#1496

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO DEPARTMENT OF CORRECTIONS

AND

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 27-21(4-21-00) 1972-01-03
Allan Svendsen, Grievant

Advocate(s) for the UNION:

Don Sargent, Field Staff Representative
OCSEA Local 11, AFSCME, AFL-CIO
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Advocate for the EMPLOYER:

Bradley A. Nielsen, Advocate
Steve Little, 2nd Chair
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INTRODUCTION

A hearing on the above referenced matter was held on January 30, 2001 in Orient, 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 submitting briefs. The hearing was closed on January 310. 2001. The Arbitrator's decision is to be issued within forty-five (45) calendar days following the date of the hearing or no later than March 16, 2001.

ISSUE

The parties agreed upon the following definition of the issue:

Was the Grievant, Allan Svendsen, terminated for just cause? If not, what should be the remedy?

RELEVANT CONTRACT LANGUAGE
(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

This case involves the removal of Allan Svendsen, Paramedic, who had been employed at the Frazier Healthcare Center (FHC), which is housed in the Orient Correctional Institute (OCI). He was terminated on April 11, 2000 for violation of Rule #22, "Falsifying, altering, or removing any official document" of the DRC Standards of Employee Conduct. The Grievant was employed with the Department of Rehabilitation and Corrections (DR)C on January 28, 1991, and he has ten (10) years of service with the Ohio Department of Mental Retardation and Developmental Disabilities.

On Saturday, December 4, 1999, the Grievant reported to work for his shift and did not punch the time clock. He claims he arrived at work prior to or precisely at the starting time of his shift, which is 10:00 p.m. The Employer claims he did not because the Paramedic he was supposed to relieve, Marisa Wilkins, submitted an overtime request for 20 minutes and listed the reason as "awaiting relief." Paramedic Wilkins stated to the Employer that she could not clock out until 10:20 p.m. due to the fact that she was not relieved by the Grievant until approximately 10:12 p.m. The

Grievant subsequently submitted paper work in the form of a missed punch report, claiming he punched in at 10:00 p.m. The Employer did not believe the Grievant arrived at work on time and considered Mr. Svendsen's report to be falsified. In addition, the Employer determined through its investigation that the Grievant forged the name of RN GladdisTrende on the supervisor approval portion of the missed punch form.

The Employer terminated the Grievant for these acts of falsification. He subsequently filed a grievance arguing he was terminated without just cause.

EMPLOYER'S POSITION

The Employer's case is straightforward. It argues that the Grievant was late for work and subsequently submitted a false punch report to cover up the fact he was late. The Employer argues that this is not the first violation of Rule #22, and it demonstrates the extent the Grievant will go to falsify both medical and administrative documents. The Employer also argues that the evidence shows the Grievant has had a pattern of chronic attendance related offenses, and this was simply "the straw that broke the camel's back." It emphatically contends that the Grievant lied about the time he arrived and attempted to claim pay for the time by

forging the signature of a supervisor, RN Trende. Based upon these facts, the Employer contends it had just cause to terminate the Grievant.

UNION'S POSITION

The Union contends that the Grievant never forged the signature of RN Trende on the missed punch form. Mr. Svendsen also argues that Ms. Trende did knowingly sign the missed punch form and there was no forgery of her signature. It provided testimony from a handwriting expert to validate Ms. Trende's signature. The Union further argues that Mr. Svendsen and Francis Brown both arrived at work on time on December 4, 1999, and the Employer is unable to demonstrate the Grievant was late for work.

Based upon the above, the Union requests the grievance be granted.

DISCUSSION

The arguments of the Grievant in this case are unconvincing when viewed in the light of the evidence and testimony. The following examples illustrate this point. The Grievant and LPN Francis Brown testified they arrived at work on December 4, 1999, at approximately 10:00 p.m. Francis Brown stated she arrived at exactly 10:00 p.m. and the Grievant stated it

was either 9:58 p.m. or 9:59 p.m. (see testimony during hearing). On the missed punch form the Grievant said he arrived at 10:00 p.m.

An examination of Management Exhibit O, the record of time punches, reveals the fact that in the five days preceding December 4th, the Grievant and Ms. Brown punched at very nearly this time every day. And with the exception of one date, 12/1/99, they punched in at precisely the same time. People are creatures of habit, and these two employees had a consistent habit of arriving just prior to their starting time, rarely leaving a margin of time for unexpected delays (See also punch records for 11/7 through 11/20 and 1/18 through 1/27). They also had a habit of consistently punching the time clock right after one another. The odds that both would experience a computer error on the same date, when there was no evidence that other employees had the same problem during this shift, appears to be remote.

It is noteworthy that the Grievant was cited for his tardiness in getting to his post in his 11/13/98 evaluation (Ex Q). Furthermore, additional time clock data indicate a pattern of the Grievant and Ms. Brown failing to punch in on the same day, on the same shift, citing the same excuse and subsequently submitting a missed punch report. On 6/8/99 the Grievant and Ms. Brown did almost the same thing they did on December 4th. They did not clock in and claimed, as they did on December 4th, that they came to work at 10:00 p.m. but could not clock

in due to a computer error (Ex P). Ironically, Paramedic Wilkins was working second shift on 6/8/99. The Grievant relieved Paramedic Wilkins, and she ended up clocking out at 10:19 p.m., which is only one minute earlier than her punch out time on December 4th. The likelihood of the Grievant and Ms. Brown both experiencing a computer error on two separate occasions, and Ms. Wilkins clocking out at approximately the same time appears implausible at best. In light of this evidence I find the Employer's argument that the Grievant was late on December 4th to be far more persuasive than the Grievant's version of the facts.

The testimony of CO Gleadell, was very matter of fact. However, when juxtaposed against the testimony of the Grievant and Ms. Brown it does little to support the Union's case. CO Gleadell, who was in charge of the key room on December 4th, firmly and confidently testified that his clock is precisely timed with that of the punch clock and is at the most just a few seconds different. He stated that he regularly synchronized his clock with the time clock. He also stated that employees are often lined up to get their keys from him.

On December 4, 1999, the Grievant had to get his key from CO Gleadell. The Grievant stated under cross-examination that there was a *"bit of a line"* of people who were waiting to get their keys on that day and he joined the line after attempting to clock in. Even assuming the line was very short, the Grievant would have had to get his key prior to alarm

setting on CO Gleadell's clock.

CO Gleadell, stated that at precisely the same moment the time clock strikes 10:00 p.m., his alarm goes off and he then alters his methodology for handling the stacking of the chits he uses to track who has what keys. He testified this methodology tells him which employees arrived after the start of a shift. He stated, *"...if someone comes in at 10:01 or 10:02 p.m. I would know it."* If the Grievant attempted to punch in at 9:58 p.m., 9: 59 p.m., or at 10:00 p.m. (according to Ms. Brown), it appears implausible that he had enough time to line up and get his keys prior to the triggering of CO Gleadell's alarm clock.

However, CO Gleadell stated his alarm clock, which was precisely set at 10:00 p.m. and coordinated with the time clock, did not go off. Therefore, he knew the Grievant got his keys prior to 10:00 p.m. (Ux 11). The Grievant's and Ms. Brown's own accounting of the time they attempted to punch in and the habits of these two people simply do not fit with CO Gleadell's account of the evening of December 4, 1999. CO Gleadell is either mistaken, is not being truthful, or his "fail safe" system failed. Therefore, his testimony cannot be considered to be a credible source of support for the Grievant's claim he arrived at 10:00 p.m.

A third factor that works against the Grievant is the fact that he signed in at the Frazier Health Center at 10:00 p.m. Given his statement he attempted to punch in one or two minutes before 10:00 p.m., it was

not possible to sign in at Frazier at 10: 00 p.m. Although the Employer did not cite the Grievant for this inconsistency, it is one more piece of evidence that undermines the Grievant's credibility. By his own account under direct examination, Frazier is a five or six minute walk from the time clock area, which does not even take into account the time to take to get his keys.

The Grievant's prior disciplinary record also serves to undermine his conduct in this matter. At the time of this incident he had seven (7) active disciplines on this record, including a substantial suspension that in part was issued as a result of a Rule 22 violation (the same charge the Grievant is facing in the instant matter).

However, the Employer's case is not without its failings. The Employer's action to terminate the Grievant rather than suspend him for a second infraction of a Rule 22 violation, was in part based upon a charge that he *"forged"* the signature of RN Trende (Ex A). The Union convincingly presented expert testimony to contradict this assertion. Furthermore, Nurse Trende testified that she signed the missed punch form for the Grievant. I found this testimony to be more convincing than the Incident Report written by Nurse Trende on 3/14/00. On this form she stated she was instructed by management to say she never signed a missed punch form, a statement she reinforced during her testimony at the arbitration hearing. The Employer was unable to refute her testimony.

Ms. Trende's credibility in this matter is suspect; however, the Employer was unable to prove that Ms. Trende's name on the missed punch form was written by anyone but herself.

I find that the evidence and the testimony in this case support the Employer's contention that the Grievant came to work late on December 4, 1999. He most likely came in at several minutes after 10:00 p.m., based upon the testimony of Paramedic Wilkins. I found her testimony to be credible and she has no apparent reason to lie. She stated during the hearing that when she was relieved by the Grievant they did not talk very long before she left. The Frazier Health Center sign in sheet indicates she signed out at 10:14 p.m. on December 4, 1999 (Ex F). Given the five to six minutes it takes to walk to the time clock, her clock out time of 10:20 p.m. validates her sign out time at Frazier.

After two failed attempts the Grievant submitted a missed punch report that stated he came to work at 10:00 p.m. on December 4, 1999. The Employer made the determination to terminate the Grievant, rather than issuing him a suspension, based upon two acts of falsification. One act was submitting a missed punch form that incorrectly stated the time he arrived at work on December 4, 1999. The other act of falsification was the alleged forgery of RN Trende's name on the punch form. As stated above, there is no substantive evidence to indicate he falsified RN Trende's signature, but it is clear from the evidence that he had her sign a

form that was invalid. One can only speculate whether her signing of the form was an act of charity, negligence or collusion.

The Grievant's prior record contains two suspensions, a five (5) day issued in 1996 and a ten (10) day issued in 1998. In the thirteen months prior to the 12/4/99 incident he was issued two (2) written warnings for duty related offenses and a verbal warning for shift tardiness. These disciplines represent a choice by the Employer to invoke lesser discipline in the possible range of discipline provided by the Disciplinary Grid. Therefore, it is reasonable to assume the offenses, even when repeated, were not considered by the Employer to be serious rule violations. The Grievant has a considerable amount of seniority. His ten (10) years of service with DRC, his total of twenty (20) years of overall state service and his evaluations over the past nine years demonstrate he is capable of performing at a satisfactory level.

The Grievant should not interpret this Award to represent an endorsement of his actions. The Employer proved he lied about what time he arrived at work on December 4th and then engaged in a cover-up of the matter. These are actions any Employer takes seriously for good reason. It is an issue of trustworthiness. However, as stated above, the Employer did not prove the Grievant committed forgery, which according to the record, was a substantial factor in deciding to terminate rather than suspend him.

The Grievant is a few years away from qualifying for full retirement; he will need to make a serious effort to change his behavior if he plans to reach the 25 years of service mark with the State. On balance the facts in this case and the guidelines contained in the Department's Discipline Grid warrant giving Mr. Svendsen what amounts to a final chance to learn from his mistakes.

AWARD

The grievance is denied in part and sustained in part.

The Grievant's termination shall be converted to a time served suspension. The Grievant is to be reinstated to his former position and shift without back pay or benefits, but shall have his seniority bridged.

Respectfully submitted to the parties this 16th day of March, 2001

Robert G. Stein, Arbitrator