

OPINION AND AWARD

In the matter of Arbitration

Between

Fraternal Order of Police, Ohio Labor Council, Inc.

And

The State of Ohio, Department of Natural Resources

Regarding

Grievance Number 25-17 (05-09-05) 01-05-02
(Rick Price)

APPEARANCES:

FOR THE STATE:

Bradley A. Nielsen Advocate
Jessie Keyes, LRS, OCB
Michael Quinn, ODNR, Dep. Chief
Latisha Harzell, DAS Witness
Bill McGarity, Watercraft Deputy Chief
(The state also had an observer
present (whose signature is illegible))

FOR THE FOP/OLC:

Paul Cox, Chief Counsel
Rick Price, Grievant
Joel Barden. Staff Rep.
Renee Engelbach, Paralegal

An arbitration hearing was conducted on November 9, 2005, at the Ohio Office of Collective Bargaining, in Columbus, Ohio.

The parties stipulated the issue in this case to be: ***“Was the Grievant, Watercraft Officer Rick Price, disciplined for just cause? If not, what shall the remedy be?”***

In a grievance dated May 4, 2005 the Grievant and FOP allege violation of Articles 19.01 and 19.05 of the Collective Bargaining Agreement.

ARTICLE 19 – DISCIPLINARY PROCEDURE

19.01 Standard

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

19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;
3. One or more fines in the amount of one (1) to five (5) days pay, for any form of discipline. The first time fine for an employee shall not exceed three (3) days pay;
4. Suspension;
5. Leave reduction of one or more day(s);
6. Working suspension;
7. Demotion;
8. Termination;

However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from an employee's wages."

The parties were able to stipulate many of the facts in this matter.

Watercraft Officer Rick Price Removal Arbitration-Joint Stipulations

- 1) This Grievance is properly before the arbitrator.
- 2) The Grievant commenced employment with the Ohio Department of Natural Resources (ODNR) as a Natural Resources Specialist on April 25, 2002.
- 3) The Grievant commenced employment with the ODNR-Division of Parks & Recreation on June 30, 2002, as an Intermittent Park Officer.
- 4) The Grievant's appointment type changed from an Intermittent to Part-time Permanent on April 6, 2003.
- 5) The Grievant laterally transferred from a Part-time Permanent Park Officer to an Established Term Irregular (ETI) Watercraft Officer with the ODNR-Division of Watercraft on March 6, 2005.
- 6) The ODNR-Division of Watercraft removed the Grievant on May 2, 2005.
- 7) The Grievant received unemployment compensation for weeks ending March 12, 2005; March 19, 2005; & March 26, 2005.
- 8) The Grievant worked for the ODNR-Division of Watercraft and earned wages for the following weeks:
 - a) \$656.00 for week ending March 12, 2005;
 - b) \$606.80 for week ending March 19, 2005; &
 - c) \$606.80 for week ending March 26, 2005.

At the hearing the parties were able to further stipulate to:

"The ODNR removed the Grievant on May 2, 2005 for violating the Willfully Falsifying any Official Document; Dishonesty, & Violation of the Uniformed Officer's Code of Conduct provisions of the ODNR Disciplinary Policy. The Grievant commenced employment with the ODNR in April 2002, and did not possess any active disciplines at the time of Removal.

The ODNR-Division of Watercraft is responsible for boating safety, education, and law enforcement on all waters of the state. The Division also administers and enforces all laws regarding identification, numbering, titling, use and operation of recreational boats on Ohio's waters. A total of 166 permanent employees provide service in the form of law enforcement patrols, emergency first response, registration

and titling services, educational programs and grants, professional training, boating access facility grants, vessel inspections, aids to navigation, and technical assistance. Specifically, Watercraft Officers are responsible for law enforcement activities regarding recreation boating of the public, marina and livery owners which includes performing field sobriety tests, responding to boating accidents, making arrests, conduction rescues and protection, transportation & emergency response to state and federal officials. Watercraft Officers also assist in providing training enforcement to Division and other Departmental employees along with teaching boating classes, enforcement and/or search and rescue techniques to the general public and other interested groups."

And further:

"While working as a Part-time Permanent (PTP) Park Officer for the ODNR-Division of Parks and Recreation, the Grievant received unemployment compensation from the ODJFS when his work hours and subsequent wages are reduced annually each season. Assigned to Middle Bass Island State Park in Ottawa County, the "busy season" typically runs from May to October and the Grievant usually works a full-time schedule. The Grievant's hours are then reduced at the end of the "busy season." Pursuant to the ODJFS publication "Workers' Guide to Unemployment Compensation," PTP employees may receive unemployment compensation if their gross earnings are less than the weekly benefit amount. The weekly benefit amount for the Grievant is \$392.00. From December 2004, until the lateral transfer to the Division of Watercraft on March 6, 2005, the Grievant received unemployment compensation until commencing employment with the Division of Watercraft."

BACKGROUND:

Beginning in 2002 Rick Price was employed by the Ohio Department of Natural Resources in the Parks and Recreation Division at the State Park on Middle Bass Island. This work was primarily during the tourist season. In the winter Mr. Price would not get full time work, and thus would file for, and receive *unemployment compensation benefits.*

In the spring of 2005 he was awarded a lateral transfer to the Watercraft Division. He began work and continued to receive his *unemployment' compensation benefits*.

The employer became aware of this situation, investigated, and terminated his employment for *falsifying an official document and the dishonesty provisions of their Disciplinary Policy*.

The grievant filed a grievance in which he asserts "*I was terminated on 5/3/05 without just cause and without regard to progressive disciplinary action*. His requested remedy is "*Reinstatement and to be made whole for all time lost*."

The FOP and the Employer agreed to "skip step 2 of the grievance process for Grievant Rick Price, #25-17 (05-09-05) 01-o5-02, and proceed directly to arbitration." ¹

MANAGEMENT POSITION:

Mr. Price received over \$600 per week for the weeks ending March 12, 19 & 26. He was paid for his participation in the orientation program of the Division of Watercraft.

During this time he continued to submit weekly claim paperwork to the ODJFA stating that he did now work during these weeks.

In April of 2005 the Grievant received a document from ODJFA titled a "Notice of Potential Issue." The Grievant admitted he "earned wages" but reported "0" as "wages reported." The employer argues that by falsifying documentation to the ODJFS along with these admissions, he falsified an official document.

The ODNR assigned Deputy Chief Michael Quinn to investigate the matter. When he interviewed the Grievant, he provided different answers than those he supplied to the ~~OSJFS~~. ODNR argues that the Grievant also told his area supervisor, Dean Palmer, that he believed he could just repay any overpayment back to ODJFS.

The employer also argues that Commissioned Law Enforcement Watercraft Officers are governed by the Division's *Uniformed Officer's Code of Conduct*. Thus, dishonesty is a very serious offense for any employee, but more so for a Uniformed Officer.

Finally, the employer calls to the attention of the arbitrator, a unique section of the Collective Bargaining Agreement between the parties; Article 20.09 states: *In cases involving termination for dishonesty or making false statements, if the arbitrator finds dishonesty occurred or false statements were made, the arbitrator shall not have authority to modify the disciplinary action.*

POSITION OF THE FOP/OLC:

The FOP first notes that section 20.09 of the Collective Bargaining Agreement comes into consideration only if the arbitrator finds the statements were *false or dishonest*.

The FOP acknowledges that Mr. Price made errors in this matter but they were inadvertent and perhaps even negligent, but not false or dishonest.

Mr. Cox, in this opening statement notes that "this case turns on whether Mr. Price knew (emphasis added) that he was not doing this correctly.

¹ Memorandum of Understanding executed June 30, 2005 by Joel Barden of the FOP/OLC and Brian

The FOP argues that the Grievant clearly did not intend to steal from the Unemployment Compensation fund.

The FOP contends that, if the Grievant did not make false or dishonest statements, then section 20.09 does not apply and the arbitrator has the ability to fashion a punishment lesser than termination.

The FOP argues that Mr. Price was naive and made a mistake but that should not result in termination.

DISCUSSION:

This case turns on the definition and application of two terms: "*dishonesty*" and "*falsification*." Webster's Dictionary defines "dishonesty" as "*want of honesty, probity, or integrity in principle; want of fairness and straightforwardness; a disposition to defraud, deceive, or betray.*"

The Encarta Online Dictionary defines "*falsification*" as "*deceitful behavior; the use of deceit, or the tendency to be deceitful.*"

Merriam Webster Dictionary defines "falsification" as "*to represent falsely or to misrepresent.*"

I agree with Mr. Cox in this opening statement, when he notes to prove either of these requires the proof that they were a conscious act.

James Reddeker in the book *Employee Discipline*, (Washington D.C., Bureau of National Affairs, Inc., 1989, page 215) states: "*An employee may be charged or otherwise disciplined for dishonesty or falsification of company records where the*

employer can sustain the burden of proving that the employee acted with knowledge of the wrongfulness of the act and with the intent to defraud the company. "

Arbitrators Steven J. Goldsmith and Louis Shuman concluded in an article in *Employment and Labor Arbitration*, (editors Tim Bornstein and Anne Gosline, New York, NY page 22): *"It is necessary to distinguish between an employee's mistake or poor job performance and a dishonest act. Unless the employee admits that he intended to deceive, the decision as to whether the employee was dishonest must rest on an evaluation of the objective evidence."*

Goldsmith and Shuman go on to offer three very helpful tests to examine the objective evidence:

- 1. Did the employee profit by receiving money or other valuable consideration by avoiding work effort, criticism or discipline?*
- 2. Were the discrepancies in the records inherently impossible or improbable so that a mistake was unlikely?*
- 3. Was the employee properly trained or warned concerning the type of discrepancy that occurred?*

There can be no question the Grievant received money or other valuable consideration. The DAS printouts (Employer Exhibit G) prove he received Unemployment Benefits while he was working for the Watercraft division. The Grievant admits he received these benefits.

The answer to question Number 2 is that it is highly improbable that the employee would not know it was wrong to claim unemployment benefits for the time he was in the Watercraft orientation program and did not realize he

was dishonest and falsifying a document when he submitted his weekly Claims Application.

The wording on the *Claim Application Forms* (Employer exhibits H, I, J) submitted by the Grievant are abundantly clear. Question 7 states: *Did you work (full-time or part-time), or were you self-employed during the week claimed? (If you worked, you should answer YES even if you will be paid in another week.)*

The statement attributed to the Grievant by his immediate supervisor, in which he allegedly stated that he thought he could just pay the money back, is also an indication that he knew what he submitted was dishonest.

The Grievant argues that his offer and willingness to pay the money back is an indication that he did not intend to be dishonest or defraud. I find this explanation to be self serving in that he only made the offer after he was aware that he was being investigated and in peril for his actions.

Question 3 raises the issue of whether the Grievant was properly trained or warned. The certification on the *Claim Application* again gives us the answer. *"CERTIFICATION: I understand the answers I give to the above questions may affect my rights to benefit payments. I certify that these statements are true and correct, and I am not claiming any benefits from any other unemployment program for the above weeks. I understand the law provides penalties for false statements."*

Any reasonable person would understand this warning. This Grievant lacks the argument that he is a novice at the unemployment compensation

requirements of the state in that he has regularly participated in the program in his prior ODNR employment.

We turn to a consideration of Article 20.09 of the Collective Bargaining Agreement which removes any discretion from the arbitrator regarding the imposition of the appropriate penalty if certain conditions are met.

When such requirements are included, and in general, in the consideration of dishonesty and falsification cases, many arbitrators, including this one, require a higher standard of proof than a simple "preponderance of the evidence."

Arbitrator Michael E. Cavanaugh, (in *Waste Management Inc., vs. Teamsters Driver, Sales and Warehouse Local 117*, 120 LA 175, June 7, 2004) suggests a "clear and convincing standard of proof."

Arbitrator Aaron Wolff, (*In United Postal Service vs. International Brotherhood of Teamsters, Local 705*, 121 LA 207 2/28/05) states: "Employer must prove by clear and convincing evidence that it had just cause to discharge employee for dishonesty, since dishonest conduct, if proven, would lark employee's discharge for conduct that was opprobrious or shameful, and make it difficult for employee to find other employment."

The employer has argued that a higher standard of conduct is embodied in the *Uniformed Officers Code of Conduct* and should be applied in this case.

While I generally agree that uniformed officers are held to a higher standard, I see no reasons to reach to that particular document or requirement in this case.

DECISION:

After listening to the witnesses, examining the documents submitted, and hearing the arguments and the explanation offered by the Grievant. And after applying a *clear and convincing standard of proof*, I must conclude that the employer proved the Grievant was dishonest and did falsify his Unemployment Compensation Claim Applications.

Based upon the requirements of Article 20.09 of the Collective Bargaining Agreement, I must uphold the removal of Mr. Price from employment with ODNR.

Just cause does exist.

AWARD:

For the reasons herein stated, the grievance is denied.

Issued at London, Ohio this 9th day of December, 2005.


N. Eugene Brundige, Arbitrator