#1880

IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/DYS

Before: Robert G. Stein

Grievant(s): Gloria Crable

Case # 35-04-2005-05-17-036-01-03

Termination

Advocate(s) for the UNION:

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Advocate(s) for the EMPLOYER:

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INTRODUCTION

This matter came on for hearing before the arbitrator subsequent to the filing of grievance number 35-04-050506-032-01-03 by the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO (herein "Union") on behalf of Gloria Crable (herein "Grievant" or "Crable"). The grievance was filed on April 30, 2005, subsequent to the termination of the Grievant's employment from the State of Ohio, Department of Youth Services (herein "Employer" or "DYS"). Robert G. Stein was selected by the parties to arbitrate this matter.

A hearing was held on April 21, 2006 at the Indian River Juvenile Correctional Facility, located at 2774 Indian River Road in Massillon, Ohio. The parties mutually agreed to that hearing date and location, and they were given a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a full written transcript, was subsequently closed upon the parties' submission of written closing statements.

The parties have both agreed to the arbitration of this matter. No issues of either procedural or jurisdictional authority have been raised, and the matter is properly before the arbitrator for a determination on the merits.

ISSUE

Was the grievant removed for "just cause?" If not, what shall the remedy be?

BACKGROUND

The Grievant began her employment with DYS on July 22, 1996. She served as a Juvenile Probation Corrections Officer at the Department's Indian River Juvenile Corrections Facility in Massillon, Ohio. The Grievant was terminated from her employment on April 29, 2005. At approximately 10:45 p.m. on January 10, 2005, Operations Manager, E. C. Bradley, received a call from the Grievant stating she was stuck on the highway, waiting for a tow truck, because she was forced off the road. She was scheduled to work 10:00 p.m. to 6:00 p.m. that day and did not arrive at work until 11:24 p.m. Her supervisor requested documentation related to the cause for her delay. The Grievant never produced any documentation related to her late call or being absent at the beginning of her shift. At the time of the incident, Ms. Crable had on her record two verbal warnings, a 3-day fine, and a 15-day suspension. A hearing officer, who was the same person whom the Grievant called on January 10, 2005, E. C. Bradley (Bradley), considered the facts in this case and determined the Grievant was discharged for just cause (see Joint Exhibit 4). Bradley found the Grievant had violated the following DYS rules:

Rule 1.2 Call off procedures

Rule 3.4 Unauthorized Leave (2 days or less)

Rule 5.1 Failure to follow policies and procedures

A grievance was filed on April 30, 2005 by the Union on behalf of Crable, challenging the latter's discharge as relates to Article 24.01 of the Agreement. In this challenge the Union also raises procedural issues regarding the appointment of Bradley as the hearing officer in this case and the timeliness of the discipline. The Employer states a typographical error in the documentation related to the discipline issued in this case (Joint Exhibit 1) mistakenly places the incident on January 10, 2004 instead of 2005. Because the matter remained unresolved after passing through the preliminary stages of the grievance procedure, the Union requested that the matter advance to the arbitration level pursuant to Section 25.02 of the collective bargaining agreement between the parties.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer firmly states that the evidence in this case is conclusive of the Grievant's wrong doing. Coupled with her prior record, the evidence represents sufficient grounds for just cause.

The Employer's arguments, as presented in its written closing, include the following:

The evidence presented in this matter was certain and profound. The fact that Gloria Crable had an unauthorized absence of 2 days or less was proven beyond any doubt by her testimony and the following joint exhibits: Tab 4 page 13, Tab 4 page 14, Tab 4 page 15 and Tab 4 page 16. The union attempted to discredit the Agency by declaring that the Department of Youth Services was untimely in it's handling of the violation. On the letter of discipline issued to the grievant, it states that the date of the incident was January 10, 2004. The evidence clearly indicated that the incident occurred on January 10, 2005. The grievant's written statements and testimony provide further proof that the grievant was knowledgeable and aware of the actual date of the incident. Neither the Union nor the Grievant made a claim that the date of the incident on the disciplinary letter prevented them from presenting a viable defense. Management maintains that it was a typographical error. The evidence proves that the Union and the grievant were well aware of the actual date of the incident. The fact that the discipline letter contained a typographical error does not warrant any change of the outcome of the discipline.

The grievant supplied management with two (2) separate statements regarding her late arrival to work on January 10, 2005 (Joint Exhibit Tab 4 pages 8 and 9). The grievant stated clearly and plainly that she was late "due to automobile/traffic incident" on her statement which was dated January 10, 2005 (Joint Exhibit Tab 4 page 8). The grievant was asked to bring documentation regarding the accident which disabled her vehicle. The grievant failed to follow those instructions. The grievant testified that when she used her cell phone to call into the institution. She had informed Operations Manager E.C. Bradley that she needed a tow truck since she had been forced off the road by a truck. At arbitration the grievant testified that others who found themselves in similar predicaments were given rides or retrieved by on duty staff. The grievant refused to

provide the names of any such individuals. The grievant testified that she did not call a tow truck nor did she call the police to report the accident. In fact the grievant drove her vehicle to work. Clearly the grievant was not honest with Operations Manager E.C. Bradley.

The grievant gave a subsequent statement on January 25, 2005 which stated that she was late "due to oversleeping" (Joint Exhibit Tab 4, page 9). Clearly this was a contradiction to the original statement that she had submitted to the employer. It is clear that the grievant was less than honest with her reason for absence initially and she could not provide proof of any emergency which would mitigate her circumstance.

The grievant in this matter gave testimony indicating that she was aware that she must "call-off" to the institution no less than ninety (90) minutes prior to the start of her shift. She testified that her normal report in time would be 9:45 pm to attend roll-call. She testified that she was aware of local operating policy (LOP 103.00.00-03 Attendance), Joint Exhibit Tab 8. During the course of the testimony it was proven that the LOP 103.00.00-03 (Joint Exhibit Tab 8, page 6) declared "Arrivals at work of one (1) hour or more past the scheduled starting time are considered AWOL and require that the Supervisor initiates a discipline package for each occurrence". According to Gloria Crable's timekeeper history (Joint Exhibit Tab 4, page 16) she arrived at work at 11:24 pm. It is without doubt that she was more than an hour late of her starting time. The grievant has had a history of time related issues while employed at the Indian River Juvenile Correctional Facility. She has had an extensive amount of absences (Joint Exhibit Tab 3, pages 2-5). When she has been able to make it to work she has habitually violated the work rules and policies of the Agency or institution. Her discipline trail has progressed consistently since 2001. The grievant had two (2) verbal reprimands for late call-off in 2001. That was followed by a 3 day fine, for being inattentive in 2002. She was suspended for 15 days for failure to follow policy and procedure in 2006. The grievant has demonstrated that past corrective measures have had little to no effect on

her. The evidence presented is clear that the grievant did violate the work rules of the agency. In accordance with our work rules, disciplinary grid, and as a result of the inappropriate actions of the grievant, I respectfully request that this grievance be denied in its entirety.

Based upon the above arguments, the Employer requests that the instant grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union's arguments, as taken directly from its written closing, are as follows:

The Union contends the Grievant was not discharged for just cause in violation of Article 24.01 of the Agreement. The Union contends the investigation conducted by the Employer was not fair in that Supervisor O. M. Bradley was a witness to the incident and was then assigned to investigate it. The Union also argues that timeliness is an issue in this case due to a date notation on a letter of discipline. A third issue raised by the Union is one of disparate treatment in the way the Employer enforces its work rules on attendance. Finally, the Union argues that the termination of the Grievant was not an application of progressive discipline.

Based on the above, the Union requests that the Grievant be made whole, returned to work with full back pay, no loss of benefits, and reinstated seniority.

DISCUSSION

In an employee termination matter, an arbitrator must determine whether an employer has proven clearly and convincingly that a discharged employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 102 LA 555 (Bergist 1994).

> Discharge from one's employment is management's most extreme penalty against an employee. Given its seriousness and finality, the burden of proof generally is held to be on the employer to prove guilt of a wrongdoing in a disciplinary discharge or to justify or show "good cause" for terminating an employee. This is especially true in cases, like this one, where the parties have agreed that the collective bargaining agreement requires "just cause" for disciplinary action, including discharge.

Int'l Assoc of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000)

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for "just cause," but does not define what does constitute "just cause," it is proper for an arbitrator to look at employer policies, rules, statutes, and regulations to determine whether or not a discharge was actually warranted. *E. Associated Coal Corp. and United Mine Workers of Am., Dist. 17,* 139 Lab. Arb. Awards (CCH) P 10,604 (1998).

> "Just cause" is a contractual principle that regulates an employer's disciplinary authority. It is an amorphous standard, ordinarily open to arbitral interpretation on a case-by-case basis. Before an arbitrator will uphold a penalty, he ordinarily looks to the circumstances of the misconduct, any mitigating factors, and whether the aggrieved employee received his/her contractual and legal due process protections.

State of Iowa, Iowa State Penitentiary and Am. Fed'n of State, County, and Mun. Employees, AFSCME State Council 61, Lab. Arb. Awards (CCH) P 3923 (Dworkin 2001).

The "just cause" standard requires an employer to conduct a fair, impartial, and thorough investigation before determining an employee's guilt and initiating discipline. It also requires the employer to impartially examine all of the evidence, including the totality of the circumstances surrounding the conduct in question and possible mitigating factors that might reasonably explain an employee's behavior. Further, this "just cause" standard requires that the employer's investigation produce substantive proof of the employee's misconduct. *Yolo County Corr. Officers Ass'n and Yolo County Sheriff-Coroner's Dept., Woodland, Cal.*, 04-1 Lab. Arb. Awards (CCH) P 3697 (Nelson 2003).

The Union raises the procedural argument regarding a misstated date in the letter of discipline issued to the Grievant. The Employer erred in listing the date of the offense as January 10, 2004 rather than January 10, 2005. In this regard the Union argues the Employer's discipline was untimely. The evidence and testimony support the fact that the incorrect

year listed on the letter was a clerical error of a de minimis nature. I do not find that it had any material effect on the substance of this case nor did it reasonably deny the Grievant or the Union any due process rights during or following the investigation of this matter. While timing is a critical issue to the parties as evidenced in their Collective Bargaining Agreement, there is no evidence to suggest this error had any impact upon the timing of the investigation or determination made by the Employer. This argument has no merit.

The Union raised a procedural argument regarding the fact that supervisor, E. C. Bradley, who was a witness to the Grievant's calling in late on January 10, 2005, conducted the investigation of this matter. In many cases such an arrangement is a very risky strategy for an employer to employ. While as a matter of course it is unreasonable to presume that a supervisor would intentionally distort the conduct and findings of an investigation, it is essential in meeting a just cause standard that the investigation be fair and impartial and that a decision is based upon an objective view of the evidence and circumstances. In this particular case I do not find any evidence of bias. The case is largely based upon objective evidence regarding the Grievant's failure to come to work on time and her call into work approximately forty-five minutes following the start of her shift. The facts in this case stand on their own and are independent of any subjective interpretation of witness accounts or the

interpretation of evidence by an investigator. The facts in this case are created and driven by the Grievant and do not represent evidence that had to be gathered and interpreted by the Employer.

The Union argues that the Grievant was treated in a disparate manner. The term "disparate treatment" is typically defined as "unlike treatment under like circumstances." *Capital Cement Corp. and Bhd. of Boilermakers Local Lodge D-208, AFL-CIO*. Lab. Arb. Awards (CCH) P3053 (Sergent 2000). The underlying principle of prohibited disparate treatment is that "like employees who commit like offenses under like circumstances should be treated in a like manner." *Fed'n of Pub. Employees (AFL-CIO) and School Bd. of Broward County (Fla.)*, 98-2 Lab. Arb. Awards (CCH) P 5196 (Richard 1997). Such circumstances in the realm of discipline include the nature of the offense, the degree of fault, and the mitigating and aggravating factors. *Hamilton County Sheriff's Dept. and Fraternal Order of Police, Ohio Labor Council, Inc.*, 91-1 Lab. Arb. Awards (CCH) P 8158 (Klein 1990).

I conclude that under the circumstances in the instant matter, evidence was not presented to show that any other Indian River employees were disciplined under "like circumstances" as compared to Ms. Crable.

Finally, the Union argues that the Grievant was not issued progressive discipline.

Section 24.01 of the parties' collective bargaining agreement provides:

> 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 . . .

The "just cause" principle applies to the level of discipline, as well as to the reason for the discipline being challenged. That means that there must be some proportionality between the offense and the punishment imposed, that the Employer must weigh all mitigating factors, such as the employee's seniority, the magnitude of the subject offense, and the employee's prior work record. *Lorillard Tobacco Co., Greensboro, N.C. and Bakery, Confectionary and Tobacco Workers Int'l Union, Local 317T,* 00-1 Lab. Arb. Awards (CCH) P 3433 (Nolan 2000).

The intent of progressive discipline is correction, and most offenses call for warnings to be used before termination is imposed. *City of Bell Gardens (Cal.),* 00-2 Lab. Arb. Awards (CCH) P 3489 (Pool 2000). In the instant matter the Grievant had been disciplined on several occasions and in particular was suspended twice.

> In evaluating whether the penalty of termination was warranted, a wide range of factors may be considered. These include the grievant's work history; prior discipline, compliance with procedural or contractual requirements regarding progressive discipline; and any aggravating or mitigating circumstances.

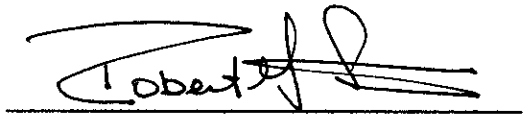
Communication Workers of Am., AFL-CIO and Quest Communications Int'l, Inc., 01-2 Lab. Arb. Awards (CCH) P 3903 (Landau 2000). Arbitrators have recognized that managers must have some latitude in disciplinary

matters and should exercise discretion to treat employee misconduct on a case-by-case basis, reflecting the circumstances of each incident and the employment record of the individual employee. I find in the instant matter, the Employer exercised sound discretion given the fact that the Grievant had failed to respond in a meaningful way to prior progressive corrective action steps (particularly to a fifteen (15) day suspension) in an attempt to improve her dependability. The Grievant also failed to present any convincing mitigating factors that would excuse her late call or her one (1) hour and twenty-four (24) minute absence from work on January 10, 2005.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 12th day of June 2006.



Robert G. Stein, Arbitrator