#1520

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO DEPARTMENT OF COMMERCE

AND

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

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 07-00-08-18-00-271-01-07
Randolph M. Burley, Grievant

Advocate(s) for the UNION:

William Anthony, Field Staff Representative
Donald Conley, 2nd Chair
OCSEA Local 11, AFSCME, AFL-CIO
390 Worthington Rd. Ste. A
Westerville OH 43082-8331

Advocate for the EMPLOYER:

Jason Woodrow, Advocate, COMMERCE
Blaine Brockman, 2nd Chair
Kelly Foster, OCB
Office of Collective Bargaining
107 N. High St., 7th Floor
Columbus OH 43215

INTRODUCTION

A hearing on the above referenced matter was held on July 11, 2001 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 submitted written closing arguments. The hearing ran for 12 hours and was closed on July 11, 2001. The Arbitrator's decision is to be issued within thirty (30) calendar days or no later than August 13, 2001.

ISSUE

The parties agreed upon the following definition of the issues:

Was the Grievant, Randy Burley, disciplined for just cause? If not, what should be the remedy?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

The Grievant is Randy Burley, an Investigator with the Ohio Department of Commerce, Division of Real Estate and Professional Licensing (hereinafter referred to as "Employer," "Department," or "Division"). The Division regulates real estate licensing, cemeteries, auctioneers, security guards, and private investigators. The Grievant was responsible for making sure the businesses, such as security guards and private investigators strictly followed the rules and regulations established by Ohio codes.

The Grievant received a five day suspension for violation of three Department policies. He was found by the Employer to have violated Policy 201.0 #2 Being Insubordinate, Policy 201.0 # 19, Being Tardy, and Policy 201.0 # 21 Being AWOL.

EMPLOYER'S POSITION

The Employer flatly rejects any notion that it engaged in any type of scheme or cover-up regarding the Grievant in this matter. It labels such accusations as excuses and arguments of convenience and argues there is no evidence to support them. The Employer points out that Mr. Patchen was only in the Grievant's chain of command for fourteen days at the time of the insubordination charge and was not with the Division during the tardy/AWOL incident. The Employer also strongly objects to the Union's charge that Ms. Hengle lied during her testimony. It points out that the Union failed to support this charge with any substantive testimony on cross examination.

The Employer argues that the Grievant was knowingly and willingly insubordinate on June 22, 2000. He was given a reasonable direct work order and

refused to do it, asserts the Employer. The Employer argues that the Grievant did not ask for clarification and understood what he was expected to do. The Grievant was asked to use his "best effort" and was not asked to falsify his timesheet, contends the Employer.

The Employer dismisses the Grievant's claim that he was afraid he would be treated in a similar fashion as Mr. Slade, who had been charged with falsification of documents. The Grievant should have been aware that what he was asked to do was not related to the activities of Mr. Slade, argues the Employer. The Employer also disagrees with the Union's contention that it wrongfully denied Union representation to the Grievant at a June 22, 2000 meeting with three superiors, a meeting in which he was given a direct order. The Employer contends that the misconduct (insubordination) did not occur until after the meeting was over.

The Employer argues that it denied the request for emergency leave submitted by the Grievant due to the fact that it correctly determined that no emergency existed to support the request. The Grievant, Mr. Burley, should have reasonably known about the closing of the Brice Rd. ramp on May 30, 2000. The Employer points out that Department employees were notified in advance of the closing by such things as e-mail, posted signs, newspaper reports, and television spots. This was not an emergency, argues the Employer. The Employer points out that the Union never refuted the fact that the Grievant was tardy on May 30, 2000 and would have been late even if he did not have family obligations on that day.

The Employer argues that the Grievant's active disciplinary record is germane to this matter. When the Grievant received his 5-day suspension for the instant offense, he

had already received an oral reprimand, a written reprimand, and a 1-day fine for attendance problems.

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

UNION'S POSITION

The Union's overriding position in this matter is that the Employer did not have just cause to suspend the Grievant. It makes this argument on two grounds: the Collective Bargaining Agreement was not followed, and the Employer did not follow its own policies/work rules.

Regarding the charge of insubordination, the Unioin claims the Grievant had a reasonable fear that if he removed his explanation from his June 21, 2000 timesheet, he would or could be required to answer to criminal charges for falsification under ORC 2921.12 (A)(7). The Union disagrees with the Employer that this section of law requires an *"intent to defraud."* The Union also contends that the Grievant asked Superintendent Hengle and Assistant Superintendent Patchen to assume responsibility for any changes to the timesheet, and they had never responded to him. The Union further argues that the Employer violated the Agreement when it denied the Grievant union representation in a situation in which he felt he could be subject to discipline. The Union points out that no one else in the Division of Real Estate and Professional Licensing (hereinafter referred to as "Division") was ever ordered to change their timesheet submission and certify the new submission as being accurate.

The charges related to unexcused tardiness and AWOL are unfounded, contends the Union. The Union asserts that the Employer's unwarranted pursuit of the Grievant on

these charges demonstrates its overall hostility toward the Grievant. The Union argues that the Grievant's request for an 8:30 starting time was wrongfully disallowed even though the Employer accommodated other employees with a later starting time. The Union also claims that the Employer violated its own policy (Commerce Policy 313.0) when it charged the Grievant with an AWOL in addition to being tardy less than 30 minutes on May 30, 2000. The Union claims the Employer violated Articles 2, 5, 13, 24, 25, and 44 in this matter.

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

DISCUSSION

AWOL and TARDINESS

The Grievant received a 5-day suspension for violating three policies of the Employer: the Tardy Policy (201.0 #19), the AWOL Policy (201.0 # 21), and the Insubordination Policy (201.0 #2).

One incident triggered the charges of violating the Tardiness Policy and the AWOL policy. It occurred on May 30, 2000 when the Grievant was 25 minutes late for work. The evidence and testimony clearly establish that on May 30, 2000, the Grievant was late for work. Upon examination of the Policy 201.0 #19, Tardy, it is also clear that the Employer misapplied its own policy. The Policy states:

TARDINESS PROCEDURES

All Employees shall be at their report-in locations ready to commence work at their starting time. The Employer in dispensing discipline shall take extenuating

circumstances surrounding tardiness into consideration.

Control of tardiness is a responsibility of supervision. If tardiness continues after verbal counseling by the supervisor, progressive discipline shall be administered. Unexcused tardiness is subject to disciplinary action in accordance with the agency's Disciplinary Policy.

Tardiness with Extenuating and Mitigating Circumstances: For incidents with extenuating circumstances, the supervisor may choose to address the incident with any of the following actions or combination of actions, at the same time maintaining consistency.

1. The supervisor may allow the employee to take leave time for the time missed; or

2. Recommend the approval of excused leave without pay for the time missed.

Tardiness without Extenuating and Mitigating Circumstances: If it is determined that there are not extenuating circumstances surrounding the instance of tardiness, it is up to management to address this with the employee as a discipline issue. The following actions must be taken:

- *Conduct a formal investigatory interview with the employee and his/her union steward (if applicable) to officially establish that there were no extenuating circumstances.*
- *Dock the pay of overtime-eligible employees for the amount of unexcused leave. The following grid is used when docking time:*

Minutes Tardy	*Docking*
0-5	*None*
6-11	*1/10 hour*
12-17	*2/10 hour*
18-23	*2/10 hour*
24-29	*4/10 hour*
30	*5/10 hour*

Absence beyond 30 minutes is not considered a tardiness issue but is considered Absence without approved leave and should be addressed as such. [Emphasis added]

- *Administering progressive discipline according to the disciplinary grid contained in the Disciplinary Policy. Unexcused tardiness on the grid calls for progressive discipline as follows: oral reprimand; oral or written reprimand; written reprimand or suspension; written reprimand or suspension; suspension or removal.*

Divisions may choose to utilize any of the options outlined above in order to effectively deal with the issue of tardiness. Additionally, supervisors are encouraged to utilize other tools available to them to monitor or curb tardiness, including the use of sign-in sheets. No changes in current procedure should occur in any division or section without prior discussion with and approval by the Human Resources Office.

Although parts of the policy allow for managerial flexibility, certain provisions of the policy are explicit. One of those definitive sections is the definition of an absence beyond thirty minutes. I find the Employer erred in application of its own policy and acted arbitrarily when it considered the Grievant to be both AWOL and tardy. It is clear from the evidence that the Employer did not consider the Grievant's tardiness to be a result of extenuating or mitigating circumstances. In accordance with its own policy (updated January 2000), the Employer must *"conduct a formal interview with the employee and his/her steward to officially establish that there were no extenuating and mitigating circumstances."* And *"it must dock the pay of overtime-eligible for the amount of the unexcused leave. "*

The underlined portion of the policy cited above unequivocally defines an AWOL as an absence of more than 30 minutes. The policy does not provide for an employee to be both tardy/without extenuating or mitigating circumstances and AWOL for the same tardiness of 30 minutes or less.

The Grievant's 5-day suspension is in part based upon a violation of Policy 201.0

#19 and #21. The Employer's disciplinary grid provides for progressive discipline for AWOL of less than 1 day (#21). However, when one views the text and particularly the sequence of Policies #19 and #20 along with #21, the definition of AWOL contained in #19 appears to be consistent with what the disciplinary grid conveys. For example, Policy #19 addresses unauthorized tardiness. It is sequentially followed by Policy #20, stating it is a violation of policy to fail to notify a supervisor of an absence within one-half hour of a scheduled shift. Finally, Policy #21 addresses absences of less than one day to absences of three or more days.

In spite of the Employer's error in charging the Grievant with AWOL there is no question the Grievant was late for work on May 30, 2000. He does not dispute this fact. The Employer stated that the Grievant would have been late for work even if the Brice Road exit he was planning to use was not closed. The facts appear to support the Employer's contention. Traffic congestion and construction in Columbus are well known to commuters. It certainly can provide a valid excuse for being late for work on occasion. However, the Grievant's prior record of tardiness, his somewhat vague and shifting explanation of his late arrival on May 30, 2000, and the evidence that the Grievant was unable to verify his arrival at work on three days in the very next pay period (JX 3c, June 8, 9, 16, 2000) undermine his credibility. I find the Employer had just cause to charge the Grievant with a violation of the tardy policy.

INSUBORDINATION

However, I find the Employer violated the Article 24.04 of the Collective Bargaining Agreement and denied the Grievant his right to representation when it

unreasonably denied the Grievant's request to have a Union Steward present at the meeting on June 22, 2001. The Employer's argument that the meeting on June 22, 2000 should not have been considered to be an investigative meeting as defined under Article 24.04 is not convincing in light of the facts.

On June 21, 2000, following a grievance meeting, the Grievant accompanied by his Union Steward, discussed the issue of his timesheet with the Employer. The evidence and testimony presented during the hearing substantiate the Union's argument that this was a contentious issue and a difficult meeting. The Union, the Grievant, and the Employer were engaged in dialogue over the Grievant's timesheet for the period of June 4 through June 17, 2000 (JX 3c). When the Grievant was asked to attend a 10:30 a.m. meeting the next day with three levels of management, he requested a Union Steward because he believed that the meeting could be used to support disciplinary action.

I find that the Grievant had reasonable grounds to have this belief based upon the events of the previous day. During the hearing the Employer argued that there was a distinction between what it did following a grievance meeting on June 21, 2000 and the meeting of June 22, 2000. This argument is not persuasive. An employer does not have to have the Union present when it gives a directive to an employee. In general employees are expected to obey (with few exceptions) reasonable orders. However, this is an unusual case. On June 21st the Employer already began the discussion with the Union as to what to do with the Grievant's timesheet. This was a reasonable approach to the problem. When this discussion was inconclusive, the Employer once again approached the Grievant on June 22nd regarding the same topic but refused his request for a Union representative.

I find the Grievant was placed in a "Catch 22" situation. He stated on the timesheet and verbally that he did not fill out his timesheet daily and instead filled it out from memory at the end of the pay period. I agree with the Union's contention that if the Grievant had submitted a different timesheet, after stating the timesheet was his best recollection, he would be risking a falsification charge (See Policy 201.23, Dishonesty).

There is no question that the Grievant's timesheet contained information of a conflicting nature, yet the disclaimer written by the Grievant was consistent with an 80-hour pay period. The Grievant's timesheet was hardly a model of good form, but the level of urgency over it appears out of proportion to its content. It represents only one pay period. A reasonable approach to the problem of timesheet completion was put into effect by the Employer one week later. Mr. Patchen issued a comprehensive notice to everyone, including all management staff as to what is expected of them regarding timesheets. Beginning July 2, 2000, he held them accountable for future timesheets (JX 7a).

The record demonstrates that in spite of a 1988 memorandum calling for *"mandatory internal control practices"* there was a chronic problem in the Division with employees properly filling out time sheets (JX 8). Mr. Patchen testified that after reviewing past time sheets in the Division (after being on the job only a few weeks) he concluded, *"...people were turning them (timesheets) in various forms, styles, using different completion methodologies...I found time sheets were not being prepared with consistency or accuracy." (JX 7B)."* It is also apparent that timesheet accuracy was not a simple topic. Even after the Employer put out new directives (JX 8) there was a need to follow-up with additional communications for one employee on July 17, 2000. It is noted

that in spite of not complying with the directives contained in JX 8, the employee was not disciplined, but was simply warned that he could be disciplined (JX 9).

The Employer argues the Grievant was not suspended for not filling out his timesheet properly. It argues that he was suspended for not following a direct order. I find the Employer's argument to lack foundation and to be a case of drawing too fine a line. The meetings held over this issue on June 21st and June 22nd were for all intents and purposes investigatory interviews regarding the inadequacies of the Grievant's time sheet.

The Employer did not object to the Grievant having representation on this issue (on June 21st), then unilaterally determined that the Grievant did not need representation when the same discussion over this issue continued on June 22nd. This was an arbitrary denial of representation as required by Article 24.04. The Grievant was denied an opportunity to have representation and more importantly was denied the counsel of the Union when the Grievant was faced with having to make a choice over a matter that was discussed with Union representation less than one day earlier. The Employer prevented the Grievant from making an informed judgement when faced with the Employer's directive to correct his time sheet within 55 minutes (10:35 a.m. to 11:30 a.m.).

In spite of the outcome of this case, the Grievant needs to be cautioned that a workplace is not a debating society. The Employer has the right to issue operational directives in spite of the fact that the Grievant may not agree with them. Disobeying a direct order is a serious matter and it frequently leads to discipline. The "obey now grieve later " strategy is a much wiser course of action. When employees seek a self-help remedy (without the Union's counsel), he is risking a great deal.

AWARD

The grievance is sustained in part.

The charges of INSUBORDINATION and AWOL shall be removed from the Grievant's record. The violation of the TARDY POLICY (201.19) for being late on May 30, 2000, shall remain part of the Grievant's record.

The 5-day suspension shall be reduced to a 2-day suspension for violation of Policy 201.19, Unexcused tardiness.

The Grievant shall receive 3 days of back pay at the appropriate rate (minus normal deductions) and shall be made whole for all loss seniority and benefits.

Respectfully submitted to the parties this 13th day of August, 2001.

Robert G. Stein, Arbitrator