

#1447

IN THE MATTER OF ARBITRATION
BETWEEN THE
OHIO STATE HIGHWAY PATROL
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION

Grievant: Tracy L. Cross
Case No. 15-00-990706-0072-01-09

Robert G. Stein, Arbitrator

Principal Advocate(s) for the Employer:

Sergeant Charles J. Linek
OHIO STATE HIGHWAY PATROL
1970 W. Broad St.
Columbus OH 43223

Principal Advocate for the Union:

William A. Anthony Jr.
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
1680 Watermark Dr.
Columbus OH 43215

INTRODUCTION

A hearing on the above referenced matter was held on July 11, 2000, in Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties made closing arguments in lieu of filing briefs. The hearing was closed on July 11, 2000. The Arbitrator's decision is to be issued by August 25, 2000.

ISSUE

The parties agreed upon the following definition of the issue:

Was the Grievant removed for just cause? If so, what should the remedy be?

RELEVANT CONTRACT LANGUAGE

ARTICLE 24 Sections 24.01, .02, .05

See Agreement for specific language (Joint Exhibit 1)

BACKGROUND

The Grievant in this case is Tracey Cross, a Patrol Radio Operator with the Ohio State Highway Patrol (hereinafter referred to as "Employer" or "Patrol"). Mr. Cross was terminated from his employment on July 1, 1999 for violation of two rules of the Patrol. The Employer determined that Mr. Cross had violated Rule DPS- 501.01 II (C)(10)(b) - Neglect of Duty-Tardiness and Rule DPS0501.01 II (C)(10)(c) - Dishonesty on April 21, 1999, when he failed to report for his scheduled shift, requested sick leave under false pretenses, and lied during the course of an administrative investigation into the matter.

Mr. Cross had worked for the Patrol for a little less than 3 years at the time of his termination. Prior to his tenure with the Patrol, he had worked for approximately 1.5 years with the Bureau of Motor Vehicles. The Grievant admits he has had a chronic problem with tardiness and has sought and completed a program of counseling through the EAP program for this problem. Prior to his discharge Mr. Cross had accumulated a verbal reprimand, two (2) written reprimands, and a one (1) day suspension (held in abeyance pending EAP) for tardiness.

On the afternoon of April 21, 1999, at approximately 2:50 p.m., Mr. Cross was driving to work on West Broad Street when Columbus Police Officer, Sgt. Eric Moore, stopped him. Mr. Cross was heading west on West Broad and was approximately 10 minutes of driving time from work at the time. His eight-hour shift began at 3:00 p.m. The Columbus Police Officer warned Mr. Cross but did not issue him a ticket for exceeding the speed limit. The stop lasted approximately 12 to 15 minutes. The Grievant claims that he was not feeling well and was having stomach problems that day.

He claims that while he was talking with the Columbus Police Officer he passed gas and soiled his underwear.

After being released by the Columbus Police Officer, the Grievant chose to go to his doctor, Dr. Susan Besser, Bexley Family Medicine Inc., located at 3158 East Broad Street. The Grievant called work at approximately 3:26 p.m. According to Department rules, an employee is to call in to work no later than one-half hour following the start of his shift. He contacted P.O. Shawver, explained the circumstances described above, and asked to speak to his shift supervisor, Sgt. Gilkerson. Once again he explained what had happened to the Sergeant and told him that he was going to be late for work because he was at his doctor's office.

Sgt. Gilkerson informed the Grievant that he has enough coverage in the Radio room and he does not want him coming to work if he is sick. The Grievant told Sgt. Gilkerson he had not seen the doctor yet and would call work again to let them know what he is going to do. Several hours latter, at 10: 08 p.m., P.O. Neal called the Grievant at his home and told him that Sgt. Gilkerson wanted to know what type of leave he was taking for missing the afternoon shift. The Grievant stated he had forgot to call back earlier and said, *"umh, I'll take sick leave I guess."*

The Patrol conducted an investigation and determined that the Grievant was not at home because of his illness. During the evening hours of April 21, 1999, when he was supposed to be working the afternoon shift, Mr. Cross attended a youth group meeting at his church, St. Paul Methodist at 639 Long Street in Columbus, Ohio. He attended this meeting from approximately 6:00 p.m. to 7: 30 p.m. Based upon these events, the Patrol determined that the Grievant violated two departmental rules and terminated his

employment. The Grievant filed a grievance claiming the Employer had committed procedural violations and violated the principle of progressive discipline.

EMPLOYER'S POSITION

The Employer contends that the Grievant established a pattern of being tardy for work for some 10 months, prior to his termination from employment. The pattern began September 11, 1998 and ended with the circumstances of the instant matter on April 21, 1999. The Employer points out that in March of 1999, it agreed to hold a one (1) day suspension in abeyance providing the Grievant seek assistance through the EAP to address his pattern of tardiness. After completing a counseling program for this problem, the Employer argues the Grievant fell right back into his old pattern of being late for work. However, the April 21, 1999 incident of being late was compounded by the Grievant's attempt to cover-up his habitual lateness, contends the Employer.

The Employer argues that it holds its radio operators to a high standard of "detail, punctuality, and honesty." In the instant matter the Grievant lied repeatedly and in doing so demonstrated that he is unfit to function in a job that requires a high level of public trust, asserts the Employer.

Based upon the above, the Employer urges the Arbitrator to deny the grievance.

UNION'S POSITION

The Union asserts two main arguments in defense of the Grievant. It first argues that the Employer violated its own administrative procedures contained in DPS-100.01 Administrative Investigations. It argues that the investigation conduct regarding the events of April 21, 1999 were "unfair, biased, non-objective, and demeaning." The Union points out that the Grievant was not allowed to have a steward present during the Employer's interview conducted on April 22, 1999.

The Union concedes that the Grievant did not ask for a steward, but contends that past practice and the Employer's own policies clearly state that the supervisor must ask an employee if he/she wants one to be present during an interview that may lead to discipline. The Union points out that during a second interview held on May 12, 1999, the Employer, in contrast to its conduct of the April 22nd interview, acted in accordance with its administrative procedures.

The Union also argues that the Employer exceeded the standards of progressive discipline and in doing so violated Article 24 of the Collective Bargaining Agreement. Based upon the above, it requests that the grievance be sustained and Mr. Cross be returned to work and made whole for all lost wages and benefits.

DISCUSSION

The Grievant's story is not believable. His record of attendance and his actions demonstrate a lack of responsibility. There are simply too many inconsistencies in his story. Furthermore, there was no evidence or testimony (other than the Grievant's own

self-report) to indicate that he was not sufficiently fit to work when he was enroute to work. Therefore, the Grievant is asking this Arbitrator to believe that during the ten (10) minute period that he was stopped, his symptoms suddenly worsened. The Grievant did not get a ticket from the Columbus Police Officer and there was no evidence he was treated poorly. One would expect a sense of relief and not an increase in symptoms based upon this outcome.

The Grievant's failure to call the Employer back further undermines his sincerity in this matter. If one were to believe the circumstances of his encounter with a Columbus Police Officer, one would expect the Mr. Cross to remember to call the Employer and to inform his supervisor regarding his intentions to come to work. It is noted that he did not forget to attend his youth group meeting and was able to participate in it, but could not work. One is either too sick to work (or sincerely believes they are) or they can work. The Grievant did not provide any testimony or evidence to demonstrate why he was too sick to be a radio operator, but was not too sick to drive to and attend a meeting. It is also ironic that the Grievant had recently sought (and was denied) to change his work schedule in order to have off during the nights his church youth group meeting was held.

The Grievant's previous record of discipline for attendance violations and his involvement in the EAP program should have given him more than sufficient reason to be conscientious about his actions. Just a few weeks after completing his EAP counseling program he was late again. From his own testimony it was apparent that he gave himself no more than enough time to get to work on the afternoon of April 21, 1999. If being late were his only rule violation on April 21, 1999 the appropriate level of discipline would

have not been discharge. However, the Grievant seriously compounded his actions by his previous record and more importantly by apparently not being completely truthful.

An employer has the right to expect an employee to be honest. While it is generally accepted by arbitrators that police officers are held to a higher standard of conduct, being dependable and truthful is expected of all employees from the day they fill out their applications for employment. Arbitrators are generally inclined to find just cause for discipline or discharge where an employee deceives an employer about the true reason for his absence (See Safeway Stores, Inc. 93 LA 1147 (Wilkerson, 1989); Chattanooga Gas Co., 83 LA 48 (Mullin, 1984); General Tel. Co. of Ohio, 74 LA 1052 (Laybroume, 1980).

Had Mr. Cross simply gone to work after being stopped by the Columbus Police, he would have simplified his dilemma. In fact, if he did soil his pants, he still could have come to work. He was not shy about explaining these embarrassing circumstances to two people at work. Why couldn't he have simply gone home, changed, and gone to work? There may have been disciplinary consequences, but termination from employment would not have been appropriate.

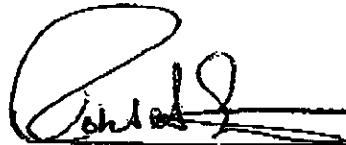
Instead, the evidence supports the Employer's contention that Mr. Cross acted to cover-up his actions in order to avoid being considered late for work. The Grievant is a relatively short-term employee who has compiled a record of unreliability. Generally, a progressive suspension is suited to an employee who is not correcting his behavior. However, the Employer already provided Mr. Cross an opportunity to correct his problem with tardiness through the EAP. This intervention apparently had little effect, and in fact a few months following the incident in April, he was late for work again while the

Employer was contemplating its actions in the instant matter. The Grievant's deceptive behavior and his apparent lack of responsibility toward his job substantially complicated his situation. The totality of the Grievant's behavior provided the Employer with sufficient reason to terminate the employment of this relatively short-term employee.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 19th day of August 2000.

A handwritten signature in black ink, appearing to read "Robert G. Stein", with a large, stylized initial "R" and "S".

Robert G. Stein, Arbitrator