#1883

OPINION AND AWARD

In the matter of Arbitration

Between

Fraternal Order of Police, Ohio Labor Council, Inc.

And

The State of Ohio, Department of Public Safety

Regarding

Grievance Number 15-00-050428-0041-05-02
(Debra Adkins)

APPEARANCES:

FOR THE STATE:

Matthew Banal, Advocate
Krista Weida, Second Chair
SuAnn Cook, Agent in Charge
Scott Pohlman, Deputy Director
Wade Sagraves, Asst. Agent in Charge

FOR THE FOP/OLC:

Paul Cox, Chief Counsel
Debra Adkins, Grievant
Joel Barden, Staff Representative
Jym Farmer, Witness
Renee Engelbach, Paralegal

An arbitration hearing was conducted on May 25, 2006, in the offices of the Fraternal Order of Police, Columbus, Ohio.

The parties stipulated the issue in this case to be: ***"Was the Grievant Debra Adkins given a three (3) day fine by the Employer for just cause? If not, what shall the remedy be?"***

BACKGROUND INFORMATION:

Debra Adkins has been an Enforcement Officer for approximately sixteen (16) years with the Ohio Investigative Unit of the Ohio Department of Public Safety. At the time of the incident giving rise to this matter, she was assigned to the Columbus District and resided in Scioto County.

The incident occurred on February 3, 2005, when Officer Adkins and her partner, Christopher Jones, were assigned to work in Scioto County. One of their work locations was the Silver Moon Bar in Portsmouth, Ohio.

The Silver Moon establishment had been the subject of prior complaints and investigations. OIU officers had observed drug deals on May 22, 2004, and December 3, 2004.

While working in Portsmouth, Agent Adkins was contacted by the Portsmouth Drug Task Force. This Task Force, which included the Portsmouth Police, had previously requested assistance in dealing with this bar. That request was made to the Assistant Agent in Charge, Wade Sagraves.

Agents Adkins and Jones met with Officer Todd Bryant and Patrolman Steve Timberlake. During that meeting Adkins and Jones agreed to assist the

officers. The plan was for Agent Jones to enter the bar and attempt to make a drug purchase. The Task Force provided the funds for the purchase.

Agent Adkins drove Agent Jones to the bar and waited outside while he made the drug purchase. The next day Agents Jones and Adkins informed Assistant Agent in Charge Sagraves what had happened the night before.

An administrative investigation was conducted to determine if Agents Adkins and Jones had violated any departmental policy.

At the conclusion of the investigation, discipline was recommended. The required pre-disciplinary meeting was held and Ohio Department of Public Safety Director, Kenneth L. Morckel, informed the grievant that she would "be fined for an amount equivalent to three (3) days' pay for violation of the Ohio Department of Public Safety Work Rule 501.02, (W) (1) Compliance to Orders, ..." (Joint Exhibit 2).

A grievance was filed April 26, 2005, contending the three day fine was not for just cause.

RELEVANT CONTRACT PROVISIONS AND RULES:

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.

ARTICLE 21 – WORK RULES

21.01 Copies of Work Rules

The Employer agrees that existing work rules, policies, procedures, and directives shall be reduced to writing and be made available to affected employees at each work location. To the extent possible, new work rules and directives shall be provided to the Ohio Labor Council two (2) weeks in advance of their implementation. In the event that the Labor Council wishes to present the views of the bargaining unit regarding a new work rule or directive, a time will be set aside at the regularly scheduled Labor/Management Committee meeting. The issuance of work rules and directives is not grievable. The application and availability of such rules and directives is subject to the grievance procedure.

WORK RULES:

501.02

(W) COMPLIANCE TO ORDERS

(1) An employee shall immediately and completely carry out the lawful orders of a supervisor, or designated officer in charge, which pertain to the discharge of the employee's duties.

Management's Position:

The case is straight forward in the minds of the Employer. A directive was issued by Agent in Charge Cook and was violated by the grievant. The Employer believes a three day fine is appropriate.

The proper way for the enforcement action to have taken place was for the agent to have obtained prior permission from the Assistant Agent in Charge.

Because the agents had not properly communicated with the members of the Task Force, Agent Jones was inside the Silver Moon without any backup, thus putting himself in significant danger.

The Employer explained that there is a process in place for obtaining the permission of the Director to conduct a long term investigation. This process is identified as a 61b order. There was an operating procedure in place. The grievant violated this procedure and the three day fine is appropriate.

Ms. Adkins was the senior officer, she had full knowledge of what was going on, and she participated in the action.

The Employer notes that Agent Adkins admitted that she was aware of the directive issued by Agent in Charge Cook. Employer witnesses adamantly denied that this memo had any type of a sunset clause.

The Employer argues that there is no conflict between Departmental Rule 200.06 and the operating procedure. The employee was on state time doing her regular duties and thus was not covered by the rules of the Task Force.

The Employer argues that this procedure was put in place to ensure the safety of the agents involved.

It notes that compliance with the directive would have demanded only a thirty (30) second phone call.

FOP's Position:

The FOP argues that this case is really about Chris Jones and the desire of the department to terminate him.

Rule 200.06 (2) c requires that agents be cooperative with police agencies. The FOP argues that there is a conflict between a departmental rule and the direction of a supervisor and that the memorandum of 2003 is not timely and should not trump the rule.

Because the grievant did not buy the drugs, FOP argues that she did not commit the charged violation.

Even if there was a violation of the memorandum, progressive discipline was not followed. A three day fine is just too great a penalty.

The FOP also argues that the Employer is not clear on what has been violated. Is it a policy or a directive or a memo?

It argues that there is no clear evidence that the directive was ever discussed with the agents. It notes that the Agent in Charge admitted she had not submitted the memo to the FOP two weeks in advance. FOP concludes that the memo was not submitted because it was not that important to the Employer.

The FOP argues that the department had failed in its response to the requests of the Portsmouth Police Department, and that the actions of the supervisors are violations of Departmental Rule 200.06.

It notes that while the grievant was aware of the 2003 Cook directive, she thought this directive was only in effect for thirty (30) days. She stated that she had been informed of the thirty (30) day sunset provision in training provided by *The Public Agency Training Council (Instructor Jim Currey.)*

The FOP comments on the quality of the investigation conducted. No transcripts were done nor were any recordings made.

In the testimony of the Agent in Charge SuAnn Cook, the issue was raised that Agent Adkins was insolent in her responses during the investigation. FOP representative Jym Farmer, who had accompanied Agent Adkins during the investigatory interview, testified that Agent Adkins was not impolite or insolent during that meeting.

DISCUSSION:

The FOP ascribes a motive to the Employer that this case exists because of a desire to terminate Christ Jones. While this is a plausible argument that case is not before this arbitrator. I must judge this case on its own merits.

The FOP argues that the grievant did not violate any of the three sections of the 2003 Cook memo. While I do agree that this grievant did not violate Section B which deals with funds for a drug purchase since the money came from the Task Force, I do not agree that the grievant acted in total compliance of sections A and C.

While Agent Adkins did not go into the bar to make the purchase, it is clear that the contact from the Task Force came to her cell phone. When asked if they would go into the bar the Grievant responded, "Chris can go in - I can't."

While the instant case was not before Arbitrator Stein in the Chris Jones matter, he did conclude, *"The arbitrator recognizes that the Grievant, as a veteran employee, failed to take the most appropriate course of action by failing to seek either Sagraves' or Cook's approval before ultimately carrying out the*

plans for executing the drug purchase. His colleague, Agent Adkins, committed the same error and was given a three-day suspension." [1]

This arbitrator concludes that the grievant did make a decision to participate in a drug purchase operation without the prior approval of either the Assistant Agent in Charge or the Agent in Charge.

The matter of backup (Section C) appears to be an act of omission and based upon assumptions regarding the location of other officers. Not withstanding this conclusion, the lack of backup did potentially put Agent Jones in significant danger and was an oversight shared by the grievant and Agent Jones.

Let us turn our attention to the existence and the status of the 2003 Cook memo. There is no question the grievant knew of its existence. The testimony that the grievant believed the memo only had a life of thirty (30) days is either self serving at worst or a misunderstanding at best.

Regardless of what a trainer might say, any employee who believes that orders or directives are only in effect for thirty days, has a responsibility to confirm their understanding rather than just ignoring the directive.

The FOP rightfully notes that the Employer had a responsibility to submit the memo in question to the FOP at least two weeks prior to its implementation. Agent in Charge Cook freely admits she did not do so. Does that negate the memo? This arbitrator must conclude it does not. A grievance challenging the directive is not before this arbitrator.

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[1] Robert Stein arbitration decision in the Christopher Jones matter, page 35. issued January 26, 2006, and submitted as Joint Exhibit 5.

The question still remains as to whether the directive is reasonable according to the tests of just cause.

While the FOP would have me believe that this rule is not a big deal, it appears on its face, to be aimed at protecting the safety of the employees.

Likewise I find no conflict between Departmental Rule 200.06 and the 2003 directive. Employees are still expected to cooperate with local law enforcement agencies but they are expected to gain supervisory permission before purchasing drugs.

While there was testimony regarding Agent Adkins deportment in the investigatory meeting, I find that not to be an issue in this case. A review of the record fails to convince me that she was either impolite or insolent, but I also do not find that to be a charge that has been made against her.

The FOP notes that this directive is not utilized in other areas of the state and is limited to the region administered by Agent in Charge Cook.

There is no contractual obligation to have uniform directives across the state. Deputy Director Pohlman testified that Agent in Charge Cook had the authority to run her region as she determined best.

The directive, on its face, appears to be intended to protect the safety of agents and therefore appears to be reasonable and related to the mission of the Employer.

Absent any evidence of disparate treatment wherein other agents in the Columbus region were permitted to participate in drug purchases without prior

approval, I must conclude that the directive was violated. This finding supports the charge that work rule 501.02 (W) was violated.

The only remaining question is the appropriateness of a three day fine. Most arbitrators are restrained in substituting their judgment for that of the Employer. This concept is consistently noted by arbitrators and forcefully restated in a decision by Arbitrator Charlotte Neigh when she states: *"The Company persuasively argues that an Arbitrator's judgment should not be substituted for that of management when its decisions are made without bias and in good faith. There is no evidence to support the Union's suggestion that the Grievant was discriminated against because of his outspoken Union activism. There is no basis for overturning management's decision. "* [2]

Having noted the inherent bias among most arbitrators to give great deference to the reasoning of management in imposing discipline, we are called upon to closely examine the exact wording of the Collective Bargaining Agreement to be sure it has not been violated and that the discipline imposed is not arbitrary or capricious.

Arbitrator Mitchell Goldberg reminds us in a 2002 case: "The arbitrator may only intercede if the agreement permits him to do so." [3]

Article 19 begins with wording common in many Collective Bargaining Agreements: *"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense."*

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[2] 115 LA 1161 Heinz USA.
[3] 117 LA 705 Twinsburg Board of Education and Twinsburg Education Association.

This language requires the arbitrator to weigh the competing claims in a balancing test to determine if the steps of *progressive discipline* must be strictly followed or if there is a reason to determine that a more severe penalty is *commensurate* with the offense.

The more instructive and specific language in this contract is found later in the section which states: "However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action."

This arbitrator wrestled with similar language in a 2003 case. In that matter I noted: *"The Attorney for the County points to the language in the contract which follows the steps in the progressive discipline process and which states: "It is recognized that some employee actions could require immediate suspension or dismissal thereby eliminating some of the above steps.*

This type of language is common in many contracts. It is added to ensure the employer has the ability to deal with those serious situations when progression is not practical or appropriate. The employee who comes to work intoxicated, or engages in the commerce of drugs, or steals, or a myriad of other infractions cannot expect to move through the steps of the progressive discipline procedure. The employee who is tardy can." [4]

This infraction is certainly more serious than tardiness but due to the language cited, the burden clearly falls to management to show this arbitrator why it was necessary to skip a verbal and written reprimand and move to the maximum fine (three (3) days) that can be imposed under this contract.

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[4] 118 LA 1764, Elkhart County.

While the Employer advocate asked each witness about the seriousness of the offense, and while each witness gave the expected affirmative answer, a major point remains unanswered.

If the Employer views this requirement as seriously as it says, why is it not a procedure required throughout the department?

While Assistant Agent in Charge Wade Sagraves gave all the expected answers, it was apparent to this arbitrator by his answers and his demeanor that he viewed this procedure as one of concern to Agent in Charge Cook but did not offer any personal endorsement of its necessity.

Likewise, Deputy Director Pohlman reiterated that Agent in Charge Cook could run her region as she saw fit, but did not offer personal rationale regarding the seriousness of the situation.

Based upon a review of all testimony and evidence, it is the judgment of this arbitrator that the grievant was frustrated by the perceived lack of action on the part of her supervisors. It also appears that she wanted very badly to protect her good working relationship with the Portsmouth Police Department and the Drug Task Force.

I find that she did have knowledge of the Cook directive but did not consider it a big deal.

She participated in a drug purchase which was in violation of the Cook directive and she did not make a prior call to her supervisor. Even though she was not the person making the drug purchase, she was a full participant.

Her actions and those of Agent Jones were viewed very positively by the Task Force, but that does not excuse her failure to abide by the Cook directive.

I must also consider that this is a seventeen (17) year employee with no discipline.

Consistent with the language of the contract I find that management did not assume its burden to demonstrate the level of severity merited a three day fine.

I do find this violation to merit more discipline than a verbal warning or a written reprimand.

There is every reason to believe that a minimum fine would serve as a adequate reminder of the seriousness of observing all supervisory directives even if the employee is not in total agreement with that instruction.

The proper discipline is the imposition of a one day fine.

DECISION AND AWARD:

The grievance is granted in part and denied in part. The three day fine is to be reduced to a one day fine and the grievant shall receive the amount representing two days' lost wages.

Issued at London, Ohio, this 25th day of June, 2006.

N. Eugene Brundige

N. Eugene Brundige, Arbitrator