

ARBITRATION DECISION NO.:

33

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Taxation

DATE OF ARBITRATION:

June 17, 1987

DATE OF DECISION:

July 14, 1987

GRIEVANT:

Zane Mustaine

OCB GRIEVANCE NO.:

G-87-0687

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

John T. Porter

FOR THE EMPLOYER:

Timothy D. Stauffer

KEY WORDS:

Just Cause

Breach Of Confidentiality

Duplicate Charges Commensurate

Offense - Breach Of Trust

ARTICLES:

Article 24 - Discipline

FACTS:

Grievant was employed with the Ohio Department of Taxation for nearly five (5) years, as an Agent 3. Prior to the incidents at issue Grievant had received no prior discipline.

The facts are as follows: Grievant's position as a Tax Agent 3 requires that Grievant receive and process tax monies in the form of cash and checks. On two occasions, January 15 and January 16 of 1987, Grievant entered two different branches of the same bank and inquired into the possibility of opening an account to deposit a check(s) made out to the State of Ohio. Grievant

showed a tax payment check to bank personnel stating that Grievant wished to deposit the check for safekeeping. Grievant left the bank on both occasions, after giving Grievant name, address and a telephone to bank employees. As a result of these actions, Grievant was discharged for failure to follow procedures.

UNION'S POSITION:

The Union contends that the Grievant's discharge was not for just cause. Grievant had no notice of discipline for breach of confidentiality until the arbitration hearing. The state did not prove dishonesty on the part of the Grievant "beyond a reasonable doubt," which is the standard that the Union argued was the proper standard of review. Also, the failure of the grand jury to indict the Grievant was persuasive on the issue of dishonesty. The Union argues that dismissal was an improper punishment under the principles of progressive discipline and in light of the Grievant's unblemished past record and actions.

EMPLOYER'S POSITION:

The Employer contends that the Grievant's discharge was for just cause. The charge of "breach of confidentiality" was encompassed within the charge of "failure to follow procedures" of which the Grievant was made aware. The proper standard of proof is the same for this dismissal as for any dismissal which is by a preponderance of the evidence. Additionally, the failure of the grand jury to indict the Grievant is irrelevant to the issues under the contractual agreement between the parties. Progressive discipline need not be imposed where the offense is of a serious nature and the Grievant has been proven to have been dishonest and has failed to follow procedures, including procedures with regard to taxpayer confidentiality.

ARBITRATOR'S OPINION:

The Union's argument that the Grievant was charged unfairly with "breach of confidentiality" is well taken. The broad statement that the Grievant "failed to follow procedures" cannot fairly embrace the charge, which carries a serious penalty of dismissal. Due process concepts of fairness require that a Grievant be made aware of all disciplinary charges.

The proper standard of proof to be used by an Arbitrator in decisions on disciplinary charges involving acts which are also criminal is not the "beyond a reasonable doubt standard." The arbitrator's task is to apply the terms of a private contract between the Union and management. The standard of proof is supplied by the contract, i.e. just cause.

The Grievant was charged with two offenses, 1) failure to follow procedures, and 2) dishonesty. The Grievant admitted to failure to follow procedures. The Grievant's dishonesty is proven by the circumstances and testimony of witnesses that the Grievant attempted to "deposit" a voluntary tax payment check in a private bank. Grievant sought to excuse the actions by highlighting poor procedures and inadequate supervision. These conditions do not excuse an attempt to deposit a state check in a private bank account.

The Grievant's dismissal was upheld.

AWARD:

Grievance is denied.

TEXT OF THE OPINION:

IN THE MATTER OF THE
ARBITRATION BETWEEN

Ohio Department of Taxation

and

OCSEA/AFSCME, Local 11

Grievance No.:

G87-0687

Grievant:

Mustaine

Hearing Date:

June 17, 1987

Brief Date:

June 26, 1987

For the Union:

John T. Porter,
Associate General Counsel

For the Employer:

Timothy D. Stauffer,
Attorney for the Ohio
Department of Taxation

Present at the hearing in addition to the Union's Counsel, Grievant, and Employer's Counsel were Samuel L. Sims (Tax Agent/Steward/Union witness), Patsy J. Adkins (Steward/employee of ODT/union witness), Arthur M. Suchta (Administrative Counsel, ODT/observer), Richard Drew Barber (Asst. Mgr., Dayton-ODT/witness), Ruben Payne (Supervisor ODT-Dayton/witness), Keith A. Palmer (Supervisor-Auditing ODT-Dayton/witness), Dorothy Hodson (employee ODT/witness), Carol Crofut (Asst. Admin-personnel ODT/witness), Christopher Wallace (Manager, Society Bank-Dayton/witness), Kelly Gevedon (Teller, Society Bank-Dayton/witness).

Preliminary Matters

Both parties agreed that the Arbitrator could tape record the proceedings for the purpose of "refreshing of memory." The Arbitrator stated and the parties acknowledged that the tapes would be destroyed simultaneous with the rendering of the award. Both agreed that the opinion could be submitted for publication.

The parties stipulated that the issue was properly before the Arbitrator. The parties agreed verbally that issue was whether the Grievant's discharge was for just cause, pursuant to Art 24 of the contract. Neither party requested that the witnesses be sequestered. All witnesses were sworn.

The Facts

The Grievant was at the time of the grievance an Agent 3 for the Ohio Department of Taxation. He had been employed by the Department for nearly 5 years. Prior to the situation at issue, Grievant had received no prior discipline. Grievant's duties included receipt and processing of tax monies in the form of cash and checks.

Around noon on January 15, 1987, the Grievant entered Society Bank and spoke to the Manager, Mr. Christopher C. Wallace. The gist of that conversation as related by Mr. Wallace is disputed by the Grievant. At the hearing, Mr. Wallace testified that the Grievant asked him how he could "open" an account "to deposit" a check made out to the State of Ohio. The Grievant identified himself as an agent of the State Department of Taxation and said that his supervisor had authorized his inquiry and actions. He showed Mr. Wallace a check for \$5557 and indicated that he had another check for \$980,000 to deposit. The Grievant told Mr. Wallace that he wished to deposit the checks for safekeeping because he was worried about their safety. Mr. Wallace left to consult others. While Mr. Wallace was gone, the Grievant left the bank after giving his name, address and a telephone number to another bank employee.

The Grievant tells substantially the same story; however, he maintains that he did not (1) ask that the check be deposited, (2) state that his supervisor authorized his inquiry, or (3) mention the amount of \$980,000. Rather, the Grievant testified that he asked the bank manager if a way existed to "hold" the check for safe keeping." The bank manager in his testimony on both cross examination and direct examination was firm in his testimony that Grievant had specifically asked to "deposit" the check in a checking account and stated that he was authorized by his supervisor. Subsequent to the Grievant's visit, Mr. Wallace called the Department of Taxation and spoke to Grievant's supervisor, Mr. Ruben Payne. Mr. Payne told Mr. Wallace that the Grievant's actions were unauthorized. Mr. Wallace reduced his memories to writing on January 16, 1987 (Employer's Exhibit No. 2).

On January 16, 1987 at 9:30 a.m., the Grievant entered another branch of Society Bank and went to the window of Teller Kelly Gevedon. Ms. Gevedon testified that Grievant said to her "I'd like to know if I can deposit this check in my checking account." The check he showed to the Teller according to her testimony was made out to the Department of Taxation and was for approximately \$5770. The Teller testified that she immediately became alert because the bank had notified all Tellers of the January 15th incident. Ms. Gevedon testified that she told the Grievant that she would need some identification because of the amount of the check. She testified that the Grievant gave her his driver's license. She also said that to her he began to appear "shakey". The teller took the check and the ID to a manager who called security. While awaiting security, she returned to the window and told the Grievant that he could not deposit a check made out to the State of Ohio. The Grievant told her that he had to return to work and that he now wanted to deposit his pay check. He then proceeded to deposit his paycheck. He had not previously made out a deposit slip for the pay check. The Grievant left the bank before security arrived.

The Grievant testified that his actions were substantially as testified to by the teller but that his words and intentions were different than she portrayed. He stated that he did not ask to "deposit" the check made out to the Department of Taxation, rather only inquired as to a method to "hold" the check for safekeeping. The Grievant testified that when he mentioned "depositing," he was talking about his payroll check. He said that the teller's testimony was correct that he had not prepared in advance a deposit slip for his payroll check. The Grievant testified that he considered himself on State of Ohio business while in the bank because he was asking how the check could be "held" for safe keeping. He also testified he was on his morning break. In response to a separate question, he testified that his main purpose that morning was to deposit his payroll check.

Another employee in Grievant's office testified that, in December of 1986 prior to these

incidents, Grievant had discussed with her a scheme whereby a tax agent could deposit voluntary tax payments into his/her own account and that because the payments were voluntary they would not be missed for a long period. During that period, the tax agent could get out of the country with the money. He indicated that such a scheme would be "nice." She further testified that the next day the Grievant told her that he had discussed the idea with his girl friend, and she had told him that the scheme was "not a good idea." The employee described her conversation with the Grievant as "friendly".

The same employee testified that tax checks (after processing by tax agents) were given to her and that she locked such checks in a locked cabinet behind her desk, especially designated for that purpose. She testified that prior to processing, checks were left on or in agents' desks.

The Grievant testified that on both occasions he had been merely attempting to find a way to safeguard the check. He testified that the \$5777 check was a voluntary tax payment which could not be processed without a vendor number and that he honestly believed that he had to hold on to the check until he received (from the vendor) either an active vendor number or the exact details of the transactions involved. Grievant testified that he could not fill out the Form No. 152 without the details nor send in the check (without details) unless he had an active vendor number. Mr. Barber, the assistant manager of the Tax Office testified that Form 152 could be filled out without sales details and illustrated the method. The Grievant testified that he had never been instructed in that precise method and that he believed that without further information he had to "hold" the check. The Grievant testified that he told his Supervisor, Mr. Payne, that he had the voluntary payment in question and that he did not have an active vendor number. According to the Grievant's testimony, the supervisor told him "hold on to it and take care of it." The supervisor, Mr. Payne, testified that he did not recall the exact conversation but agreed that he might have said something similar. The supervisor denied authorizing or discussing opening a bank account for the check with the Grievant.

The Grievant testified that his whole intention was to safe guard the check. He admitted in retrospect that his actions were "stupid". He said he believed that he had no choice but to "hold" the check and that he personally was "responsible" for the check. He testified that leaving the check in the office in his desk was "unsafe" and that locking the check in the drawer previously mentioned was also "unsafe". He said that he regarded the office as "unsafe" because of alleged prior office thefts. No evidence was adduced with regard to these alleged robberies. He testified that both bank employees had misunderstood what he was asking. He admitted during the hearing that he became aware that he had breached taxpayer confidentiality by showing the voluntary tax payment to the various bank personnel. He said, under cross examination, that he had never gone to Mr. Barber (the assistant manager) and asked for help on these matters when he was unclear as to proper procedures. Although not stated explicitly or clearly, one of the Grievant's contentions appeared to be that his supervisor Mr. Payne had not trained him on the use of Form 152 nor had he (the supervisor) been adequately responsive to his (the Grievant's) questions. The supervisor, Mr. Payne, testified as to the procedures involved. The Arbitrator found his answers confusing and lacking in clarity. Mr. Barber, the assistant manager, testified lucidly about the procedures.

Another tax agent, a witness for the Grievant, testified that checks were commonly left out on agent's desks, that the locked drawer had been available for about 1 year, and that the office had no safe. This agent testified that he too regarded the office as unsafe. He also testified that as a Union Steward he had formally protested these unsafe conditions to management; such protests were made subsequent to the Grievant's problems. This agent and another employee both in their capacity as union representatives testified that a charge of "breach of confidentiality" was not formally made against Grievant until the Arbitration hearing. Joint exhibit #1 (the grievance trail)

shows that both letters (February 3 and 6th) to the Grievant specified "dishonesty and failure to follow appropriate procedures" as the reasons for his dismissal. The Step 3 Response of the Department, dated March 17, 1987, makes no formal charge with regard to "breach of confidentiality" nor to R.C. 5703.21. In that Response, the crucial tax payment is referred to as a "confidential" tax payment. Ms. Crofut, the personnel officer of the Department, admitted on cross examination that the issue was not explicitly raised below. Ms. Crofut also stated that she, the personnel officer, did not believe that fairness required that the Grievant have notice of all the charges. At the Arbitration hearing, the Department alleged that the discharge of Grievant was for (1) dishonesty, (2) failure to follow procedures, and (3) breach of confidentiality under R.C. 5703.21, which statute mandated dismissal.

At the hearing, the Union introduced a letter from the Grievant's lawyer which stated that a grand jury had failed to indict the Grievant (Union Exhibit #1). The Employer did not object to the admission of this exhibit.

Much other testimony was elicited at the hearing with regard to procedures. The bottom line was that both sides admitted that procedures for check processing existed; however, these procedures were mostly unwritten. The testimony was significantly conflicting as to the clarity and explicitness of these processing procedures.

Union Position:

The Union argues that Grievant's discharge was not for just cause because

1. the Grievant had no notice that he was being disciplined for breach of confidentiality until the Arbitration hearing;
2. the state did not prove dishonesty on the part of Grievant "beyond a reasonable doubt" which standard the Union argues is the proper standard of review;
3. the failure of the grand jury to indict the Grievant was conclusive of the issue of dishonesty;
4. dismissal was an improper punishment under the principles of progressive discipline in light of Grievant's past record and actions; and
5. regardless of the standard of proof used, the State failed to prove its case.

State's Position:

The State argues that Grievant's discharge was for "just cause" because

1. the charge of "breach of confidentiality" was encompassed within the charge "failure to follow procedures";
2. the proper standard of proof is the same for this dismissal as for any dismissal and "beyond a reasonable doubt" is an improper standard;
3. the failure of the grand jury to indict the Grievant is irrelevant to issues under the contract;
4. progressive discipline need not be imposed where the offense is of a serious nature; and
5. regardless of the standard of proof, the Grievant was proven to have been dishonest and proven to have failed to follow procedures, including procedures with regard to taxpayer confidentiality.

Discussion

The Union's argument that the Grievant was charged unfairly with "breach of confidentiality"

(pursuant to R.C. 5703.21) is well taken. A perusal of the grievance trail reveals that prior to the Arbitration, no explicit charge of breach of confidentiality was made against Grievant. The designation of the tax payment as "confidential" in the Step 3 Response was insufficient to put the Grievant on notice of the charge. The broad statement that the Grievant "failed to follow procedures" cannot fairly embrace a highly specific charge detailed in a statute which carries the serious penalty of dismissal. Contrary to the testimony of Ms. Crofut, the personnel administrator, due process concepts of fairness require that a grievant be notified of all disciplinary charges.

A major controversy exists as to the proper standard of proof to be used by Arbitrator in decisions on disciplinary charges involving acts which are also criminal. (See Elkouri and Elkouri, How Arbitration Works at 661-663; see also Evidence in Arbitration by Hill and Sinicropi, pp. 32-39.) This Arbitrator agrees with those persons who reject the use of "the beyond a reasonable doubt standard". The Arbitrator's task is not a public one; rather, the Arbitrator's task is to apply the terms of a private contract between the union and management. In a sense, the standard of proof is supplied by the contract, i.e., just cause. To attempt to equate exactly that standard which has evolved in labor-management practice with the standards applied in civil and criminal courts can lead to certain semantic game playing. The consequences attached to dismissal from a job are very serious to the individual. However, to equate those consequences with the consequences of a criminal action, i.e., prison terms, fines, loss of civil rights, life long stigma, is over-reaching. On the other hand, arbitrators have long recognized that dismissal is the ultimate labor sanction and that the economic and social consequences of dismissal on an individual can oft times be devastating. Such consequences are particularly devastating if one is fired for an action which calls into question the employee's character. If one must delineate the comparable standard of proof to be used in a case such as this one, the Arbitrator opts for less than "the reasonable doubt" and significantly more than a "mere preponderance of the evidence." The standard used comes closest to "clear and convincing". Caveat: This Arbitrator regardless of semantics involved in standards of proof regards dismissal as the last resort (after progressive discipline) in most cases and the first resort only in cases where the Grievant's offense is so serious that the arbitrator cannot in good conscience return the employee to work.

The Union's argument that the grand jury's decision is binding or even highly persuasive is erroneous. (See Hill and Sinicropi at 375-382, particularly at FN 42.) The admission of the grand jury's decision is itself questionable. The purposes of the two forums are entirely different; the rules of evidence are significantly different. The Arbitrator heard none of the evidence or arguments of the other forum. Again, the Arbitrator's task is to find "just cause", if it exists, under the contract. The findings of such collateral proceedings are irrelevant.

The use of dismissal in this case is not barred because progressive discipline was not imposed on Grievant. Employers have long had the right to by pass corrective discipline where the first offense is a serious one, such as a charge of dishonesty. (See Weiner, Bompey, & Brittain Wrongful Discharge Claims at 112-115. See also Elkouri and Elkouri at 673.)

The Grievant is charged with two offenses 1) failure to follow procedures and 2) dishonesty. The Grievant admitted that he failed to follow procedures. The evidence revealed that his failure was mitigated by a work situation which contributed to but did not excuse his failures. The lack of written policies and the apparent poor supervision contributed, in the Arbitrator's mind, to the situation at hand. Were the procedural issue the sole issue, dismissal could not be upheld, and any discipline would be mitigated by the circumstances.

However, the Grievant was also charged with dishonesty. Neither side offered a coherent definition of dishonesty nor does the contract define dishonesty. To be a procedurally fair charge, "dishonesty" must encompass acts which a reasonable person in Grievant's position knows or should know to be prohibited. Webster's New Collegiate Dictionary defines dishonesty to include

"lack of trustworthiness, truth, or honesty". Trustworthiness means that "(1) a charge or duty is imposed in faith or confidence or as a condition of some relationship; (2) something is committed or entrusted to one to be used or cared for in the interest of another." The Arbitrator finds that the nature of the department and the duties of the department and its personnel are crucial in this decision. The Grievant was entrusted with money, not only money but public monies, the taxes of citizens. The question becomes "did the Grievant handle this entrustment in a "trustworthy," i.e., "honest" manner?"

Two disinterested witnesses testified that Grievant attempted to "deposit" a voluntary tax payment check in a private bank. That one person might have misunderstood his expressed wishes is plausible but that two disinterested persons in separate locations, on separate occasions, with distinct personalities heard the same words and came to the same conclusions is implausible. No bias, prejudice, or incompetency was adduced with regard to these witnesses. The Grievant's contention that the Tax Office was so unsafe as to require these actions are equally unbelievable. Other agents according to the testimony of Grievant's own witnesses left checks on and in their desks. Whether this practice is wise is not the issue here. The question is whether the Grievant's alleged fears of "unsafe" conditions were reasonable. The Grievant admitted knowledge of the locked drawer but declared that too unsafe. No other testimony elicited evidence of alleged office robberies other than Grievant's own allegations. In fact, the assistant manager testified to the contrary.

The Grievant sought to extricate himself from his untenable position by pleading "stupidity". Stupidity does not exclude a dishonest intent. The testimony of the fellow employee with regard to Grievant's discussion of the scheme to convert tax payments could have been, without more, innocent joshing. At the minimum, the conversation indicated Grievant's knowledge of such a scheme. Moreover, the Grievant's own testimony indicated that he discussed the dishonest scheme with a second person and discussed the scheme a second time with his fellow employee.

The Grievant sought to excuse his actions by highlighting poor procedures and inadequate supervision. These conditions do not excuse an attempt to deposit a state check in a private bank account. Moreover, Grievant was not a new employee. After five years, he was on notice of the fiduciary nature of a tax department. If he needed advice to protect himself from liability of a stolen check he had access to Union officials and access to Mr. Barber the assistant manager and others, if he found Mr. Payne unresponsive. Grievant's explanation for his behavior is implausible. The Arbitrator finds the Grievant's actions untrustworthy and hence, dishonest. In a tax department, such behavior constitutes a serious offense which merits dismissal.

Award

Grievance is denied.

July 14, 1987

Date

Rhonda R. Rivera, Arbitrator