove the file from the file room.

In a few months the grievant presented the injured worker's claim to the Lump Sum Settlement Committee. He indicated to the committee that the injured worker had an eighth grade education and no transferable job skills. Based on the grievant's report, the case was settled for \$60,000. The injured worker, however, was a high school graduate and had been a police officer and a Fraternal Order of Police business agent.

The criminal investigation continued. The state claims that it revealed that the grievant was taking bribes from claimants' attorneys for favorable settlements. It asserts that bribes took the form of clothing from an exclusive men's shop, meals in expensive restaurants, and \$1400 tickets to Cleveland Cavaliers basketball games. The state also noted that the grievant's mother was employed by a law firm which represented claimants handled by the grievant.

On July 10, 1996 the grievant was interviewed by Larry Phillips, an investigator from the Bureau, and Trooper Daniel Ferguson from the Highway Patrol. The grievant waived his right to an attorney and was questioned for 4 1/2 hours. The next day the grievant was assigned to the file room where he was to perform clerical duties.

On February 7, 1997 Roger Coe and Kathleen Raparelli, Labor Relations Officers from Columbus, planned to interview the grievant in the presence of Sheilah Hampton, the manager of the Cleveland Service Center; and Eduardo Romero, a Team Leader who supervised the grievant. Coe explained to the grievant that it was an administrative investigation. He also read a Garrity waiver to the grievant. The grievant, however, refused to answer any questions unless his attorney was present. Coe and Raparelli then ordered the grievant to answer. When he did not comply, he was told that his failure to respond was insubordination and that it could result in his removal. The interview was ended when the grievant continued to insist that his attorney be present.

On February 28, 1997 a pre-disciplinary hearing was held. The grievant was accompanied by Steve Lieber, a union staff representative, and A. June Smith, a union steward. At the hearing the grievant offered to answer any and all questions but the Bureau's representatives refused his offer. The grievant claimed that on February 7, 1997 he had refused to answer any questions without his attorney being present because the Garrity form which was read to him states that an employee has the "right to talk to an attorney and to have him/her present" during questioning. Raparelli claimed that the grievant refused to read the Garrity form and could not have been confused by the attorney language. Kim A. Browne, the hearing officer, found that the grievant had refused a direct order when he did not answer questions put to him and that he had been warned that he could be removed for his insubordination. She concluded that there was just cause to remove the grievant.

The grievant was terminated on March 27, 1997 by James Conrad, the Administrator of the BWC. The termination letter states that he was removed for

violating the Bureau's Progressive Disciplinary Guidelines for Bargaining Unit Employees, Insubordination (a) Willful disobedience/failure to carry out a direct order.

A grievance was filed by the union. It claims that the grievant "never refused the 02-07-97 investigatory interview but was misled as to the representation [and] ... the Garrity form ... interjected into the interview ... was misleading as to his representation." The union requested that the grievant be reinstated as a Claims Specialist in the Cleveland office and be made whole.

The step three hearing took place on June 3, 1997. The positions of the parties were unchanged. The hearing officer, Gary A. O'Neal, found no violation of the collective bargaining agreement and denied the grievance on June 24, 1997.

The possibility of criminal action against the grievant appears to have ended on July 25, 1997. On that date James A. Gutierrez, an Assistant Prosecuting Attorney in Cuyahoga County, informed the Highway Patrol that he did not believe that there was enough evidence to convict the grievant. He indicated that the case was being closed.

The arbitration hearing was held on March 11, 1998. At that time the state argued that the grievance was not arbitrable because it was not submitted within 14 days and because the grievance form received did not include the back of the form. The union claimed that the grievance was submitted well within the time limits and that the grievance form given to the state included both sides of the form. The Arbitrator reserved judgment on the arbitrability issue and proceeded to hear the merits of the case. Written closing statements were received on March 30, 1998.

ISSUES

The issues as framed by the Arbitrator are as follows:

- 1) Is the grievance arbitrable?
- 2) Was the grievant removed for just cause? If not, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

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.

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. One or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- 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;
- D. one or more day(s) suspension(s);
- E. termination.

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24.05 - Imposition of Discipline

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Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

Article 25 - Grievance Procedure

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25.02 - Grievance Steps

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Step Two (2) - Intermediate Administrator

In the event the grievance is not resolved at Step One (1), a legible copy of the grievance shall be presented in writing by the Union to the intermediate administrator or his/her designee within five (5) days of the receipt of the Step One (1) answer or the date such answer was due, whichever is earlier.

STATE POSITION

ARBITRABILITY - The state argues that the instant grievance is not arbitrable. First, it claims that the grievance is not timely. It points out that the grievant's removal was effective March 27, 1997 but the time stamp of the Bureau of Workers' Compensation indicates that the grievance was not received until April 15, 1997. The state notes that this is 19 days after the grievant was removed while Article 25 requires a removal to be grieved within 14 days.

Second, the state contends that the grievance is not arbitrable because the grievance form submitted by the union was defective. It asserts that the form it received in the mail from Smith consisted of only the front page of the grievance form. The state maintains that this violates Article 25, Section 25.02 which requires the filing of a legible copy of the grievance form.

The state rejects the union's claim that the arbitrability issue cannot be raised at the arbitration hearing. It asserts that a memorandum from O'Neal to Browne indicates that he raised the issue of the incomplete grievance form prior to the start of the step three meeting. The state further claims that it is well-established that the right to challenge the arbitrability of a grievance is not waived by failing to raise the issue prior to arbitration.

MERITS - The state argues that the grievant was insubordinate. It points out that the statements of Coe, Hampton, Raparelli, and Romero indicate that the grievant was given at least two direct orders to answer administrative investigatory questions, was advised of his right to union representation, and was specifically warned that his refusal to comply was insubordination which would subject him to termination yet he refused to answer questions. The state notes that the testimony of its witnesses confirmed each of these points.

The state contends that it has been consistent in dealing with cases where employees were suspected of mishandling claims. It states that Kathy Chubb, Kent Cicerchi, Kim Horvath, and Nancy Wall were subjected to investigatory interviews and

ultimately removed from service. The state reports that Wall refused to respond to questions relating to her claims processing and, like the grievant, was instructed that her continued refusal to respond to investigatory questions would result in her removal.

The state maintains that the grievant was afforded all of the due process required under the collective bargaining agreement. It observes that the notice for his pre-disciplinary hearing provided him notice of the charges against him. The state indicates that the pre-disciplinary report establishes that the grievant knew the nature of the interview on February 7, 1997. It reports that the grievant signed receipts acknowledging that he had received the Claims Management Resource Guide, the BWC/IC Code of Ethics, and the BWC Progressive Disciplinary Work Rules so that he was well aware of the work rules and the Bureau's responsibility to zealously investigate alleged mishandling of public funds.

The state asserts that the union did not prove its claim that it failed to conduct a fair investigation, that the work rule was unreasonable, that the grievant was treated in a disparate manner, or that the discipline imposed was unrelated to the offense committed. It states that the union submitted only the grievant's contradictory and self-serving testimony, two letters regarding the status of the criminal investigation of his alleged mishandling of claims, the opinion of a Bureau staff attorney regarding his settlement evaluations, his performance reviews, an e-mail expressing gratitude for performing normal job functions, an unrelated Performance Action Plan for an unclassified employee, and one Certificate of Merit. The state stresses that none of the testimony or evidence prove that the discipline meted out to the grievant was inconsistent with the principle of just cause or progressive discipline.

The state argues that it met its burden of proving that there was just cause for the grievant's removal. It cites Shelby County Government, 100 LA 284 (1992) where a union steward at a corrections facility was removed for disobeying a single direct order to return to her post. The state indicates that like the instant case a failure to obey an order

was designated as a major offense where an employee could be removed without following progressive discipline. It observes that Arbitrator Harvey found that the grievant had no right to disregard management orders.

The state notes that Arbitrator Harvey rejected the argument that the grievant's actions were justified because under NLRB v. J. Weingarten, 420 US 251 (1975) she had the right to represent a group of employees en route to an investigatory interview. It states that Arbitrator Harvey applied the reasoning of Weingarten and Roadway Express, Inc., 246 NLRB 1127 (1979) in holding that the grievant should have complied with the order and grieved later. The state maintains that "this is precisely the issue the Bureau faces when it is prevented from investigating serious issues of violating the public trust by an employee who arrogantly refuses to respond to questions posed and/or orders issued at investigatory interview." (State Written Closing Statement, page 8).

The state contends that the requirements to establish disparate treatment are clear. It points out that in OCSEA/AESCME v. Ohio Department of Rehabilitation and Correction, case no. 27-910905-0719-01-03 Arbitrator Rhonda Rivera stated that "the disparate treatment claim is essentially an affirmative defense which may be asserted to overcome a claim of just cause [and that] the burden is on the union." (State Written Closing Statement, page 9). The state claims that as far back as 1987 arbitral decisions between the union and the state established that to sustain a claim of disparate treatment the union must prove:

- (1) the preferably treated employee(s) violated the work rule in question;
- (2) the preferably treated employee(s) are in a work unit which serves as a fair basis of comparison (i.e., the same agency);
- (3) the preferably treated employee(s) were in fact disciplined in a manner which differed from the manner in which the grievant was disciplined and that the difference in treatment exceeded the "range of reasonableness" typically allowed in disciplinary cases;

(4) the preferably treated employee(s) were similarly situated with respect to their work records, seniority, degree of fault, etc.; and

(5) the employer was aware of the disparity in disciplinary penalties. (State Written Closing Statement, page 9).

The state contends that there were a number of contradictions in the grievant's testimony. First, it questions his testimony that he was confused by Coe's statement that he had a right to an attorney and by the wording of the Garrity waiver. The state notes that Coe and Raparelli testified that the grievant never read the Garrity waiver and that when Coe attempted to explain the qualifications on his right to an attorney, the grievant said he had heard it all before. The state notes that the grievant admitted on cross-examination that Coe told him he did not have a right to legal counsel because the inquiry was solely administrative in nature.

Second, the state challenges the grievant's testimony that he refused to answer Coe's questions because he had no idea of the nature of the inquiry. It observes that the grievant admitted that when Coe began to ask questions, he recalled the questioning by Phillips and Trooper Ferguson in July 1996. The state notes that the union stipulated that the grievant admitted at his pre-disciplinary hearing that he refused to answer questions regarding his alleged mishandling of lump sum settlements.

Third, the state rejects the grievant's testimony that he refused to answer Coe's questions because he thought it was an extension of the July 1996 interview where he had already answered questions. It reports that at the pre-disciplinary hearing, the step three meeting, mediation, and the arbitration hearing, the grievant admitted that Raparelli told him that the interview was administrative.

Fourth, the state maintains that the grievant's offer to answer questions at the pre-disciplinary hearing on February 28, 1997 is surrounded by inconsistency. It points out that on cross-examination he indicated that on February 7, 1997 he refused union representation because he felt that he was entitled to an attorney. The state stresses that at the pre-disciplinary hearing the grievant was willing to answer questions without an

attorney present because he felt that Steven Lieber was a "seasoned" union representative. It asserts that giving an employee three weeks to respond to questions "would invite even the most 'virtuous' employee to conjure up the perfect exculpatory response to each and every inquiry -- it's a function of human nature." (State Written Closing Statement, page 13).

The state urges the Arbitrator to consider that the Bureau is a "high profile" state agency. It maintains that its right to investigate alleged wrongdoing and to require employees to cooperate in such investigations is important because the Bureau is "repeatedly accused of being ethically void, fiscally irresponsible and grossly unresponsive to the public's concerns and best interests." (State Written Closing Statement, page 13).

The state concludes that the grievant knowingly and willfully refused to answer administrative questions in the face of multiple direct orders. It contends that his removal was commensurate with his offense and was for just cause. The state maintains that the grievant's removal should be upheld.

The state argues that if the Arbitrator somehow concludes that the grievant was not terminated for just cause, he should disallow any claim for back pay. It indicates that the grievant was unemployed only six weeks before he accepted a job as a case manager at Travelers Insurance Group. The state observes that the grievant testified at the hearing that he was paid \$35,000 per year but a statement (attached to the State's Written Closing Statement) from Travelers reports his base salary as \$36,500 or \$1,536 more than he earned at the Bureau. It further requests that the period from March 27, 1997 to the date of the award be recorded as a suspension and remain in the grievant's employment record for no less than 24 months.

UNION POSITION

ARBITRABILITY - The union argues that the instant dispute is arbitrable. It points out that Smith testified that she filed the grievance three days after the grievant's

removal. The union contends that the entire grievance form was submitted. It notes that Smith stated that the issue of arbitrability was not raised at the step three meeting.

MERITS - The union contends that the grievant's removal does not satisfy a number of the elements of just cause. First, it charges that the rule at issue is not reasonably related to the operation of the Bureau's business and is totally unreasonable. Second, the union claims that a fair and objective investigation did not take place. Third, it alleges that the Bureau did not apply its rules, orders, and penalties even-handedly but instead treated the grievant differently from other employees. Fourth, the union maintains that the degree of discipline is not reasonably related to the seriousness of the offense or the grievant's record of service.

The union questions why the state used the Garrity waiver. It contends that the state "proffered no evidence ... as to why they chose to read a 'Garrity Waiver'." (Union Written Closing Statement, page 1). The union asserts that since Coe and Raparelli stated that the purpose of the interview was administrative, they should have proceeded as usual instead of confusing the grievant and clouding the issue.

The union claims that the state did not show how it would have been harmed by allowing the grievant to have an attorney present or by postponing the hearing. It asserts that it is a "shallow argument" that postponing the hearing would have given the grievant time to talk to an attorney because the grievant had seven months to discuss the matter with an attorney. The union stresses that the grievant only wanted what Coe had offered - the right to have an attorney present while he was being questioned.

The union maintains that the state has the flexibility under the disciplinary grid to suspend rather than remove the grievant. It indicates that Raparelli testified that the state had predetermined that the grievant would be removed if he did not cooperate. The union observes that the grievant had an excellent work record, high evaluations, and no prior discipline.

The union accuses the state of "an arbitrary and capricious attempt .. to harass and intimidate [the grievant]." (Union Written Closing Statement, page 3). It indicates that the state tried to indict the grievant but failed miserably. The union asserts that the state could not stand to lose.

The union asks the Arbitrator to reinstate the grievant with full back pay and benefits.

ANALYSIS

ARBITRABILITY - The Arbitrator must reject the state's charge that the grievance is not arbitrable. First, while the state claims it received the grievance in the mail 19 days after the grievant was removed, Smith testified under oath that it was submitted three days after the grievant's removal. Second, even if only the front page had been filed, nothing on the back of the form was important at that point in time. Furthermore, the fact that the back side might have been missing does not mean that the grievance was not "legible" as required by Article 25, Section 25.02.

MERITS - The Arbitrator believes that the essential facts are clear. On February 7, 1997 Coe and Raparelli wished to interview the grievant regarding his role in certain lump sum settlements. When he refused to answer their questions, Coe read a Garrity waiver to him. It states:

I wish to advise you that you are being questioned as part of an official investigation of the State of Ohio. You will be asked questions specifically directed and narrowly related to the performance of you[r] official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and constitution of Ohio and the Constitution of the United States, including the right not to be compelled to incriminate yourself, and the right to talk to an attorney and to have him/her present with you while you are being questioned. I further wish to advise you that if you refuse to testify or answer questions relating to the performance of you[r] official duties or fitness for duty, you will be subjected to departmental charges which could result in you[r] dismissal from the department. If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceedings. However, these

statements may be used against you in relation to subsequent departmental charges.

After Coe read the waiver, the grievant requested that his attorney be present. Coe denied his request but offered the grievant union representation. The grievant was warned that if he refused to answer Coe's questions, it would be insubordination and he could be removed. Despite the warning he continued to refuse to respond to questions and as a result he was removed on March 27, 1997.

The Arbitrator recognizes that it is imperative that the Bureau be able to conduct investigations when it believes misconduct has occurred. The Bureau has a very difficult mission and is under constant public scrutiny. It must be able to require employees to answer relevant questions as part of its investigations.

The Arbitrator also understands the Bureau's decision to offer a Garrity waiver to the grievant. He had been under investigation by the Highway Patrol and the Cuyahoga County Prosecutor since March 1995 and in early 1997 there appeared to have been little progress. The Bureau was anxious to proceed with its administrative investigation. With the pending criminal matter, the Bureau felt that the only way it could proceed was a Garrity waiver.

The Garrity waiver is based on Garrity v. New Jersey, 385 US 493 (1967). In that case police officers were questioned about fixing traffic tickets. They answered questions when they were told that they would be removed if they failed to cooperate. Their statements were subsequently used to convict them for conspiracy to obstruct the administration of traffic laws. The U.S. Supreme Court, however, held that the statements obtained from the police officers under the threat of removal were inadmissible in subsequent criminal proceedings. A Garrity waiver allows the employer to require an employee to answer questions or face removal but prohibits the use of the employee's statements or any information or evidence obtained as a result of the statements against the employee in any subsequent criminal proceeding.

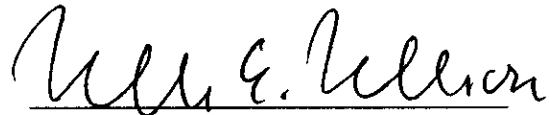
In the instant case the difficulty is the procedure followed by the Bureau. Coe read the Garrity waiver to the grievant including "the right to talk to an attorney and to have him/her present with you while you are being questioned." Since the grievant knew he was the subject of a criminal investigation, it is quite understandable that he attempted to exercise the rights he had just been told that he had. When Coe told him that he did not have the right to have an attorney present, it no doubt raised questions in the grievant's mind about the entire procedure. Under these circumstances, it is easy to understand why the grievant refused to answer any questions. His failure to do so cannot be considered just cause for discharge.

The Arbitrator believes that it should be noted that the grievant did offer to answer the Bureau's questions at the pre-disciplinary meeting on February 27, 1997. The Bureau's claim that the delay would have given the grievant an opportunity to consider his answers and made questioning him pointless must be rejected. The grievant had been under investigation since March 1995 and no doubt had consulted with his attorney about his position long before February 7, 1997.

The remaining issue is the proper remedy. The grievant must be returned to work and made whole for any losses which he suffered. Since the grievant testified that he began working at Travelers Insurance on May 12, 1997 at an annual salary which exceeded his salary at the time of his removal, he would not be entitled to any back pay for the period after May 12, 1997. However, the grievant is entitled to any lost earnings from his removal up to the time he started working at Travelers Insurance.

AWARD

The grievant is to be reinstated and granted back pay for the period from March 27, 1997 up to May 12, 1997.

A handwritten signature in cursive script, appearing to read "Nels E. Nelson", written over a horizontal line.

Nels E. Nelson
Arbitrator

May 5, 1998
Russell Township
Geauga County, Ohio

