

#1485

In The Matter of the Arbitration

OPINION AND AWARD

Grievance No. 04-00 (21-08-00) 12-01-07

-between-

The State of Ohio
Department of Agriculture

-and-

Ohio Civil Service Employees
Association, AFSCME, Local 11

ARBITRATOR: John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE UNION: Michael E. Martin
Staff Representative
Ohio Civil Service Employees Association
390 Worthington Road, Suite A
Westerville, Ohio 43082-8331

John Porter
2nd Chair, OCSEA

Also present: Joseph Rogers
Grievant

Duane Murray
Chief Steward

FOR THE STATE: John H. Hix
Human Resources Administrator
Ohio Department of Agriculture
8995 East Main Street
Reynoldsburg, Ohio 43068

Patrick Mogan
2nd Chair, Office of Collective Bargaining

Also present: Dr. Terri Short
Veterinary Supervisor
Meat Inspection Division

Larry Fugett
Inspector Supervisor
Meat Inspection Division

FACTUAL BACKGROUND:

A) The Grievant as a Meat Inspector
and His Supervision

This case concerns the discharge of an inspector of fourteen years seniority who worked in the Division of Meat Inspection of the Department of Agriculture. The Grievant inspected four plants that process beef, pork, or poultry for human consumption, which inspection permits the use of the legend, "Ohio" similar to the legend "USDA Inspected" as a mark of wholesome product. The purpose of the inspections is to ensure safe, wholesome meat, pork, and poultry products for the consumer.

The Grievant is one of twelve inspectors who inspect thirty-four facilities in fifteen counties in Southern Ohio--all joined together in a particular District. The Grievant is under the supervision of two persons--the inspection supervisor in the District, Larry Fugett, and Dr. Terri Short, the District Veterinary Supervisor. Both supervisors operate in the field, that is, they visit and observe inspectors while performing their duties at the meat processing plants. Fugett, who supervised the Grievant for the past eight or nine years, has observed the Grievant in the field at least twenty-six times per year; Short has visited plants to inspect animals where the Grievant has been present about 1.5 times per week.

B) The Grievant's Discharge

The Grievant was terminated on August 14, 2000 by letter from the Director of the Department of Agriculture, which letter specified five violations of the Department's disciplinary grid

found by the Director to have been violated as a result of four factual transactions. The letter noted a pre-disciplinary meeting had occurred on Thursday, July 20, 2000 after written notice received July 11. After the Director received a report from the hearing officer and a recommendation, the Director stated that he was convinced of the following facts:

1. On April 12, 2000, at Huisemann's Poultry (Establishment #8018), you failed to secure your Gateway 2500 microcomputer in either a secure desk or table or a secure room while it was left unattended for over 30 (thirty) minutes, in violation of the written Micro Computer Security Policy you received and signed February 28, 2000;
2. On May 9, 2000, at Mannings (Establishment #0194), you failed to insure the humane and timely slaughter of a downer animal with an obviously broken leg, by allowing said animal to remain downed in an antemortem pen from 7:12 AM until approximately 3:00 PM before it was slaughtered;
3. On June 7, 2000, at Huisemann's Poultry (Establishment #8018), you failed to perform an adequate inspection by overlooking numerous sanitation deficiencies (observed immediately after his inspection by Meat Inspection Supervisor Larry Fugett); by being unable to demonstrate to your supervisor a sufficient knowledge of the facility's SSOP or HACCP plans necessary to perform your duties;
4. On June 21, 2000, Terri S. Short, DVM, conducted a routine inspection at Huisemann's Poultry (Establishment 8018). She discovered the facility's water certificate, required by both the HACCP and SSOP, had expired June 10, 2000, but you failed to write any infraction for this noncompliance. Furthermore, Dr. Short noted the bird carcass fecal check was not properly performed nor was it performed by the proper employee. Inspection records revealed this test had been improperly done according to the HACCP plan as noted in all available inspection records, but you failed to note this noncompliance which occurred three times per day on every kill day, even when you were present.

The letter further found that the facts recited above constituted violations of Rules 5 (b), 25, 28, 30 (a), and 31 (a), (b), and (c). The letter concluded that there was sufficient just cause for the Grievant's permanent removal from this position as a Meat Inspector.

A timely grievance was filed which stated:

Joe Rogers denies all charges . . . Management failed to show just cause for this termination. It was also noted that Joe has been harassed by Dr. Short for personal reasons.

The grievance requested the following remedy:

To be re-instated in his job and made whole. To have the supervisory intimidations stopped along with the harassment.

STIPULATED ISSUE:

Was the termination of Joseph Rogers by the Ohio Department of Agriculture for just cause, thus eliminating the statutory return to work rights under PERS disability? If not, what should the remedy be?

RELEVANT DISCIPLINARY RULES:

OHIO DEPARTMENT OF AGRICULTURE

DISCIPLINARY POLICY

PURPOSE

. . .

DISCIPLINARY GRID

RULES VIOLATIONS AND PENALTIES

Steps in Progressive Discipline

- (OR/WR) - Oral/Written Reprimand
- (WR/1) - Written Reprimand/One (1) Day Suspension
- (1-3) - One (1) to Three (3) Day Suspension
- (5-10) - Five (5) to Ten (10) Day Suspension
- (R) - Removal

		<u>Offenses</u>				
		1st.	2nd.	3rd.	4th.	5th.
5.	Insubordination					
	b. Failure to follow work rules administrative regulations and/or written policies or procedures, unless infraction is covered under another specific section of the grid.	OR/3	WR/5	3-5	5/R	
. . . .						
25.	Other actions that could knowingly harm or potentially harm the employee, a fellow employee(s) or a member of the general public.	WR/R	R			
30.	Neglect of duty					
	a. Major (endanger life, property or public)	5-10/R	R			
31.	Poor Performance					
	a. Failure to properly carry out work assignments	OR/WR	WR/1-3	3-5	R	
	b. Failure to complete assigned tasks	OR/WR	WR/1-3	3-5	R	
	c. Performance at sub-standard levels	OR/WR	WR/1-3	3-5	R	

ISSUES OF JUST CAUSE AND DUE PROCESS:

The Union argued that the Grievant was fired without just cause and without due process. Three of the four factual incidents were "minor and probably called for no more than a verbal correction." (Union post-hearing brief at 3). The fourth incident concerning a lame animal at a slaughterhouse involved the use of

discretion by the Grievant. While the Grievant's judgment may have been faulty, he had good reason why he did not order the slaughter of the lame animal immediately. Therefore, on the merits, the Employer did not have just cause to discharge the Grievant.

With respect to due process, this discharge occurred without any formal investigation or any interview of the Grievant before the Grievant received notice of a pre-disciplinary hearing. The Employer must use progressive discipline under Article 24:02 of the contract, and each of the four charges should have been pursued separately.

The Employer did not pursue the discipline in a timely manner since it waited ninety-nine days from the first incident on April 12, 2000 to the July 20, 2000 pre-disciplinary hearing. In addition, the Grievant had no notice of potential disciplinary action until July 11, 2000--the date at which the Grievant received the notice of the pre-disciplinary hearing.

OPINION:

A) Did the Employer Have Just Cause
to Discharge the Grievant?

There was no controversy in this record about the reasonableness of Rules set forth in the Department's disciplinary grid or about the reasonableness of the sanctions set forth for violation of the Rules. What is important in this analysis, however, of just cause to discharge the Grievant is the threshold fact that only two of the Rule violations charged against the Grievant list removal as a potential sanction for a first offense. Rule 25 prohibits "actions that could . . . potentially harm . . .

a member of the general public" with a potential sanction of removal to written reprimand for the first offense. Rule 30 prohibits neglect of duty and specifies a major violation as one that would endanger life or the public. It carries as a potential sanction the longest suspension possible under the disciplinary grid, or removal.

It is true that the Disciplinary Policy of the department states that the purpose of the policy is only to outline guidelines to be used in determining the appropriate discipline to be imposed in individual situations. It is also true that the Disciplinary Policy explicitly states that the listed disciplinary action "may be more severe depending upon the nature of the offense." For purposes of this analysis, however, the question raised is whether any of the factual transactions charged against the Grievant constituted a major neglect of his duty that endangered the public under Rule 30, or constituted an action that could potentially harm a member of the general public under Rule 25. If either or both of these determinations can be made, then the Employer did have just cause to discharge the Grievant. This would be true under the literal listing of "removal" as an alternative sanction for violation of either Rules 25 or 30. The determination would also require assessing the circumstances of each violation to further determine that removal was a reasonable alternative to the lesser sanctions listed for a first offense under both Rules 25 and 30.

The record was fact-intensive on the transactions charged by the Employer to be violations of Rules 25 and 30. The record

consisted of detailed testimony by the Grievant and both of his supervisors as they personally interacted at facilities where the Grievant engaged in his duties as a meat inspector. Based on the details set forth below, the arbitrator concluded that the factual transactions did constitute major neglect by the Grievant of his duties as a meat inspector that endangered the public under Rule 30 and that could potentially harm the public under Rule 25. The circumstances surrounding these violations constituted just cause for the discharge of the Grievant.

1.) Failure to Tag and Immediately Slaughter
a Suspect and Downed Animal on May 9, 2000

An inspector must look for abnormalities in an animal such as lameness, injury, or sickness. By regulation of the Federal Food Safety and Inspection Service, a Veterinary Medical Officer should examine all disabled livestock, including "downers," and those that show signs of trauma. Therefore, the inspector is required to contact the veterinarian, and, even if the downed animal had been processed, the carcass must be separated for the veterinarian's inspection. The purpose is to eliminate the possibility of contaminated meat from entering the consumer food chain.

On May 9, 2000, an owner of a red meat processing plant telephoned Dr. Terri Short, the District veterinarian supervisor and a supervisor of the Grievant. The owner told Dr. Short that a bull had come to the plant in an apparently good condition but during the night became unable to rise. The bull was suffering from either disease or injury.

Dr. Short learned from the owner that the Grievant was present at the processing plant and Dr. Short had a conversation with the Grievant. She told the Grievant to kill the animal and get its temperature. The Grievant responded, "I'll do it."

Dr. Short visited the processing plant on May 10. The Grievant was not present, but Dr. Short learned that the bull had been left to struggle on the floor by the run through which the cattle proceeded for slaughter for seven hours until the bull itself was slaughtered at 3:00 p.m. at the end of the slaughtering process for the day. The meat from the bull had not been tagged nor separated; rather, it went into the food chain from the processing plant.

The Grievant testified that he relied on the owner's experience in dealing with downed animals by delaying the slaughter of this animal until after the kill day had been completed at 3:00 p.m. The Grievant testified that he agreed with the owner that the suspect downed bull should be killed last "because it (the bull) could, if diseased, contaminate the kill floor." Nevertheless, after justifying the delay in slaughtering the bull based upon a potential disease suffered by the bull, the Grievant then testified that he did not tag or separate the carcass in any manner. The Grievant stated, "I could have tagged or isolated the carcass." He did not, and the bull, suspected by the Grievant as having been diseased, entered the food chain, thereby endangering the public.

The delay in slaughtering the animal raised a further violation of regulations by the Food Safety and Inspection Service.

The regulations require the humane handling of animals. Slaughter practices should cause "a minimum of excitement, pain, injury or discomfort to livestock." Despite Dr. Short's request that the downed bull be killed, the Grievant let the animal suffer for seven hours prior to complying with the order of Dr. Short. The key consideration, however, is the failure by the Grievant to perform his duty resulting in potential danger to the public by introducing the meat of a suspected diseased animal into the food chain.

2.) The Fecal Check at a Chicken Processing Plant
on June 21, 2000

The Grievant was the inspector in charge at the only chicken processing plant in Ohio that is inspected by Ohio inspectors from the State Department of Agriculture. Other inspectors come to this processing plant, but only randomly, and to do trim checks.

This plant, as is true of all meat processing plants, drafts a plan within department parameters that sets forth the hazard analysis listing critical control points during the process where there is a potential for adulteration of the meat. The plan for this chicken processing plant listed a critical control point for a fecal check. On June 8, 2000, the Grievant's immediate supervisor spoke with the Grievant about the plan for this chicken processing plant. He asked the Grievant if he knew what the critical control points were that had to be checked by the Grievant during his inspection. The Grievant did not know the specific test that should have been conducted by the plant for checking presence of feces in the processed chickens. The plan specified that five birds were to be selected randomly from the processing line, placed

on a separate rack, and observed under a powerful light to see the contamination. On June 21, 2000, Dr. Short conducted an inspection of the chicken processing plant. She asked to see the on-line fecal check. According to the plan, the fecal test was to be done three times every kill day. In addition, the plan defined the person who was to perform the check. Dr. Short discovered that the person who indeed conducted the check was not the person so defined in the plan. While Dr. Short considered this problem "minuscule," Dr. Short found "appalling" the fact that the person did not know what she was looking for in the test. Dr. Short then checked the written record of tests conducted in the past and noticed that the same person (who was not certain of the purpose of the test) had her initials on previous tests.

The Grievant was not only the chief inspector at this chicken processing plant, but he had also conducted the inspections from the beginning of March to June 21, 2000. Dr. Short's discovery, however, showed that the plant personnel were not conducting fecal checks as stated in the plan in order to avoid contamination of the chickens. Again, this constitutes a major dereliction of duty that endangered the public.

3.) The Pre-operation Inspection of the
Chicken Processing Plant on June 7, 2000

On this date, the Grievant's immediate supervisor conducted a check of the Grievant's work at the chicken processing plant in inspecting the plant prior to the commencement of its operations. The first duty of the inspector is to check the plant prior to kill operation by checking machines, barrels, and other points where

contamination could occur. In this process, the chickens come to the processing plant alive, are cut in their throats, scalded and hung on a line and guts are removed. This is a small facility with twenty or less employees working in a small slaughter room. The process is largely a hand process.

The supervisor, Larry Fugett, observed the Grievant walk through the facility as part of his pre-operation inspection. Fugett had already conducted his own inspection and found five aprons hanging in the processing room with blood and viscerae on the aprons. The aprons were about to be worn by the employees and were hanging in plain view. There were barrels used to chill the chickens that had mold on the top of the barrels. There were unclean knives in plain sight. There were dead flies in the chill tanks that are used to chill dead chickens to a forty degree temperature to prevent bacteria.

Fugett asked the Grievant what he had seen in his pre-operation inspection. The Grievant said, "I found nothing." The Grievant acknowledged at the arbitration hearing that he did see the mold, flies, dirty aprons, and dirty knives when he was shown these items by Fugett at the chicken processing plant.

The Grievant also acknowledged at the arbitration hearing that the deficiencies observed by his supervisor were so serious that he (the Grievant) "would have shut it down." The supervisor testified that he did not red tag the door of the chicken processing plant because the manager did correct all direct-contact deficiencies. Again, these facts that were undisputed by the Grievant display a

major neglect of duty that created a potential harm to the public by contamination of the chickens processed by the plant that had been poorly inspected by the Grievant.

B.) Was the Process Leading to the Discharge of the Grievant Fair?

The Union pressed several concerns about the process used by the Employer leading to the discharge of the Grievant. Collectively, the concerns center on whether or not the process was fair to the Grievant. The main concern centered on the absence of a separate investigation and an investigatory interview of the Grievant prior to the notice of the disciplinary hearing. Associated with this claim is the additional claim that the Grievant was not aware that disciplinary action was being considered against him until July 11, 2000. Before addressing these major claims, this analysis will first deal with some preliminary matters.

The Union did argue that the State did not initiate the disciplinary action "as soon as reasonably possible . . ." as required by Article 24:02 of the contract. The same article requires an arbitrator to "consider the timeliness of the Employer's decision to begin the disciplinary process." This claim is justified with respect to the charge that the Grievant failed to secure his microcomputer at the chicken processing plant on April 12, 2000. While one of his supervisors did bring this infraction to his attention, this transaction was not raised by the State for purposes of discipline until approximately three months later when the Grievant received a notice of a pre-disciplinary

hearing with this transaction listed as a cause for discipline. The State offered no explanation for its failure to initiate the disciplinary process for the transaction involving the microcomputer occurring on April 12, 2000. The State breached its duty under the contract, and, therefore, this transaction cannot be counted as a basis for the discipline in this case.^{1/}

By contrast, the factual transactions involving the pre-operation inspection (June 7, 2000), the failure to tag and humanely slaughter a downer animal (May 9, 2000), and the failure to inspect for correct fecal testing (June 21, 2000) are closely related in time to each other and to the notice of pre-disciplinary hearing on July 10. Consequently, the State did not violate its duty to initiate in a timely fashion a disciplinary action with respect to these matters, and it is these matters that were the basis for the finding of just cause to discharge the Grievant.

The Union, however, did raise a claim of unfairness with respect to these three matters in that they were not separated for different disciplinary actions by the Employer. According to the Union, this constituted a violation of the duty of the State to use progressive discipline. Again, these matters occurred so closely in time with each other that it would constitute an artificial and unreasonable straight jacket on any employer to force the employer to initiate separate disciplinary actions for three actual

^{1/} The State appeared to acknowledge this problem in connection with the April 12, 2000 transaction involving the microcomputer by stipulating at the arbitration hearing that this transaction was not a basis for the discharge in this case.

transactions that occurred within a five week period. The contract makes no such demand upon the State.

The major claim of unfairness is that the State did not initiate a formal investigation, and did not interview the Grievant. In addition, the Union claimed that the Grievant was unaware that discipline was being contemplated.

These claims are predicated upon the absence of any working relationship between his supervisors and the Grievant as the Grievant proceeded to conduct his inspection duties at facilities in his District. The fact is that the Grievant and all twelve inspectors within this District are under extensive close supervision by both their immediate supervisor, Fugett, and their veterinary supervisor, Short. As previously noted, both supervisors worked in the field, checking the same hazards to the public that the Grievant checks as an inspector. As noted above, the Grievant's direct supervisor visits on a random basis the same plants that the Grievant inspects, and observes the Grievant in the field at least twenty-six times a year. The veterinary supervisor also observes the Grievant as well as the Grievant's immediate supervisor in the field at the plants under inspection. On an average of 1.5 times per week, Dr. Short visited the plants where the Grievant was present and acting as a meat inspector.

The transactions that constitute the basis for the finding of just cause to discharge the Grievant were transactions, for the most part, that involved interaction between the Grievant and the supervisor. The pre-operation inspection involved only Fugett and

the Grievant. The transaction involving the downed bull involved essentially an admission by the Grievant that he did not tag nor isolate the carcass of a bull whose slaughter was delayed because he (the Grievant) suspected a disease and did not wish to contaminate the kill floor. The transaction involving the improper fecal testing went on for months while the Grievant was the chief inspector at the poultry processing plant.

To require a "formal investigation" or a disciplinary interview on the circumstances of this case would be to require an empty act. All the information that lay at the core for the basis for the discharge was known to both the Grievant and his immediate supervisors. This information centered upon events of interaction among these three people, and no other persons were essentially involved in any of these three transactions.

Lastly, it is claimed that the Grievant was unaware that discipline was impending. The fact is that the Grievant was told during each occurrence that constituted just cause for discharge that the matter was being "written up" by the supervisor. It is true that no specific discipline was mentioned by either supervisor because neither had the authority to make this determination nor participate in the decision making on possible sanction. On the other hand, the notice of pre-disciplinary hearing was issued on July 11, 2000 that specified potential sanctions in the disciplinary grid. This notice followed by a little over two weeks the transaction involving the fecal matter test; one month following the transaction concerning the downed animal; and two

months following the pre-operation inspection. On balance, it cannot be said that the Grievant did not receive sufficient notice of the potential for disciplinary action for the three factual transactions that are the basis for his discharge.

AWARD:

The grievance is denied.

Date: April 16, 2001



John J. Murphy
Arbitrator

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