

ARB Decision #1005

OPINION AND AWARD
Case No. 29-03-2007
- 0406-0127-01-14

In the Matter of the Arbitration
- between -
State of Ohio
Rehabilitation Services Commission
- and -
Ohio Civil Services Employee Association,
AFSCME, Local 11, Chapter 2538

Arbitrator: John J. Murphy
Cincinnati, Ohio

For the Union: Sharon Ralph, 1st Chair
OCSEA/AFSCME, Local 11
390 Worthington Road, Ste. A
Westerville, Ohio 43082-8331

John Gersper, 2nd Chair
OCSEA/AFSCME, Local 11

Also Present:

Grievant

Diane Bagdassarian
Business Enterprise Specialist

Keith Goudy
Union Steward

For the Employer: Allison Vaughn, 1st Chair
Ohio Rehabilitation Services Commission
400 E. Campus View Blvd.
Columbus, Ohio 43235

David Long, 2nd Chair
Office of Collective Bargaining

Also Present:

S. Michael Hanes
Director, Bureau of Services for the
Visually Impaired

Lisa Kemp
Assistant Manager, Business Enterprise
Program

Jeffrey Tolle
Business Enterprise Operator

Annette Lutz
Business Enterprise Operator

Karen Raines
Business Enterprise Operator

BACKGROUND:

This case involves the unfortunate discharge of an employee of the Rehabilitation Services Commission with twenty-seven years of service and without any active discipline on his record. He was terminated by the Commission effective April 4, 2007, and the Commission's decision was grieved by the Union. The parties agreed that the matter was properly brought to arbitration. There follows a brief contextual note and a listing of the four charges asserted by the Commission as the basis for the discharge.

A.) Contextual Note

This case--in its broadest sense deals with how Ohio aids the visually impaired--the blind--among its citizens. Encouraged by a federal law, the Randolph-Shepherd Act, Ohio and other states have undertaken the project of assisting persons severely disabled through blindness to become self-employed entrepreneurs and to live independently. The vehicle for this goal is the Business Enterprise Program--an entity found in several states. (The State Helps the Blind Provide for Themselves, New York Times, August 17, 2008 at p. 22). In Ohio, the Business Enterprise Program is run by the Rehabilitation Services Commission, the ultimate employer of the Grievant in this case.

The Program begins with an identification of those blind persons who may have the capacity to be successful in running a business as a self-employed person. The State has a process that includes the blind candidate to decide if the Business Enterprise Program is appropriate as a vocational field for the blind person under consideration.

The blind persons chosen for the Program are then placed in an extensive training program where their progress is monitored. The successful candidates are then licensed as Business Enterprise Operators. The operators are then entitled to bid to manage and operate cafeterias and vending machine locations in state and federal buildings as well as state highway rest areas. There are approximately 120 such locations in Ohio.

The blind Operator is not left unsupported as he or she engages in this entrepreneurial venture. A Business Enterprise Specialist is assigned to monitor the Operator by checking monthly financial reports, making site inspections, reviewing equipment and product inventories, and maintaining relationships with the owner of the building containing the cafeteria or vending machine operation. The specialist also performs an annual assessment of the performance of the Operator.

At the time of his discharge, the Grievant was a Business Enterprise Specialist^{1/} since 1993. As a Specialist, he had been assigned to monitor operators in five facilities, including facility 259 located in the headquarters of the Ohio Rehabilitation Commission itself.

Facility 259 was managed and operated by a Business Enterprise Operator named Kirtley. The Grievant's relationship as the Specialist monitoring Operator Kirtley's activities and the ensuing investigation of this relationship is at the core of this discharge case.

B.) Charges Against the Grievant

The parties stipulated^{2/} that the Commission's decision to discharge the Grievant was based upon the Grievant's alleged

^{1/} The Grievant held a merged position title at the time of his discharge. He was both a Business Enterprise Specialist and Business Enterprise Coordinator. All of the activities, however, that relate to the Employer's decision to discharge, occurred during the performance of his duties as a Specialist.

^{2/} It may appear surprising that the matter of the charges against the Grievant was the subject of a stipulation by the parties during the arbitration hearing. However, approximately 200 documents were admitted in the record as Union or Employer Exhibits or Joint Exhibits. While many of these documents were duplicates, they were all set forth in two large and one moderately sized binders. This stipulation by the parties was quite helpful in appraising all of the testimony received in five days of hearing and all of the documents. It was also helpful in structuring the briefs with the parties and the opinion of the arbitrator.

violation of four charges set forth in the Discipline Grid located in the Commission's Performance Management Policy. The four charges were:

- 4.2: Making false, abusive, inflammatory or obscene statements toward or concerning a supervisor or representative of management.
- 4.3: Failure to fully cooperate, interfering with and/or providing false, incomplete or misleading information in an investigation or inquiry.

These two charges are set forth in Section 4 of the Disciplinary Grid entitled "Failure of Good Behavior." Both of these charges set forth a range of penalty for the first violation of either charge as Written Reprimand to Removal.

The final two charges were found under Section 7 of the Disciplinary Grid entitled "Neglect of Duty."

- 7.1: Failure to carry out assigned job duties.
- 7.5: Failure to follow work rules, administrative rules or regulations, written policies or procedures, the Ohio Administrative Code, and/or the Ohio Revised Code.

The range of penalty for first violation of either charge is Oral Reprimand to Removal.

STIPULATED ISSUE:

Was the Grievant removed for just cause? If not, what shall the remedy be?

OPINION:

The following analysis is divided into two major inquiries. First is the question of whether the Employer satisfied its burden substantiating the charges against the Grievant. In other words, what are the arbitral findings on the four charges against the Grievant. The second part is an analysis of the appropriateness of the discipline imposed by the Commission against the Grievant. This will include consideration of the affirmative defenses raised by the Union.

A.) Findings on the Four Charges

1.) Charge 4.2 Making False, Abusive, Inflammatory . . . Statements . . . Concerning a Supervisor ^{3/}

The Business Enterprise Program suspended Business Enterprise Operator Kirtley from the facility located at the headquarters of the Rehabilitation Services Commission. The suspension was based upon repeated customer complaints concerning the behavior of Kirtley's employees, equipment not working, cleanliness, children in or with food service equipment, and not opening on scheduled time.

Suspension was considered by the Ohio Vendors Representation Committee--an advocacy group composed of Business

^{3/} While the text of 4.2 includes additional language, the portion cited in this sub-heading are directly applicable in this case.

Enterprise Operators elected by their peers. While the advocacy group affirmed the suspension and agreed that Kirtley had serious problems in her operations, the group also claimed that Kirtley's Business Specialist, the Grievant, shared responsibility for the problems at the facility. "[T]hough Ms. Kirtley had serious concerns of her own (the Grievant's) lack of responsibility was equally to blame for the problems of this facility, and he should be held accountable for his inaction." The advocacy group concluded that "serious problems are present in (the Grievant's) job performance concerning this facility. . . ." This letter dated December 20, 2006 was directed to Lisa Kemp, Assistant Manager of the Business Enterprise Program and the Grievant's direct supervisor.

There then followed an investigation. The Grievant's relationship to Business Enterprise Operator Kirtley was examined in reference to his monitoring her operation of the facility from which she was suspended. The Rehabilitation Services Commission conducted investigatory interviews of the Grievant on January 5, 11, and 29, 2007. The Grievant's supervisor, Lisa Kemp, was present and participated in at least two of the interviews.

It was during the course of this investigation that the Grievant dispatched an Email to his Union Steward acting as his

representative during the investigation. The Email was dated January 16, 2007 and was made part of the record. It is no doubt the most significant document contained in this extensive record.

The Email states that its subject is "Lisa Kemp Contacting Operators."

The Email refers to the Grievant's supervisor or her husband, Rick Kemp, contacting three Business Enterprise Operators, including Kirtley, seeking negative comments about the Grievant. The Email also attributes statements made by the three Operators and their telephone calls to the Grievant during which the Operators reported the efforts by the Kemps.

The Grievant had responsibility for monitoring five Business Enterprise Operators. Of these five, the Grievant named three in his Email to the Steward--Patricia Kirtley, Eugene Veasey, and Karen Raines.

With respect to Raines, the Email stated:

Also I received a call from Karen "Mozell" Raines (Operator at facility known as 384 cafeteria); she also was contacted by Lisa to say something negative about me.

With respect to Kirtley the Email stated that she reported to the Grievant that Kemp "wanted her to come into the office and meet with Allison, Human Resources, and write a statement against me." The Email attributed a statement by Veasey to the

Grievant that Kemp's husband "was asking questions about me and his (Veasey's) facility."

The record shows that this Email by the Grievant on January 16, 2007 had serious consequences to the recipient of the Email, Keith Goudy, the Steward; the subject of the Email, Lisa Kemp, the Grievant's supervisor; and, finally, one of the three Business Enterprise Operators who chose to testify at the arbitration hearing, Karen Raines.

a. The Steward

Goudy testified about his deep concern on the receipt of the Email because it contained--as he testified--"alleged improprieties by Lisa Kemp." The content of the Email raised a question about the validity of the investigation of the Grievant because Kemp was involved as a questioner in the investigatory interviews of the Grievant.

Goudy testified that the Grievant told him how he (the Grievant) obtained the information contained in the Emails. The Grievant said that he had received phone calls from the three operators alleging what the Grievant said in the Emails. Goudy determined that he had a duty to inform management about the allegations of improprieties by the Grievant's supervisor in the course of the investigation of the Grievant. Goudy explained to the Grievant that he had this duty and proceeded to send his own

Email to the representative of the Commission, raising the issue of the alleged improprieties of the Grievant's supervisor.^{4/}

b.) Grievant's Supervisor

When the Grievant's supervisor, Lisa Kemp, learned of the Email and its contents, she was stunned. Her supervisor called her and said that the Commission had possession of an Email concerning her contacting Operators seeking negative information about the Grievant. The supervisor read the Email to Kemp.

Lisa Kemp--a legally blind person--had been a licensed Business Enterprise Operator for over 13 years. On September 3, 2006 she was hired by the Rehabilitation Services Commission as an Assistant Manager on a six-month temporary probationary period. From this position she had the responsibility of supervising 6 Business Specialists, including the Grievant. In order to perform these duties, her husband, Rick Kemp, was employed by the Commission as her driver and reader--a reasonable accommodation to the performance of her duties given her disability through blindness.

^{4/} There is some conflict in the record on the manner by which the Commission received the Grievant's Email to Goudy. There is no conflict, however, on the authenticity of the Email as one sent by the Grievant to Goudy, the receipt of the Email by Goudy and the receipt of the Email by the Commission.

Lisa Kemp was deeply concerned about the Grievant's Email because her continuation in her job was at stake. At the time the Grievant issued the Email--January 16, 2007--Kemp was still serving on a temporary basis as a probationary employee.

c.) Business Enterprise Operator

The most painful consequence of the Grievant's Email was suffered by Karen Raines, one of the three Operators noted in the Email who testified at the arbitration hearing. She began her testimony by authenticating a written summary of telephone conversation she had had with the representative of the Commission conducting the investigation of the Grievant. That record displayed deep fear of retaliation against her as an Operator as a result of being enveloped in the investigation of the Grievant. The record shows that she agreed to answer questions by telephone but would not provide a formal statement "for fear of retaliation." The record contains the following:

Question: Would you be willing to sign a formal statement?

Answer: No. Not unless I get a written agreement from Mike Haynes (Director of the Bureau of Services for the Visually Impaired) that I will not be retaliated against. (The Grievant) is my specialist, the first time I mess up he will be on me like rice on rice. Lisa is his supervisor. I'm in a no win situation.

Karen Raines did not provide a signed written statement, but she did testify at the arbitration hearing. She stated that prior to January 16, 2007 (the date of the Grievant's Email),

Lisa Kemp never solicited negative comments regarding the Grievant. Her attention was drawn to the last sentence of the January 16 Email in which there is attribution of a telephone call by her to the Grievant reporting efforts by Kemp to damage the Grievant. With her attention drawn to this sentence, she testified "this did not occur."

The above is a recitation of part of the record concerning the charge under 4.2 of the Disciplinary Grid--"making false, abusive, inflammatory statements concerning a supervisor." Karen Raines' testimony is credible, crucial, and compelling. It shows the Grievant deviously enveloping his innocent, blind clients into an investigation of his own conduct. Raines, as well as the other two Operators mentioned in his Email, were persons being monitored by him and whose performance was being annually evaluated by him. They were under a deep level of dependency upon the Grievant.

Raines' testimony is to be contrasted with that of the Grievant. Raines' testimony is detailed and focused precisely upon what the Grievant said in the Email about Raines and about the supervisor Kemp. By contrast, the Grievant was asked in direct examination whether he had ever made false, abusive, or inflammatory statements concerning his supervisor. His answer was "I have never made such a statement of that nature."

That portion of the January 16 Email relating to Raines and supervisor Kemp maligned the supervisor by portraying her as one on a hunt not for the truth, but for any negative comments about the Grievant. This statement by the Grievant in the January 16 Email was a false, abusive, and inflammatory statement concerning his supervisor Kemp.

A different analysis applies to portions of the Email relating to Operator Kirtley and Veasey. Neither Operator testified. Expectedly, Lisa Kemp expressly denied asking Operator Kirtley to write a statement against the Grievant as mentioned in the Email. Kemp's testimony is to be given credit. She as well as other legally blind witnesses who testified showed an extraordinary focus on the substance of the verbal questioning. On the other hand, the Commission has the burden of showing falsity in that portion of the Email concerning Kirtley and this record is insufficient in that regard. The same is true with respect to portions of the Email relating to Operator Veasey. Neither Veasey nor Kemp's husband testified. Their written statements were made part of the record. However, given the hearsay nature of these statements, again the Commission failed its burden to establish falsity by the Grievant as required by 4.2 of the Disciplinary Grid.

The record, however, concerning the Email and Operator Kirtley Veasey is admissible and helpful in showing a pattern by

the Grievant in enveloping his innocent clients in the investigation of his conduct. They also support a finding that the Grievant engaged in a substantial effort to malign his supervisor as on a mission to extract negative comments about his performance from Operators.

2.) 4.3 [P]roviding False, Incomplete or Misleading Information in an Investigation^{5/}

The Email discussed above was issued by the Grievant in the course of an investigation that had initially concentrated only upon his work performance as a Business Enterprise Specialist. The investigation sought to determine whether he had failed in his duties to provide monitoring and counseling to Operator Kirtley.

Much of the investigation centered upon the Grievant's role in conducting an inventory of all of the stock at the facility formerly managed by Operator Kirtley. Completion of the inventory was necessary to determine whether Kirtley owed money to the Business Enterprise Program, or the reverse. It was also important for purposes of setting the value of the inventory for receipt by the succeeding Operator.

^{5/} While there are other words located in 4.3 of the Disciplinary Grid, these are the critical words applicable in this case.

There was considerable testimony and documentary evidence concerning whether the Grievant fulfilled his duties as Business Enterprise Specialist monitoring Operator Kirtley. All of this was clearly related to the question of whether the Grievant failed to perform his job duties cognizable under 7.1 of the Disciplinary Grid.

This investigation also disclosed information in the Grievant's State-supplied computer that appeared to contravene two regulations concerning the personal use of State-provided computer equipment. Again, all of this testimony and documentary evidence was relevant to the question of whether the Grievant failed to follow these regulations, cognizable under 7.5 of the Disciplinary Grid.

In this case, the Commission went beyond merely arguing that it had sustained its burden of showing a failure of the Grievant to perform his duties and a failure of the Grievant to follow regulations. The Commission also took the position that any countervailing explanations by the Grievant were ipso facto violations of 4.3 of the Disciplinary Grid as false information by the Grievant.

The difficulty with this approach by the Commission is that 4.3 specifically requires falsity in the information provided by the Grievant in the investigation. The burden, of course, is that proof of 4.3 requires not only that information be untrue,

but that the Grievant knew it was untrue when the information was supplied.

This record does not supply a basis upon which to make these findings with respect to the Grievant's explanation as to the use of his computer supplied by the State or his conducting the inventory at the facility formerly managed by Operator Kirtley.

But there is more. The Grievant also supplied information in the investigation in the form of his January 16, 2007 Email. In this Email he asserted that three operators had telephoned him and reported to him that Kemp was seeking negative comments about him. As presented above, the record shows that the Grievant submitted the following statement in the course of the investigation: 1) Karen Raines called him prior to January 16; and 2) Raines told him that Lisa Kemp contacted her seeking negative comments about the Grievant. This statement was false, and caused a painfully difficult situation for Karen Raines. In addition, the record supports the additional finding that the Grievant knew that this statement was false when he uttered it. Consequently, the Grievant did provide false information in an investigation in violation of 4.3 of the Disciplinary Grid.

3.) 7.1: Failure to Carry Out Assigned Job Duties

Whether or not the Grievant performed his assigned duties as the Specialist responsible for Facility 259 resulted in a

clash of opposing positions by the parties. The Commission claimed that the Grievant failed to provide the requisite support to the visually impaired operator at Facility 259 resulting "in a legally blind operator and consumer losing her livelihood . . ." Employer post-hearing brief at 1. The Union contended that the Commission used the Grievant "as the scapegoat for a very visible failure of the cafeteria and vending facility known as #259, which was located at (the Commission's) office in Columbus." Union post-hearing brief at 6. The Union acknowledged that the operator at 259 failed, but the Union contended that "there will always be facility operators that, despite the best efforts of . . . staff, have difficulty meeting the stringent expectations of the Business Enterprise Program." (Id.) A considerable portion of the record deals with this fundamental difference between the parties.

Initially, it should be noted that many of the jobs found in the job description for Specialist are also enshrined in administrative regulations. For example, it was the job of the Grievant as Specialist to conduct the closing inventory of stock when the Operator of 259 was suspended on December 5, 2006. This duty is also enshrined in an administrative regulation that states that "The BE Specialist shall . . . conduct or provide for the inventory." Administrative Code 3304:1-21-07 (G) (3).

Another example is the job description for Specialist that states that the Specialist:

Provides management direction and consultation services to food service facility operators (i.e., individuals who are visually impaired and operating under the business enterprise program) in assigned facilities . . .

The same can be found in the Administrative Code in 3304:1-21-11

(D) (6).

The BE supervisor/specialist shall: Advise the operator with respect to business management, record keeping, merchandising, sound retail practices, and maintaining good relations with customers employees and suppliers.

The result of the engrossment of many of the duties of the Specialist into Administrative Rules means a double exposure for the Specialist under the Disciplinary Grid. A failure of a job duty would violate Section 7.1 and would also fall within the purview of Section 7.5: Failure to Follow Work Rules, Administrative Rules . . . Whether this should result in a doubling of sanction if a job duty is breached by a Specialist is a different question.

A considerable portion of the record relating to charges against the Grievant under 7.1 and 7.5 concerned the closing inventory at Facility 259 and the customer complaints about this facility. The questions are whether the Grievant completed the inventory of stock, and if so, was the completion proper; also, whether the Grievant provided adequate support to the operator

in dealing with customer complaints. We turn first to the matter of the closing inventory.

a.) Closing Inventory

The Commission, of course, had the burden of showing that the Grievant did not fulfill his duty to complete the inventory properly. This burden was made more difficult because this closing was occurring under circumstances which were not typical of the standard process of conducting a closing inventory. Typically, there is at least a 2-week preparation time prior to the closing. During this time, recent wholesale invoices are obtained which provide pricing of the stock. In the absence of recent invoices, vendors are contacted to obtain the wholesale prices. Finally, each and every item is counted, and the record shows there could be up to 500 items involved in a closing inventory of stock.

In this case there was no such two weeks of advance notice at a minimum. On December 5, Lisa Kemp found that the facility was not open at the time set forth in the contract with the building manager. She consulted with her supervisors and based upon the prior experience of difficulties with the facility, the decision was made to do a "shock removal." The Grievant and Kemp drafted a termination letter which was read to the Operator at approximately 8:30 a.m. on December 5, and the facility was closed to the public.

The actual inventory was conducted by the Grievant assisted by another Specialist called to the facility by Lisa Kemp. Another team consisting of the Operator and two employees assisted in the inventory. Kemp did not remain at the facility while the inventory was being conducted.

The testimony of Kemp and that of the Grievant differ on the extent to which the inventory was completed on December 5. Kemp testified that she was still in the building at 5:00 p.m. and met the Grievant who stated "inventory completed. I need to check pricing." On the other hand, the Grievant testified that the inventory was not completed at 5:00 p.m. because he needed to verify count by the Operator and her employees in the refrigerator and verify pricing.^{6/} Given the chaotic conditions existing at December 5, there is no way to resolve their difference in testimony.

There is, however, more telling evidence that points to a failure by the Commission of its burden of showing breach of duty by the Grievant concerning the closing inventory.

The Grievant testified that early in the morning of December 6 as he was checking the count in the refrigerator,

^{6/} The Operator was emotionally distraught on being informed that she was terminated; yet, she participated in the counting process.

Kemp ordered him to go to his office in another building and order new vending machines. He stated he was surprised at this order because typically the Specialist finishes the inventory and certifies wholesale product.

Kemp's testimony on this point makes probable the finding that the Grievant was not permitted to complete the inventory. Kemp testified that she talked to the Grievant in the morning of December 6 but could not recall the conversation. She also did not know if the Grievant left Facility 259 during December 6. She denied that she ordered him to leave that day to arrange the purchase of new vending machines.

Kemp did forthrightly acknowledge, however, that vending machines were indeed ordered and arrived at Facility 259 within days of December 6. She also acknowledged that the Grievant did order the vending machine. On this state of the record, the finding is that the Grievant was not permitted to complete closing inventory in Facility 259. Consequently, he did not breach his job duty to complete the inventory properly.

b.) Customer Complaints

The Grievant acknowledged that a Specialist has the duty to provide management consultation and support to the visually impaired operators of food services with respect to customer service. The obvious basis to show a need for such consultation and support is the existence of complaints by customers, and

this record contains many written complaints by customers of Facility 259.

Typically a Specialist does not receive complaints directly from a customer of a facility. Specialists receive such complaints from the building manager who contracts with the Commission for positioning of a business enterprise facility in the building. In this case however, the customers were employees of the Rehabilitation Services Commission; therefore, the customers knew to whom to complain about the services provided by an Operator, and that person was the Grievant.

The record includes a large number of written complaints by customers of Facility 259, most directed to the Grievant. They are dated from May 8, 2006 up to October 18, 2006. The complaints include a printed call for a boycott of the cafeteria giving ten reasons for the boycott. Several of the complaints center on what might fall under the category of cleanliness and sanitation. For example, among the reasons to boycott the cafeteria included: "toenail painting by workers on the counters where our food is set." Another included: "cafeteria workers used gloves but then picked things up from the floor and continued using the same gloves."

On the matter of the cleanliness and sanitation of Facility 259, a significant document in the record is a statement of the condition of that facility as observed on December 6 and 7 by

the succeeding operator. Jeff Tolle, an operator of 19 years experience, temporarily assumed responsibility for the vending portion of Facility 259. He provided Lisa Kemp with a written statement of the conditions of the facility. Lack of cleanliness and sanitation are prominent in his statement.

All of the vending machines had a build up of dirt and dust that demonstrated a lack of general cleaning on both the interior and exterior of the machines.

Mops and brooms found in the storeroom--food prep line--were covered with filth and grease. When we tried to use them, they just spread more dirt and grease.

Dirt and debris discovered underneath and behind equipment and shelving in kitchen and storage area.

This record, therefore, includes complaints from customers--many concerning cleanliness and sanitation--over a six month period. It also includes the observations of an experienced Operator that clearly support the finding of long-term disregard of cleanliness and sanitation at Facility 259. The question now is, what was the level of support provided by the Grievant to the visually impaired Operator during this period of time of persistent customer complaints about cleanliness and sanitation.

An investigatory interview was conducted with the Grievant on January 5, 2007. He was asked about customer complaints that he had received prior to the closing of Facility 259 and what he did as Specialist. The following is the record of the questions and answers.

34. What type of assistance and/or guidance did you provide Ms. Pullien-Kirtley in an effort to address these complaints?

Response: Training, I have a 7 series customer service training tape. I did one statewide and she and her employees attended. I offered her tapes on customer service and forwarded her the complaints.

In his testimony at the arbitration hearing, he stated that he dealt with the Operator at 259 concerning customer complaints by telephone calls, personal conferences, and Email. There was no specific testimony of hands-on work with the Operator in reference to any particular customer complaint.

While the customer complaints, including those concerning cleanliness and sanitation, were continuing, the Grievant purported to have conducted an appraisal of the operation at the Facility 259 in late October, 2006 as part of his duties as Specialist. There were five categorical questions under the topic of Sanitation and Safety. Of the three rating choices--excellent, acceptable, and unacceptable--the Grievant rated the operations at 259 as excellent in each of the five categorical questions. Spread within the ratings were comments by the Grievant such as "equipment is clean," "employees use appropriate procedures with cleanliness," and, finally, "Operator has written cleaning schedules." The Grievant's ratings test credulity in the face of the customer complaints

concerning cleanliness and sanitation as well as the graphic description of Facility 259 by Operator Tolle.

Without laboring this opinion with more details from the record, the record clearly supports the finding that the Grievant did not provide even a minimal level of support to the Operator in dealing with customer complaints about the operation of Facility 259. While customers were complaining, including complaints about cleanliness and sanitation, the Grievant, as Specialist, rated the operation of Facility 259 as "excellent" in the area of sanitation. This rating from the Operator's mentor would obviously assuage any concern by the Operator about her continuation as an Operator in the Business Enterprise Program. A little more than a month after the rating was received, the Operator was suspended from the program.

It is found, therefore, that the Grievant did fail to carry out one of his assigned job duties and failed to follow administrative rules in providing assistance to the Operator of Facility 259 in dealing with customer complaints.

4. 7.5: Failure to Follow Work Rules, Administrative Rules, or Regulations . . . , the Ohio Administrative Code

There were two administrative regulations in the record that prohibited staff employed by the Ohio Rehabilitation Services Commission from using the Commission's computer equipment for operating a business or for personal gain.

Personal use was permitted during breaks or lunch hours. There was no dispute about the applicability of the administrative regulations to the Grievant and at the time period involved in this arbitration.

The Grievant acknowledged that his hard drive did contain materials related to Columbus State College where he was employed as an instructor, and Eagle Business Enterprises, a private business in which he participated.

There were two explanations for the appearance of this material on his hard drive in the computer equipment supplied by the Commission. First, he used the materials relating to both entities for purposes of his training exercises for trainee-operators in the Business Enterprise Program. The second was actually a defense in that he claimed he received no profit from one entity. The first explanation is rejected. Without developing all the details, the rejection is illustrated by the evidence concerning a document relating to Columbus State College entitled "Principles of Business--Mid-term." There was a series of 25 questions with multiple choice answers that the Grievant claimed he used in training in the Business Enterprise Program.

The record shows, however, that the 4-week training program for Operators is directed towards training of self-employed retailers to consumers in food enterprises. The training

emphasizes taxation for the self-employed, workers compensation, and food matters such as menu planning. In addition, the 36-page licensure exam taken by trainee-operators at the end of the 4-week program was made part of the record. By contrast, the Columbus State College examination found on the Grievant's hardware had very little bearing on the direction of training for Operators in the Business Enterprise Program.

Finally, the Grievant specified: "I did not profit from it because Columbus State College and the Rehabilitation Services Commission are both State agencies." On cross examination, the Grievant acknowledged that he taught Principles of Business Marketing and Finance at Columbus State College and that he received money in exchange for his services. In the language of the applicable administrative regulations, the Grievant's endeavors in his personal business and in Columbus State College were for his "personal gain." Accordingly, the Grievant did fail to follow administrative regulations of the Commission in the use of his computer equipment assigned to him by the Commission.

B.) Appraisal of the Commission's Decision
To Discharge the Grievant

We will begin with the affirmative defenses raised by the Union. First, the Union claimed that the Commission had treated the Grievant in a disparate fashion relative to the penalty of

discharge in the Grievant's prohibited misuse of the Commission's computer system. The Union made a contractually-based request of the Commission for information regarding discipline of its employees for misuse of the Commission's computer system. The totality of the documents produced by the Commission showed that two employees received written reprimands and one had a "letter of concern" placed in his or her file.

Surely if the charges against this Grievant were limited to a charge under 7.5 of the Disciplinary Grid for the misuse of the computer system, proof of that charge would not support a decision by the Commission to discharge the Grievant. But we are not faced merely with a charge of misuse of the computer system. However, this affirmative defense by the Union clearly establishes that much more egregious conduct must be found under the other three charges against the Grievant. The finding in this case that the Grievant did violate Section 7.5 by misusing the computer system would have warranted at most a written reprimand.

Two other affirmative defenses are based upon Article 2.01 and 2.02 of the contract between the parties--the first claiming racial discrimination; the second, retaliation for previous exercise of contract rights. There is no evidence in the record to support either of these affirmative defenses. The final defenses are also based upon the contract--Article 24.02 and

.06--that the discipline of discharge was not progressive and commensurate with the offense, and was used solely for punishment. These defenses are discussed in the following appraisal of the Commission's decision to discharge.

As noted above, the Employer's decision to discharge cannot be based simply on the violation of Section 7.5 of the Disciplinary Grid dealing with the Grievant's misuse of the Commission's computer equipment. As detailed above, however, there is a great deal more in this case. The Commission had just cause to discipline the Grievant for making a false, abusive and inflammatory statement concerning his supervisor under 4.2. The Commission also had just cause to discipline the Grievant for providing false information in an investigation under 4.3. Finally, the Commission had just cause to discipline the Grievant under Section 7.1 for failing to provide assistance to a visually impaired Operator as one of his assigned job duties.

We are dealing with a Grievant with 27 years of service to the Commission, and without a disciplinary record. There must be found in his conduct an overwhelmingly critical concern about return to his work to justify the separation from his employment instead a lengthy suspension.

The question, therefore, is whether this Grievant, a person with eyesight, can be trusted to return to an organization

dedicated to the service of the visually disabled. Measured by his own conduct, he cannot be so trusted. First, his ease in enveloping his blind clients into the investigation of his own conduct as a Specialist manifests a callousness to the vulnerability of his clients. He cast these blind clients into an agonizingly difficult choice--support their mentor or face retribution. The testimony of Operator Raines painfully demonstrates this point.

He was found to have breached one of his job duties, and this was to provide assistance to Operator Kirtley in dealing with the high level of customer complaints. He did not meet this duty, and the consequence was a contribution--albeit unintentional--to the removal of Kirtley from her business enterprise.

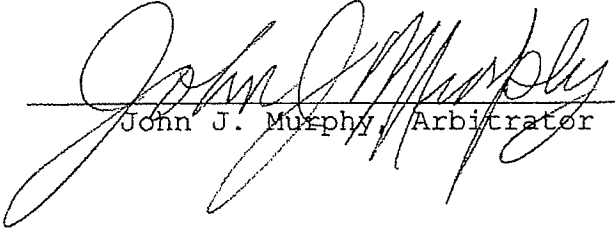
Next, his supervisor was visually impaired to such an extent that she was qualified to be an Operator for 13 years. She became his supervisor of 2006. Five months later, he wrote a false statement about her in the course of the investigation of his conduct. This is not to suggest a causal connection between the sightless state of his supervisor and his false statement about her. It does show that the Grievant exhibits little concern for the blind.

This Grievant cannot be trusted to return to an organization devoted to the service of the blind. Despite his long service to the Commission, he forfeited any claim to return to the Business Enterprise Program--a program devoted to independent, entrepreneurial life for blind persons.

AWARD

The grievance is denied.

Dated: August 23, 2008



John J. Murphy, Arbitrator