

#1639

Arbitration Decision and Award in the matter of Arbitration between:

Ohio Department of Natural Resources

And

**The Fraternal Order of Police
Ohio Labor Council Inc.
Unit 2**

**Case # 25-12-(06-07-02)-10-05-02
Grievant: Mr. Gary Allred**

**E. William Lewis
Arbitrator**

Hearing Dates: December 10, 2002

January 6, 2003

Briefs Received: January 24, 2003

Decision Issued: February 21, 2003

Representing the Employer:

Representing the Union:

Ms. Shelly Ward
Labor Relations Officer

Mr. Paul Cox
Chief Council
F.O.P., Ohio Labor Council

APPEARANCES:

The December 10, 2002 hearing was convened at 1:30pm at Maumee Bay State Park in Oregon, Ohio. The January 6, 2003 hearing was convened at 10:00am at the Office of Collective Bargaining in Columbus, Ohio.

In attendance at the 12/10 hearing was:

For the Union:

Mr. Gerald W. Allred	Grievant
Mr. Joel Barden	Staff Representative
Mr. Paul Cox	Chief Council
Ms. Renee Englebach	Paralegal
Mr. Thomas Harrod	Unit 2-Associate (witness)

for the Employer:

Mr. James Brower	Park Manager-MBSP
Mr. Rick Corbin	Office of Collective Bargaining
Mr. Michael G. Fountain Jr.	Pier 1 Imports (witness)
Mr. Nicholas R. Hagedorn	Former employee of Maumee Bay Resort (witness)
Ms. Lindsay E. Hanisko	Bowling Green State U. Student (witness)
Mr. Donald Starr	Labor Relations Officer- Parks (witness)

Ms. Sarah Valesk

Enforcement Agent II
Dept. of Public Safety (witness)

Ms. Shelly Ward

Labor Relations Officer

In attendance for the January 6, 2003 hearing:

For the Employer:

Mr. Rick Corbin

OCB

Mr. Donald Starr

Labor Rel. Officer-Parks

Ms. Shelly Ward

Labor Relations Officer

For the Union:

Mr. Gerald W. Allred

Grievant (witness)

Mr. Douglas Behringer

Ohio Labor Council

Mr. Joel Barden

Staff Representative

Mr. Paul Cox

Chief Council

Ms. Renee Engelbach

Paralegal

The parties were asked to submit exhibits into the record. The following were submitted as Joint Exhibits:

Joint Exhibit #1

Collective Bargaining Agreement
2000-2003

Joint Exhibit #2

FOP Grievance Report Form
Dated: 5-24-02

Joint Exhibit #3

Memorandum Dated: 5/14/2002
Gerald Allred-Removal Recommend-
Ation

**Last Chance Agreement-Dated:
5/24/00 & 5/26/00**

POSITION DESCRIPTION

PARK OFFICER

WITNESS INTERVIEW
STATEMENT- Nick Haggadorn

WITNESS INTERVIEW
STATEMENT- Lindsay Hanisko

Removal letter to: Mr. Gerald Allred
Dated: January 27, 2000

Memorandum: Dated 5/14/02
Investigatory Interview

Garity Agreement-To Gerald Allred
Dated 5-17-02

Allred Investigatory Interview notes
taken by Mr. Don Starr

Duty Ranger Logs of Gerald Allred
-dated 2-25-02 & 3-9-02

Report of Investigation: dated
2/26/02 & 3/10/02

DISCIPLINARY POLICY, ODNR
effective December 5, 1999

Ohio State Parks-PHILOSOPHY DUTIES, and POWERS-Section 1-100

Management Exhibit #9

WITNESS INTERVIEW STATEMENT
- Dated 3/12/02 Michael Gregory Fountain

Management Exhibit #10

Picture of Ms. Hanisko—in handcuffs

The following was submitted as the Union Exhibit:

Union Exhibit #1

Packet of documents of Gerald Allred's
Certifications and achievements

INTRODUCTION:

This matter was heard on December 10, 2002 in Maumee Bay State Park Lodge and on January 6, 2003 at the Office of Collective Bargaining in Columbus, Ohio. All witnesses were sworn. All Joint Exhibits were stipulated to and no other stipulations were made by the parties.

ISSUE:

The parties were unable to agree on the issue formulation, therefore the arbitrator formulated the issue as follows:

“Was the grievant terminated for just cause, per Article 19.01 (STANDARD) and /or the Last Chance Agreement (dated 5/26/00)? If not, what should the remedy be?”

POSITION OF THE PARTIES:

MANAGEMENT POSITION:

The employer argues that the removal of the grievant, Park Officer Mr. Gary Allred, on May 24, 2002 was for violations of several work rules of significant magnitude. The grievant was terminated for Insubordination, Failure of Good Behavior and Neglect of Duty.

The State contends that a Last Chance Agreement dated 5/24/00 & 5/26/00 was in effect relative to this employee and it was violated. Signatures of the Union, Department and the Grievant were on the Last Chance Agreement. It provides for termination of the grievant if **any** work rule violations occurred within the life of the Agreement.

The employer purports that on February 25, 2002 the grievant attended a cabin party while on duty where there was under age drinking. The employer argues that Officer Allred observed the under age drinking and failed to act. He further violated Department work rules on 2/25/02 by transporting an unauthorized person in his state issued patrol car.

The employer cites another incident of rule violations on March 9, 2002. Another party, even larger than the first, occurred at a park cabin also involving under age drinking. The employer contends that the 3/9 party occurred because of the grievant's inaction at the 2/25' party. The grievant took action on 3/9 to involve Liquor Control, which resulted in arrests. However, argues the employer, in so doing the grievant jeopardized the safety of the Liquor Control Agents. The agents' safety was compromised by Mr. Allred when he told a Lodge employee of the Liquor Agents presence, argues management. The grievant's behavior on 3/9 also violates work rules & policies and the employer requests denial of the grievance.

UNION POSITION:

The union argues in its opening statement and brief that the Last Chance Agreement and the Contract requires the employer to show just cause for firing the grievant. More than just showing that an incident occurred the employer must show that the termination was justified, argues the union.

The union also contends in their opening statement, that the State was not in compliance with paragraph 18.02 of the contract (Bargaining Unit Members Rights). Paragraph 18.02, **Bargaining Unit Member Rights**, reads as follows:

- "1. When an employee is to be interviewed or questioned concerning a complaint or allegation of misconduct, the employee shall be informed of, prior to the interview, the nature of the investigation and whether the employee is the subject of the investigation or a witness in the investigation. Notice shall be provided to employees who are subjects of investigations And shall include:

- a. A statement that the employee is a subject of an administrative investigation.
- b. The nature of the complaint or allegation of misconduct so that the employee knows the subject matter of the interview.
- c. Information to the employee that the interview is part of an official administrative investigation and that failure to answer questions completely and accurately, may lead to disciplinary action, including dismissal.
- d. The time and location of the interview.”

The grievant according to the union was not informed in advance of the AI of the specific charges being brought. Unlike most disciplinary actions by the State the charging letter is vague on the alleged violations. This contends the union, is contrary to the practice of the State, which is, to cite the facts and the exact allegations.

On the two dates cited by the employer (2/25 & 3/9) of grievant rule violations the employer fails to prove any grievant guilt, argues the union. The employer did not show that the observations by a Park Officer of a potential violation required the officer to bring charges, contends the union.

The union alleges that this case involves an employer's rush to judgment and that the management witnesses were not creditable. The union states that the fundamental fairness supposedly guaranteed by the Contract has not here been fulfilled. Therefore, the union requests the arbitrator to sustain the grievance in its entirety.

FACTS:

The grievant, Mr. Gerald Allred, was employed by the Ohio Department of Natural Resources until May 24, 2002. Mr. Allred had been employed by the Department of Natural Resources for over nine years and most recently as a Park Officer. His last assignment was at the Maumee Bay State Park.

Mr. Allred was terminated from State employment on May 24, 2002 for allegedly violating certain ODNR Policies and Park Officer Duties & Guidelines. The grievant was charged with Neglect of Duty, Insubordination, and Failure of Good Behavior. The alleged violations by the grievant occurred on the dates of

February 25, 2002 and March 9, 2002.

The Department of Natural Resources was made aware of the alleged violations on or about March 15, 2002 by the Department of Liquor Control. Liquor Control was investigating possible under age drinking violations. The alleged violations occurred at Maumee State Park on February 25 and March 9, 2002. As a result of Liquor Control's notification to ODNR an Investigatory Interview was conducted on May 17, 2002. Mr. Allred was further notified, by hand delivery, on May 17th that the Division was planning discipline, his removal for Insubordination, Neglect of Duty and Failure of Good Behavior. The May 17th notification also included a scheduling of a Pre-disciplinary hearing for May 22, 2002 @ 5:30pm. On May 23, 2002 the grievant was notified that he would be removed from his Park Officer position effective May 24, 2002.

Mr. Allred filed a Step 2 grievance on June 3, 2002 alleging that the employer had violated Article 19-DISCIPLINARY PROCEDURE, Section 19.01-STANDARD. Section 19.01—pertinent part reads as follows:

“No bargaining unit member shall be reduced in pay or position, suspended or removed except for just cause.”

The grievant charged the employer with removing him without just cause. The employer and union conducted a Step 2 grievance meeting on 6/20/02. The employer denied the grievance on 6/24/02 and the dispute was subsequently scheduled for arbitration.

DISCUSSION:

Testimony and evidence showed that there were two cabin parties held at Maumee State Park on February 25 and March 9, 2002. These particular cabin parties were hosted by individuals who were under the legal drinking age. According to testimony, these parties were attended by as few as 15 (2/25/02) to as many as 50 (3/9/02) people. Many of the attendees, most according to testimony, were under the legal drinking age and there was alcohol consumed by the party goers.

During both of these events the grievant, Park Officer Gerald Allred, was on duty. According to management the grievant was terminated because of his activities and/or in-activities regarding these parties. The removal notice dated 5/23/2002, effective 5/24/02 charged the grievant with Neglect of Duty, Insubordination, and Failure of Good Behavior. All of these charges, per

Management Exhibit #7, were violations of the Ohio Department of Natural Resources, Disciplinary Policy. Furthermore, management contends that the grievant was on a Last Chance Agreement dated 5/26/00 (Attachment #1). The LCA states that as long as the grievant remains discipline free for two (2) years from signature dates the discipline would be expunged. The Last Chance Agreement further conditions the employee's behavior to not violating any work rules during the two year period in order to avoid immediate termination. The termination would only be grievable to determine just cause.

According to evidence and testimony the February 25th cabin party was attended by 15 to 20 people, most were under drinking age. The grievant made appearances at the cabin three times according to his log and testimony. The first stop, early in the evening, was only a drive by conversation with the host (Mr. Hagedorn) and his friend. The next appearance by officer Allred was between 10:00 and 11:00pm for a period of forty (40) + minutes. The officer was in the cabin during most of this time and according to interpretive testimony, just visiting. Testimony differed as to his activity in the cabin, whether participating in the activities or just observing. Alcohol was being consumed during this time as testified to by management witnesses, however, the grievant denies that he actually observed it being consumed. The final grievant appearance at the 2/25 event occurred at approximately 1:30am, in response to a cell phone call regarding a disturbance. The host and his lady friend had a dispute and officer Allred was called to calm the situation. According to testimony and the Officer's log the situation was controlled. Testimony differed as to the rest of the night. Officer Allred testified that in accordance with his log he left the cabin @ 2:45am and returned to the cabin @ 3:20am to 3:45am, chatting with some awake party goers. The grievant testified that he then went to the service area, checked out, and went home at about 4:00am.

Management's witness Ms. Hanisko, a 19 year old Bowling Green student and party attendee, tells a different story as to how the grievant spent his time the rest of the night. She testified that she was awakened while in her cabin bedroom, by some loud voices. Ms. Hanisko determined, per her testimony, that the loud voices were probably the dispute between the host and his girl friend. Later that same AM she awoke again being handcuffed by the grievant and Ms. Hanisko's friend Katie, per her testimony. A snapshot was taken of her in handcuffs (mgm't. ex. #10) and she claimed that she and the grievant had a "playful" interchange. Ms. Hanisko stated that she accompanied the grievant in his patrol car, cuffed, to the "Ranger Station". The two, according to Ms. Hanisko, returned to the cabin in the grievant's red pick-up truck at approximately 4:00am where he removed the handcuffs. The night was concluded at about 4:20am contends this witness and the grievant left.

The March 9, 2002 cabin party was scheduled and hosted by another management witness by the name of Mr. Michael Fountain. Mr. Fountain (DOB 4/24/82) testified that he attended the 2/25 party while Officer Allred was present (mgm't. ex. #9). Mr. Fountain alleges that he booked the March 9 party because of the grievant's tacit approval of under age drinking during the 2/25 party (mgm't. ex. #9). The March 9th party was raided by Liquor Control, Oregon Police and Park Officer Allred, where a number of arrests were made for under age consumption etc.. The March event was attended by as many as 50 people and was very unruly according to testimony. The disruptiveness of the 3/9 party, according to the grievant, prompted him to contact other enforcement agencies for assistance.

Management's allegations of the grievant's misbehavior on 3/9/02 are limited to a questionable information sharing by the grievant with park employee (2/25-host), Mr. Hagedorn and the grievant's failure to fully account for his activities on the Ranger Log (mgm't. ex. #5). On 3/9 testimony showed that during the Liquor Control raid the grievant stopped the speeding Hagedorn on his way to the party. During the un-logged speeding stop the grievant informed Mr. Hagedorn of the raid, which did not, but could have compromised the Liquor Control Agents security (jt. ex. #6 & testimony).

OPINION:

The union contends, though somewhat belatedly, that management was procedurally in violation. The union's allegation of lack of specificity regarding the Investigatory Interview should have been discussed between the parties while grievance processing. However, in examining Management Exhibit #2, dated 5/14/02 I find: the AI notice included a statement that the employee was subject to an AI, a delineation of the allegations with clarification of when they occurred, notification of this being part of an official AI with consequences of non-compliance and information regarding date and time. Without specific evidence to the contrary from the union, I do not find this alleged breach of process to be enough to charge the employer with a violation.

The arbitrator must consider the Last Chance Agreement a part of the decision equation since the employer alleged work rule violations (dated 2/25 & 3/9/02) did occur within a two year period from 5/26/00. Furthermore, the grievant was disciplined within two years of obtaining signatures on the Last Chance Agreement.

The grievant's alleged work rule violations need now to be addressed. The employer charged the employee with Neglect of Duty, Insubordination, and Failure of Good Behavior (jt. ex. #3,-mgm't. ex. #7-pg. 2). Evidence and testimony identified that the charged violations occurred on 2/25/02 and 3/9/02. On both dates under age persons were consuming alcohol on Park premises. The grievant was obviously aware of youth consumption on 3/9 and called in other agencies to help. In the arbitrator's opinion, the March 9th event need not have occurred had the grievant's presence and behavior been different on February 25, 2002. The February 25th party, hosted and attended by some fellow workers as well as others, had a significant number of under age drinkers. In the arbitrator's opinion, it is unlikely that considering the length of time of the grievant's presence at the 2/25 party that he saw no under age drinking. In fact he testified that he observed the presence of alcohol. The grievant was negligent in not addressing it in some manner until the intoxication got out of hand. Although the grievant denies any meaningful contact with Ms. Hanisko it is unlikely she would have invented her story. Her knowledge of certain items and events such as the red pick-up truck, duration of the ride to the Ranger Station and the grievant removing the handcuffs are compelling to the arbitrator. These events, although personally uncomfortable for the arbitrator to acknowledge, are clear and convincing enough to find the grievant in violation as charged.

Last Chance settlements occur when an employer believes it has adequate reason to terminate an individual and the union and the employee are willing to sacrifice contractual entitlements in order to preserve the job. When encountering a last chance agreement an arbitrator can presume its validity even though it places the subject employee in a somewhat disadvantage. It should be inferred that the settlement was negotiated in good faith to grant the employee something s/he could not otherwise achieve-continued employment. If these last chance agreements are ignored or freely overturned by arbitrators the parties will be discouraged from making such efforts. This would be a considerable disservice and injustice to the parties, including employees, who might benefit from "last chance" opportunities¹.

AWARD:

I find the employer has met their just cause requirement as set forth in the Last Chance Agreement and since the discipline is herein defined I must deny the grievance.

¹ (93LA441-Dworkin & 91LA549-Howell)

Attachment #1

J. T. A. 4

Last Chance Agreement

The Ohio Department of Natural Resources (Employer), Fraternal Order of Police (FOP, Ohio Labor Council, Inc.), (the Union), and Gerald Allred, (the Employee) enter into an agreement concerning employment. The intent of this agreement is to provide the employee with one final opportunity to maintain his position as a Park Officer with the Ohio Department of Natural Resources, Division of Parks and Recreation.

Specifically, in consideration of the Employer providing a last chance opportunity for employment, the Union and the Employee agree to the following:

1. The employee has served a twenty (20) day suspension and will enter into a "Last Chance" agreement and an Employee Assistance Agreement.

The Department agrees that so long as the Employee remains entirely discipline free for a two (2) year period commencing upon signatures being obtained on this agreement, the discipline will be expunged. However, if during that period of time the Employee has any work rule violation, then the Employee will be terminated immediately. The Employee and the Union agree that such action would be for just cause and grievable only to determine just cause. Management must meet normal standards in establishing the facts in demonstrating that a work rule violation did occur.

The Employee, by signing this agreement, acknowledges that he has received a copy of this agreement, and has been fully informed of the terms and consequences of it, hereby voluntarily signing said agreement after having been advised by his representative.

This agreement shall be considered in effect upon the Director's signature and date.

Employee:

Gerald W. Allred

Date:

05/24/00

Union:

John R. B...

Date:

5/24/00

Employer:

William M. Mordy
for Samuel W. Speck, Director

Date:

5-26-00