

ARBITRATION DECISION

November 14, 2008

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In the Matter of:

NOV 14 2008

State of Ohio, Department of Commerce)
Sandusky)

OCSEA-OFFICE OF
GENERAL COUNSEL

and)

Case No.33-00-(2007-12-20)-0173-01-04

Noel Williams, Grievant)

Ohio Civil Service Employees Association,)
AFSCME Local 11)

APPEARANCES

For the State:

Ray Mussio, First Chair, OCB
Victor Dandridge, Second Chair, OCB
Andrew Shuman, Labor Relations Officer
Charles Ryan Webb, Expert Witness
Chase Canfield, HR Director
Kelly Igoe, Public Information Officer
Christine Thompson, Observer

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For the Union:

Bill Anthony, Advocate
Noel Williams, Grievant
Katie Jones, Witness
Rich Shantery, Expert Witness
LaNette Brown, Witness
Randi Lee Hirschauer, Witness
Michelle Lutz, Witness
Deborah Bertelli, Witness
Nicholas Giester, Witness
Norman Rose Jr., Witness
Ronald Richards, Witness
Jeff Bender, Witness
Rozland McKee-Flax, Witness
Richelle Denis, Observer

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant is Noel Williams. She was hired by the Ohio Department of Commerce on April 18, 1994, and at the time of her removal was a Public Information Specialist 2. The grievant is represented by the Ohio Civil Service Employees Association, AFSCME Local 11.

The events leading to the grievant's removal began on May 24, 2007. On that date, evidence was uncovered indicating that Rozland McKee-Flax, an Information Technology Group help desk employee, had accessed the files of Kimberly A. Zurz, the Director of the Ohio Department of Commerce, and emailed confidential information to the grievant concerning the Foreclosure Prevention Task Force, which was chaired by Zurz. As a result, the grievant was placed on administrative leave. The letter placing the grievant on leave instructed her to remain at home in work-ready status during her regularly scheduled work hours.

On May 31, 2008, a criminal investigation was initiated by the Highway Patrol. It reviewed documents and interviewed a number of individuals. The Highway Patrol concluded on June 13, 2008, that there was no evidence of any criminal intent and the case was considered unfounded.

The state also launched an administrative investigation. As part of the investigation, it assigned Charles Ryan Webb, an ITG Network Administration Supervisor, to do a full forensic analysis of the grievant's computer to determine if there was evidence of any violations of Policy 501.1, the computer use policy. He found that the grievant had received the confidential documents from McKee-Flax but he located no evidence that she saved or made copies of them or that she sent the documents to anyone.

Webb, however, discovered that the grievant maintained files related to the NAACP on her computer; had unauthorized software on her computer related to a P handheld device; accessed a hotmail account from work on a regular basis; used a Juno account to transact NAACP business from work; found cookies on her system that indicated a high level of non-work related computer use; shopped online using her state computer; and used the AOL Instant Messenger while at work. On June 12, 2007, he submitted his findings to Chase Canfield, the department's Human Resources Director.

On August 3, 2007, Canfield issued his report on the charges against the grievant. He found that the record was inconclusive as to whether the grievant copied or misused the confidential documents she received from McKee-Flax but stated that she had engaged in a high level of computer misuse; accessed the internet outside normal work hours; and submitted inaccurate timesheets. Canfield also stated that the grievant had violated the terms of her administrative leave when she visited John Haseley, the governor's chief of staff, at 11:00 a.m. on June 4, 2007, to discuss an NAACP matter and her pending discipline.

On August 28, 2007, Andrew Shuman, a Labor Relations Officer, issued his report for the pre-disciplinary hearing held on August 15, 2007. He found just cause to discipline the grievant for violating the computer use policy and for insubordination for failing to follow the terms of her administrative leave. Shuman recommended to Zurz that the grievant be removed.

On August 30, 2007, Zurz notified the grievant that she was being removed from her position effective that day. She indicated that the reasons for the removal were:

- Policy 201.1 #2 - Insubordination
- Policy 201.1 #5 - Violations of Computer Use Policy (#501.1)

Policy 201.1 #6 - Dishonesty - Falsifying timesheets
Policy 201.2 #6 - Working in excess of scheduled hours without authorization

The union filed a grievance on behalf of the grievant on September 4, 2007. It charged that the discipline imposed on the grievant was unjust, punitive, and disparate; that it was not initiated in a reasonable time period; and that the employer engaged in stacking of charges.¹ The union asked that the grievant be reinstated with full back pay and be made whole.

The grievance was processed according to the contract. It was heard at step three on September 18, 2007. The grievance was denied at step three on December 10, 2007, and the following day the Office of Collective Bargaining informed the union that it was waiving mediation. The union appealed the case to arbitration on February 4, 2008. The arbitration hearing was held on July 24, 2007, and August 6, 2008. Post-hearing briefs were received on September 23, 2008.

ISSUE

The issue as agreed to by the parties is:

Did the Department of Commerce remove the Grievant for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 2 - Non-Discrimination

2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio on the basis of race,

¹ At step three of the grievance procedure, the union amended the grievance by adding a charge that the state also violated Article 2 of the collective bargaining agreement.

sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status ...

* * *

Article 24 - Discipline

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

* * *

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. One or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. working suspension;
- D. one or more fines in an amount of one (1) to five (5) days, the first time an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB;
- E. one or more day(s) suspension(s);
- F. termination.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

* * *

24.06 - Imposition of Discipline

* * *

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

* * *

STATE POSITION

The state argues that Webb found that the grievant repeatedly violated the department's computer use policy. It described Webb's findings as follows:

1. He opened the "my documents" file on the grievant's state issued computer and found 46 files related to the NAACP. These were membership rosters of NAACP affiliates around the state (**J3-24 – 26**). He also located documents that were on NAACP letter head showing the grievant as president and labeled as Exec Minutes(APR,17'07).doc (**J 3- 46 – 49**). He testified that he inquired as to whether there was a legitimate business reason for these items to be on her state computer, and was informed there was not. As such he described how having these documents on her state issued computer was a violation of the Computer Use Policy (**J 4-7 VI**). As he went through her my documents file on line at the arbitration he also opened a file pertaining to a grievance that involved the grievant, further indication of her use for personal rather than state business.

2. Mr. Webb described how in looking at her C drive documents and settings file he found 2 entries showing that a P pilot had been installed on her state computer as well as the software to allow the transfer of data back and forth from the system (**J 3 -30**). This concerned him because it was not only an issue of it potentially being unauthorized but the software to transfer data was present on the grievant's state computer. Mr. Webb described in detail his efforts to determine if the grievant had authorization to install this device on her state computer and concluded she did not have authorization. He testified that installing software without authorization was a violation of the Computer Use Policy (**J 4 – 8 XI**).

3. Mr. Webb testified that he found two external non-commerce related e-mail accounts the grievant had attached to her state issued computer. He identified the first account as **noelthe1st@msn.com (J3-31 -33)**. He described this as a personal e-mail account of the grievant that she accessed through her own manual effort repeatedly from her state computer. He stressed that these were not just pop-ups that came on by themselves but actual accesses she made to this account. The second external e-mail account he found was a junos account for the Columbus NAACP (**J 3-34 -36**). He explained that when looking at the information on this account you do not get this without actually accessing it from a computer engaging in a log-in session and accessing e-mail. **"IT JUST DOESN'T HAPPEN"** (emphasis added). He testified that this account had 7,599 accesses from the grievant's state computer that had to be initiated by the user and were not the result of pop up ads. Finally, he described that the

Computer Use Policy forbids the use or access of outside e-mail accounts and requires e-mail to only be used for official business (**J 4-9 XIV**).

4. Finally, Mr. Webb testified regarding the evidence that the grievant used the state computer to do personal on line shopping. He explained that through the devices he used he was able to determine that she was actively accessing shopping sites and that this was not just a case of pop-ups appearing on her screen. He specifically showed on (**J-5**) numerous occasions where she was in the Famous Footwear site. (State Written Closing Statement, pages 2-4)

The state contends that the grievant admitted to violating the computer policy. It maintains that the grievant's responses to Canfield's questions are clearly a confession of her repeated violation of the computer use policy. The state claims that at the arbitration hearing, the grievant admitted on direct and cross-examination that she repeatedly violated the policy.

The state characterizes the union's defense of the grievant as its "usual shotgun approach." It indicates that the union's position focused on two areas, the testimony of Rich Shantery, its expert witness, and the claim that the grievant was the victim of disparate treatment.

The state questions Shantery's testimony in support of the grievant. It suggests that his testimony regarding the procedures followed in criminal cases has no relevance in the instant case. The state rejects his testimony regarding potential problems with the software used by Webb because "on cross examination he admitted that he did not use the grievant's state computer or an exact replica in conducting his analysis, that none of the data he collected was done by using a computer linked to the network used by Commerce, and he acknowledged by not doing so he could not factually refute the management allegations in this case." (State Written Closing Statement, page 7)

The state argues that the union did not meet its burden of proof to show that the grievant received disparate treatment. It states that Randi Hirschauer provided a business reason for visiting the websites she visited and, unlike the grievant, had no active discipline for computer misuse. The state indicates that Michelle Lutz explained that her one hit on Amazon.com might have been a pop up and that sites such as the post office and yellow pages were related to her job duties. It acknowledges that Deborah Bertelli accessed non-work related information on the internet but stresses that she admitted that she is under investigation for computer misuse. The state observes that Nicholas Giester, a Network Administrator, is required to look at information and accounts and insisted that his access was for work purposes.

The state contends that the grievant's testimony does not provide proof of disparate treatment. It points out that she charged that other employees have misused their computers but claims that "she provided no specific information regarding who did what when on their state computer." (State Written Closing Statement, page 9) It accuses the grievant of making baseless accusations and states that "the other witnesses clearly pointed out through their testimony the information in their blue coat reports were shown to be linked to their job duties and as such there was not sufficient information to move further in the investigative process." (Ibid.)

The state maintains that it was within its right to remove the grievant for violating the computer use policy. It claims that the grievant chose to violate the policy and admits to doing so. The state rejects the grievant's attempt to "marginalize and minimize her wrong doing" and her claim of disparate treatment. It asserts "when an employee with an active 5 day suspension for the same violation commits the same violation a total of 5

different ways it does not get any more severe than that.” (State Written Closing Statement, pages 10-11)

The state charges that the grievant violated the terms of her administrative leave, which required her to remain at home in work-ready status during her regularly scheduled work hours. It points out that the grievant is scheduled to work from 7:00 a.m. to 3:30 p.m. but she scheduled an appointment with Haseley from 11:00 a.m. to 11:30 a.m. on June 4, 2007. The state claims that her testimony about the time it took to get to Haseley’s office, to meet with him, and to return home indicates that she was out of her home for at least 50 minutes. It stresses that this means that the grievant “was not at her home in a work ready status for at least 20 minutes of her regularly scheduled hours of work on 6/4/07.” (State Written Closing Statement, page 12)

The state rejects the union’s argument that the grievant should have been charged with being late returning from lunch rather than insubordination. It asserts that the union never produced evidence showing that similarly situated employees were disciplined for being tardy rather than for insubordination. The state claims that the fact that the grievant received a letter instructing her to remain at home places her in a different situation from other employees. It states that the grievant’s conduct represents a “defiance of authority,” which under its work rules is insubordination.

The state argues that the grievant improperly worked outside her scheduled hours and falsified her timesheets. It points out that computer records indicate that on eight occasions the grievant used her computer after her 3:30 p.m. quitting time while her timesheets show that she left work at 3:30 p.m. The state notes that Canfield learned from Kelly Igoe, the grievant’s supervisor, that on seven of the eight occasions she was

out of the office and that she did not know that the grievant was working after her scheduled quitting time.

The state contends that the grievant's use of her computer after her ending time violates its policy governing an employee's hours of work. It indicates that Sections II and VII of Policy 313.0, Hours of Work, state:

It is permissible for overtime eligible employees to remain in the workplace after their end time. However, no such employee may operate his/her computer.

Overtime eligible employees must complete a report ... accurately indicating the total hours worked for each day of the work week. (State Written Closing Statement, pages 14-15)

The state asserts that the grievant's actions "were designed to conceal her after hours computer access." (State Written Closing Statement, page 14)

The state concludes that there was just cause for the grievant's removal. It asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that the state "had it out for the grievant from the very beginning." (Union Written Closing Statement, page 1) It accuses the state of trumping up charges that the grievant and McKee-Flax accessed information from Zurz's personal file folder. The union stresses that the Highway Patrol's investigation concluded that there was no wrongdoing by the grievant and the case against her was dropped. It adds that the information regarding foreclosed properties had been provided to the grievant a month earlier and was public information.

The union contends that the grievant complied with the terms of her administrative leave letter. It indicates that the grievant's meeting with Haseley started a

little after 11:00 a.m. and ended around 11:25 a.m. The union asserts that the grievant was home by 11:35 a.m. so that she was only five minutes late coming off lunch. It claims that Igoe testified that she never monitored the grievant's lunch period and that she did not have a problem with her coming back late from lunch.

The union maintains that the insubordination charge was not based on the grievant returning from lunch late. It claims that "the real problem here is that [the grievant] visited the Governor's chief of staff and lodged a complaint toward the director of Commerce about being placed on administrative leave unfairly." (Union Written Closing Statement, page 2) The union states that the grievant's visit to Haseley's office was not "an act of open defiance of authority nor insubordination" and notes that "neither the grievant nor Roz Flax were ever told or directed not to discuss the letter placing them on administrative leave with the Governor's office or anyone else." (Ibid.)

The union claims that the appropriate charge for returning late from lunch is tardiness. It points out that since this would have been the grievant's first offense, she should have received no more than a verbal warning. The union notes that Canfield knew that the grievant had returned late from lunch on June 4, 2007, but did not charge her with tardiness or even mention it until the pre-disciplinary meeting on August 15, 2007. The union asserts that it is a "huge stretch" to charge the grievant with insubordination for returning late from lunch.

The union denies that the grievant violated the computer use policy. It observes that the grievant acknowledged putting PALM Pilot software on her computer but claims that other employees have loaded personal software such as pictures and music on their computers. The union notes that Webb could not testify that the PALM Pilot software

was ever used. It observes that the grievant testified that she loaded the software on her computer to aid her in scheduling work-related events but was unable to get it to work.

The union argues that the discipline the grievant received for loading software on her computer was not reasonable or commensurate with the offense. It states that the grievant's action was not a very serious offense and did not cause any problems or difficulties for the department or its computer system. The union also claims that the state could not wait more than seven months to discipline the grievant.

The union contends that the grievant did not excessively abuse the computer policy. It states that the testimony offered by Igoe, Hirschauer, Lutz, Bertelli, Giester, and the grievant shows that most employees have used the internet for non-work purposes. The union observes that Normam Rose, a Network Administrator 2, reported that when he worked on the help desk, he saw a lot of non-work related internet activities.

The union suggests that its expert witness is more qualified than the state's expert witness. It reports that Rich Shantery has been doing cyber forensic and police IT procedures for Robson Forensic since 2002. The union notes that in contrast to this, Webb testified that he had taken security training for one week through an internet program called Security Plus and had two months of on and off internet training on a program called Certified Information Systems Security Practitioner.

The union challenges some of the evidence offered by the state. It points out that Shantery testified that the report showing the websites allegedly visited by the grievant does not show the times and dates but only a range from which the data was generated. The union claims that this means that the information the state relied upon could not be verified. It complains that "for the employer to rely on such faulty and shoddy

documentation to uphold a termination on an employee with 13 years of service just does not add up.” (Union Written Closing Statement, page 5-6)

The union charges that the state failed to provide it with complete information. It indicates that on several occasions the state told it that there was no information beyond what it supplied at the pre-disciplinary meeting. The union complains that “it is very disturbing that the employer presented additional information that clearly showed that the information that was given to the union initially was not complete [and] ... heightened concerns that the documentation ... could not be verified for accuracy or validity.”

(Union Written Closing Statement, page 6)

The union argues that the grievant’s job required her to use the internet on a daily basis. It reports that Igoe testified that the grievant’s job required her to visit the NAACP website and that her connection to the organization helped her with her job. The union claims that “even if you single out the grievant and charge her with violating the computer use policy, it does not rise to the level of removal, particularly since the employer allowed other employees to access their computers for non-work related purposes.” (Union Written Closing Statement, page 7)

The union rejects the state’s argument that on eight occasions between January 17, 2007, and May 8, 2007, the grievant falsified her timesheets by working beyond her scheduled hours without authorization and by failing to show her actual hours on her timesheets. It offers the following:

Mr. Richards testified that the grievant always left at 3:30 PM everyday [and that] he rarely ever remembers seeing her leaving after 4:00 PM.

Jeff Bender testified ... that the grievant had a training class on January 22, 2007 that started at 1:30 PM and lasted at least 2 hours. He testified that none

of their classes that start at 1:30 PM last longer than 2 hours and all of the classes are over before 5:00 PM.

Ms. Igoe testified that she flexed her schedule and she allowed the grievant to flex her schedule when they had to be out of town for a presentation or meeting. She also testified that the Department of Commerce did not allow them to have a flex schedule ... she also testified that [the grievant] rarely stayed late past 3:30 PM and she was always on time in the morning ... [and that] she did not recall the grievant working past her 3:30 p.m. quitting time ... [and that] she recalls the grievant leaving around 3:45 p.m. on January 22, 2007.

* * *

Mr. Canfield testified that he did not know that on January 22, 2007 the grievant had a training class that ended after 3:30 p.m. ... [or that] on May 8, 2007 the grievant had a meeting outside the office at 4:30 PM.

LaNette Brown testified that she was in a meeting with the grievant and a COTA representative on May 8, 2007 this meeting was held at COTA's McKinley offices. She testified that the meeting started at 4:00 PM and lasted about 45 minutes. (Union Written Closing Statement, pages 7-9)

The union charges that Canfield "did not really investigate these alleged working on your computer past your normal quit time charges." (Union Written Closing Statement, page 9)

The union argues that the forensic examination conducted by the employer was flawed and should not be used to uphold the grievant's removal. It states:

If you look at union exhibit 2, item 4, the union requested any and all logs or documentation showing that the date and time of the computer as indicated by both the BIOS of the computer and the operating system was recorded and its accuracy as to the actual date and time of the alleged incident

Mr. Shantery testified that this information was not provided even though the employer provided union exhibit 15 for that purpose.

When asked why Union exhibit 2, item 4 was important, Mr. Shantery testified that in an investigation where dates and times of the incident is of concern, and because of the way that computer creates date and time stamps on data, you must verify that those date and time stamps match some source to calculate the difference that may occur depending on how accurate you need those date and time stamps to read. So you compare them to some official

source, whether that is an atomic clock, a time on a server, a clock on a wall, depending on what the target of your time is. But you must be able to verify what the difference is, if any.

He further testified that in the case where you're looking for an event and what time it occurred, the date and the time stamp on the computer, if the computer's clock would be off by, say, six hours, the date and time stamps are going to be off by six hours, possibly, of the actual date of the incident.

In union exhibit 2, item 9 the union requested the description of the software used and a copy of the raw log files that was used to generate the after-hours report that shows three columns. Date, time, file size and cookies --cookie name.

Mr. Shantery testified that the requested information was not provided. When asked why it was important he stated I would need to review the after-hours report to see if it's the same.

In Union exhibit 2, item 10 the union requested a listing and raw logs of the network devices and software that collects data on user's network usage, Internet usage, log in and log out dates and times during the time of the alleged incident. The employer stated that this information was contained in Union exhibit 15. Mr. Shantery testified that Union exhibit 15 states that that information was not stored.

Mr. Shantery testified that under the sections one -- item number one, two, three and four on the first page of union exhibit 15, it indicates that they do not routinely archive active directory logging activity. Active directory is the Microsoft Windows server standard for directory services which is how all your computers talk to one another and authenticate and you're allowed to go here and there and you log in and you log out. And it gives various reasons why they don't store that information and then it says it wouldn't be useful. And that it would be difficult for them to take the information from all different sources and put it together. Plus they don't keep it for more than ten days. But in section two, there is a section -- actually, it's underlined in this -- that shows that users have been logged on for weeks at a time. But if they only keep the data for ten days, I don't know how you draw the conclusion for the weeks at a time. So this just appears to be in response to that question as to why they don't keep the data. (Union Written Closing Statement, page 9-10)

The union contends that the discipline imposed on the grievant is inappropriate. It points out that the grievant has 13 years of service and has only a five-day suspension on the books and that the state "cannot go from a 5-day to a removal based on the facts [it]

presented.” (Union Written Closing Statement, page 10) The union claims that the grievant’s removal is neither reasonable nor commensurate with the offense and was issued solely to punish the grievant.

The union concludes that the grievant’s removal was not for just cause. It asks the Arbitrator to reinstate the grievant with full back pay and benefits.

ANALYSIS

The grievant was terminated for four violations of the department’s work rules. The first charge against the grievant is that she is guilty of several violations of the computer use policy, Policy 501.1. The first allegation is that the grievant installed a P Pilot on her computer. The Arbitrator believes that the testimony and evidence support this charge. Webb reported that the grievant installed P software on her computer on May 9, 2007, and indicated that the evidence suggested that the device and the associated software may have been in use since at least October 19, 2006. While the grievant claimed that she was never able to use her P device, she admitted that she installed P software on her computer without permission.

The grievant’s conduct breached Sections V and XI of the computer use policy. Section V prohibits connecting a personal computing device to the state network without written authorization. Section XI bars an employee from installing software on his or her computer without the express authorization of his or her division/office senior manager.

The second alleged violation of the computer use policy is that the grievant maintained non-work related files on her department computer. Webb’s investigation revealed that the grievant had 46 files on her hard drive containing NAACP membership lists for correctional facilities in Ohio. The grievant could not dispute that the files were

on her hard drive and was unable to provide any worked-related reason for them to be there. Her conduct is a violation of Section VI of the computer use policy, which states that the “Department’s computers and computer system must only be used for the purposes for which they are authorized ... [and] shall not be used for personal or commercial purposes without the authorization of the Director or his/her designee.”

The third allegation relating to the computer use policy is that the grievant accessed two non-departmental email accounts from her computer. Webb reported that the grievant repeatedly accessed MSN and Juno email accounts. He indicated that the Juno account was used to conduct the business of the Columbus NAACP chapter and he reported that the grievant accessed the account 7,599 times. Webb stressed that the accesses were initiated by the grievant.

These actions clearly violated the computer use policy. As indicated above, Section VI of the policy bans accessing email accounts for personal or commercial purposes. In addition, Section XIV states that “employees shall not use or access personal email accounts from outside vendors (hotmail, AOL, etc.) from his/her state owned computers.”

The final allegation relating to the computer use policy is that the grievant used her computer to shop online. Webb testified that he was able to determine that the grievant was actively accessing shopping sites, including numerous visits to the Famous Footwear website. He stressed that it was not a matter of pop-ups appearing on her screen but rather each visit required action by the grievant to reach the site. This constitutes a further violation of Section VI of the computer use policy, which bans an employee from using his/her computer for personal purposes.

The Arbitrator must dismiss the questions raised by the union regarding the evidence and testimony offered by Webb. Shantery complained that specific dates and times were not included in some of the spreadsheets and that the material provided was incomplete. The Arbitrator, however, believes that the evidence and testimony, including the grievant's own admissions, clearly establish that she committed numerous violations of the computer use policy on a regular basis

The Arbitrator must also reject the union's charge that the grievant was the victim of disparate treatment. The union submitted no documentary evidence to support its charge. The testimony of the witnesses it called demonstrated very minor, if any, misuse of computers compared to the grievant's substantial and continuing violations of the computer use policy. The only possible exception was Bertelli but she admitted that she is currently under investigation for violating the policy. Even in her case, there was nothing in the record to suggest that she maintained files of an outside organization on her computer, installed unauthorized software on her computer, or accessed an outside email account 7,599 times.

The second charge against the grievant is that she ignored the terms of the letter placing her on administrative leave and that her conduct amounted to insubordination in violation of Policy 201.1, Rule 2. The state characterized her conduct as an "open defiance of authority," which is classified as "major" insubordination under its rules. The penalty specified in the rules is a ten-day suspension or removal for a first offense and removal for a second offense.

The Arbitrator must reject the charge of insubordination. First, the letter placing the grievant on administrative leave directs her to "remain at home during your regularly

scheduled hours of work.” On the day in question the grievant appears to have left her home shortly before her regularly scheduled lunch period to meet with Haseley. While the exact time the grievant returned home is in dispute, it was probably not more than ten minutes after her lunch period normally would have ended. Even though the grievant may have been foolish to imagine that she could have travel to Haseley’s office, meet with him, and return home in 30 minutes, it is does not constitute an “open defiance of authority” to attempt to do so. In fact, if Haseley had not been late returning to his office from another meeting, the grievant may have arrived home by 11:30 p.m.

The Arbitrator believes that it would have been more appropriate to charge the grievant with “extending a paid break without authorization,” a violation of Policy 210.2 of the Disciplinary Grid/Attendance. Since there is nothing in the record to suggest that the grievant had ever been disciplined for this offense in the past, the grid suggests that the grievant should have received a reprimand.

The third charge against the grievant is that she worked in excess of her scheduled hours without authorization in violation of Section 6 of Policy 201.2. In support of this charge, the state offered evidence indicating that on eight occasions the grievant was working on her computer after her regular quitting time of 3:30 p.m. It adds that the grievant’s actions also violated Policy 313.0, Section II, which prohibits an employee from operating his/her computer after his/her regular ending time.

The Arbitrator believes that charge against the grievant was substantiated by the state. The evidence that the grievant was using her computer after her regular quitting time is irrefutable and Igoe had no reason to be mistaken when she testified that she did not authorize the grievant to stay beyond her regular ending time. The testimony

provided by the union focused on the time the grievant normally left work rather than the eight dates in question. Under Policy 201.2, Section 6, the penalty for a first offense is a reprimand.

The final charge against the grievant is that she violated Policy 201.1, Section 6, by falsifying her timesheets. As indicated above, the examination of the grievant's computer revealed that on eight occasions she stayed after her 3:30 p.m. quitting time but the grievant's timesheets indicate that she left work at her regular ending time. The penalty for a first violation of this section ranges from a five-day suspension to removal.

The Arbitrator, however, does not believe that "dishonesty," the title of Section 6 of Policy 201.1, is the proper charge. It implies serious misconduct where an employee's motive is often to obtain pay that he/she is not entitled to receive. In the instant case, the grievant's timesheets suggest that she simply recorded her regular starting, lunch, and ending times regardless of the actual times and none involved a claim for extra compensation. Furthermore, all of the grievant's timesheets were approved by Igoe.

Once an Arbitrator determines that there is just cause for discipline, the issue becomes the propriety of the penalty. Article 24, Section 24.02, requires the state to use progressive discipline, and Section 24.06 requires that discipline be "reasonable and commensurate with the offense." In addition, it is widely understood that the seniority of an employee is an important factor to consider in weighing the appropriateness of a disciplinary penalty.

The Arbitrator believes that the state's decision to remove the grievant needs to be very carefully considered. The grievant has 13 years of service with the state, which represents a significant investment on her part. Furthermore, there is nothing in the

record to suggest that the grievant's performance was anything but satisfactory, except for a five-day suspension to be discussed below.

The Arbitrator finds that three of the four instances of misconduct by the grievant represent minor infractions. The record indicates that on one occasion the grievant returned from lunch 10 to 20 minutes late while at home on administrative leave; that she stayed at work past her normal quitting time without authorization on eight occasions; and that she failed to report her actual quitting time on those eight occasions. However, while these offenses are minor, they do represent violations of the work rules.

The most serious charge against the grievant is that she violated the computer use policy. The record clearly establishes that she violated the policy by installing PALM Pilot software on her computer; by maintaining numerous NAACP membership files on her computer; by accessing two email accounts, including one 7,599 times; and by using her computer to do online shopping. While the Arbitrator recognizes that other employees may make some personal use of their work computers, the grievant's violation of the computer use policy was extensive and ongoing.

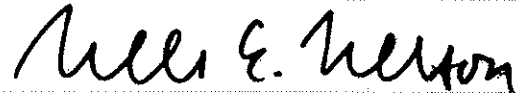
A very significant factor is the grievant's disciplinary record. The parties stipulated that the grievant had an active five-day suspension for computer misuse. This prior discipline suggests that the grievant was familiar with the computer use policy and knew that further discipline would result from continued computer misuse. It also indicates that the grievant failed to take advantage of the opportunity to correct her behavior.

Despite the grievant's significant state service, the Arbitrator has no alternative but to conclude that the state had the right under the collective bargaining agreement to

remove the grievant. The grievant's extensive violations of the computer use policy combined with the other less serious offenses strongly support the state's action. Her prior five-day suspension for computer misuse removes any doubt that the state acted pursuant to its contractual authority.

AWARD

The grievance is denied.

A handwritten signature in black ink, reading "Nels E. Nelson", is written over a horizontal dotted line.

Nels E. Nelson
Arbitrator

November 14, 2008
Russell Township
Geauga County, Ohio