IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF YOUTH SERVICES

AND

OHIO EDUCATION ASSOCIATION/
STATE COUNCIL OF PROFESSIONAL EDUCATORS

Grievant: Michael Miley

Case No. 35-03-20140508-0018-06-10

Date of Hearing: December 15, 2014

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:
Advocate: Kerri Hoover, Labor Relations Consultant
Witnesses:
Michael Miley - Grievant
Betsy Lavinder – Grievance Chairperson

For the Employer:
Advocate: Larry Blake, Labor Relations Officer
2nd Chair: Megan Schenk, Policy Analyst, Office of Collective Bargaining
Witnesses:
David Haynes – Investigator

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: February 11, 2015

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect July 1, 2012 through 2015, between the State of Ohio Department of Youth Services ("DYS") and the Ohio Education Association (OEA)/State Council of Professional Educators (SCOPE) collectively referred to as the Union ("Union").

The issues before the Arbitrator are whether the procedural timelines were complied with by the Union, and just cause exists to support the removal of the Grievant, Michael Miley ("Miley") for violating the Ohio Department of Youth Services Policy 103.17, General Work Rules, Sections 5.01P – failure to follow policies and procedures regarding its equipment and software; 5.04P – destruction, damage, misuse or theft of property or equipment; 5.28P – failure to follow work assignment or the exercise in poor judgment in carrying out an assignment; and 6.04P – intimidation or harassment of any youth.

The removal of the Grievant occurred on April 22, 2014 and was appealed in accordance with Article 5 of the CBA. This matter was heard on December 15, 2014 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were agreed to be submitted by both parties on or about January 16, 2015. This matter is properly before the Arbitrator for resolution.

BACKGROUND

The Grievant was removed on April 22, 2014 because he violated Ohio Department of Youth Services ("ODYS") General Work Rules Policy 103.17 according to the Employer. [Joint Exhibit ("JX") 26] Specifically, Rules 5.01P (failure to follow policies and procedures); 5.04P (destruction, damage, misuse or theft of property or equipment); 5.28P (failure to follow work

assignment or the exercise in poor judgment in carrying out an assignment); and 6.04P (intimidation or harassment of any youth under the supervision of the Department).

Miley was employed as a physical education teacher at the Scioto Juvenile Correctional Facility ("SJCF") with approximately twelve years of service at the time of his removal. The Grievant had no prior discipline and was considered a good employee.

In August 2013, Miley was placed on paid administrative leave pending an investigation into allegations of inappropriate touching of female juveniles by Miley. The touching incident(s) were not substantiated and Miley returned to work. However, during the internal investigation, additional claims were uncovered regarding misuses of his computer and inappropriate language used or directed toward female juveniles.

The investigation was concluded on December 30, 2013. David Haynes ("Haynes"), Investigator, concluded that Miley had misused his State of Ohio computer equipment and used unprofessional language when referring to or talking to the female youth at SJCF. [JX 4, pp. 36-37]

Miley was on paid leave from August 2013 until January 2014 at which time he returned to work at the Indian River Juvenile Facility.[1] On March 17, 2014, a pre-disciplinary meeting occurred in accord with Article 13.03 of the Collective Bargaining Agreement. The meeting officer concluded that just cause for discipline was established. [JX 3, pp. 4-6]

On April 22, 2014, the Grievant was removed from his position as a teacher. The Order of Removal was signed by Miley and provided to the Union. [JX 2(b)]

[1] SJCF had been closed while Miley was on paid leave necessitating his reassignment to the Indian River Juvenile Facility.

On April 22, 2014, Phil Paar (Labor Relations Officer – 2) was sent an email with an unsigned/undated grievance requesting that a grievance number be assigned to the Miley grievance.

On April 24, 2014, Betsy Lavinder ("Lavinder"), Grievance Chairperson, emailed an unsigned and undated grievance to Larry Blake ("Blake"), Labor Relations Officer. [Management Exhibit ("MX") 2] On May 8, 2014 via certified mail, the grievance was received by Blake, who acknowledged same to Lavinder on May 12, 2014. [Union Exhibit ("UX") 1] The grievance was properly filed on May 8, 2014 in accordance with Article 5.08(c)(1) of the CBA. The grievance was received sixteen days after the removal notice, as opposed to the ten day requirement. [CBA, Article 5.02] According to the Employer, the grievance was untimely filed and these proceedings should be terminated.

However, the Union points out that the Employer failed to issue its written decision within forty-five days of the pre-disciplinary conference on March 17th to OEA as required by Article 13.03 of the CBA. Kerri Hoover ("Hoover") did not receive the written decision until "several days after the removal (of) May 8th, 2014." [UX 1]

During the pre-disciplinary conference, the Grievant conceded that he misused the computer and used inappropriate language at times when referring to the female juveniles while talking with co-workers. The Employer considers the behavior of the Grievant as egregious warranting removal, whereas the Union argues some level of discipline was appropriate, but removal was too severe and not corrective.

ISSUE

Was the discipline imposed for just cause? If not, what shall the remedy be?

RELEVANT PROVISIONS OF THE CBA AND DYS WORK RULES

ARTICLE 13 – PROGRESSIVE DISCIPLINE

13.01 – Standard

Employees shall only be disciplined for just cause.

13.03 – Pre-Suspension or Pre-Termination Conference

The Appointing Authority, or designee, shall issue a written decision within forty-five (45) work days after the conclusion of the conference and transmit the written notification to the employee and the OEA LRC. "Work days" refers to Monday through Friday excluding legal holidays. Times shall be computed by excluding the first and including the last day. In the event that additional documentation has been identified and forwarded to the Association, the timeline on the written decision by the Employer may be extended by the ten (10) days during which the Association will examine and respond to the new evidence.

POLICIES AND PROCEDURES

Ohio Department of Youth Services Policy - Policy 103.17

Rule 5.01P – Failure to follow policies and procedures

(Specifically: DHYS Policy 106.06 – ITS Equipment and Software; 106.06.01 – Internet, Email and other on-line Applications and Software)

Rule 5.04P – Destruction, damage, misuse or theft of property or equipment

Destroying, damaging, concealing, misusing, removing and/or stealing the property of the State, other employees, the youth, or the public.

Damage, loss or misuse of property of the State to include but not limited to vehicles, telephones, hardware/software, computer, e-mail and internet usage.

Damage, loss, or misuse of property to include, but not limited to property of any employee, any individual under supervision of the Department or a member of the general public.

Rule 5.28P – Failure to follow work assignment or the exercise in poor judgment in carrying out an assignment

Failure to perform assigned duties in a specified amount of time or failure to adequately perform the duties of the position or the exercise in poor judgment in carrying out an assignment.

Rule 6.04P – Intimidation or harassment of any youth under the supervision of the Department

Conduct which instills fear or constitutes threatening, intimidating, coercing or bullying behavior toward a youth.

POSITION OF THE PARTIES

EMPLOYER'S POSITION

The grievance was filed sixteen (16) days from the notice of removal which was issued on April 22, 2014. In accordance with Article 5.68(c)(1), the Union was required to file its grievance "within ten days after receipt" of the Order of Removal. The Employer, received this grievance on May 8, 2014, i.e., sixteen days from the notification of removal, thereby invoking Article 5.40 which provides that if the grievance fails to comply with the time limits within Article 5 ". . . that [the] grievance shall be terminated and considered resolved in favor of the Employing Agency." [CBA Article 5.04 (in part)]

No evidence exists that legitimate reasons prevented the Union from complying with the timelines, and due to the Union's failure this matter should be resolved in the Employer's favor.

Regarding the merits, the Grievant was removed when the Employer determined that inappropriate words, such as "bitches" and "beeotches" were used in referring to the female youth. The Grievant, also misused his state issued computer by sending several emails to another employee where in one of the transmissions he referred to himself as "Captain Save A Hoe." [JX, pp. 249-251]

Prior to Grievant's removal, the Employer became aware of allegations made by several youth that the Grievant had engaged in inappropriate physical contact and used demeaning words such as "bitches" and "whores" when referring to them. [JX, p. 88]

On August 30, 2013, an internal investigation was commenced which lasted until December 30, 2013. David Haynes ("Haynes") conducted the investigation which included interviews with youth, co-workers and administrators. Haynes also reviewed training materials, educational records and ODYS Activity Management System data. [JX 4]

Haynes' investigation substantiated the following: (1) the Grievant used inappropriate language when referring to or talking to the female youth; and (2) the Grievant misused his state issued computer when sending emails to another state employee. [JX 4, p. 36]

The Employer, indicates that the Grievant was assigned to teach the "PREP" program. This program was designed to educate the youth regarding pregnancy prevention, birth control methods, STD and abstinence. The Grievant was the only teacher at SJCF who taught this course to the female population. Due to the sexually charged culture of today, the Grievant was required to exercise restraint and respect in all dealings with the youth, given that many may have experienced social trauma prior to their incarceration.

The use of words such as "bitches," reaffirms negative stereotypes and creates an environment which is unsafe that causes the youth to continue to model negative behaviors. The Grievant's admission that he only used the words when talking to other staff and/or while venting, is equally unacceptable and misguided. [Employer's Post Hearing Statement (Em. Stmnt.), pp. 7-9]

The Grievant, admitted at the hearing that his use of "bitches," etc. while conversing with staff violates ODYS policies, and the Licensure Code of Professional Conduct for Ohio Educators ("Code"). Under the Code, the Grievant agreed to act in a professional manner; maintain a professional relationship at all times; and serve as a positive role model. The Grievant's overall behavior warrants discipline and removal was appropriate.

The Employer submits that Grievant's length of service and good evaluations fail to mitigate his discipline and just cause exists for his removal.

UNION'S POSITION

The Grievant, with no prior discipline, was disciplined without receiving an opportunity to correct the behavior that caused his removal. After the internal investigation substantiated that unprofessional language and misuses of his computer occurred, the Grievant ". . . did not deny sending two emails he should not have and referring to some of the youth as biatches or bitches." [Union's Post Hearing Statement (Un. Stmnt.), p. 6] The Grievant testified that he never called them bitches in their presence, and other staff was always present in the classroom during his teaching sessions.

Not only did the Grievant apologize for his behavior, but also indicated that such language was used by other co-workers including management. Witness statements from teachers Melissa Lepus (JX 4, p. 189), David Voorhees (JX 4, p. 193) and David Burns (JX 4, p. 210) validate the Grievant's position on this point. Moreover, Donna Marshall (JX 4, p. 202), David Colley (JX 4, p. 206) and Fred DeJorge (JX 4, p. 215) at various times were observers in the Grievant's class and never heard him refer to the youths unprofessionally at any time. The testimony of Lavinder, grievance chairperson and a teacher with twenty-nine years of experience indicated that it was common for staff to use unprofessional language when talking with each other.

Regarding the misuse of Grievant's computer, the other State of Ohio employee who was involved was also disciplined. Ashley Elder ("Elder"), also a teacher, was found to have violated ODYS work rules 5.01P, 5.04P and 5.28P. [UX 3] Elder received a written reprimand on March 6, 2014. [UX 3]

The Union contends that Grievant's removal is punitive, not corrective. The Employer failed to apply any principal(s) of progressive discipline as required by Article 13.04, and just cause did not exist to remove the Grievant. The application of the just cause standards protects against unreasonable and arbitrary actions in administering workplace discipline. The admission by the Grievant during his investigatory interview (JX 4, pp. 226-298) and at the pre-disciplinary hearing indicates that some discipline was warranted, but termination was unreasonable.

With respect to the Employer's position regarding the timeliness of advancing the grievance within ten days of April 22nd, the Union offered the following:

1. April 22nd at 2:07 p.m.: Lavinder emails Paar (Labor Relation Officer – 2) requesting that a grievance number be assigned to the Miley grievance which was included in the email.

2. April 24th at 8:35 a.m.: Lavinder emails Blake (Labor Relations Officer) requesting that the attached two page grievance be advanced to Step 2.

3. May 12: Blake receives the Miley grievance via U.S. certified mail dated May 8th at which time the grievance was assigned a processing number.

While the grievance did not arrive to the Employer via U.S. certified mail within ten days of April 22, 2014, the Union complied with the spirit of timely notification by providing a copy of the grievance to the Local CRO (Paar) on April 22nd and to LRO (Blake) on April 24, 2014.

The Union, further contends that the CBA requires forty-five days after the pre-disciplinary hearing of March 17, 2014 to issue a written decision and provide notification to the employee ". . . and the OEA LRC." [CBA Article 13.03] Kerri Hoover did not receive the written decision within forty-five days; however, she received the written decision on May 8, 2014, or seven days after the deadline. [UX 2] The Union states that the parties failed to comply with the timelines and both parties are at fault, with neither party gaining an advantage.

The Union seeks reinstatement, back pay, reimbursement of health insurance and other remedies to make him whole.

DISCUSSION AND CONCLUSION

After consideration of the testimony and the evidence submitted jointly or by either party, I find that the grievance is granted in part and denied in part. My reasons are as follows.

The facts for the most part are not in dispute, nor is the credibility of the witnesses of what occurred. The internal investigation conducted by Investigator Haynes lasted approximately one hundred twenty (120) days with the report of investigation (JX 4) consisting of three hundred twenty five (325) pages including thirty three (33) witness interviews. Haynes interviewed twenty-two (22) administrators, staff and teachers; and eleven (11) youth. The report of investigation was thorough. Haynes' report reached the following conclusions:

(1) Unsubstantiated: Grievant touched youth inappropriately.

(2) Substantiated: Grievant used unprofessional language referring or talking about female youth.

(3) Substantiated: Grievant misused State of Ohio computer equipment.

(4) Substantiated: Teacher Ashley Elder misused State of Ohio computer equipment.

The report clearly concluded that the Grievant and Elder had engaged in inappropriate conduct regarding the use of their computers. Both Grievant and Elder admitted their wrongdoing and were charged with violating DYS Policies. The Grievant and Elder were charged with identical Rule violations, except, Rule 6.04P. The Grievant was charged with violating Rule 6.04P, whereas Elder was not.

Regarding the timeliness issue, the Union was six (6) days late in perfecting its Step 2 appeal by U.S. certified mail to the Employer. Conversely, the Employer was seven (7) days late

in issuing its written decision to the OEA LRC after the March 17, 2014 pre-disciplinary hearing. Both parties opine that they acted in good faith and rational reasons exist for the delays. However, the Employer seeks to have this matter summarily resolved in its favor and offers little weight to the Union's position since it was not raised until the hearing. I disagree.

The timeframes contained in Article 5 are designed for consistent and efficient resolution, particularly when removal is involved due to the consequences at issue for both parties. However, as a result of the delay of both parties, neither side was harmed and no evidence suggests that either delay was done in malice.

Even though the Union raised its timeliness issue at the hearing, substantive and procedural arbitrability is not waived and can be raised by any party up to and including the hearing. See, *Elkouri & Elkouri*, 6th Ed., pp. 287-290. No waiver occurred by the Union and the minor delays impacted the parties similarly. In other words, the minimal time defect must be balanced when both parties failed to comply with the procedural requirements in the CBA. Therefore, the Employer's request to terminate this matter due to the Union's failure to comply with Article 5.04 is denied.

I do find that just cause existed to discipline the Grievant for his on-duty behavior regarding the use of inappropriate language and the misuse of his computer. However, given the applicability of the work rules to this misconduct, the discipline issued to Elder, and mitigation principle for consideration, I will now discuss whether or not the record indicates that removal was the appropriate discipline.

The Union contends for a variety of reasons that the Employer failed to consider mitigation factors and/or the concept of corrective behavior. Specifically, the Union concludes that removal is not commensurate with the offense. The Grievant admitted on several occasions

including at the hearing that he used unprofessional language when talking with other staff, and he distributed several emails that he originally viewed as political commentary that contained inappropriate words.

The Union argues that the Grievant had no discipline for past behavior, good performance evaluations and long service were factors to mitigate against removal. Additionally, Elder only received a written reprimand for violating the identical rules – except Rule 6.04P (rule prohibiting unprofessional language when talking to or referring to the female youth). Therefore, the record must contain evidence to find the violation of Rule 6.04P provides the aggravated conduct that makes removal, as opposed to any other range of penalty the appropriate remedy.

An analysis of the record fails to establish that the Grievant used inappropriate language when **talking to** any of the youth. The interviews of the youth establish a split as to whether the Grievant talked to the youth inappropriately or not. Several youths stated that he did and several indicated that he did not. Youth statements: #218265 (JX 4, p. 78); #217955 (JX 4, p. 88); and #217002 (JX 4, p. 99); #217805 (JX 4, p. 161). I find that the record fails to establish that the Grievant violated Rule 6.04P, in that he talked to the female youth inappropriately. The adult and youth statements coupled together, fail to provide the clarity and consistency to conclude that inappropriate language was used by the Grievant in the youth's presence.

The evidence through testimony of Lavinder and witness statements[2] also suggests that other teachers have had or witnessed other conversations that referred to the female youth at SCJF in less than professional terms when talking with each other. The Employer argues that inappropriate language of any type when referring to or talking about the youth in this

[2] Tiara Williams (JX 4, p. 99); Kim Crider (JX 4, pp. 156-157); Tammy Dearden (JX 4, p. 185); Melissa Lepus (JX 4, p. 189); David Voorhees (JX 4, p. 193); Donna Marshall (JX 4, p. 202); David Colley (JX 4, p. 206); David Burns (JX 4, p. 210); and Fred DeJorge (JX 4, p. 215).

environment cannot be tolerated, even if just "venting" to a co-worker. However, no evidence exists to indicate that any employee has been counseled or disciplined for this behavior.

Other co-workers' statements indicate that an environment existed among staff that facilitated the use of words such as "bitches" and "beeotches" as not uncommon. Both the Grievant and Lavinder testified that the terms are used by management as well. No evidence was offered to refute the foregoing. The report of investigation contains ten statements from teachers and staff that corroborate the Geivant and Lavinder's position. I find that the Employer has implicitly condoned this practice and the record is void of any employee who was disciplined in the past for this behavior.

The Employer seeks to provide a safe and protective environment for youths under its supervision. DYS employees are commended for their efforts in dealing with the youth under their control. The Grievant, like the other employees, is required to act professionally at all times. It is unrefuted that the Grievant violated the General Work Rules, but not in an egregious manner that precludes Michael Miley from being employed at DYS. Simply, the penalty was excessive and unreasonable. What's the appropriate remedy? Due to the record, the Grievant was disciplined for just cause; however, removal was inappropriate.. Therefore, the grievance is granted in part, and denied in part.

AWARD

The Grievant shall be suspended without pay for five (5) days, and is entitled to reinstatement and to any economic harm, including back pay (less interim earnings) as a result of the removal. Any and all rights and benefits, including seniority, shall be restored to the Grievant as if he wasn't removed. The Grievant shall be reinstated within thirty (30) days of this Award.

Jurisdiction is retained for thirty (30) days to resolve any and all issues associated with the implementation of this Award.

Respectfully submitted this 11th day of February, 2015.

Dwight A. Washington, Esq., Arbitrator