

ARBITRATION BETWEEN:

Fraternal Order of Police, Ohio Labor Council, Union

Stephen Ritter, Grievant

v.

Fairfield County Sheriff's Office, Employer

OPINION AND AWARD

ARBITRATOR RICHARD W. CROLL

November 28, 2011

PROCEDURE

This dispute involves the Fairfield County (Ohio) Sheriff's Office (Employer) and the Fraternal Order of Police, Ohio Labor Council, Inc. (Union); parties to a Collective Bargaining Agreement dated December 16, 2008 – December 15, 2011 (Agreement). A grievance was filed over the termination of Stephen Ritter (Grievant). This grievance was processed through the procedures in the Agreement. However, the parties were unable to resolve the grievance and it was submitted to Arbitration under the terms of the Agreement and the Federal Mediation and Conciliation Service (FMCS).

Richard W. Croll, Arbitrator was selected by the parties to hear this dispute and the parties stipulated that it was properly before him for a decision on the merits of the grievance. A hearing was held in the offices of the Sheriff at 239 West Main Street, Lancaster, Ohio on September 12, 2011. The parties were allowed a full opportunity to present evidence, examine and cross-examine witnesses, and to present argument. The parties elected to present written argument to the Arbitrator on October 17, 2011 and their briefs were received by him on that date. With the receipt of the briefs the Arbitrator declared the hearing closed and under the terms of the Agreement the Arbitrator has thirty (30) days from the close of the hearing to post an opinion and award to the parties. The Arbitrator has requested the parties extend more time and it has been granted.

ISSUE

The parties stipulated to the following issue: Was the termination of Stephen Ritter for just cause? If not what shall the remedy be?

APPEARANCES

Employer:

Marc A. Fishel, Esquire
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Columbus, OH 43215

Union:

Paul Cox, Esquire
FOP/OLC, Inc.
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EXHIBITS

Joint #1	Agreement, December 16, 2008 – December 15, 2011.
Joint #2	Grievance report, 3 Pages.
Joint #3	Notice of pre-disciplinary conference, October 1, 2010.
Joint #4	Notice of pre-disciplinary conference, October 20, 2010.
Joint #5	Notice of termination, October 28, 2010.
Employer #1	Sheriff's policy, 3.07.
Employer #2	Hand Gun Qualification Sheet, 9/17/2010.
Employer #3	Hand Gun Qualification Sheet, 9/24/2010.
Employer #4	Hand Gun Qualification Sheet, 2 pages, 9/29/2010.
Employer #5	Norris Report on Grievant, 4 pages, September 21, 2010.
Employer #6	Stephens Report on Grievant, 1 page, 9/21/2010.
Employer #7	Norris Report on Grievant, 2 page, September 30, 2010.
Employer #8	Rules of Conduct, 1.01 – 1.21, Signature page, 5 page.
Employer #9	Kennedy Memo, 09/29/2010
Union #1	Grievant medications list, 6/28/2010.
Union #2	Grievant discharge instructions, 7/28/2010
Union #3	FMLA 10/10 -10/12/2010
Union #4	Physicians Excuse 10/8/10 dated 10/6/2010.
Union #5	Grievant prescriptions, 10/10/2010.
Union #6	FMLA 10/10 – 12/2010

PERTINENT AGREEMENT LANGUAGE , LAW & WORK RULES

Section 11.2. Discipline

The Employer may take disciplinary action against an employee in the bargaining unit only for just cause.

Section 11.3. Pre-disciplinary Conference

- B. At the pre-disciplinary conference the employee may elect to do any of the following:
1. Appear at the conference and present an oral or written statement;
 2. Appear at the conference and have a representative present an oral or written statement;
 3. Have a representative appear at the conference and present an oral or written statement in place of an employee who is physically unable to appear at the conference; or
 4. Elect to waive the opportunity to have a pre-disciplinary conference.

An employee who, without notice, fails to appear, or fails to cause a representative to appear, at a pre-disciplinary conference shall be considered to have waived the conference. The neutral supervisor shall prepare a written report on the conference, and the employee shall be given a copy of the report.

OCR 109.801 Firearms requalification program.

Each year, any of the following persons who are authorized to carry firearms in the course of their official duties shall complete successfully a firearms requalification program approved by the executive director of the Ohio peace officer training commission in accordance with the rules adopted by the attorney general pursuant to section 109.743 of the revised code: any peace officer, sheriff, ... who carries a firearm in the course of official duties;...

Fairfield County Sheriff's Office Regulation 3.07:**II Policy Statements**

- A. All sworn personnel shall annually satisfy Sheriff's Office qualification standards with any firearm they intend to carry while on or off duty. This does not apply to personal rifles, shotguns, and /or handguns used only for recreational purposes.

BACKGROUND

The Sheriff's Department provides law enforcement for the county. Two of the primary law enforcement functions for Fairfield County are the road patrol and the operation of two jails. The Deputy Sheriffs are certified by the Ohio Peace Officer Training Academy (OPOTA) as sworn peace officers. This organization has developed statewide rules on the certification of sworn peace officers. All officers who work road patrol must be certified; additionally, the sheriff requires as a condition of employment that the deputies who work in the jail also have the OPOTA certification. A condition of the certification is that the deputies must requalify with firearms each year.¹ The OPOTA provides the standard for requalification for the entire state. The Grievant, who was hired in January, 2003,² was assigned at the time of his termination in one of the jails.

The Sheriff terminated the Grievant after he failed to requalify with his weapon and additionally he was observed on two separate dates by his Sergeant while sleeping on duty in the jail.³ The instant grievance was timely filed and processed by the Union and the Sheriff. A resolution was

¹ RC 109.801

² Witness testimony.

³ Termination Letter, Joint #5.

not reached by the parties and binding arbitration as provided in the Agreement and the rules of FMCS was requested.

DISCUSSION AND OPINION

The facts of this dispute are substantially not in conflict. The parties agree that the events on which the Employer based his rationale for this termination did occur and they started in mid September through late October, 2010. There is also agreement that the Grievant had a clean employment record in the years prior to his firing. The major disagreement between the Union and the Employer is that the Employer's view of the reasons for the termination is both legal and work related.⁴ The Union's view of both the legal issue and the work related issue is that the Grievant had some major health problems and that the Employer should have known that and should have sought assistance for the Grievant rather than disciplining him. The question being asked by the parties is whether the Employer had just cause to discipline (terminate) the Grievant on October 28, 2010.

Annual Weapon Requalification, ORC 108.801: The Union has not contested that peace officers continued employment with their departments under Ohio Law requires that they must annually requalify with their weapons. A review of the Grievant's attempts to requalify with his weapon based on the testimony of his superiors and trainers indicate that he was not

⁴ The legal issue was that the Grievant lost his certification as a peace officer when he failed to qualify with his weapon; the work issue is that he was sleeping on the job.

able to requalify and his weapon was taken from him and he was put on limited duty in the jails.

Sergeant Collins, a patrol shift supervisor and a certified firearms instructor for ten years was the first to test the Grievant for his annual weapon requalification. Collins said that the firearms test used by the Department is developed by the certified firearms instructors in the Fairfield Sheriff's Department and approved by OPOTA.⁵ The second item of the Grievant's test results, Long Range, was marked F (failed). Collins said if a deputy fails the first attempt to qualify, the deputy is given shells, time off to practice and rescheduled for another attempt to qualify.⁶ The second attempt was scheduled for a week later on September 24, 2010 again with Collins as the tester. The test sheet for the September 24th test indicated that the Grievant missed the same test as the previous week and he again failed to qualify. The policy for a second failure is that the Deputy's gun is taken from him. He is then assigned to an outside of the department trainer, in this case Terry Dunlap who has trained with the department for nine years. The Grievant worked with Dunlap for approximately a day and at the conclusion of that day, September 29, 2010, he took the test for a third time. He failed yet again, missing the long range part of the test.

Collins was present on the 29th at the Dunlap Range and talked to the Grievant about failing the test with Dunlap. Collins testified that the Grievant said he was confused and did not know that Dunlap was testing him. Collins agreed to let the Grievant take the failed portion of the test

⁵ Employer #2 is the score sheet used by Collins for the Grievant's test on September 17, 2010. The test itself is contained on the score sheet. While the deputies have three chances to pass the tests, they only have to pass once.

⁶ Directive 3.07, Employer #1.

again at that time on Dunlap's range. He supplied him with shells for three tests and the Grievant failed the tests.⁷

There is no argument that the failure of the Grievant to requalify with his weapon, as described above, makes him ineligible to serve as a sworn peace officer. This is both a violation of the above cited ORC and the policies of the Fairfield County Sheriff's Department.⁸ The Grievant continued to be assigned to the jails. However, on September 30, 2010, after failing his weapon tests for at least the third time, he was neither allowed to wear clothing identified as that of a peace officer nor to have contact with the prisoners.⁹

Lieutenant Gary Kennedy wrote a memo to the Sheriff on September 29, 2010 outlining the Grievant's failure to requalify with his weapon. Kenney concluded his memo with:

"It is my opinion that (Grievant's) lack of proficiency with a firearm now excludes him as a certified peace officer in this state. Per Directive 3.07 (W), I am requesting departmental charges and his removal from his position as Deputy Sheriff." (Employer #9)

Asleep while on duty: On September 21, 2010, Sergeant Steven Norris, the third shift jail supervisor, filed a multi-page typewritten report on the activities of the Grievant during that shift.¹⁰ The Grievant had reported that he was going to be late for his shift and he was late. The report cited that Norris's observation of the Grievant when he arrived, both outside in the parking area and inside with the Sergeant, was that, "His walking was very

⁷ Two other deputies who also failed their initial tests with Collins were sent to Dunlap for training and retesting. Both passed the test after training with Dunlap.

⁸ Employer #1, Directive 3.07.

⁹ Employer #8, P2.

¹⁰ Employer #5.

slow.” (Emp. #4, P.1) He further described the Grievant as follows, “..., his eyes were very heavy, as if he were going to fall asleep, and his speech was somewhat slurred.” (Emp. #4, P.1) Norris asked what was wrong and the Grievant replied he had not slept for a couple of days, but he did not know why. Norris further inquired of if the Grievant if something was wrong; family, money or the gun range. The Grievant answered no, but that it was not fair that he did not get three chances to qualify on the gun range. Norris, who was at the range when the Grievant failed his test, said that he did get three chances; but the Grievant argued with Norris. Norris asked the Grievant why he was walking like he was intoxicated and he said he had pulled a muscle. Norris asked the Grievant if he had taken too much of his medication, and he replied no. Norris said, the Grievant then appeared to “Wake Up” and went to work.

Later in the shift Deputy A. Stephens asked Norris if he could observe the Grievant on his camera. Norris and Stephens both observed the Grievant attempting unsuccessfully to open a cell door for a check. Norris directed the other deputy to go assist the Grievant and have him then report to Norris.¹¹

Norris informed the Grievant he was securing his weapon and taking him to the hospital to be tested for drugs or other problems.¹² While waiting for other deputies to arrive to cover for them, the Grievant informed the Sergeant he had been diagnosed with sleep apnea in 1990. Norris left the Grievant at the hospital where he was given several tests.

Sergeant Norris reported a second incident of the Grievant sleeping on duty on October 30, 2010. (Employer #7) That night when Norris came to

¹¹ Deputy Stephens was asked by Norris to file a written report on his observations of the Grievant while attempting to open the cell door and sleeping on duty on the 21st and he did so. Employer #6

¹² Norris cited (3.34 A – 2 Reasonable Suspicion Testing).

work he was informed that the Grievant would not be to work because his wife could not wake him. Then, prior to the start of the shift, the Grievant's wife called and said he was awake and coming to work. Norris went into the Central Control Room at around 0325 where he found the Grievant. "With his feet up on the counter and reclined back, asleep, snoring loudly."¹³ Norris said that he did not wake the Grievant, but he and other deputies continued to converse and operate in normal noise and fashion and the Grievant did not wake for fifteen minutes. Norris said that when the Grievant woke he remained in the same position. Norris said hi, and the Grievant responded, hi. Norris then asked how he was and the Grievant responded, "Okay." and then went back to sleep. Norris found out that the Grievant had been asleep for approximately 35 minutes before he found him. Norris proceeded to get a vehicle and then woke the Grievant. Norris said, "I finally had to take a hold of his shoulder and shake him." (Employer #7) Norris contacted another Sergeant and had him witness his conversation with the Grievant. He told the Grievant he could not report to work again wearing any clothes or gear that identified him as a peace officer. He also told the Grievant he was driving him home which the Grievant protested; however, Norris persisted and did drive him home.

Pre-disciplinary conference and charges against the Grievant: The Sheriff on October 1, 2010 sent the Grievant a notice of a pre-disciplinary conference scheduled for Friday, October 8, 2010 at 9 am in Chief Perrigo's office. The notice contained the following charges:

¹³ Employer #7.

“Charge I: You are hereby charged with violating Rule 1.04 which reads in pertinent part, “Sheriff’s Office personnel hold their positions during good behavior and efficient service, but may be suspended or dismissed for incompetence, gross neglect of duty or for any other just and reasonable cause.

Charge II: You are hereby charged with violating rule 1.14 which reads in pertinent part, Sheriff’s Office personnel are to report for duty and remain on duty, at the time and place required by their assignment or as ordered, and be physically and mentally fit to perform their duties.

Charge III: You are hereby charged with violating Rule 1.20 which reads in pertinent part “personnel shall be strictly accountable for complete compliance with the firearms policy of the Sheriff’s Office.”
(Joint #3)

On October 8, 2010 the Grievant did not attend the pre-disciplinary conference in the office of Chief Perrigo; however, he was represented by John Looman from the Union. Following this meeting Looman sent a note from the Grievant’s physician to Chief Perrigo that the Grievant was:

“Emotionally and mentally unfit to attend meeting on 10/8/10.”(Un. Ex. #4)

Looman and Perrigo arranged a subsequent pre-disciplinary conference for the Grievant with Perrigo on Wednesday, October 27, 2010 at 9 am. The

notice of this meeting sent to the Grievant by the Sheriff included the following statement:

“Failure to appear will constitute a waiver of the conference.” (Joint #4)

The notice was signed received by the Grievant on October 20, 2010 at 1700 pm. Neither the Grievant nor the Union showed at the conference scheduled for the 27th. Additionally, there was no communication from the Grievant or the Union about their non-attendance, either before or following the date of this conference. Upon hearing of the Grievant's non-attendance at the pre-disciplinary conference, the Sheriff sent the Grievant the following notice terminating his employment from the Sheriff's Office:

October 28, 2010

To: Deputy Stephen Ritter, FC 363

From: Sheriff Phalen

Subject: Final Disposition

On October 27, 2010 you again failed to show up for your pre-disciplinary conference. You did not call or notify anyone of your intentions. On October 8, 2010 you also failed to show up for a pre-disciplinary conference and also failed to notify the Sheriff's Office of your intentions. Mr. Drum from the FOP states his office has talked to you once about turning in FMLA paperwork but hasn't had any other contact with you regarding the current office charges. At this

point I am assuming you are waving your right to a pre-disciplinary conference.

I have reviewed the information submitted by your chain of command and Lt. Kennedy. There is little doubt that you were sleeping on duty twice and that you are unable to satisfy firearms qualification standards.

I am terminating your employment with this office. You are to turn in all Sheriff's Office items in your possession.

Sincerely,

Dave Phalen(Sig.)

*Sheriff Dave Phalen*¹⁴

Again, the basic facts leading to this termination are not being disputed. The Union and the Grievant agree that he failed to requalify with his weapon and his sleeping on the job. They also agree with the Employer about the seriousness of these incidents. Their argument is that the Employer *should have known* that the Grievant failed to requalify with his weapon *because he was not well*; and *should have known* he was sleeping on the job *because he was not well*. The Employer agrees that the Grievant's behavior was aberrant; Lt. Perrigo agreed on this with Union council during the hearing. But a major question has to be, why had his behavior changed? What should the Employer have known about the Grievant?

There are several circumstances that could account for why the Grievant was failing weapon's qualification and sleeping on the job. In addition to

¹⁴ Joint #5.

illness or poor health, the Employer testified that the change in the Grievant's behavior could have been caused by drugs, stress, insubordination, family problems, alcoholism and perhaps other reasons. When Sergeant Norris questioned the Grievant on September 21, he asked about his health, marriage, failing the weapon qualification and other stress. The Grievant denied that there were any problems.

The Union's argument that the Employer had an obligation to ferret out an undisclosed medical condition and offset the charges against the Grievant just does not exist in either the Agreement or the law. Had the Grievant supplied the Employer of substantive medical reasons for his sleeping on the job and/or for failing his weapons requalification, then the Employer should have taken those reasons into consideration. But that did not happen here. Instead, the Grievant testified that he had not produced any evidence to the Employer that sleeping on the job and/or failing to requalify with his weapon was caused by a medical difficulty. He further testified that he had not produced such evidence because he did not know that there was a medical reason for his actions at the time he was employed by the Sheriff. He further testified that when he met with Dr. Poland on October 6th he did not ask him if there was a medical reason why he was failing his weapon qualification and sleeping on the job. While he verbally informed Norris on September 21, 2010 about having sleep apnea, he testified that he had first been diagnosed with it "20 years" previously, but that he had never given the Sheriff any documentation of sleep apnea as a medical problem. At the Hearing he testified that he did not supply the Sheriff with documentation about being medically impaired because he did not know he had a medical

problem at that time.¹⁵ It seems highly unlikely that the Sheriff would know the rationale for the Grievant's actions if the Grievant himself did not know.

FMLA: The Grievant cited being on FMLA at the same time he was terminated and also being on FMLA when his insurance was terminated. (Joint #2) While the Union spent little time or energy on the FMLA argument, it is clear from the citation offered by the Employer that the only time FMLA could have an impact on a termination is when the Employee is terminated for filing an FMLA.¹⁶ In this case the Grievant was terminated for violation of work rules and for failure to requalify with his weapon in violation of state law.

Summary: The Parties Agreement contains a comprehensive procedure for the Sheriff and the Union to utilize if there is a need to discipline an employee of the Sheriff's Department. In two instances conferences were scheduled for the Grievant to appear and explain what he thought was the reason 1) why he was sleeping on the job and 2) had failed to qualify with his weapon. At the first pre-disciplinary conference scheduled for October 8, 2010, (Joint #3) a Union Representative appeared and supplied the Chief with a medical excuse from the Grievant's physician and rescheduled the conference for October 27, 2010 (Joint #4). Neither the Grievant nor a Union Representative attended the second conference. The purpose of the pre-disciplinary conference is for the Union and/or the Grievant to respond to the charges contained in the notice of hearing, something they have never

¹⁵ Grievant's testimony.

¹⁶ "Moreover, it is not unlawful to terminate an employee while on FMLA leave, provided the taking of FMLA leave was not the cause for termination. See Santos v. Knitgoods Worker's Union, Local 155, 1999 WL 397500 *3 (S.D.N.Y. June 15, 1999)

done. The Grievant still has not provided the Sheriff with a substantive medical reason for his failure to requalify with his weapon and for sleeping on the job. While the sleeping on the job charge is a work rule and in some circumstances may be either debatable or mitigated, the failure of the Grievant to requalify with his weapon is a state law and there is no room for it to be set aside. Neither the Grievant nor the Union communicated any reason to the Sheriff or his staff why they chose not to attend the October 27th pre-disciplinary conference.

The following day the Sheriff terminated the Grievant. A thorough analysis of what the Sheriff knew about the Grievant on October 28, 2010, and a review of the steps he implemented establishes that the Sheriff followed the appropriate procedures and had just cause to terminate the Grievant.

AWARD

FMCS Case Number 111123-00695-6, Grievance denied.

Richard W. Croll

Richard W. Croll, Arbitrator

November 28, 2011

Date