#1607

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 34-05-020222-0023-01-09
and	*	
	*	
OHIO BUREAU OF WORKERS'	*	Linda M. Hibbler, Grievant
COMPENSATION	*	Removal
	*	

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Steve Lieber, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11, AFL-CIO

For the Ohio Bureau of Workers' Compensation:

Rhonda G. Bell, Labor Relations Officer
Ohio Bureau of Workers' Compensation

Neni Valentine, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on August 29, 2002, at the Lausche State Office Building in Cleveland, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties presented issues on arbitrability and the merits. These issues are set forth below. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Bureau of Workers' Compensation (the "Bureau") were Neni Valentine, Labor Relations Specialist; Samantha Coon, Labor Relations Officer; Jermaine Watts, Security Officer and Janine Hansen, Site Manager, both of United Security Management Services; Tpr. Darren Thomas; and Tpr. Christopher Aussie. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Lisa Baker, Claims Specialist; and the Grievant, Linda M. Hibbler. A number of documents were entered into evidence: Joint Exhibits 1-5 and 7-8, State Exhibits 1-2 and Union Exhibit 1. The oral hearing was concluded at 12:30 p.m. on August 29. Written closing statements were timely filed and exchanged by the Arbitrator on September 6, 2002, whereupon the record was closed. This opinion and award are based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of her removal, on February 8, 2002, the Grievant was a Workers' Compensation Claims Representative in the Cleveland Lausche Service Center of the Field Operations Division of the Ohio Bureau of Workers' Compensation. A nearly 23-year employee, she had accumulated the following disciplinary record:

Date	Discipline	Infraction
July 8, 1999	Written reprimand	Insubordination
March 10, 2000	1 day fine	Attendance & insubordination
April 22, 2000	3 day fine	Attendance
May 18, 2001	5 day fine	Attendance
June 25, 2001	5 day suspension	Dishonesty and neglect of duty
July 20, 2001	10 day suspension	Attendance
November 13, 2001	20 day suspension	Attendance

The 20-day suspension was part of a settlement agreement which, amongst else, contained a last chance provision: "All parties agree that any further work rule violations shall result in Ms. Hibbler's removal" (Joint Ex. 2E).

The incident that lead to the Grievant's removal occurred the week of December 17, 2001, upon her return to work from her 20-day suspension. Since September 11, 2001, employees were reminded by memorandum to display their I.D. while in the building. When the Grievant went on her afternoon break that Monday, she forgot to take her state identification and driver's license with her. The security guard on duty at the console, who is African-American, was new to the building and did not recognize her, refused to admit her. In accordance with building operations rules, he also did not allow her to use the telephone at the console to call her office. Building rules would have allowed him to make the call for her, but he did not think to offer this nor did she think to ask for the favor. According to the guard, the Grievant, who is also African-American, called him a "cocksucker," "trifling," "childish" and "boy," rolled her eyes at him and acted outraged. He felt insulted by this. State Trooper Christopher Aussie, who was checking bags ten or twelve feet from the console testified over the objection of the Union that he heard the Grievant use the words "cocksucker" and "boy." She was agitated and upset, he

said, rude and unprofessional for a state employee. Since he recognized her, he waved her through. He did not think the incident warranted a statement and since the guard mentioned he would report it to his supervisor, Tpr. Aussie wrote no report. Another trooper in the vicinity (Thomas) testified he also heard the words "cocksucker" and "boy" used. The Grievant had an agitated demeanor. This trooper said he did not intervene because the Grievant's conduct was not criminal and the guard did not ask for assistance. He did write a statement, but not until January 23, 2002, when he was asked for it.

For her part, the Grievant denies she used profanity or obscenities. She did call the guard "boy," but says that is just her normal term for any male and she did not intend to demean him. All three of the witnesses against her are lying, but she does not know why. She testified that when she was leaving the building for the day, the guard said he would make it hard for her, but she has no idea why he would harass her.

The guard reported this incident to his supervisor, Security Director Janine Hansen, who told him to let her know if he saw the Grievant again. When the guard saw the Grievant again on December 20, he held her at the console and called Hansen as directed. The guard testified that while they were waiting for Hansen to arrive, the Grievant said she would "kick your ass," something the Grievant denies. When Ms. Hansen attempted to talk to the Grievant about the incident, the Grievant began to "get heated," Hansen said, so she terminated the conversation, took measures to identify the Grievant another way, wrote an incident report, and took the security guard's statement.

An investigatory interview was conducted on January 8, 2002, at which time to Grievant denied using inappropriate language. A pre-disciplinary meeting was convened on January 16.

The Union supplied statements from two witnesses who were later interviewed by the hearing officer. One of these, Lisa Parker, did not personally witness either the incident on December 17 or the one on December 20. The other, Lisa Baker, who was with the Grievant on December 17, testified she did not hear anything inappropriate and that the Grievant was neither defiant or belligerent. However, she also admitted in an interview conducted after the pre-disciplinary hearing that if the Grievant had used inappropriate language, she would not have heard it.

On January 23, the Bureau received Tpr. Thomas's written statement collaborating a number of the guard's allegations. Therefore, the pre-disciplinary meeting was reconvened to complete the record. As before, the Grievant admitted calling the guard "boy" but denied the rest. On January 30, the pre-disciplinary hearing officer found just cause to discipline the Grievant for violating the Bureau's work rule Failure of Good Behavior (p) General based on "defiance, belligerence, inappropriate language, and behavior." The Grievant's employment was terminated effective February 8, 2002.

The Grievant acknowledges receiving the termination notice on February 7. She testified she informed the Union and asked that a grievance be filed in her behalf. She later followed up on it, she said. However, no written grievance was ever received by the Bureau, according to Labor Relations Officer Samantha Coons. The first the Bureau learned of a grievance on this matter was when the Office of Collective Bargaining contacted Coons saying it had received an Appeal and Preparation Sheet (on February 26, postmarked February 22) without a grievance attached to it. On March 18, the Bureau denied the claim stated on the Appeals and Preparation Sheet on procedural grounds, saying the paperwork filed did not constitute a grievance and was untimely in any case. It also rejected the claim on its merits, asserting that the Grievant was on a

last chance agreement at the time of the incidents and that the evidence supported removal even without the last chance agreement. The matter was subsequently appealed to arbitration. While the case was pending, the Grievant filed for unemployment compensation. The Grievant was initially denied benefits, but won an appeal to the Unemployment Compensation Review Commission. At the time of the arbitration hearing, the Bureau was considering whether to seek a review of the determination.

III. STIPULATED ISSUES

1. Is the grievance properly before the Arbitrators?

2. If so, was the Grievant, Linda Hibbler, removed for just cause? If not, what shall the remedy be.

IV. PERTINENT CONTRACT PROVISIONS

ARTICLE 25 - GRIEVANCE PROCEDURE

25.01 - Process

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

D. When different work locations are involved, transmittal of grievance appeals and responses shall be by U.S. mail. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

25.02 - Grievance Steps

Layoff, Discipline and Other Advance-Step Grievances

...A grievance involving a layoff or discipline shall be initiated at Step Three (3) of the grievance procedure within fourteen (14) days of notification of such action.

V. ARGUMENTS OF THE PARTIES

Argument of the Bureau

The Bureau argues first that the grievance is procedurally flawed. The removal notice was received by the Grievant on February 7, 2002, but no grievance was ever filed at Step 3 as specified by the Contract, either by the Grievant or by the Union. Instead, an Appeal and Preparation Sheet was sent to the Office of Collective Bargaining on February 22, fifteen days after notification. As a result, the Bureau had no notice of a grievance until notified by the Office of Collective Bargaining. Thus, not only was no grievance filed at Step 3 as required by the Contract, but what was filed was untimely. This issue was raised in the Bureau's first response, on March 18. Thus the grievance should be dismissed as untimely.

The Bureau argues second that it had just cause to remove the Grievant. Four witnesses

indicated they observed inappropriate behavior on either December 17 or December 20. One testified he had seen similar behavior before. Two troopers described rude, discourteous, inappropriate conduct and heard the words "cocksucker" and "boy." The guard testified he felt demeaned and "less than a man" by his treatment which included being called "childish," "trifling," "boy," and "cocksucker." He was a new employee, did not recognized the Grievant and was only following procedure. The security manager, too, described the Grievant's behavior as heated and escalating when the Grievant was asked about the December 17 incident on December 20. The Grievant admits using the term "boy" but denies calling him "childish," "trifling," or "cocksucker," saying she doesn't " know what he sucks." What is more, the Union brought no witnesses substantiating the Grievant's version or indicating that the guard instigated the incident.

Removal is justified, contends the Bureau. The Grievant was on notice of termination through her last chance agreement. Just back from her twenty day suspension, one would think she would be on her best behavior, not creating an incident in the front entry with non-employees of the Bureau. Her behavior is inexcusable, especially since directed towards security personnel charged with enforcing workplace safety for state employees and visitors. For these reasons, the removal should be upheld and the grievance denied.

Argument of the Union

The Union urges the Arbitrator to consider the case as a whole and not simply dismiss it on procedural grounds. The intent to file was there even though there may be a procedural flaw. The Grievant should not be penalized but deserves a ruling on the merits.

The Union's position is that the Bureau lacked just cause to terminate the Grievant. The guard could have avoided the entire incident, but he was less than helpful to the Grievant. Clearly his inexperience played a role. In the Union's view, management was out to get the Grievant. This is evidenced by her lengthy disciplinary record over a short period of time whereas she had a clean record for her first 20 years of state service. The Bureau did not conduct a fair and objective investigation and it did not consider the Grievant's years of service or good work record. The Union submits that this case should be treated as one of off-duty conduct. As such, the Arbitrator must consider whether there was a negative impact on the Bureau's relationship with building management. This relationship was not damaged. For these reasons, the Union asks that the Arbitrator sustain the grievance and make the Grievant whole.

VI. OPINION OF THE ARBITRATOR

There are several reasons for denying this grievance. For one, there is no question the grievance is procedurally flawed and fatally so. The Contract is specific: disciplinary grievances must be filed at Step 3 (with the agency) within fourteen days of notification. This grievance was filed, not on the proper form but on an appeal form, at Step 4 (with the Office of Collective Bargaining) fifteen days after notification. The Arbitrator is just as bound to uphold Contract obligations placed on employees and the Union as she is bound to uphold those placed on the Employer.

Second, even if the grievance had been properly filed, it would have to be denied on the merits. This is not a "he said–she said" case. The guard's version of what transpired the afternoon of December 17 is supported by two witnesses. One is Tpr. Thomas who wrote his

statement before disciplinary action was taken. Both the guard and Tpr. Thomas are corroborated by Tpr. Aussie. To be sure, Tpr. Aussie's evidence was not relied on in the discipline. However, he testified at the Unemployment Compensation Review Commission's hearing, as shown by the hearing officer's decision admitted into evidence for the Union over the Bureau's objection. His evidence could not, then, have been a surprise to the Union. It can be and is used to the extent it corroborates evidence brought forth at the pre-disciplinary hearing. What these witnesses establish is a single, continuous incident on December 17 culminating in derogatory and obscene words directed towards the security guard that got the troopers' attention, leading one to wave the Grievant through after he recognized her. Against this is the Grievant's disavowal supported only by a witness who was standing to the side and admitted she would not have heard inappropriate language if it had been used. I conclude the Grievant's actions that afternoon constituted failure of good behavior. Yes, the guard was not helpful, but there is no evidence he acted in a provocative manner. It is also true that the incident did not occur when the Grievant was on duty in the Bureau's offices, but it did occur in the public area of the state office building where those offices are located and where employees of the Bureau, other state agencies and members of the public including vendors and customers must be cleared by security. As such, it was actionable.

Finally, there is the Union's claim that the Bureau was out to get the Grievant. I find no evidence of an unfair investigation. The Bureau accepted evidence brought by the Union at the pre-disciplinary meeting and went back to interview those witnesses as well as to get a statement from one of the troopers. As for the Grievant's recent disciplinary record, its presence is not *per se* evidence of bad faith. Unless the discipline has been successfully challenged in arbitration, it

must be presumed to have been for just cause. It is true the Bureau did not consider the Grievant's length of service and job performance, but it was not obliged to do so because the Grievant had signed a negotiated last chance agreement. For these reasons had a grievance been timely filed, I would have to deny it as the Bureau had just cause to remove the Grievant.

VI. AWARD

The grievance is dismissed and denied.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
October 3, 2002

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