

#1755

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO – DEPARTMENT OF AGRICULTURE
AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Kyle Hoppes

Case No. 04-00 (03-08-05)-0005-01-07

Date of Hearing: February 20, 2004

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Michael D. Muenchen

Witnesses:

Charles Hutchidson
Kyle Hoppes

For the Employer:

Advocate: John H. Hix
2nd Chair: Neni Valentine

Witnesses:

Dr. Terri Short
Dr. Tom Brisker
Larry Fugett

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: April 2, 2004

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003 through February 28, 2006, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether "just cause" exists to support the ten (10) day suspension of the Grievant, Kyle Hoppes ("Hoppes"), for neglect of duty as a result of certain conduct which occurred on February 12, 2003. The discipline was issued because the Grievant allegedly allowed certain contaminated meat to pass inspection.

The discipline of the Grievant was issued on April 21, 2003, and appealed in accord with Article 25 of the CBA. This matter was heard on February 20, 2004, and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties, with the record being closed as of March 3, 2004. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Hoppes was employed as a meat inspector for the Ohio Department of Agriculture (ODA) at the time the ten (10) day suspension was issued. The Grievant was originally hired in January 1998 as a grain warehouse inspector and was promoted to a meat inspector in November 2000. Meat inspectors are required to have a presence in the fully-inspected plants (1) and the custom-exempt plants (2).

(1) Fully-inspected plant is defined as follows:

The fully-inspected plant operates by purchasing animals or inspected product for slaughter and/or further processing. The fully-inspected plant's product is subsequently sold into commerce (the consumer or another entity for resale). Since the individuals in commerce have no knowledge of either the animal or the processing environment, the fully-inspected plant is required by statute and regulation to be accountable not only for sanitation but also for processing controls in the context of a hazard analysis critical control point (HACCP) plan. In addition, each animal slaughtered in a fully-inspected plant must have an ante and post-mortem inspection by a meat inspector to evaluate the disease status.

(2) Custom-exempt plant is defined as follows:

The custom-exempt plant operates to provide a slaughter, process, cut/grind, wrap and freeze service for individual animal owners. While the owner is still aware of the health status and history, he relinquishes control of the sanitary environment and dressing procedures to the custom plant owner. The owner, however, is on-site in the custom plant and there is an assumption that he is able to evaluate and be satisfied with the basic sanitation of the plant.

Inspectors are required to have a daily presence in the fully-inspected plants to conduct ante and post-mortem inspection during all slaughter times and to ensure compliance with applicable sanitation and process procedures. In custom-exempt plants, meat inspectors are not required to have a daily presence but will conduct random visits, normally bi-weekly, to verify the sanitary environment.

ODA is responsible for maintaining strict control over the various meat-processing plants in Ohio and employs approximately two hundred (200) meat inspectors who work in the field on a full-time basis. Meat that is targeted for public consumption is regulated by Federal, i.e., United States Department of Agriculture ("USDA"), and state regulations in an effort to prevent any health danger to the public. ODA has taken a zero tolerance policy for fecal matter on any inspected carcasses due to the potential of e-coli 151 contamination.

Hoppe's immediate supervisor was Dr. Terri Short ("Short"), a Doctor of Veterinary Medicine, who was responsible for thirty-eight facilities and eleven meat inspectors in the district 8 geographical area. District 8 territory consisted of Southwestern Ohio from Cincinnati to Marietta. In addition to Dr. Short, Dr. Tom Brisker ("Brisker") was a supervisor for ODA in District 8 as well. Dr. Short indicated that each facility has an inspector in charge of that establishment who maintains overall responsibility for the regulatory compliance monitoring of the activities of the processing operations. An inspector is required to document and establish non-compliance in any of the following areas: product, economic, misbranding, facility, lighting, structural, outside premises, and/or product bared (Union Exhibit ("Un Ex") 17). The non-compliance record form delineates with specificity the description of non-compliance, and immediate and/or future actions to be taken by the facility to correct the areas of non-compliance. (Un Ex 17). Drs. Short and Brisker indicated that facilities that engage in

slaughtering of animals for "public sale" have an inspector who is present at all times prior to and after the slaughter. The facilities labeled as fully-inspected operate under more rigid standards for public health reasons due to the myriad of problems that could result if contamination occurs.

On February 12, 2003 Hoppes was the inspector in charge at Plant #18 (Wilson's). Larry Fugett ("Fugett"), Supervisor, at approximately 12:15 p.m. observed fecal slurry on the front shank of a beef carcass that was hanging in the cooler. Fugett noticed that Hoppes' stamp of approval was also on the front shank. Dr. Short was present at Plant #18 and at 12:15 p.m. was informed by Fugett of this matter. She also observed the fecal matter. The Grievant was shown the beef with the fecal matter and indicated that he inspected the beef as it came off of the line, observed it being washed, re-inspected after the wash and stamped the beef prior to it being placed in the cooler. The beef passed his inspection, with no fecal matter being present. Additionally, Hoppes testified that he was told that the beef in question was slaughtered on either February 10th or February 11th not on February 12th, suggesting that another inspector could have been responsible, somehow. Hoppes admitted that he observed the fecal matter, but would not have stamped that beef if contamination was present during his inspection. Hoppes further indicated that employees' aprons are contaminated and, while the carcass is being pushed into the cooler after inspection, a transfer of fecal matter could occur. Furthermore, if Hoppes had observed any contamination on the carcass he would have had the carcass trimmed by the employees to remove the fecal matter.

As a result of the foregoing, Hoppes was charged with violation of ODA disciplinary grid 30 (A)- Neglect of Duty which has a disciplinary range from 5 days to 10 days for the first offense, or removal if the conduct is deemed a major violation. On April 2, 2003 Hoppes attended a pre-disciplinary meeting to discuss the February 12th incident nearly seven (7) weeks after the date of the incident.

The union contends that Supervisor Fugetts' February 12th supervisory report (Un Ex 15) indicated that Hoppes should be retrained or removed to a position of lesser responsibility but

did not recommend discipline. On February 26th Assistant Director, Jim Buchy ("Buchy"), received a written request from Dr. Brisker to conduct a pre-disciplinary meeting regarding the February 12th incident, as well as other alleged misconduct, i.e. sleeping in the truck, failure to monitor humane treatment of hogs, and failure to follow sample shipping procedures which ODA viewed as unacceptable. (Un Ex 9). According to Dr. Short, Dr. Brisker, and Fugett, Hoppes' work performance since the last quarter of 2002 had begun to deteriorate resulting in an oral reprimand issued November 25, 2002, an oral reprimand issued January 3, 2003 (Rule 30), and a written reprimand issued January 3, 2003 (Rule 30).

On March 14, 2003, Dr. Brisker sent an updated, more comprehensive report to Buchy regarding the February 12th matter and other conduct and stated again "... In view of these performance deficiencies, I am requesting a pre-disciplinary meeting notice be sent to Mr. Hoppes....." (Un Ex 10). On April 2, 2002 Buchy notified Hoppes of the pre-disciplinary meeting scheduled for April 8, 2003, at which he was charged with multiple rule violations of the ODA disciplinary grid. In addition to the above, from January to March 2003, ODA was investigating charges alleged by a co-worker (Jill Carter) that Hoppes had attempted to coerce and/or threatened her about her inspection responsibilities. On March 27, 2003, ODA's inspectors interviewed Hoppes and prepared a summary of their findings. (Un Ex 16). In addition to Carter's allegations, which investigators documented, the following issues were discussed: repairs of his state vehicle, failure to send reports to Dr. Short, taking of a hog's temperature and arguing with Dr. Short about the use of neckties on the kill floor. (Un Ex 16). At no time was the February 12th matter discussed by the ODA's investigators during this meeting.

On April 21, 2003, Shannon K. McQuade, Chief Legal Counsel issued her recommendations to Fred L. Dailey ("Dailey") regarding all of the allegations against Hoppes and concluded that a violation of Rule 30 (A) occurred on February 12th and recommended a five (5) day suspension. In her opinion the other alleged violations of ODA Rule 28, 31(b) and 31 (c) were not supported by the evidence. Ms. McQuade found that the February 12th incident was a major violation of Rule 30 (A). Director Dailey respectfully disagreed with McQuade's

recommendation and imposed a ten (10) day suspension. The Union contends that just cause is absent from the facts in this matter and, in the alternative, other "inspectors" were allowed to trim off contamination when discovered post-inspection, without discipline being issued. Furthermore, the Union contends that meat inspector(s) and supervisor Fugett failed to write a non-compliance report when fecal matter was discovered without any discipline occurring.

ISSUE

Was the Grievant's, Kyle Hoppes, discipline of ten (10) days for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA, ODA DISCIPLINARY POLICY

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(L).

OHIO DEPARTMENT OF AGRICULTURE DISCIPLINARY POLICY

30. Neglect of Duty	Offenses				
	1 st	2 nd	3 rd	4 th	5 th
a. Major (endanger life, property or public)	5-10/R	R			
b. Minor (other)	OR	WR	1-3	R	

POSITION OF THE PARTIES

POSITION OF THE UNION

The Grievant's performance as an employee for over seven and one-half (7 1/2) years was exemplary, he received good performance evaluations (Un Exs 6, 7), and had no disciplinary actions against him until November 2002.

In the spring of 2002, Hoppes was assigned to a new poultry plant in New Vienna, Ohio with Inspector Charles Hutchinson ("Hutchinson"). An e-coli program was required to be implemented at this facility. Inspector Hutchinson had the appropriate training and assumed the responsibility for developing the program. On the other hand, Hoppes was only experienced and trained in red meat inspection, and had not received any classroom training on poultry inspection. Hoppes testified that he had observed a poultry operation in Cincinnati, Ohio, but received no formal e-coli training regarding poultry. Therefore, the oral reprimand received by Hoppes on January 3, 2003, for failure to monitor the e-coli plan at the New Vienna, Ohio, plant is suspect. The Union further points out that inspector Hutchinson was not disciplined regarding this matter.

The testimony of Dr. Short supports the facts that Hoppes had an unusually heavy workload based in part on the upcoming reviews of certain fully-inspected plants in the fall of 2002. Despite Hoppes' work ethic, Dr. Short had personal animosity towards the Grievant, as demonstrated in the manner in which she participated in the Carter situation. (Un Ex 4).

Hoppes testified that on February 12, 2003, he observed the slaughter process and gave his stamp of approval after the beef was washed but prior to being placed in the cooler by the employees. At no time did he observe any fecal matter or slurry on the shanks of any carcass until it was pointed out by Dr. Short and Supervisor Fugett. How the fecal matter contamination

got on the shanks could have happened in several ways-but more than likely was transferred from the employees' aprons who moved the carcass from the floor into the cooler.

Inspector Hutchinson testified that during the week of February 10, 2003, he was working at Wilson's Zero Locker ("Locker"), a custom-exempt plant, where fecal matter was discovered by the plant owner. Both Hutchinson and Fugett were aware of this situation at the Locker facility but neither individual prepared a non-compliance report. Simply, the employer fails to enforce rules in an evenhanded manner.

Finally, from February 12, 2003, until April 8, 2003 (pre-disciplinary meeting), there was a violation of Article 24.02 in that ODA failed to implement the disciplinary process in a timely manner.

The remedy sought includes the revocation of the discipline.

POSITION OF THE EMPLOYER

Due to fully-inspected plant status, the inspector is required to conduct daily AQL inspections due to the fact that the plant is accountable not only for sanitation but also for processing controls, as required by regulations and statute. The Wilson's facility where the February 12th incident occurred was a fully-inspected plant and as such, stricter standards apply to inspections of all animals slaughtered on site.

Inspectors at fully-inspected plants are required to have a daily presence during the slaughter to verify compliance with sanitary and process control issues.

In custom-exempt plants a key difference is that the meat is not destined for general public use and therefore the standards are less rigid. A custom-exempt plant operates to slaughter and process animals for individual owners. The owner of the animals is generally on-site and is often knowledgeable of the health status and history of the animal. However, the processing environment and procedures remain under the guise of the custom-exempt plant owner. Inspectors in custom-exempt plants have a regular, as opposed to daily, presence to

verify plant complaints with regulatory standards. Generally, inspectors conduct bi-weekly visits to the custom-exempt facilities.

ODA refutes any suggestions of disparate treatment of Hoppes in comparison to other inspectors. Particularly, ODA argues that inspector Hutchinson was at a custom-exempt plant on February 12, 2003 when the contamination was discovered. The other samples provided by the Union, i.e., Elliott's failure to document non-compliance, etc., all occurred at custom-exempt plants where the standards are different.

The Grievant admitted that contamination was on the beef at Wilson's (Plant #18) at around 12:30 p.m., and Fugett, on his second visit to Plant #18 later that afternoon, discovered a contaminated carcass on the kill floor and had to retrieve the Grievant to show him that problem as well.

Regarding training, the Grievant received training similar to his peers and he performed his tasks quite well for over a year after his promotion to an inspector and only challenged his training as it related to poultry e-coli procedures, not to beef.

The Grievant was aware of the zero tolerance position that any amount of fecal matter that could make in into the public domain was unacceptable. Drs. Short and Brisker testified credibly that ODA has established a zero tolerance standard for fecal matter on any inspected carcasses, especially meat destined for public consumption.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances that the employer bears the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th ed., 1997)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. such as "beyond reasonable doubt," "preponderance of evidence," and "clear and convincing,") commonly used in non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of ODA's burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of the Grievant's guilt. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After careful consideration of the evidence in this matter including all of the testimony and evidence of both parties, I find that the grievance is granted. My reasons are as follows:

In support of the Rule 30(A) violations by Hoppes, ODA presented evidence regarding the training of the Grievant and explained why the risk to public safety requires a strict application of the zero tolerance policy for contamination of meat carcasses.

Regarding Hoppes' training, I find that evidence is unrefuted that on February 12, 2003 the Grievant was properly trained regarding what was expected of him in order to adequately perform ante and post mortem inspections during slaughter times at fully-inspected plants regarding the detection of fecal matter on beef.¹ The Grievant has been employed for over two and one-half (2 1/2) years as a meat inspector and no evidence exists to suggest that he was not trained to detect fecal matter on beef. The next area of considerable evidence presented through the testimony of Dr. Brisker, Dr. Short and Supervisor Fugett involved why ODA must enforce a zero tolerance on meat that's destined for public consumption. The Union did not contest the zero tolerance standard, and I find that this standard is applicable in this matter.

Another issue of concern was the distinctions between fully-inspected versus custom-exempt plants. ODA correctly points out that inspectors are assigned to the fully-inspected plants on a daily basis due to regulatory requirements. On the other hand, at custom-exempt plants inspectors are not required to be present daily and will schedule random visits to verify sanitary conditions, etc. Animals that are slaughtered at custom-exempt plants are for individual

¹ The Union's position that Hoppes was not adequately trained on poultry e-coli testing is immaterial as to whether he was trained to detect fecal matter on beef.

owners who know of the history and health status of those animals, thereby removing the public health concerns attached to animals processed at fully-inspected plants.

Nevertheless, basic similarities exist from an inspector's vantage point whether inspecting meat at a custom-exempt or fully-inspected plant. Examples would include preparation of non-compliant orders, making visual inspections of the premises/equipment and visually inspecting the carcasses. Inspectors are required to document process and/or sanitary concerns to plant operators such as contaminations on carcasses; meat not properly stamped; contaminates not properly marked; cooler doors not properly secure; improper lighting; potential rodent and/or insect infestation; equipment or utensils used for processing must not cause adulteration; and the exterior of the building must be free of debris and clutter. (Un Ex 17). In other words, the basic skill set utilized by inspectors in the custom-exempt and/or fully-inspected environments are the same.

The divide between the ODA and the Union centers on whether the fecal matter discovered around 12:15 p.m. on February 12, 2003, was due to neglect of duty by Hoppes.

It is undisputed that Hoppes had stamped the front shank of the beef during the morning of February 12th. According to Hoppes, the beef was stamped and inspected after the wash and prior to being placed into the cooler. No fecal matter was observed by Hoppes at this point in time. ODA presented no evidence to refute the contention that when the front shank was stamped no fecal matter was present. I concur with the Union's position on this point: it would seem highly unlikely that Hoppes would have stamped over the top of fecal matter or not notice the contamination on the front shank when stamped.

Therefore, the evidence must be such to find that Hoppes neglected his duty to inspect the beef (again) when moved from the floor to the cooler and prior to 12:15 p.m., to support a violation of Article 24.

Neither party disputes that contamination existed on the beef at 12:15 p.m., or that the beef was in the cooler when discovered by Supervisor Fugett and Dr. Short. Simply, does the evidence support the finding that Hoppes was responsible to detect the contamination after

stamping the meat on the floor? In other words, was Hoppes required to inspect the beef in the cooler prior to 12:15 p.m.?

The burden to prove a wrongdoing in violation of Rule 30(A) rests with the ODA. See, Indiana Convention Center and Hooiser Dome, 98 LA 713 (Wolff 1992); Cleveland Construction, 96 LA 354 (Dworkin, 1990). ODA considered Hoppes' conduct as a major violation of plaintiff's rules and imposed discipline to deter this conduct in the future. ODA is required to demonstrate Hoppes' punishment was for "just cause" and this Arbitrator will not substitute his judgment for that of ODA. However, if the penalty is excessive or management's decision is "unjust or unreasonable" under all the circumstances" an arbitrator is required to perform the appropriate actions that fairness requires. See, Werner-Continental, 72 LA 1, 9-11 (LeWinter, 1978).

With regard to the February 12, 2004 incident, proof must exist to establish that Hoppes neglected his duty to inspect the carcass after being removed from the floor, or neglected to inspect the carcass after being placed in the cooler prior to 12:15 p.m. The evidence is silent on critical areas that would have been helpful in resolving the following questions: (1) Are inspectors required to follow the meat until it reaches the cooler? (2) Are inspectors required to periodically check carcasses once placed in the cooler? (3) Are employees at the plant required to change their aprons once a carcass has been inspected? (4) Have contaminations occurred in the cooler as a result of plant employees moving carcasses in and out of the cooler? (5) What's the written procedures or custom/practices for inspectors to follow throughout the slaughter process? and (6) Was the grievant required to inspect each carcass in the cooler that was killed on February 12, 2003 by 12:15 p.m.?

Simply, the presence of fecal matter could have come from an apron while being transported to the cooler; from an apron while in the cooler; or from failure of the grievant to properly inspect. Any of the foregoing is a possibility, and that's the evidentiary flaw in establishing the wrongdoing in this matter to support the discipline issued.

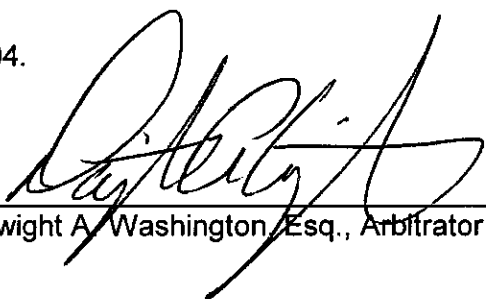
Finally, based upon what appeared to be a strained relationship between Hoppes and his supervisors that began in 2002, this award should not be viewed as a win by the grievant-but a reflection of the evidence. See, Interstate Brands, 97 LA 675 (Ellman, 1991).

The evidence fails to establish that the Grievant neglected his duty on February 12, 2003, to support a suspension of ten (10) days. The disparate treatment theory and failure to commence timely disciplinary action raised by the Union will not be addressed due to the determination previously made.

AWARD

The grievance is granted. The grievant was not disciplined for just cause; he is to be made whole.

Respectfully submitted this 3rd day of April 2004.



Dwight A. Washington, Esq., Arbitrator