

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANT: CHAD NEWPORT
CASE NO.: 31-08 (11-15-10) 32-01-07

THE STATE OF OHIO, DEPARTMENT :
OF TRANSPORTATION :

The Employer :

and :

OPINION AND AWARD

THE OHIO CIVIL SERVICE :
EMPLOYEES ASSOCIATION, :
AFSCME LOCAL 11, AFL-CIO :

The Union :

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LICENSED TO PRACTICE LAW IN THE STATE OF OHIO AND COMMONWEALTH OF KENTUCKY

APPEARANCES

For the Employer:

John Dean, Labor Relations Officer, Advocate
Ed Flynn, Asst. Admin., ODOT
Jessie Keyes, LRS, OCB
Edward Moore, Witness
Michael Brown, Witness
Les Reel, Deputy Director, Chief Investigator
Jay Stookey, Transportation Tech. One
Ana Middleton, Greene County Resident Engineer

For the Union:

Michael Muenchen, OCSEA Staff Representative
Chad Newport, Grievant
Scott Wyrick, District Steward
Krina Penewit, Greene County Steward
Jennifer Cantrell, Life Essentials Counselor

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having been unable to resolve this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on May 12, 2011, at the conference facility of the employer in Lebanon, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn but not sequestered; and that post hearing briefs would be filed. It was upon the evidence and argument that this matter was heard and submitted and that this Opinion and Award was thereafter rendered.

II. STATEMENT OF FACTS

The grievant received notice of a disciplinary action in the form of a removal by letter of October 18, 2010. That letter, in full, stated the following:

“

October 18, 2010

Chad Newport
55 Wolf Road
West Alexandria, Oh 45381

Dear Mr. Newport:

Notice is hereby given that the Agency is considering taking disciplinary action against you upon the recommendation of management. The level of discipline being considered is removal from employment with the State of Ohio, Department of Transportation. In accordance with ODOT Directive

WR-102 a pre-disciplinary meeting will be scheduled. The meeting is scheduled to begin at 8:30 a.m. on Thursday, October 21, 2010 and will be held in the office of labor relations at the district headquarters.

You and/or your union representative shall be given the opportunity to ask questions, comment, refute or rebut the allegations and charges made against you and the evidence and facts on which the State is basing this proposed discipline.

You are charged with violations of ODOT Directive WR-101, Item 13. Leaving the work area without permission of the supervisor. Item 18. Falsifying any document related to employment, including electronic documents. and Item 27. Other actions that could compromise or impair the ability of the employee to effectively carry out his duties as a public employee.

The basis of this charge is outlined in investigative report #10-145 and shows that between the dates of September 8 and 11, 2010 you were absent from your assignment without authorization, you falsified your time sheet, you misused state time for personal business, you failed to perform required project inspection and tests on concrete, you falsified you(sic) daily inspector report and you repeatedly provided false information to your supervisor.

This is a short synopsis of the facts at this time and may not be construed as including all the details of the events giving rise to the possible disciplinary action.

This letter is your formal notice of the meeting. If there are any changes, you will be notified by another letter. You are directed to attend the meeting unless you wish to waive your rights to the meeting by signing the enclosed waiver form. Copies of known documents and a list of potential witnesses that will be used to support the disciplinary action are attached.

Sincerely,

/s/ Christine Hilbert
Meeting Officer
Christine Hilbert"

It might be further noted that at Article 5 of the contract of collective bargaining the employer retains the rights to suspend, discharge and discipline employees.

Thereafter, and by letter of November 10, 2010, the grievant was in fact terminated from his employment as a highway employee. That letter of termination revealed the following:

“November 10, 2010

Chad Newport
55 Wolf Road
West Alexandria, OH 45381

Mr. Newport:

This letter is to inform you that you are hereby terminated from employment as a Highway Technician 3, assigned to Green County, effective Friday, November 12, 2010. After reviewing the recommendation of the WR-102 Meeting Officer and others, it has been determined that just cause exists for this action. You are found to have violated Directive WR-101, Items:

- #13 - Leaving the work area without permission of the supervisor;
- #18 - Falsifying any document relating to employment;
- #27 - Other actions that could compromise or impair the ability of the employee to effectively carry out his duties as a public employee.

Respectfully,
/s/ Jolene M. Molitoris
Jolene M. Molitoris
Director of Transportation”

A grievance was filed. The grievance, as to the statement of facts, revealed the following:

“No just cause for a first offense 24.01

Progressive discipline for first offense 24.02

Employee is participating in a EAP program for addiction to Rx drugs. Started treatment before disciplinary meeting. No consideration was given Chad for modifying the contemplated disciplinary action. Reinstatement to Highway 3 - Gr. Co. Back pay of lost wages, compensated for lost overtime, all health ins. to cover medical expenses incurred while off work. Seniority reinstated to make everything whole.”

Thereafter, and by letter of December 7, 2010, the grievance was denied and that letter revealed, in full, the following:

“December 7, 2010

Chad Newport, HT 3
55 Wolf Rd.
West Alexandria, OH 45381

Re: Grievance #31-08(11-15-10)32-01-07

Mr. Newport:

The following represents my decision regarding the Step 3 grievance meeting conducted on November 17, 2010 at ODOT’s District 8 office. At this meeting you were represented by Scott Wyrick. Also present:

Union: Chad Newport, Grievant
 Krina Penewit, Steward

Management: Ed Flynn, Meeting Officer
 Carl Best, LRP

Ana Middleton, Supervisor

Union Contention

The Union contends that the Grievant's removal for violations of WR-101, numbers 13, 18 and 27 is excessive. The Grievant was a seven year employee with no prior disciplinary action. The Grievant was experiencing personal difficulties during the period of his infractions. The Grievant has been under professional care to resolve those difficulties.

The Union contends that each WR-101 violation cited provides for less severe discipline. Section 24.10 provides for mitigation of disciplinary action in connection with a successful Ohio Employee Assistance Participation Agreement (EAP).

Management Contention

Management contends that the imposed discipline was for just cause. On September 11, 2010, the Grievant was assigned to a concrete pour on a project. The Grievant was to perform duties to ensure the proper strength of the concrete. Even though the Grievant was previously advised to bring certain tools with him to complete his assignment, he reported without those tools. The Grievant was sent to obtain those tools and never returned.

The following Monday the Grievant was confronted by his supervisor and he was not truthful. The Grievant then falsified his diary report and time sheet. Later, during the administrative investigation, the Grievant admitted he left to care to personal business including selling scrap metal, going to a cell phone store and attending a soccer game.

As a result of the above, the concrete in question was not properly tested. ODOT does not know if that concrete is safe.

Discussion and Decision:

I find the imposed discipline was for just cause. Section 24.10 is a permissive tool for Management's use. The Grievant's actions severely damaged the trust relationship with Management. That relationship cannot be repaired. This grievance is denied in its entirety.

Sincerely,
/s/ Jim Miller

Jim Miller, Administrator
Office of Labor Relations”

It might be noted from the facts of this case that the grievant does not deny any of the allegations of the employer. The record shows that the grievant was a seven-year employee (approximately) without any discipline and that he did not notify the employer of any drug or personal problems that might have caused the grievant to act in the manner that he did in violation of his duties under the contract of collective bargaining. Thus, the Employee Assistance Program activity was reported to the employer after the termination of the grievant's seniority giving the employer no knowledge of any EAP activity prior to the event of discipline.

The employer, it appears, has the option of delaying discipline until the completion of any EAP activity but in this case, the employer chose not to delay the termination of seniority. The record was clear in this case that the grievant acquiesced to the charges of the employer.

It is also true in this case that the grievant sought counseling service sometime after he was disciplined by way of termination. The record is clear in that regard and the counselor testified that her first appointment with the grievant was sometime in November or some 60 days after the event of discipline. The question therefore in this matter is whether the grievant was guilty of substandard conduct to such a degree as to merit a just cause disciplinary action in the form of discharge.

The parties agreed that the issue was whether the grievant was removed for just cause. If not, what should the remedy be?

It was upon these facts that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

The activity of the grievant was described by the employer as being grossly substandard conduct. I am in agreement with the assessment made by the employer. The grievant did not complete his work on the day involved but instead left the work area and ran personal errands, notably failing to inspect a concrete pour on a highway overpass. The grievant went to the bank, the cell phone store and to the scrap yard all during his work hours. The duties of the grievant were serious in that the testing was not appropriately done on the newly poured concrete.

There is no doubt therefore that the activity of the grievant was sufficient to trigger a substandard conduct finding and sufficient cause to trigger a termination of seniority. One question remains: Can an individual take advantage of the Employee Assistance Program (EAP) after discipline is invoked? It appears, from the contract, that there is an EAP in effect. The EAP under the terms of the instant contract does not automatically delay the completion of discipline when invoked. In this particular case, management decided not to place the discipline on a hiatus but rather decided to proceed with the termination because of the seriousness of the failure of the


grievant to perform his assigned duties. I am in agreement with management in this particular case.

Merely using the EAP as a crutch to defend against discipline when the event was highly substandard and when the notification to the employer of the grievant's participation in the EAP was after the fact leads me to believe that the employer acted properly in the invocation of discipline in the form of discharge. Yes, the discipline of the grievant in the form of discharge was for just cause and the record is amply clear in that regard. That is especially true when the grievant waited to notify the employer of his EAP participation to a point in time after the discipline was invoked. It might be noted that the grievant's first appointment with the counselor was in November 2010 after the incident occurred in early September 2010. It appears that the grievant not only committed the acts alleged but was tardy in notification to the employer about the necessity of his participation in the EAP. For all of these reasons, the grievance must be denied.

Severely substandard conduct may trigger termination of seniority without progressive discipline. Ignoring concrete tests, failure to report time off and not accurately reflecting the truth in the employer's documents is clearly, grossly substandard conduct. The activity confessed to by the grievant is clearly gross substandard conduct and properly termed just cause to trigger a discharge.

IV. AWARD

Grievance denied.



Marvin J. Feldman, Arbitrator

Made and entered
this 27th day
of June 2011.