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IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO DEPARTMENT OF HEALTH

AND

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/

AFSCME LOCAL 11 AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 14-50-000908-032-01-09

David Carter, Grievant

Advocate(s) for the UNION:

Brenda Goheen, Staff Representative
OCSEA Local 11, AFSCME, AFL-CIO
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Westerville OH 43082-8331

Advocate(s) for the EMPLOYER:

Chris Keppler, LRO/ODH
OHIO DEPARTMENT OF HEALTH
Kelly Foster, 2nd Chair
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INTRODUCTION

A hearing on the above referenced matter was held on February 20, 2001 in Applecreek, 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 provided written closing arguments in lieu of making verbal closing arguments. The hearing was closed on March 5, 2001. The Arbitrator's decision in this matter is to be issued by April 19, 2001.

ISSUE

The parties stipulated to the following definition of the issue:

Did the Employer violate Article 24 of the Agreement when it removed David Carter from his position? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

The Grievant is David Carter, an Account Clerk I who was employed with the Ohio Department of Health (hereinafter referred to as "Department" or "Employer" for almost six (6) years. Mr. Carter worked in the Department's Bureau of Vital Statistics (hereinafter referred to as "Bureau"). He previously held the positions of Clerk I and Reproduction Equipment Operator prior to being promoted to Account Clerk I in the Bureau.

On September 1, 2000 Mr. Carter was fired for being absent without leave and for being insubordinate. The incident giving rise to these two charges occurred on August 4, 2000. On August 4th Mr. Carter was required to take a certification examination for the position for which he had been promoted, Account Clerk I. Mr. Carter was recently promoted into this position and finished his probationary period. Individuals taking the examination were to report to the exam site by 8:30 a.m. Mr. Carter's normally scheduled workday begins at 7:45 a.m.

On August 4th the Grievant was given permission by his supervisor to report directly to the examination, the site of which was only a few city blocks from his office. The examination was approximately two (2) hours

in duration. The Grievant arrived on time and took the exam. What happened after the examination was completed is the focus of this case.

The Employer stated that Mr. Carter was given a directive to report to work following his examination. Mr. Carter did not return to work after the examination; he went home instead. The Employer viewed the time between the end of the examination and the end of the Grievant's regular shift (about 4 hours) as unauthorized leave time. When Mr. Carter returned to work he was asked and then directed to fill out a leave of absence to account for the 4 hours. The Grievant refused to submit a leave form.

The Employer charged the Grievant with being absent without leave and for being insubordinate and consequently discharged him. Mr. Carter filed a grievance claiming the Employer did not have just cause for its actions. At the time of his termination the Grievant had a prior disciplinary record. On 12/17/98 he had been issued a written warning for violation of Department Rule (A 1), failure to follow call-off procedures. On 2/5/99 he had received a two (2) day suspension for violation of Department Rules, (A 2) tardiness; (A 10) absence without approved leave; and (N 5) sleeping on the job. The third active discipline in the Grievant's personnel file was a three (3) day suspension for violation of Department Rules, (A1) failure to follow call-off procedures; and (A 11) abuse of sick leave.

EMPLOYER'S POSITION

The Employer argues that employees in the Bureau of Vital Statistics are always expected to return to the office after taking an exam, but are not always permitted to report directly to the exam rather than reporting to work. The Employer points out that the Union acknowledges that the Grievant was *"...in error, he should have returned to work or requested leave for his absence."*(See Union's opening statement).

The Employer contends that the Grievant should have been fully aware that he was expected to return to work after the exam and was expected to obey a supervisory directive. The testimony of witnesses Holbrook and Harrington made it clear that on the day before the examination he had been instructed to return to work following the completion of the exam, asserts the Employer. The Employer argues that these expectations were further enforced by the testimony of Judy Roberts.

The Employer admits that the Grievant's attitude was a factor in determining the level of discipline that was issued. When his past disciplinary record, the current offense, and his attitude are taken into consideration, suspending the Grievant a second time (in lieu of discharge) would not help correct his behavior, asserts the Employer.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union argues that based upon prior experience with taking state certification exams, the Grievant believed that he was permitted to take off the remainder of the day on August 4, 2000. The Union disagrees with the statements of Ms. Holbrook and Ms. Harrington that on August 3rd, the day before the exam, they told him to return to work following the exam. The Union's disagreement is based upon the Grievant's testimony that the meeting had never taken place.

The Union points out that the Grievant did not ask for the Department's policy on test taking until August 11th when he was asked to submit a leave form to account for the remainder of his work time following the end of the certification exam. The Union contends that this fact demonstrates the Grievant did not know he was expected to return to work after the exam. The Union also points out that Ms. Harrington called the testimony site on August 4th (after the test ended) with the intent of informing the Grievant he must return to work. This is further evidence that Ms. Harrington had not previously informed the Grievant he was expected to return to work.

The Union further argues that Ms. Harrington's testimony, during the

arbitration, that she warned the Grievant he would be suspended or terminated if he refused to sign the leave form, was contradicted by Mr. Lowery's testimony. He testified that he told Ms. Harrington to tell the Grievant he would be suspended. The Union stated that Mr. Lowery never mentioned the word terminated. The Union rejects the notion that an employee can be forced to take a leave. The Union states that the Grievant was absent without leave for which there were mitigating circumstances, but it is not reasonable to consider him to be insubordinate.

Based upon the above, the Union requests that the grievance be sustained.

DISCUSSION

The Grievant was wrong to assume he could take off the remainder of the day after taking a two (2) hour certification examination. There appears to be little dispute over this point. He worked just a few blocks from the test site, and was required to report to work following the exam. The policy of the Department in this regard appears to be very reasonable. However, the testimony of the Grievant as to why he did not return to work was not credible or believable.

It is unreasonable an employee to assume, particularly one who is on probation in a new position that he did not have to return to work after

a two (2) hour certification examination without supervisor approval. Mr. Carter appears to be an intelligent person with sufficient experience to understand what is expected of him and the need to have supervisory approval for absences. Six years of working for the State of Ohio and being issued corrective action for absentee related offenses should have reinforced those principles.

However, even if the Grievant had the mistaken notion he could have the whole day off, his impression should have been corrected as soon as one (1) day prior to the exam. The Employer presented credible evidence and testimony (from witnesses Harrington and Holbrook) that the Grievant was specifically told, on the day before the exam, that he was to return to work following the exam. The testimony of these witnesses appeared to be forthright and credible. They were sure they informed him to return to work following the exam. There is sufficient reason to believe that the Grievant knew what he had to do and chose not to do it. He willfully and deliberately defied managerial authority (Formal definition: See Black's Law Dictionary, 942 (4th ed.).

The charge of insubordination is also based upon the Grievant's refusal to submit a leave form after being directed too by his supervisor. While the Grievant appeared to have no legitimate basis for his absence on August 4, 2000, it also appears he did not intend to take any type of leave. Yet, it is clear that the Grievant's supervisor ordered him to fill out a

form. Article 31 provides that an unpaid leave must be initiated as a result of an employee request. The parties provided an employee with the right to request (or not request) a leave and there is certainly room to debate the propriety of demanding that an employee submit a request for leave. However, this is a matter for the parties to settle and does not relieve the Grievant from following his supervisor's legitimate directive.

Under the *"obey now and grieve later"* principle Mr. Carter was obligated to follow his supervisor's directive. Arbitrator Joseph V. McKenna best explains the rule:

"A plant is not a debating society but a production unit. The "obey now and grieve later" principle is founded upon the idea that, if production is stopped, or reduced, every time a dispute arises, everyone suffers. Therefore, a mechanism is provided for the specific purpose of resolving disputes without interrupting production. The usual mechanism is a grievance procedure and binding arbitration. With few exceptions...the "obey now and grieve later" principle applies whenever an employee is (1) faced with an order he believes to be unfair or in violation of the labor contract and (2) has at his disposal a grievance procedure terminating in binding arbitration."
(Crossroads Press, 72 LA 1015 (McKenna 1979))

The Department of Health is also not a debating society. Mr. Carter should have obeyed his supervisor's directive and if he thought it violated the Agreement he could have grieved it.

The Grievant's prior discipline substantiates the fact that violations of rules relating to job attendance have repeatedly occurred, and he had been disciplined for them. This substantiates the notion proffered by the Employer that the Grievant has not given any indication that he has

corrected his pattern of poor attendance. I must concur with the Employer's argument that the Grievant appears to have been unaffected by his prior disciplines. The question is whether further discipline short of discharge would have any positive effect on a Mr. Carter.

The Employer cited Mr. Carter's attitude, and again I must concur that up to this point there appears to be little reason to believe he understands the gravity of his actions. However, moving from a three (3) day suspension to a termination is a considerable leap considering the totality of what occurred in this case. One can never predict what will change a person's behavior. Sometimes people finally "get it" after being faced with a harsher reality brought about by an intervening suspension of substantial length.


It is unknown whether such a penalty will work. However, Article 24.02 points out that the parties have committed themselves to the concept of progressive discipline and this language must be considered when determining an appropriate level of discipline under a just cause standard.

AWARD

The grievance is denied in part and sustained in part.

The Grievant is to be reinstated without back pay or benefits, but his seniority shall be bridged. His termination is to be converted to a time served suspension for being absent without leave and insubordinate. It should be made clear to the Grievant that this Award provides him with an opportunity to continue work, but he faces discharge if he fails to correct his pattern of conduct.

Respectfully submitted to the parties this 18th day of April, 2001.

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a series of horizontal strokes.

Robert G. Stein, Arbitrator