

#1964

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO – DEPARTMENT OF REHABILITATION AND CORRECTIONS
AND
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL – CIO

Grievants: Eddie Wright & Dan Miller

Case No. 27-27- 905-22-06 0-2691-01-03

Case No. 27-27- 906-11-20 0-2728-01-03

Date of Hearing: November 29, 2007

Place of Hearing: Trumbull Correctional Institution, Leavittsburg, OH

APPEARANCES

For the Ohio Civil Service Employees Association, Local 11 AFSCME:

George L. Yerkes, Staff Representative

Ohio Civil Service Employees Association, Local 11 AFSCME

For the Department of Rehabilitation and Corrections

Victor Dandridge, Labor Relations Officer, Office of Collective Bargaining

Department of Administrative Services

Mike Duco, Manager of Dispute Resolution, Office of Collective Bargaining

I. HEARING

The hearing was held at Trumbull Correctional Institute on November 29, 2007. The hearing commenced at 9:00 A.M. The joint issue before the arbitrator is “did management violate the Collective Bargaining Agreement, Appendix M, Section 4(E) by testing the grievants for reasonable suspicion of alcohol abuse at the Ohio Highway Patrol Outpost? If yes, what shall the remedy be?”

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME (the “Union”) were Robert Hausen, Chapter President at Trumbull Correctional Institution and Patty Rich, Grievance Manager of the Union.

Testifying for the Employer were Bertha Laverna Styles of the DAS Drug Free Work Place Program; Raymond Keith Weimer of the Central Office of the Department of Rehabilitation and Corrections; Edward Arthur Flynn, Assistant Director of Labor Relations for the Ohio Department of Transportation; and Mike Duco, Manager of Labor Relations and Dispute Resolution at the Office of Collective Bargaining. The parties had Sixteen Joint Exhibits as well as both Employer and Union Exhibits.

The Oral hearing was concluded at 11:25 A.M. and Written closing statements timely filed on December 21, 2007.

II. STATEMENT OF THE CASE

On November 11, 2006 a grievance was filed by Eddie Wright and on May 25, 2006 a grievance was filed by Dan Miller. (Joint Exhibit 3). Both grievances claimed that the use of the Ohio Highway Patrol to administer Breathalyzer test was a violation of the Collective Bargaining Agreement. Both grievants received discipline but the discipline is not before the arbitrator. The issue raised in the grievances is the use of the Ohio Highway Patrol for "reasonable suspicion" testing for alcohol abuse. The remedy sought by the Union is a Cease and Desist Order against the use by the Employer of the Ohio Highway Patrol for such testing.

III. THE PROCEDURAL OBJECTION

There was an initial objection by the Employer as to the arbitrability of the issue. The Employer contended that these were disciplinary cases resolved either by a Last Chance Agreement or by termination. The Union responded by saying the only question before the arbitrator was the Cease and Desist Order and there was no matter before the Arbitrator concerning the discipline. The Employer the agreed that there was no question as to arbitrability and the case proceeded with evidence from both parties.

IV. THE UNION'S CASE

The Union's first witness was Robert Hausen. Robert Hausen has been a Corrections Officer for 16 years at Trumbull Correctional Institution and Chapter President for the last 2 years. Corrections Officer Hausen testified he had attended the Basic and Advanced Steward's Academy. Corrections Officer Hausen was asked to review Joint Exhibit, Tab 3, Page 1. He testified that this was an issue grievance requesting a Cease and Desist Order. Corrections Officer Hausen then was given Union 1. Union 1 is Appendix M to the Collective Bargaining Agreement. The witness reads this to mean all testing including the Breathalyzer for "reasonable suspicion" testing. Corrections Officer Hausen then reviewed Joint Exhibit, Tab 1, Pages 55 & 56. The witness said "off site" means off the grounds of the Institution and "non State" means no usage of State Employees. Corrections Officer Hausen then testified that both Wright and Miller were given "reasonable suspicion" testing at the Ohio State Patrol barracks. He also testified that he thought the testing was to be done by a private contractor off site.

Upon Cross-Examination Corrections Officer Hausen testified he had never participated in Contract Negotiations. The witness was also Cross- Examined over Employer Exhibit 1, The Last Chance Agreement of Robert Carter showing use of the Ohio State Patrol. Corrections Officer Hausen was also shown Employer Exhibit 2, The Last Chance Agreement of Eddie Wright and Employer Exhibit 3, The Last Chance Agreement of Dan Miller. The witness was asked why the Union approved a Last Chance Agreement where the Ohio State Patrol did the testing. The witness said the Union was only a witness and the employee had the decision on the agreement. On re-direct examination the witness repeated his understanding of Last Chance Agreements.

The Union's next witness was Patty Rich. Ms. Rich testified that she had been employed by the Union for 15 ½ years and was the Grievance Manager. Prior to being the Grievance Manager she was the Arbitration Coordinator. Ms. Rich testified she had never seen this issue raised at the Union headquarters until now. She also testified that the Union never gives up the right to grieve and that Central Office is not always advised of Last Chance Agreements signed by Employees.

V. MANAGERMENTS CASE

The Employers first witness was Bertha Laverna Styles. Ms. Styles oversees the DAS Drug Testing Program. Ms. Styles does all random drug testing schedules. The witness reviewed Employer Exhibit 4, Page 2. This exhibit shows law enforcement officers are qualified to administer the tests. The Ohio State Patrol officers are certified by the State. Ms. Styles testified that the State had a contract with Kroll Labs to do urine testing but no breath testing. Kroll has agreed to provide sites for Breathalyzer testing. Most sites are only available until 5:00 or 6:00 P.M. "Reasonable Suspicion cases after 5:00 or 6:00 P.M. cannot use Kroll Labs. After 5:00 or 6:00 P.M. hospital Emergency Rooms are used but timeliness cannot be guaranteed. Employees must be tested within 2 hours with an 8 hour maximum limit. She testified she had reviewed records back to 1999 and agencies use the Ohio State Patrol. There had been no questions or concerns from any Union concerning use of the Ohio State Patrol. Upon Cross-Examination the witness said Union 2 shows there are other Contractors and that Kroll can arrange alcohol testing.

The next witness was Raymond Keith Weimer. Mr. Weimer is a Labor Relations Officer

3 and works at the Central Office of the Department of Rehabilitation and Corrections. Mr. Weimer testified the use of the Ohio State Patrol with Last Chance Agreements started in 1995 and is done throughout the Department. Mr. Weimer said the issue has never been raised before and that the Union has never failed to sign a Last Chance Agreement based on Ohio State Patrol findings. Upon Cross-Examination the witness read Joint Exhibit Tab 5, Page 48 which indicated that Beth Lewis' institution used Madison County Hospital for testing. Upon Re-Direct she indicated the E-Mail did not say "reasonable suspicion" alcohol testing.

Edward Flynn, the Assistant Director of Labor Relations for the Ohio Department of Transportation testified that he had developed the Drug Testing Program for the Department of Rehabilitation and Corrections. Mr. Flynn testified he participated in work sessions with management and labor in preparation for negotiations. When negotiations started Department of Rehabilitation and Corrections and Ohio Department of Transportation District 1 wanted non-State personnel and off-site testing. Mr. Flynn read Joint Exhibit Tab 2, Page 37 and said it only referred to urine testing. The Union never mentioned Breathalyzer testing. Breath test was in the previous contract but not this one. Mr. Flynn said Joint Exhibit Tab 2, Page 45 clearly refers only to drug testing. Mr. Flynn then said employees can sign Last Chance Agreements without the Union.

Mike Duco; Manager of Labor Relations and Dispute Resolution for the Office of Collective Bargaining testified that he had been with the Office of Collective Bargaining since 1985. Mr. Duco testified that the Contract was changed and that he was involved toward the end of the negotiations. Mr. Duco testified that Mr. Flynn is the Drug Test expert and that the language sought was to comply with Federal Regulations and the Federal Omnibus Act. This

language is in Appendix M (E) of the Collective Bargaining Agreement

Mr. Duco testified that the Union did not like Mobile Testing at the Institutions. Also, the Ohio Department of Natural Resources wanted to use their own collection process. Mr. Duco confirmed that Federal Regulations permit the use of the Ohio State Patrol to be utilized for “reasonable suspicion” testing.

VI. OPINION OF THE ARBITRATOR

The issue before the Arbitrator has been well presented by both parties to this dispute. Considerable effort has been expended and there is merit to both arguments in this case. The Employer has offered substantial testimony that the Ohio State Patrol is qualified to administer the Breathalyzer test and this is not disputed by the Union. The real question is not the qualifications of the Ohio State Patrol but rather is their utilization in accord with the terms of the Collective Bargaining Agreement and with the established past practice.

The Employer has substantial evidence that this practice of using the Ohio State Patrol has been on going without objection by the Union. The Union concedes this point but argues the issue was never advanced to their Central Office. However, as many arbitrators have held the Union never gives up it's right to grieve.

The Union argues that this case is a simple one of “the plain language of the contract”. I do not agree the issue is that simple.

The real issue is has a past practice of long standing changed the “plain meaning” of the language in Appendix M to the Collective Bargaining Agreement.

Mr. Weimer testified that the Ohio Highway Patrol is used throughout the department to

handle “reasonable suspicion” alcohol testing. He testified that Trumbull Correctional Institution (TCI), Central Reception Center (CRC) Pickerington Correctional Institution (PCI) and North Coast Correctional Institution (NCCI) all utilized the Highway Patrol to conduct “reasonable suspicion” testing.

However, the Union queried 27 institutions as to their methods of handling the testing. The responses are summarized in the Union’s past hearing brief, Appendix A, Page 12. Two institutions did not respond. Of the 25 institutions that did respond 14 said they did not use the Ohio State Patrol for “reasonable suspicion” testing. The remaining 11 institutions said that they did use the Ohio State Patrol.

This creates a past practice that is not followed by a plurality of the institutions. Robert M. Schwartz’s, How to Win Past Practice Grievances (Second Edition, 1999, 2001, Page 19) says “a practice that is followed on a majority of occasions or “most of the time” is known as a mixed practice and does not satisfy the consistency standard”.

I find the past practice not to be “on a majority of occasions” and not persuasive.

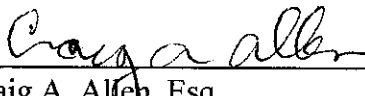
In reviewing the Joint Exhibits there are numerous collection sites. In addition the Department of Administrative Services (DAS) memorandum set forth in Joint Exhibit 11 says in pertinent part “Please note that some collection sites may offer after hours testing but the agency must contact the testing site during normal business hours to coordinate an after hours test. If it involves second or third shift testing and the collection site is not a twenty-four hour operation, the agency must contact the Department of Administrative Services, Drug Free Work Place, to work with Kroll Labs to coordinate an after hour collection for alcohol test”. It appears from the record that 14 institutions must have made these arrangements.

Further Management Exhibit 5, pages 2 and 3 indicates that after hours testing for Trumbull is available at St. Elizabeth's Hospital Medical Center in the Emergency Room after hours. There was evidence that the Emergency Room may not be able to do the testing within 2 hours. The assumption by Management is that the Ohio State Patrol is always available to test within 2 hours but there is no evidence that this is correct.

I therefore find that Appendix M, Section 4 (E) is controlling.

VII. AWARD

The State shall Cease and Desist from using State employees for "reasonable suspicion" alcohol testing.



Craig A. Allen, Esq.
Arbitrator