ARBITRATION DECISION

July 26, 2012

In the Matter of:

State of Ohio, Department of Job and Family Services	)	
	)	
	)	Case No. 27-11-20110215-0011-02-12
and	)	Michael Little, Grievant
	)	
SEIU District 1199 WV/OH/KY	)	

APPEARANCES

For the State:

Victor Dandridge, Labor Specialist, First Chair
Tiffany Richardson, Labor Relations Officer, Second Chair
Vanessa Niekamp, Former Personnel and Labor Liaison, Office of Child Support
Jeffrey Aldridge, Deputy Director, Office of Child Support
Yvette Rutherford, Human Capital Analyst, Bureau of Human Resources

For the Union:

Amanda Schulte, Advocate for Union
Lea Davis, Second Chair
Michael Little, Grievant
Barbara Montgomery, 1199 Delegate
Valerie Smith, Training Officer, Office of Child Support

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant is Michael Little. He was hired as a Chaplain by the Ohio Department of Rehabilitation and Correction in approximately 1997. In the fall of 2010, he applied for and was granted an inter-agency transfer to a position as a Human Services Program Consultant in the Office of Child Support in the Ohio Department of Job and Family Services. On January 7, 2011, as part of the process, the grievant signed a Consent to Conduct Pre-Employment Criminal Background Check and Employment Reference Check where he acknowledged that he was subject to a criminal background check. The grievant also agreed that "if the results of the checks are unsatisfactory, including but not limited to, felony and/or misdemeanor convictions, ODJFS may terminate my employment." (Joint Exhibit D).

The grievant reported for his new position on January 17, 2011. The next day he signed a statement accepting his transfer from ODRC effective January 16, 2011. On or about January 24, 2011, the Bureau of Criminal Investigation mailed the grievant's criminal history to ODJFS. (Joint Exhibit D, pages 3-4).

On February 3, 2011,Vanessa Niekamp, the Personnel and Labor Relations Liaison for the Office of Child Support, sent a memorandum to Aleta Guilford, an employee in the Office of Employee and Business Services, requesting the grievant's removal. Niekamp provided two reasons for his removal. First, she stated that the grievant's BCI background check revealed:

> [The grievant] has two previous issues related to domestic violence. A review of [the grievant's] child-support obligations revealed he has a case in our system which is flagged confidential with a family violence indicator (FVI). This FVI means information regarding the other party to [the grievant's] case must not be shared with [the grievant]. The other party to the case also has other cases in our system that are not confidential. The Office of Child

> Support will not be able authorize [the grievant] access to our system due to the fact that he would then have access to information, which is to be protected from him. [The grievant] will not be able to perform the functions of a Human Services Program Consultant in the County Services Unit without access to our systems.

Second, she complained about the grievant's attendance. The tables included in the memorandum indicated that between Monday, January 17, 2011, when the grievant began work at ODJFS, and February 3, 2011, he called off five times and was late on one occasion.

On the same day as Niekamp requested the grievant's removal, Sonnetta Sturkey, the Deputy Director of Business and Employee Services, sent a letter to the grievant. The letter stated that "pursuant to agency policy, Article 9 of the 1199 Contract, and unsatisfactory BCI results you will be probationarily removed from the position of Human Services Program Consultant, effective the close of business on Friday, February 4, 2011." (Joint Exhibit E)

The union responded by filing a grievance on behalf of the grievant. It charged that on January 14, 2011, the grievant requested to remain in his previous position but was denied the opportunity to do so and was directed to report to work on January 17, 2011. The union further alleged that he was discharged from ODJFS without just cause and that the state had violated Articles 2, 9.02, and 30.02 of the collective bargaining agreement. The union requested that the grievant be reinstated to his position at ODJFS with full back pay and be given the option to return to his former position at ODRC.

The step one grievance hearing was held on March 16, 2011. At the hearing, the union argued that there was not just cause to terminate the grievant because in accord with ODJFS Policy IPP. 5001 he had consented to the background check and had no

felony convictions; that he had requested his starting date be postponed until the BCI report was completed; that he had told Vanessa Rutherford, a Human Capital Analyst in the Bureau of Human Resources in ODJFS, about his disorderly conduct convictions; and that prior to his transfer, he had left a message for Rutherford indicating that he no longer wanted the position at ODJFS but she did not return his telephone call; and that he was advised by his supervisor at ODRC that he had to report to ODJFS on January 18, 2011.

The state rejected the union's position. It argued that there was just cause for the grievant's termination. It pointed out that the consent form signed by the grievant warned him that felony and/or misdemeanor convictions could lead to his termination. The state indicated that upon the return of the BCI report and after a review of the grievant's position, it decided that the grievant's background check was unsatisfactory. It added that on January 19, 2011, the grievant signed the transfer acceptance letter stating that his transfer was effective January 16, 2011, even though he could have refused to sign the letter and remained at ODRC.

Tiffany Richardson, a Labor Relations Officer, who served as the hearing officer, issued her report denying the grievance on April 4, 2011. She stated:

> On January 7, 2011, the Grievant reported to the Bureau of Human Resources to complete ODJFS paperwork in regards to the new position in the Office of Child Support. Among the papers that were signed by the Grievant was the "consent to conduct pre-employment criminal background check and employment reference check" form. The form states that "I understand that if I fail to complete the prescribed checks, or if the results of the checks are unsatisfactory, including but not limited to, felony and/or misdemeanor convictions, ODJFS may terminate my employment." The Grievant signed the form with the knowledge that if the BCI results were not satisfactory the Grievant could be terminated. Furthermore, Ms. Rutherford sent an e-mail on January 14 and 18 to the Grievant stating that the BCI report was being mailed to HR and if anything detrimental was found, it could be grounds for termination. ODJFS has the discretion to determine which background reports

are unsatisfactory based on the position for which the applicant is applying, thus, the Grievant's BCI results were determined to be unsatisfactory.

Additionally, ODJFS IPP. 5001 states that a direct connection between any convictions contained in the background check and the responsibilities of the position for which the candidate is being considered may be a disqualifying factor. ODJFS determined that the BCI results were in conflict with the Grievant's position and therefore decided to terminate his employment.

Based on the above information Management did not violate Articles 2, 9.02, or 30.02 of the SEIU 1199 contract in the termination of the Grievant.

On April 13, 2011, the union appealed the case to arbitration. The Arbitrator was notified of his appointment on April 26, 2012, and the hearing was held on June 4, 2012. Written closing statements were received on July 10, 2012.

ISSUE

The issue as agreed to by the parties is:

Was the grievant's probationary release proper (not arbitrary, capricious or discriminatory) in accordance with Article 9.02(C) of the Collective Bargaining Agreement? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 9

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9.02 Promotion, Demotion, and Lateral Transfer Probationary

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C. Inter-Agency Transfer.

Employees who accept an Inter-Agency transfer pursuant to Article 30, shall serve an initial probationary period. If the employee fails to perform the job requirements of the new position to the Employer's satisfaction, the Employer may remove the employee. The employee has the right to grieve such decision …

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Article 30
Vacancies

***

30.02 Awarding the Job (Transfers and Promotions and Demotions)

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> "Inter-Agency Transfer" is defined as an employee requested movement to a posted vacancy in a different agency …

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UNION POSITION

The union argues that the grievant's probationary removal was not proper. It points out that in SEIU District 1199 and Ohio Department of Health; Case No. 14-50-20100235-0010-02-12; June 4, 2012, Arbitrator Susan Grody Ruben held:

> The State does not have unfettered discretion to remove an employee. Rather, this Arbitrator finds the soundest approach is whether the State's action was "arbitrary, capricious, or discriminatory."

The union adds that page 934 of the sixth edition of Elkouri and Elkouri's How Arbitration Works states that "some arbitrators, however, have set aside the discharge of the probationary employee if management's action was 'arbitrary, capricious, or discriminatory'; thus, 'the question in such a case goes to the good faith of the Company, not to the merits of its conclusion.' "

The union contends that the state's action meets the definition of arbitrary and capricious. It observes that USLegal.com states that "arbitrary and capricious means doing something according to one's will or caprice and therefore conveying a notion or tendency to abuse the possession of power." (Union Post-Hearing Brief, page 2) The

union indicates that "many arbitration decisions state that one of the ways to show an Employer acted in an arbitrary and capricious manner is to show that the Employer failed to comply with its own policies and administrative requirements, which constitutes an abuse of power." (Ibid.) It cites the syllabus in In re Mayor Dante Carpenter, County of Hawaii and Hawaii Government Employees Association, AFSCME, Local 152 AFL-CIO; 87 LA 349 (1985), which states "County's termination of probationary employee was not arbitrary or capricious where County substantially complied with training and evaluation requirements of contract and civil service rules." (Ibid.)

The union maintains that the state cannot discharge the grievant because he properly disclosed his misdemeanor convictions. It states that "he had disclosed to Ms. Rutherford everything that would come up on his background check before he even started at ODJFS … [and that she] even told him that it should not be a problem." (Ibid.) The union cites Buffington Harbor Riverboats, LLC [Gary, Indiana] and Local 1, Unite Here, 125 LA 1082, 1084 (2008), where the Arbitrator determined that "the employer knowingly and voluntarily waived discretionary right to terminate probationary employee because the employee disclosed on his job application that he had no felony convictions, and he told HR in detail about his non-felony convictions with an offer to provide any other necessary details." (Ibid.)

The union argues that the state has a policy regarding background checks and new employees. It observes that the policy states:

> B. Disqualifying Factors
>
> 1. The following are in and of themselves disqualifying factors:
>
> a. Refusal to consent to a criminal background check.

b. A felony conviction for a violation of any of the following sections of the Ohio Revised Code or a felony conviction (or equivalent) in another state for the same kind of conduct:

(1) Bribery, ORC 2921.02

(2) Theft in Office, ORC 2941.41

(3) Soliciting/Receiving Improper Compensation, ORC 2921.43, any conviction for this within seven years of submission of the employment application to ODFJS.

2. The following may be used as disqualifying factors:

(a) There is a direct connection between any convictions contained in the background check and the responsibilities of the position for which the candidate is being considered.

(b) Failure of the candidate to disclose a felony conviction on application for the position.

3. If a background check is returned indicating a possible criminal act, the BCI check and information about the position will be researched by the BHR and a recommendation will be provided. If necessary, an additional review will be conducted by the Office of the Chief Inspector (OCI) and a recommendation based on the results of that review will be provided. The final decision whether or not to withdraw tentative offer of employment based on these recommendations will be made by the director or designee. This also applies to those persons described in Sections VI - F and G.

(4) Notification of disqualification

(a) If the decision is made to withdraw the tentative offer of employment, the selectee will be notified by telephone or in person by the responsible personnel officer.

(b) After the initial notification, a letter will be sent to the disqualified selectee providing him or her with written notification of withdrawal of the tentative offer of employment. The letter will also detail the process to challenge and review the information with BCI. See sample letter-withdrawing tentative offer of employment due to unsatisfactory criminal background check, Appendix B-1.

The union claims that "not only did [management and the HR staff] … fail to comply with the policy, not one witness even recognized the policy." (Ibid.)

The union rejects the state's argument that the policy does not matter because the grievant signed a consent form. It points out that Richardson testified that if a form conflicts with agency policy, the policy would prevail. The union claims that the policy "prevents the agency from acting arbitrarily and discriminatorily in its hiring and termination processes." (Union Post-Hearing Brief, page 4)

The union contends that the state failed to comply with its policy regarding background checks. It states that the policy lists certain felonies convictions as disqualifiers and indicates that any conviction could result in disqualification if it has a direct link to an employee's position. The union points out that the grievant had no felony convictions but acknowledges that he had two misdemeanor convictions for disorderly conduct. It claims, however, that neither Richardson nor Rutherford could explain the connection between the grievant's misdemeanor convictions and his job.

The union maintains that the state also violated its policy by failing to properly notify the grievant of his disqualification. It reports that under Section VI(B)(4) of the policy the grievant should have been notified of his disqualification by telephone by a personnel officer and then sent a letter detailing the process to challenge and review the information with the Bureau of Criminal Investigation. It recognizes that Richardson, Rutherford, and Niekamp testified that they did not know about the policy but claims that "ignorance of Agency policy is not an excuse for arbitrary and capricious behavior." (Ibid.) The union adds that "had the [the grievant] received the required notice and

instructions, he may have been able to clear up the problems that the Agency claimed to have at that point in time." (Union Post-Hearing Brief, pages 4-5)

The union argues that the state abused it power and discretion by accessing the grievant's confidential information. It claims that when Niekamp found that the grievant's divorce case was marked as confidential, Jeffrey Aldrich, the Deputy Director of the Office of Child Support, contacted the Montgomery County Office of Job and Family Services to see why the case had that designation. The union stresses that when the grievant "signed a Consent to Conduct Pre-Employment Criminal Background Check and Employment Reference Check … he never consented to the Agency accessing confidential files of his divorce case." (Union Post-Hearing Brief, page 5)

The union contends that accessing the grievant's confidential information was a significant abuse of power. It points out that Rutherford told Niekamp that the grievant had been convicted of "domestic violence assault," which she understood to be a felony. The union notes that this was inaccurate and characterized it as "grossly false information." It claims that "making these actions even worse was the fact that [the grievant's] violence had nothing to do with his divorce, his ex-wife or his daughter, and that is why he was convicted of disorderly conduct rather than domestic violence." (Union Post-Hearing Brief, page 6) The union charges that because the state considered only the charges against the grievant and failed to determine whether the "made-up" domestic violence conviction was related to his family members, the state discriminated against the grievant.

The union maintains that the agency accessed confidential, non-public records. It indicates that when Niekamp relayed the "domestic violence assault" conviction to

Aldrich, he failed to verify the information and contacted the Montgomery County Office of Job and Family Services office. The union states that the person at the office gave Aldridge information regarding the grievant's case without Aldridge giving a reason for requesting the information. It observes that Valerie Smith, a Training Officer who trains County employees in the use of the computer system where the grievant's information was stored, testified that the person at the Montgomery County Office of Job and Family Services "should not have disclosed any information about [the grievant's] case to Mr. Aldridge, unless he stated a legitimate reason; regardless of the content of the information." (Ibid.)

The union argues that the state had a duty to ensure that its information was accurate. It points out that Aldridge and Smith testified that ODJFS employees are aware that in some counties FVI designations stay on cases indefinitely unless an individual takes action to have it removed. The union adds that employees also know that some individuals do not know that their cases have a FVI designation. It indicates that the state "should have notified [the grievant] of its accessing his case [and] also should have asked the County about the date the FVI was placed on the case and whether the FVI could be removed." (Ibid.) It claims that "either of these actions would have quickly shown the State that the FVI was outdated and/or easily removable." (Ibid.)

The union contends that the agency's reliance on the grievant's case having a FVI designation as the basis for his removal was arbitrary and capricious. It states that when the grievant learned about the FVI at the step two meeting, he called ODJFS and had it removed. The union indicates that the removal of the FVI from the grievant's case made him eligible for access to Support Enforcement Tracking System.

The union maintains that the state did not offer attendance as a reason for the grievant's removal until the arbitration hearing. It points out that the step one response states that "ODJFS determined that the FVI results were in conflict with the grievant's position and therefore decided to terminate his employment." (Joint Exhibit A, page 6) The union notes that the grievant's termination letter did not list attendance as a reason for his termination.

The union argues that the fact that the state waited so long to raise the attendance issue is "suspect." It observes that on February 3, 2012, Niekamp wrote a memorandum requesting the grievant's removal. The union states that "making this even more suspect is the fact that [the grievant's] termination letter was written on the same day… [because] it is highly unlikely that with all the red tape of any government, ODJFS was able to request [the grievant's] termination in writing, have it approved and write the termination letter all on the same day." (Union Post-Hearing Brief, page 7)

The union contends that the state could not explain why the attendance issue never surfaced prior to the arbitration hearing. It points out that it never saw Niekamp's memorandum requesting the grievant's removal. The union notes that Richardson, who begins step one grievance meetings by giving management's position, did not mention the grievant's attendance at the meeting or in her step one response. It claims that "because of the [the attendance issue's] suspicious surfacing a year and a half after the grievant's termination, using it as a basis for termination is unreasonable and constitutes an arbitrary and capricious reason for termination." (Union Post-Hearing Brief, page 7)

The union maintains that the state's problem with the grievant's attendance was arbitrary and capricious. It observes that as an interagency transfer, the grievant had

accrued leave from his prior position. The union cites In re Cuyahoga County [Ohio] Sheriff's Office and Ohio Patrolmen's Benevolent Association, 124 LA 1481 (2007), where an Arbitrator reinstated a probationary employee who was discharged for two AWOLs when he left work because of an on-the-job injury and a health emergency. It claims that being AWOL is much more serious than taking too many days of approved leave.

The union argues that the state cannot be allowed to approve the leave requests and later claim that the use of the leave constituted an abuse. It states that it is reasonable for an employee to assume that the state is following its own attendance policy. It cites Fraternal Order of Police, Ohio Labor Council and State of Ohio, Department of Liquor Control; Case No. 21-04-(06-15-90)-127-05-02; June 29, 1991), where Arbitrator Harry Graham held that it is reasonable for employees to assume the employer is following its policies and procedures for processing checks. The union adds that in the instant case, the grievant was never shown the Agency's attendance policy. It claims that for these reasons, the grievant's discharge for the approved use of leave was arbitrary and capricious.

The union concludes that the grievant's probationary release was arbitrary, capricious, and discriminatory and therefore was not proper. It asks the Arbitrator to reinstate the grievant to his former position at the ODJFS with full back pay. The union also requests that for the remainder of the grievant's probationary period, the state be permitted to terminate him only for just cause.

STATE POSITION

The state argues that the union bears the burden of proving that its decision to release the grievant during his probationary period was arbitrary, capricious, or discriminatory. It points out that Article 9.02(C) provides that "if the employee fails to perform the job requirements of the new position to the Employer's satisfaction, the Employer may remove the employee." The state claims that it "provided two (2) credible and factual reasons for determining the grievant's performance was unsatisfactory." (State Post-Hearing Brief, page 1)

The state contends that the first reason relates to the grievant's background check. It reports that prior to accepting the position at ODJFS, he was advised that an unsatisfactory result could lead to his termination. The state observes that the grievant signed a consent form that stated:

> I understand that this conditional offer of employment is subject to required documentation for proof of employable status and satisfactory completion of pre-employment screening requirements. I understand that if I fail to complete the prescribed checks, or if the results of the checks are unsatisfactory, including but not limited to, felony and/or misdemeanor convictions, ODJFS may terminate my employment.

The state maintains that the grievant's background check was unsatisfactory. It reports that "the result of the grievant's background check provided the agency with knowledge that the grievant had a child support case which was earmarked with a Family Violence Indicator (FVI)." (Ibid.) It observes that the FVI was the result of the grievant's conviction for disorderly conduct and led to a protection order being filed against him. The state indicates that the FVI prohibited the agency from granting the grievant access to SETS.

The state argues that the grievant's FVI status would prevent him from performing his job. It points out that the use of SETS is included in the Position Description for the Human Services Program Consultant job he was seeking. The state claims that its conclusion that the grievant was unable to complete the duties of his position was not arbitrary, capricious, or discriminatory.

The state contends that the second reason for the grievant's removal relates to his attendance. It observes that for the three weeks the grievant worked in ODJFS in a probationary status, he was absent 30.2% of the 112 hours he was scheduled to work and that he was absent all or part of 35% of the days he was scheduled to work. The state adds that his absences were the result of call-offs and claims of emergency situations. It acknowledges that management approved the grievant's requests for leave but stresses that "the fact that management approved the leaves based on the contract language is not an indication of the satisfaction of the grievant's attendance practices." (State Post-Hearing Brief, pages 2-3)

The state maintains that the Arbitrator should reject the union's suggestion that he should decide the grievance as a just cause case. It observes that page 934 of the sixth edition of Elkouri and Elkouri's How Arbitration Works states:

> Where the provisions of a collective bargaining agreement mentioned probationary employees, but were unclear as whether the employees were included under a just cause clause, the arbitrator held that "the weight of arbitral authority supports the proposition that Management has broad, if not almost unlimited, discretion where probationary employees are concerned."

The state stresses that Article 9.02(C) of the contract states that "if the employee fails to perform the job requirements of the new position to the Employer's satisfaction, the Employer may remove the employee."

The state cites SEIU District 1199 and Ohio Department of Health; Case No. 14-50-20100235-0010-02-12; June 4, 2012, where Arbitrator Ruben held that a decision to remove a probationary employee after an inter-agency transfer must not be arbitrary, capricious, or discriminatory. It points out that in the instant case, the grievant acknowledged that at the time of his removal, the results of his background check were accurate so that his removal could not be construed to be arbitrary or capricious. The state notes that since the union presented no evidence that the grievant was treated differently from any similarly situated employee, his removal was not discriminatory.

The state dismisses the union's claim that the arbitration hearing was the first time it heard of the employer's "displeasure" with the grievant. It observes that the grievant "did testify that he felt 'tension' when he requested vacation leave on January 26, 2011." (State Post-Hearing Brief, page 3) The state adds that in any event, the grievant was notified that it was not satisfied with him as an employee when he was informed on February 4, 2011, that he was being removed.

The state acknowledges that the grievant claimed that he received bad advice from ODRC and ODJFS and his local union. It claims, however, that the union failed to show any misconduct by any party. The state adds that "the fact that the grievant claimed ignorance of the contract language and the process outlined and defined by the CBA, is the fault of the grievant." (State Post-Hearing Brief, page 4)

The state concludes that the union failed to prove that its actions were arbitrary, capricious, or discriminatory. It asks the Arbitrator to deny the grievant's in its entirety.

ANALYSIS

The facts leading up to the grievance are clear. In the fall of 2010, the grievant, who had worked in ODRC as a chaplain for approximately 15 years, sought an inter-agency transfer to a position as a Human Services Program Consultant in ODJFS. On January 7, 2011, the grievant signed a consent form authorizing the employer to conduct a background check and acknowledging that if the results of the background check were unsatisfactory he could be terminated. On January 19, 2011, the grievant signed a statement accepting his transfer to ODJFS effective January 16, 2011.

On February 4, 2011, the grievant was removed from his position. The employer's removal letter stated that he was being removed because he had unsatisfactory BCI results. At the arbitration hearing, the employer also indicated that the grievant's attendance was unsatisfactory because he was absent 30.2% of the hours he was scheduled to work and was absent all or part of 35% of the days he was expected to work.

The union responded to the grievant's removal by filing a grievance on the his behalf. When the grievance was not resolved, it was appealed to arbitration. At the arbitration hearing, the parties agreed that the issue before they arbitrator was whether the grievant's removal was arbitrary, capricious, or discriminatory.

The union offered a number of arguments and complaints in support of its claim that the grievant's removal was improper. First, it charges that the employer's action was arbitrary and capricious because it failed to follow its own policy regarding background checks. The union observes that the policy lists certain felony convictions and any conviction directly related to the employee's job as disqualifiers. It claims, however, that

the grievant had no felony convictions and that the employer failed to establish a direct link between his disorderly conduct convictions and his job.

The union also charges that the employer failed to comply with the notice requirements contained in the policy. It observes that the policy requires a personnel officer to notify an employee if a tentative offer is withdrawn and requires a follow-up letter detailing the process to challenge and review the information contained in the criminal background check. The union claims that if the grievant had received the required notice and instructions, he may have been able to clear up the problems identified by the employer.

The Arbitrator must reject the argument that the employer failed to follow the policy regarding background checks and therefore the grievance removal was arbitrary and capricious. First, as indicated above, the employer's background check revealed that the grievant had a FVI notation on his child support case related to his conviction for disorderly conduct, which would have prevented the employer from providing the grievant with access to SETS. Since an important part of the grievant’s job required him to have access to SETS, the link to his job is clear.

Second, the Arbitrator does not believe that the employer was bound by the policy cited by the union. The policy was adopted on May 1, 2002, and last revised on November 12, 2003. The record suggests that the policy has not been in effect for a number of years as revealed by the testimony of the employer's witnesses that they were not aware of the existence of the policy. The inter-agency transfer process is governed by the terms of the collective bargaining agreement and the consent form signed by the grievant.

The Arbitrator must also dismiss the union's charge that the employer accessed the grievant's confidential information and that by doing so abused its power and discretion. The consent form signed by the grievant gave the employer broad discretion in conducting its background check. When Niekamp discovered that the grievant's case was marked as confidential, Aldridge appropriately contacted Montgomery County's Office of Job and Family Services to find out the basis for the confidential status of his record. This was authorized by the consent form signed by the grievant.

The Arbitrator rejects the union's contention that the employer's action was arbitrary and capricious because the employer should have notified the grievant that it was accessing his case and should have asked him when the FVI was placed on his case and whether the FVI could be removed. While nothing would have precluded the employer from doing so, there is nothing in the consent form or the contract or even the policy relied upon by the union that would have required the employer to contact the grievant regarding the FVI it discovered in the course of conducting its background check.

The union contends that the employer's attempt to use the grievant's attendance record as a basis for his termination is arbitrary and capricious. First, it points out that the employer's removal letter does not list the grievant's attendance as a reason for his termination. The union claims that it was unaware that attendance was an issue until the arbitration hearing. Second, it points out that the grievant had accrued leave from ODRC and that the use of approved leave should not be a reason for discharge.

The Arbitrator believes that the failure of the employer to cite the grievant's attendance as a reason for his removal does not make its action arbitrary or capricious. He

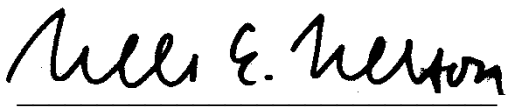
acknowledges that logic might dictate that if the employer cited the grievant's unsatisfactory background check as a reason for his removal, it should have also included in his termination letter its concern about his attendance. However, the contract does not require the employer to explain why it has concluded that a probationary employee's performance is unsatisfactory. In any event, the union addressed the attendance issue at the arbitration hearing and in its written closing statement so that the grievant suffered no prejudice.

The Arbitrator must also reject the union's suggestion that the employer could not consider the grievant's absences because they all involved the use of approved leave. The employer must rely on employees to report to work on a regular basis absent extenuating circumstances. Where an employee in his probationary period uses a substantial amount of accumulated leave in a short period of time, it is not unreasonable for the employer to be concerned about the employee's future attendance. In fact, as the employer noted, the grievant had some concerns about his use of leave while on probation.

Based on the above analysis, the Arbitrator must conclude that the union was unable to establish that the grievant's removal during his probationary period was improper. It is universally recognized that an employer has broad discretion in terminating a probationary employee. In the instant case, when the employer conducted its background check, it found that the grievant had a FVI designation on his record which would have prevented him from accessing SETS which was necessary for him to perform his job. In addition, the grievant missed a considerable amount of work during his three weeks at ODJFS. Given these facts, it is impossible to conclude that the employer's decision to remove the grievant was arbitrary, capricious, or discriminatory.

AWARD

The grievance is denied.



Nels E. Nelson
Arbitrator

July 26, 2012
Russell Township
Geauga County, Ohio