#1819

OPINION AND AWARD

In the matter of Arbitration

Between

SEIU/District 1199
The Health Care and Social Services Union, AFL-CIO

And

The State of Ohio, Office of Collective Bargaining and the Ohio Department of Rehabilitation and Correction

Regarding

Grievance # 28-08-2004-07-09-0094-02-12
Timothy Heimberger (Grievant)

APPEARANCES:

FOR THE STATE:

David Burrus, Advocate
Jessie Keyes, Second Chair
Chris Lambert, Labor Relations Officer
George L. Lopez, MASI/LRODPC3
Henry Hagaman, DRC/DPSC

FOR THE UNION:

Lee Alvis, Advocate & Organizer
Timothy Heimberger, Grievant
Jim Tudas, SEIU Admin. Organizer
Rhonda Heimberger, (Spouse/observer)

An arbitration hearing was conducted March 9, 2005 at the Offices of Collective Bargaining, Columbus, Ohio. The parties provided the arbitrator with a list of stipulated documents which included the Collective Bargaining Agreement, The Grievance Trail, The Discipline Trail, and the Standards of Conduct.

The grievant was not present at 9 a.m. when the hearing started but arrived at a later time.

The Union raised a procedural objection stating that they believed the grievant had been charged with the wrong rule violation. The Arbitrator made note of the objection and stated that he would examine that issue while considering all the evidence presented.

With this understanding the parties agreed the case was properly before the Arbitrator for determination.

The advocates submitted numerous factual stipulations

The matter came to arbitration as the result of a grievance filed July 9, 2004. That grievance asserts management violated Article 8.01 and 8.02 of the Collective Bargaining Agreement when they terminated Mr. Heimberger.

All parties were given full opportunity to examine and cross examine witnesses, present evidence, and arguments which they did competently and professionally.

The parties stipulated the issue before the arbitrator could be phrases as: *Was the Grievant' removal for just cause? If not, what shall the remedy be?*

RELEVANT CONTRACT SECTIONS:

ARTICLE 8 - DISCIPLINE

8.01 **Standard**
Disciplinary action may be imposed upon an employee only for just cause.
8.02 **Progressive Discipline**
The principles of progressive discipline shall be followed. These principles usually include:
A. Verbal Reprimand B. Written Reprimand C. A fine in an amount not to exceed five (5) days pay
D. Suspension E. Removal
The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.
The employee's authorization shall not be required for the deduction of a disciplinary fine from the employee's paycheck.
If a bargaining unit employee receives discipline, which includes lost wages or fine, the Employer may offer the following forms of corrective action:
1) Actually having the employee serve the designated number of days suspended without pay; or receive only a: working suspension, i.e., a suspension on paper without time off; or pay the designated fine or;
2) Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may; be mutually agreed *to* between the Employer, employee, and the Union.

BACKGROUND INFORMATION:

The Grievant has been an employee of the Ohio Department of Rehabilitation and Correction since August 6, 1984. At the time of his removal the grievant was employed as a parole officer with the Adult Parole Authority.

January 29, 2004 the grievant was involved in a one car accident. The grievant's blood alcohol content after the accident was .3202. He pled no contest and was convicted of Operating a Vehicle While Intoxicated.

At the time of the accident he was in possession of a loaded firearm and eighteen rounds of ammunition.

Mr. Heimberger failed to notify management of his OMVI conviction. His driving privileges were initially suspended and later reinstated for occupational privileges.

He was terminated July 7, 2004 for violation of the Departmental Standards of Conduct.

MANAGEMENT POSITION:

Management asserts that this is a very serious matter. They stated that the accident took place about 5:30 p.m. about 30 minutes after he left work.

He was wearing his loaded firearm at the time. The Highway Patrol Officer who responded took the gun and transported the grievant to a hospital where he fell off a gurney.

The grievant refused treatment until he talked to an attorney. He was permitted to make a call and he called the Richland County Prosecutor.

Finally he allowed test to be done about 9 p.m.

It was discovered that he tested at a level four times the legal limit and that he was taking prescription anti-depressants which he had also not reported to the employer as required by Department Policy.

He had alcohol in his car and in his briefcase.

He violated the weapons policy by not disclosing his use of prescription drugs and by wearing his firearm while intoxicated. This is also a violation of Ohio State Law.

Finally, the State argues the employee has brought significant discredit upon the employer by his actions.

UNION POSITION:

The Union points out that the grievant is a nineteen and one half year employee. They argue that the penalty is not commensurate with the action taken. They note he has a spotless record and good job performance.

The Union indicates that a coworker told an investigator that he did not smell alcohol on the grievant.

The Union notes that other employees have been convicted of an OMVI and not terminated for their offense.

The major argument advanced by the Union is that the grievant was charged with a violation of Rule 39 and he should have been charged with a violation of Rule 25.

The grievant did apologize for his actions.

The grievant personally advanced another defense by stating that he had filed a HIPPA[1] violation and thus no one should have access to the amount of blood alcohol present in his system.

DISCUSSION:

Let us begin by examining the actual charge(s) levied against the grievant by the employer. The grievant received a letter from Deputy Director Harry Hagaman dated May 12, 2004 in which he was informed of the charges facing

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[1] HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

him. Specifically he was charged with a violation of Rule 7[2], Rule 25, Rule 39 and Ohio Revised Code 124.34 [3]

The specific actions charged were stated in that letter:

"It is alleged that you failed to notify your Regional Administrator of your being prescribed medication in the form of an anti-depressant as mandated in the APA Weapons Policy 104-TAW-01.

It is alleged that you were in possession of a fully loaded firearm while under the influence in violation of the APA Weapons Policy 104-TAW-01.

It is alleged that you failed to notify your supervisor or any other manager in the Mansfield Region of your citation for OMVI, Failure to Control.

It is alleged that on January 29, 2004 in Ashland, Ohio, your actions were such that they could bring discredit to the employer."

On June 8, 2004 the grievant elected to waive his pre-disciplinary conference stated that he had consulted with his Union.

Upon notice from the grievant the assigned hearing officer, Kara Peterson, reviewed the investigative report and issued her report without benefit of hearing from the grievant.

In her report she concluded: "From all the information and attachments presented in the investigative report it is the Hearing Officer's opinion that there is **just cause** for discipline under Rules 7, 25, 39 & 49 of the Standards of Employee Conduct.

The joint exhibits offered at the Arbitration hearing indicate that the grievant was convicted of OMVI after a no contest plea, in Ashland County on April 13, 2004. He was sentenced to 15 days in jail with 12 suspended and three bring served while completing a "Drivers Intervention Program."

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[2] All charges are from a document jointly entered into evidence, titled ***Ohio Department of Rehabilitation and Correction, Standards of Employee Conduct.***

[3] The State Statute that governs the conduct of all State of Ohio employees.

Mr. Heimberger was notified of removal from employment by means of a letter dated June 23, 2004. In that letter Harry E. Hagaman, Deputy Director and Appointing Authority for the Adult Parole Division, stated "Your are being removed for the following infractions:

- You failed to notify the Regional Administrator of being prescribed medication in the form of an anti-depressant as mandated in the APA Weapons Policy 104-TAW-01.
- You failed to notify your supervisor or any other manager in the Mansfield Region of your citation for OMVI and failure to control.

This is a violation of the Standards of Employee Conduct Rule: Rules #7 and #39.

The Union, in a good faith effort to represent the grievant, has made much of the contents of this letter.

The Arbitrator would agree that the letter is not artfully written. We do not know why Mr. Hagaman did not include the other two charges and he did not offer testimony explaining his thoughts or actions.

For whatever reason the charges we are limited to considering are alleged infractions of rules 7 & 39 even though more than adequate evidence exists to prove a violation of all four charges.

Rules 7 states: "Failure to follow post orders, administrative regulations, policies or directives."

Rule 39 states: "Any act that would bring discredit to the employer."

The grievant and the union would prefer to have had the grievant charged with a violation of Rule 25. It is not the option of the Union to select the charge.

The question before this Arbitrator is whether Rule 7 and/or Rule 39 violated?

There is no question that Rule 7 was violated. The grievant failed to report his use of prescription medication. The grievant failed to report his OMVI.

To determine if the grievant brought discredit on the employer we must examine the facts as they have been established.

The grievant was involved in an accident 30 minutes after he left work. He had in his possession an empty vodka bottle and a half full vodka bottle. He smelled of alcohol when the Highway Patrol arrived. His blood alcohol level was .3202 even though he was tested almost four hours after the accident.

His blood alcohol level and his behavior at the hospital would indicate that he was, in the vernacular, "falling down drunk."

He insisted on calling the County Prosecutor. He threatened the Highway Patrol Officer who cited him. He was wearing a loaded firearm.

The mission of his position was to guide parolees to abide by the law.

Of course he brought discredit on his employer.

The Union proffered that one of his co-workers stated during the investigation he had not smelled alcohol on the breath of the grievant. Even if that employee had been present to offer testimony, it would have proven nothing except that employee apparently lacked a keen sense of smell.

A reasonable person would have to conclude that, in order to test at .3202 four to five hours after leaving work and not being able to have consumed alcohol while at the hospital or in the presence of the Highway Patrol, there must have been some alcohol present during working hours.

But the employee is not charged with drinking on the job. He is charged with the impact of his actions on the employer.

The grievant would have the Arbitrator ignore the blood alcohol results because he states he filed some type of a complaint under HIPPA relating to the hospitals handling of the results.

This defense is not compelling for several reasons:

The grievant had an opportunity to raise these preliminary matters during his pre-disciplinary meeting but he chose to waive it. He cannot now show up at Arbitration and offer a new way to stop the Arbitrator from considering evidence he has before him.

The results of the blood alcohol test were included in the documents offered as joint exhibits at the beginning of the hearing. If the grievant had a concern about the information going before the Arbitrator, it was incumbent on him to arrive at the hearing in time to consult with his Union representative.

The matter of suppression of medical evidence is something more appropriate to have been argued in a court of law prior to the day of arbitration.

Rule 39 permits a wide range of discretion on the part of the employer in determining the appropriate penalty on the first offense. Based upon the

circumstances the employer may impost anything from a written reprimand to removal.

As every Arbitrator notes, removal is so serious that it merits a very close examination of the appropriateness of the penalty.

In examining the appropriateness of removal from employment in this matter, the arbitrator will examine three areas:

What have other arbitrators done in similar situations?

If the employee were returned to work, can he successfully perform his duties?

Based upon his long tenure with the department, are there other mitigating circumstances that would support a reduction in the level of discipline?

Arbitrator Calvin William Sharp in a 1990 case considered a similar matter when an Ohio Highway Patrolman was arrested for DUI following an off duty accident.

He determined that "where the entire matter was covered extensively by radio, television, and newspapers, it impaired the grievant's ability to perform his job."

It that case he determined that removal was the appropriate penalty. [4]

In another case Arbitrator Hyman Cohen concluded: "City had just cause to discharge police officer who drove under influence, where his credibility as police officer in enforcing laws ... has been seriously compromised," [5]

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[4] In re State of Ohio and Fraternal Order of Police, Ohio Labor Council, Inc. Unit 1., 94 LA 533, February 23, 1990

[5] In re CITY OF FAIRBORN, OHIO and FAIRBORN NEW CITY LODGE NO. 48 OHIO LABOR COUNCIL, INC., FRATERNAL ORDER OF POLICE, 119 LA 754, October 17, 2003.

While other Arbitrators have reached different conclusions in different cases, Arbitrators often support termination for a first offense if the incidents are of a serious enough nature to demand such a serious consequence.

The second question relates to the ability of the grievant to resume his job duties. Newspaper articles can never provide adequate support of management's actions by themselves. They do, however, show a clear pattern of how seriously the matter was viewed in Richland County.

A judge would have good reason to question the effectiveness of a Parole Officer who has been judged guilty of not only a serious infraction, but also of showing extremely poor judgment by his actions surrounding that infraction.

Deputy Director Hagaman testified that returning the grievant to Richland County could lead to negative consequences for the Department in the Richland County area.

Finally, I must consider if there are other circumstances that would mitigate against a penalty of termination of employment.

This is an employee who has served for nearly twenty years. According to the jointly stipulated documents, he has faced significant medical and emotional challenges.

He states that he has remorse over his actions. He completed the Court Ordered Training and, according to his testimony, his counselor has apparently not recommended further intervention.

There is a temptation to substitute my judgment for that of the employer and reinstate the employee.

I am dissuaded from doing so by the grievant's own testimony. His testimony regarding when he was drinking and whether he was hiding the fact from his wife was not forthcoming and in conflict with statement he made to the investigator.

He would have this Arbitrator believe that he was not unruly at the hospital in direct contradiction to the findings of the investigator who interviewed the State Trooper and others at the hospital.

His references to the County Prosecutor being nearly his best friend, and then his allegation that the prosecutor was not correct when he stated that he did not know the grievant that well.

The grievant was also unable to offer a clear and consistent explanation of the presence of a half empty and a completely empty bottle of Vodka in his car and in his briefcase.

Finally the grievant, when given the opportunity to add anything he wanted to, stated "I am sorry that I was charged with an OMVI ***BUT*** (emphasis added) and then went on to offer a litany of excuses.

The grievant remains largely unrepentant regarding his actions, and continues to fail to take responsibility for the damage has been done.

At no time did the grievant acknowledge the import of such a high blood alcohol reading. Instead he testified "I disagree with the blood test."

In cannot, under the standards of just cause, find any reason to overturn the decision to terminate the grievant.

Just cause does exist to support the disciplinary action. I find no contractual violation.

AWARD:

The grievance is denied.

Respectfully submitted this 27th day of April, 2005 at London, Ohio.

N. Eugene Brundige,
Arbitrator