#1397

OPINION AND AWARD
Case No.: 25-08-0002-01-14

In The Matter of the Arbitration
-between-
State of Ohio, Ohio Dept. of Natural Resources
-and-
OCSEA, AFSCME Local 11, AFL-CIO

ARBITRATOR: John J. Murphy
Cincinnati, Ohio

DATES AND PLACE OF HEARINGS: May 19, 1999 and September 1, 1999, Columbus, Ohio

DATE ON WHICH BRIEFS WERE RECEIVED: September 21, 1999

APPEARANCES:

FOR THE UNION: Herman S. Whitter, Attorney
Director of Dispute Resolution

Maxine Hicks
Staff Representative-2nd Chair

OCSEA, AFSCME Local 11
1680 Watermark Drive
Columbus, Ohio 43215

Also present: Chet Chaney
Chapter President, State Board Member

Blythe Dion Lampkins
Anthony Perry
Bargaining Unit Members

Josephine Ellen Peters
Grievant

FOR THE DEPARTMENT: Jon Weiser, Management Advocate
Lou Kitchen-2nd Chair, OCB
Ohio Department of Natural Resources
Fountain Sq. Building D-1
Columbus, Ohio 43224

Also present: Jenni Worster
Former Chief, Division of Recycling and Litter Prevention

Stephanie Koscher
Personnel Manager for Division

Sue Johnson
Labor Relations Officer

Ken Temple
Department Investigator

Brian Eastman
Former Attorney for OCB

Kelly Armfelt
Manager, Labor Relations

BACKGROUND:

On July 16, 1998, the Grievant was notified that the Division of Recycling and Litter Prevention had recommended that she be disciplined in the form of removal from her employment as Grants Coordinator for three violations of the disciplinary policy of the Department of Natural Resources. The notice listed the three violations as Insubordination, Neglect of Duty, and Failure of Good Behavior. The Grievant was supplied with documentation of specific allegations, and was informed that a pre-disciplinary hearing would take place on July 23, 1998.

Present at the pre-disciplinary hearing were Department and Division Representatives, the Union President, the Grievant and her private attorney. The Grievant had previously (by written document dated June 9, 1998) waived her right to representation by the Union and had retained her private attorney to represent her at any investigatory interviews and pre-disciplinary hearings.

Management presented its factual basis for its allegation that the Grievant was guilty of three violations of its Disciplinary Policy. Factually, management claimed that the Grievant had threatened and intimidated coworkers; failed to answer investigatory questions after being provided with a Garrity waiver, not once, but twice. She also refused to participate in a required medical evaluation.

After making various procedural objections, no information on behalf of the Grievant was offered to the hearing officer at the pre-disciplinary hearing. The hearing officer concluded that

management's charge concerning the threats and intimidation of coworkers should "stand as outlined since she (the Grievant) offered no rebuttal." Further, the hearing officer concluded that the Grievant refused to answer questions about alleged misconduct during an administrative investigation, and refused to participate in a medical evaluation for which she was subject to discipline under Chapter 123.1-33 of the Ohio Administrative Code.

The hearing officer concluded his report with the notation, "the testimony and documentation presented from Management is uncontested since the Employee failed to refute and/or rebut any of the charges." He recommended to the Director of the Department of Natural Resources that the Grievant be removed from her position, and she was so removed by the Director on August 7, 1998 for "Insubordination, Neglect of Duty, and Failure of Good Behavior."

STIPULATED ISSUE:

Whether or not there was just cause to remove the Grievant? If not, what should the remedy be?

RELEVANT CONTRACT PROVISIONS AND PROVISIONS OF THE DEPARTMENT'S DISCIPLINARY POLICY:

A) Contract Provisions

Article 24.02 (in part)

> Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

B) Department's Disciplinary Policy

General:

In those cases where the employer must take corrective action, the disciplinary measures shall be taken for the purpose of correcting an offending employee and problem situation while maintaining discipline and morale among other employees.

Types of Disciplinary Action:

a. Oral Reprimand - This action must be accompanied by a memorandum for record in the employee's personnel file stating the nature of the offense, time, and place. This memorandum will be signed by the issuing supervisor and the employee acknowledging the oral reprimand. The original will be forwarded to the department's Labor Relations Section. An oral reprimand is the least formal and least severe of the disciplinary actions.

b. Written Reprimand - This action states in writing to the employee the specific violation for which the reprimand is being given. This letter should state "Written Reprimand" in the subject. This will ensure the employee knows disciplinary action is being imposed. The original will be sent to the department's Labor Relations Section.

c. Fines - This action is an involuntary, temporary reduction in pay within a designated pay period. The amount of such fine will not exceed five (5) days' pay.

d. Suspension - This action is an involuntary, temporary separation from active pay status. A suspension is made for a definite and stated period of time, at the end of which the employee returns to normal employment status.

e. Removal - This action is an involuntary, permanent separation from employment.

. . .

Violation	First	Second	Third	Fourth
Neglect of Duty				
a. Major (Endangers life, property or public safety)	Suspen Remov	Remov		
b. Minor (Other)	Oral Written	Suspen	Suspen	Remov

. . .

Insubordination				
a. Refusal to carry out a work assignment	Oral Suspen	Suspen	Suspen	Remov
b. Willful disobedience of a direct order by a supervisor	Suspen	Suspen Remov	Remov	
c. Failure to follow the written policies of the Director, division/offices	Oral Suspen	Suspen	Suspen	Remov
. . .				
Failure of good behavior	Oral Suspen	Suspen Remov		

POSITIONS OF THE PARTIES:

A) Union Position

The Union first attacked what the Department considered its strongest basis for removing the Grievant--the Grievant's refusal to answer questions during two investigatory interviews. From the very beginning, the Union noted that the Grievant "did not handle the situation under Garrity the way the Union would have." The Union strongly insisted that the Department had no basis to remove the Grievant for her failure to answer questions during the investigation.

As the Grievant testified, she would have answered the questions had her personal attorney not advised her to be silent in both investigatory interviews. Therefore, the question becomes should the Grievant be punished for following the advice of her attorney who is present during the investigatory interviews? A

negative decision would have a chilling effect on the Grievant's right to retain counsel. To a reasonable lay person, the right to have an attorney present implies the right to follow the attorney's advice. Here, the choice is between believing her attorney--knowledgeable about the law--and the Department who insisted upon its right to compel her answers. The Grievant's decision to follow her attorney's advice should be protected against discipline by the Department. The Union predicated its argument upon an arbitral decision by arbitrator Nels Nelson issued on May 5, 1998 in State of Ohio, Bureau of Workers' Compensation and Ohio Civil Service Employees Association, AFSCME Local 11 Case No. 34-22-970415-0088-01-09.

The Union then turned to the fact that the first complaint concerning the Grievant was made to the chief of the Division of Recycling in October of 1997. On the other hand, the Division did not conduct an investigation of the facts at that time, but instead waited six months. This delay is inconsistent with the requirement in Article 24.02 that disciplinary action shall be initiated as soon as reasonably possible. Lastly, the Grievant did participate and cooperate in her evaluations which were performed by the State hired psychologist and psychiatrist.

B) Department's Position

The Department argued that the Grievant was guilty of three basic offenses. First, she threatened and intimidated coworkers. Second, she failed to participate in a required independent psychological examination. The examination was required by the

Department under its legal privilege to insist upon a psychological examination of the Grievant under Chapter 123:1-33-01 of the Ohio Administrative Code.

The Department then turned to the Grievant's failure to respond to questions during the investigatory interviews. The person who initially recommended removal of the Grievant--the chief of the Division of Recycling--called this refusal by the Grievant the strongest basis for removing the Grievant. The Department tracked the development of the law in this area beginning with the decision by the United States Supreme Court in Garrity v. New Jersey, 385 US 493 (1967). Garrity deals with the balancing of a public agency's interest in conducting an investigation concerning the workplace and a public employee's Fifth Amendment privilege against self-incrimination. The Department's analysis concluded with a decision by the Ohio Supreme Court in 1990, Jones v. Franklin Cty. Sheriff 52 Ohio St. 3d 40 (1990). The Ohio Supreme Court applied the Garrity decision and concluded that public employees could be required to answer potentially incriminating questions in an investigatory interview so long as the employees are not asked to surrender their constitutional privilege against self-incrimination.

The Grievant was advised in writing that none of her statements would be used against her in any subsequent criminal proceeding. Yet, despite this assurance, the Grievant refused to answer questions during the investigatory hearing. Consequently, she was removed.

The Department rejected the defense of "advice of counsel" raised by the Union. The Grievant was a Union employee who chose to follow the advice of her privately hired, independent attorney. The Grievant chose not to cooperate, yet now she asked the Arbitrator to somehow relieve her of the consequence of that choice. Although individuals are certainly free to seek independent legal advice in the employment setting, they are not free to ignore the reasonable demands of their employer based on that advice.

Lastly, removal is not too severe a punishment in this case. The imposition of any discipline less than removal would effectively render the principles of Garrity meaningless. To place an employee back in her previous position after she ignored Garrity, would send the message that employees could refuse to answer questions and hide behind the cloak of progressive discipline. Why would an employee ever feel compelled to answer questions under Garrity if the employee could preserve a right to argue progressive discipline?

OPINION:

This analysis is structured to reflect the divisions between the parties in this case. First, we will consider the Union's claim that the Department delayed its decision to begin the disciplinary process; next, whether the Grievant was guilty of Failure of Good Behavior through intimidating coworkers. We then turn to whether the Grievant refused to participate in required psychiatric examinations. Lastly, we turn to the heart of the

matter: whether under the circumstances of this case the Grievant had a duty to respond to the Department's questions during investigatory interviews; and, if so, was the sanction of removal appropriate?

A) The Timeliness of the Department's Decision to Begin the Disciplinary Process

Article 24.02 does state that "Disciplinary action shall be initiated as soon as reasonably possible . . ." The same Article imposes a duty upon an arbitrator in deciding a discipline grievance such as this case. The arbitrator "must consider the timeliness of the Department's decision to begin the disciplinary process."

The chief of the Department in which the Grievant worked received her first complaint about the Grievant's conduct in the workplace in October of 1997. Indeed, the chief received complaints from both the Grievant and others concerning the conduct and comments by the Grievant and another female employee when in the presence of a male employee, Tony Perry. Despite these complaints, the chief did not begin a disciplinary process of investigatory interviews until April of 1998. This delay, according to the Union, violates Article 24.20, and the arbitrator must consider this delay in deciding this discipline grievance.

Both the chief of the division and the Union president testified as to the events that took place during the period that intervened between the receipt of complaints by the chief and the institution of the disciplinary process. An internal mediation of

the differences among the employees within the division was attempted. As the Union president testified, this is a procedure that operates outside of the collective bargaining contract but was previously used in 1997 at another agency. The chief and the Union president differ as to who proposed the use of the mediation process with each claiming that the other made the initial suggestion.

While the record is not sufficient to attribute the idea of mediating the differences to the Union, the record is more than ample to conclude that the Union acquiesced to the idea of the use of mediation among the division's employees in this case. As the Union president testified, the matter about which the complaints had been made to the chief were viewed by both the president and the chief as consisting of a personality conflict among co-employees. As the chief testified, she viewed the complaints by her employees as a personal problem that did not reach operational levels.

Based on the acquiescence of the Union, the chief proceeded to set up the mediation process obtaining written permission from three or four employees. When Grievant refused to voluntarily participate in the mediation, the mediation process ended. It was at this point the disciplinary process with investigatory interviews began.

While there was a delay by the Department in initiating the disciplinary process, this delay has been considered by the arbitrator. Both the Union and Department viewed the complaints by

the employees as exhibiting personality conflicts without operational consequences. This initial perception by both parties led to the decision to resolve the problem through mediation--a decision in which the Union acquiesced.

B) The Charge of Failure of Good Behavior

As previously noted, the disciplinary process began sometime in April of 1998 through several investigatory interviews conducted by the Division of Recycling. As also noted previously, the Grievant refused to answer any questions at two such investigatory interviews--a matter which the Department claims is an independent basis for the removal of the Grievant.

The difficulties for the Department in sustaining its burden of proof at the arbitration hearing concerning the charge of failure of good behavior is exhibited in this case by refusal of the Grievant to answer questions during the investigatory interviews. The arbitration hearing was the first time that the Department heard the Grievant's side of the matter concerning complaints about her intimidating behavior to co-employees.

The essence of the case against the Grievant for Failure of Good Behavior centered on a brief meeting of four employees in the hallway at the Department of Reclamation, Blythe Lampkins, Tony Perry, the Grievant, and a management employee Kelly Armfelt. Ms. Armfelt complained to the chief of the division in October of 1997 that the Grievant had approached her from behind while she was standing in the hallway in the company of the other named employees, and the Grievant then pushed Ms. Armfelt. According to

Ms. Armfelt she began to feel intimidated by the Grievant thereafter. Ms. Armfelt testified in this manner at the arbitration hearing.

For the first time the Department heard the Grievant's view of what happened in the hallway on September 9. She testified that she met Blythe Lampkins and Tony Perry in the hallway, but at no time did she see Kelly Armfelt. The Grievant testified that she did in fact hear Kelly's voice from somewhere in the hallway, and she did not push Ms. Armfelt. Both Lampkins and Perry testified at the arbitration hearing, and both stated that they did not see the Grievant push or bump Kelly Armfelt.

The Department did not have the benefit of listening to the Grievant's view of what transpired in the hallway on September 9. Even with this disadvantage, the Department still had the burden of showing a factual basis for the core of its charge against the Grievant of Failure of Good Behavior. On this record, the Department did not sustain its burden of showing the factual basis for this charge.

C) The Charge of Refusal by the Grievant to Participate in a Psychiatric Evaluation

The Union did not contest the right of the Department to require the Grievant to submit to an evaluation to determine whether the Grievant was able to perform her duties in the workplace. Indeed, an appointment was made with Dr. Lowenstein, a psychologist, on May 12 and the Grievant did appear for the evaluation. As the doctor noted in a letter to the Department, the

Grievant decided at some point during the evaluation that she would not continue "until she had an opportunity to talk with her attorney . . ." At that point she left the doctor's office.

The above facts are the basis for the charge against the Grievant of refusal to submit to the examination. This charge is rejected for two reasons. First, the Grievant did not make a statement of unqualified refusal to submit to the evaluation. The Grievant stated that she wished to consult with her attorney before proceeding.

The second, and more important reason is that the Department did not treat the episode that occurred in Dr. Lowenstein's office as a refusal to submit to an evaluation. Indeed, the Department scheduled the Grievant for a second interview with another physician because of a lack of availability of Dr. Lowenstein. After the Department made the arrangements for the second evaluation of the Grievant, the Grievant attended this session. The Department received the physician's opinion that the Grievant was able to perform her duties as a Grants Coordinator.

D) The Grievant's Refusal to Respond to Questions During Two Investigatory Interviews

The Union agreed at the arbitration hearing that the Grievant should have answered the questions in the two investigatory interviews. As noted previously, the Union argues that the Grievant should not be penalized for relying upon the advice of her private attorney to be silent. If the Grievant were disciplined,

this would show the future exercise of rights by employees to be represented either by the Union or private attorneys would be useless.

The Union's claim is rejected for two reasons. First, it is hard to envision the facts of another case in which a public employer could do more to explain its privilege under Garrity and Jones v. Franklin County Sheriff, supra, to demand answers by an employee to questions during an investigatory interview. Second, the arbitral decision by arbitrator Nels Nelson in State of Ohio, Bureau of Workers' Compensation and Ohio Civil Service Employees Association, AFSCME Local 11, supra, does not govern the facts of this case. There was agency misconduct in the notice to the employee in the case before arbitrator Nelson. There is no such evidence in this case. Quite to the contrary, this case shows substantial effort by the Department to educate the Grievant and her attorney about the Grievant's duty to respond to the questions.

The Grievant after notice met with Department personnel and Ken Temple, the Department investigator. During this first investigatory interview on June 9, 1998, Temple provided a copy of the written basis for the duty on the part of the Grievant to respond to questions. The document noted that the nature of the questions would be narrowly related to her performance of her official duties. The purpose of the interview was to assist the Department in determining whether any disciplinary action is warranted. The document further noted that her statements would not be used against her in any subsequent criminal proceedings, but

could be used against her in any departmental disciplinary proceedings. She was further notified in writing that her refusal to answer questions could subject her to disciplinary action "which could result in your dismissal from the department."

Temple attempted but was unable to read the document because the private attorney interrupted and said the Grievant would not be answering any questions. Temple testified that he stopped the interview at that point out of compassion for the Grievant because he did not believe that the Grievant and the attorney knew the consequences of a refusal to answer the questions.

Temple then sent a memorandum to the Grievant with copy to the private attorney noting that he had observed on June 9, 1998 "a misunderstanding and/or confusion regarding the purpose of the interview and Management's right to conduct such an interview." Among other references he referred to the Garrity decision and enclosed a copy. He also enclosed a copy of the so-called "Garrity Waiver,"[1/] which Temple could not read on June 9 because of the interruption by the private attorney.

[1/] It is difficult to understand why this document is referred to as "Garrity Waiver" or, occasionally, the "Garrity Warning." It is essentially a grant of use immunity with respect to any of the answers for state or federal prosecution. With the preservation of the right against self incrimination, the public agency can then require answers from employees as it pursues an investigation of misconduct at the workplace.

Temple's memorandum included a notice of a second investigatory interview on June 18, 1998. At this meeting, Temple read word for word the "Garrity Waiver." At that point the private attorney stated that the Grievant would not answer any questions by Temple. After Temple stated that answer must come from the Grievant, the Grievant stated that she would not answer any questions.

This arbitral opinion should not be read to support the proposition that erroneous advice by a Union representative or private attorney can never be a basis to restore a job to an employee fired for refusing to answer questions based upon that advice. In the circumstances of this case, the public agency went out of its way to educate both the Grievant and her representative of the basis for the demand to answer questions. If, on the circumstances of this case, the Grievant did not have a duty to answer these questions, then the interest of the public agency in conducting an investigation of alleged misconduct at its workplace would be nullified.

The facts presented to arbitrator Nels Nelson raised a considerably different issue than is presented in this case. Arbitrator Nelson noted that in the case before him, ". . . the difficulty is the procedure followed by the Bureau" (see p. 13). Arbitrator Nelson explained that the Bureau representative read the "Garrity Waiver" which included a written statement that the Grievant had the right not only to talk to an attorney but to have the attorney present with the Grievant while being questioned.

After the Bureau representative read the waiver, the employee then requested that his attorney be present. The Bureau representative denied the request. Arbitrator Nelson decided--quite correctly in my opinion--that the Bureau had tainted the procedure used to establish the Bureau's right to demand answers to questions from the employee.

By contrast, there is no evidence of any tainting of the procedure by the public agency in establishing its right to demand answers from the Grievant. Quite to the contrary, the agency took extra steps to educate both the Grievant and her private attorney of the basis for insisting on answers to questions at the investigatory interview. The effort at education took place prior to the date of the investigatory interview on June 18, 1998.

E) The Sanction of Removal

The 1967 Garrity decision by the United States Supreme Court, and the 1990 Jones by the Ohio Supreme Court firmly establish the constitutional aspects of an investigatory interview by a public agency of alleged misconduct by employees at the workplace. Once the privilege against self incrimination is preserved by a use immunity from subsequent criminal proceedings, an employee must answer specific, narrowly tailored questions or face discipline.

Once an employer has constitutionally set the basis to demand answers from an employee at an investigatory interview, quite a different question arises. If the employee refuses to answer those questions, what is the sanction for this refusal? Garrity and Jones do not establish automatic removal as such a sanction. Quite

to the contrary, the Jones decision demonstrates that the answer to the question of what sanction applies is embedded in the public agency's disciplinary policies. A public agency must turn to its own disciplinary policies to determine the appropriate sanction; the sanction does not emanate from the constitutional analysis found in Garrity or Jones.

In the Jones case, removal of a deputy sheriff was upheld by the Ohio Supreme Court when the deputy sheriff refused to answer questions during an investigatory interview. The appeal to the Ohio Supreme Court included a separate question of whether removal was warranted as a sanction for the refusal to answer the questions. The Ohio Supreme Court upheld the removal because the removal was warranted under the sheriff's disciplinary policy. Therefore, the Court considered the appropriateness of the sanction of removal not under the constitutional law analysis in Garrity, but under the preexisting disciplinary policy of the public agency. On this point the Ohio Supreme Court said:

> The trial court also correctly concluded that Jones' dismissal was warranted under the department's policy of progressive discipline. The sheriff's department had already disciplined Jones six times. In his opinion Judge Thompson noted that Jones' disciplinary record included several written reprimands and a suspension for reasons including failure to follow the direct order of a superior officer. Jones v. Franklin Cty. Sheriff 52 Ohio St. 3d 40, 45 (1990).

In this case, the Department considered the refusal to answer questions in the investigatory interviews as a factual basis to support its claim that the Grievant committed three violations of its disciplinary policy: Neglect of Duty, Insubordination, and

Failure of Good Behavior. Only neglect of duty carries the prospect of removal as a sanction for a first offense,[2/] and that applies only when the Grievant's conduct "endangers life, property, or public safety." There is no source in the record to apply this charge to the Grievant's refusal to answer the questions in the investigatory interviews.

The other two charges of violation of Disciplinary Policies of the Department include insubordination and failure of good behavior. These charges do not include removal as a possible sanction for a first offense.

The question of the appropriateness of the sanction for refusal to answer questions during an investigatory interview is to be determined by a review of the public agency's preexisting disciplinary policies. The Grievant's refusal in this case constituted a willful disobedience of a direct order by a supervisor and suspension is set forth in the Department's Disciplinary Policies as a sanction for first offense.

As noted in the discussion above, the Grievant did frustrate the Department's legitimate interest in conducting an investigation of alleged misconduct by its employees at the workplace. By the refusal of this Grievant to answer the questions--in spite of the

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[2/] The Grievant had no "active" disciplines on her record at the date of her removal. In 24 hours of service with the Department, she had one disciplinary event in 1980. She was suspended for one day for failure to return to work after early release from Jury Duty.

efforts of the Department to educate the Grievant and her attorney about her duty to answer--clearly harmed the Department's legitimate interest. This obviously constitutes the basis for a lengthy suspension.

AWARD:

The Grievant is to be reinstated to a position similar to that she occupied prior to her removal on August 7, 1998. The reinstatement shall take effect within two weeks from the date of this decision.

The Grievant's removal shall be converted to a suspension for six months commencing on August 7, 1998. The Grievant is to be made whole for the period commencing at the end of her six month suspension and ending at the date of her reinstatement.

Date: October 8, 1999

John J. Murphy
Arbitrator