

1028

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Robin Shipp

Case No. 24-01-(20080626)-003-01-09

Date of Hearing: February 12, 2009

Place of Hearing: OCSEA Office
Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Lori Collins, OCSEA Staff Representative

Witnesses:

Grievant: Robin Shipp

For the Employer:

Advocate: Laura Frazier, Labor Relations Officer

2nd Chair: Jessie Keys, Office of Collective Bargaining

Witnesses:

Diane Cavese, Auditor

Michael Rench, Deputy Director of Community Services

Gary Groom, Grants Coordinator II

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GENERAL COUNSEL

OPINION AND AWARD

Arbitrator: Dwight A. Washington, Esq.

Date of Award: April 29, 2009

INTRODUCTION

The matter before the Arbitrator is a Grievance brought pursuant to the Collective Bargaining Agreement (CBA) in effect March 1, 2006 through February 28, 2009 between the State of Ohio Department of Mental Retardation and Developmental Disabilities (MRDD) and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO (Union).

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Robin Shipp (Shipp) for violating MRDD policies regarding theft.

The removal of the Grievant occurred on or about June 24, 2008 and was appealed in accordance with Article 24 of the CBA. This matter was heard on February 12, 2009 where both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties to the Arbitrator on or about March 16, 2009. This matter is properly before the Arbitrator for resolution.

BACKGROUND

The Grievant was removed by MRDD on June 24, 2008 for theft. The Grievant was employed as a Grants Coordinator II and had worked for the State of Ohio for seventeen years, serving the last seven and a half years with MRDD. At the time of her removal, the Grievant was responsible for coordinating, monitoring and evaluating grant-funded programs.

MRDD is the fiscal agent for the Ohio Developmental Disabilities Council (ODDC). The ODDC's role is to assist individuals who have developmental disabilities and their families in an effort to achieve the individual's inclusion in every area of the community. Specifically, ODDC acts as an advocate and engages in activities for systematic changes to enable developmentally challenged individuals and/or their families to "... participate in the design of and have access to

needed community services . . . [and] other forms of assistance that promotes self-determination, independence, productivity . . .” (Union’s Post-Hearing Statement, p. 1).

In 2002, David Zywer (Zywer), the Deputy Director of ODDC, created the Empowerment Fund. The Empowerment Fund was originally established to pay, in advance, expenses relating to training conferences attended by Council members and disabled recipients or their family members who were unable to pay. In 2004, Zywer received authorization to also allow ODDC employees to use the Empowerment Fund to cover “up front” expenses for attendance at approved conferences. The cash advances were to be repaid after the employees received their reimbursement checks for the actual expenses incurred in attending the conference. In November 2003, Advocacy and Protective Services (APSI) and ODDC entered into an agreement that APSI would act as the fiscal agent for the Empowerment Fund (Joint Exhibit (JX) 11).

The written process regarding the Empowerment Fund has changed very little since 2004. (JXs 14, 15, 16 and 17). The user of the Empowerment Fund completes an application seeking a cash advance and specifies what conference they are going to attend. Upon completion of the event, the user submits receipts to ODDC indicating the expenses incurred. If the employee fails to spend all of the cash advance, the user returns all unused funds to ODDC. Receipts are required to be turned in thereafter. If the process is not followed, a letter is sent to the applicant demanding reimbursement of the advanced funds to the Empowerment Fund.

In 2006, the Grievant received a cash advance of \$550.00 from the Empowerment Fund to attend a seminar in Pittsburgh, Pennsylvania in October 2006. The Grievant turned in her receipts/expenses totaling \$550.00 for the trip in November 2006. The Grievant was approved for some expenses totaling \$242.00, but was denied other expenses in the amount of \$308.00.

According to the Employer, the Grievant was required to return the surplus of \$308.00 immediately upon her return, and then submit the remaining \$242.00 to the Empowerment Fund when she was reimbursed from the State of Ohio on December 7, 2006.

In March 2007, Gary Groom, Administrator of the Empowerment Fund, asked Grievant to reimburse the Empowerment Fund. The Employer made no other request for the Grievant to return the money until March 2008. The Grievant did not repay the Empowerment Fund any of the \$550.00 advance until March 15, 2008.

Beginning in late 2007 and continuing until April 2008, an internal audit was conducted which revealed numerous financial mishaps by management and employees regarding the grant programs administered by ODDC. A portion of the audit focused on the Empowerment Fund and uncovered that four employees, including the Grievant, had failed to repay the Empowerment Fund in a timely manner. At all times relevant herein, Gary Groom (Groom) was responsible for administering the Empowerment Fund.

The Union contends that the Empowerment Fund was loosely administered at best, and was used as a short-term loan under Groom's stewardship. Moreover, the Employer was directly involved in all aspects of the Empowerment Fund. There was a lack of urgency regarding reimbursement, and the policies governing the Empowerment Fund were never fully developed or implemented by the Employer.

The union seeks reinstatement, back pay and a make whole remedy, whereas MRDD argues that the removal was for just cause and the grievance should be denied.

ISSUE

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

RELEVANT PROVISIONS OF THE CBA AND MRDD POLICIES

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

MRDD/ODDC POLICIES (IN PART)

Violation	1 st Offense	2 nd Offense	3 rd Offense	4 th Offense	5 th Offense
Theft: Any act of theft.	5-day Time/ Work Suspension or Fine to Removal	Removal	N/A	N/A	N/A

POSITION OF THE PARTIES

THE EMPLOYER'S POSITION

The Grievant's removal was for just cause due to theft. The Grievant failed to reimburse the \$550.00 cash advancement to the Empowerment Fund until an audit disclosed the non-payment. As a former administrator of the Fund, the Grievant was aware of her obligation to reimburse the Empowerment Fund as soon as she was paid her trip expenses.

The evidence indicates that the Grievant received a cash advance of \$550.00 to attend a conference in October 2006. The actual expenses Grievant incurred at the conference totaled \$242.00, leaving a balance of \$308.00 from the advance that was not used for her conference travel expenses. The Grievant completed the travel reimbursement form and submitted receipts

to the State of Ohio for reimbursement. The Grievant did not return the unused balance of \$308.00 after the conference nor did she account for this money on the travel expense report. (JX 10). Although the Grievant initially turned in receipts totaling \$550.00, only \$242.00 of that amount was approved. Therefore, the unused balance of \$308.00 remained unaccounted for.

The Grievant's travel expenses of \$242.00 were approved and submitted to the Department of Administrative Services for reimbursement. On December 7, 2006, the Grievant received her travel reimbursement check of \$242.00 from the State of Ohio. (Management Exhibit (MX) 2). The Grievant was aware of her obligation to reimburse the Empowerment Fund and on November 21, 2006 was given the following instructions by Groom: (1) upon receipt of her reimbursement check from the State of Ohio deposit it into her personal checking account; (2) issue a check to the Empowerment Fund for the total cash advance amount; and (3) give the check to Groom. Not only did the Grievant fail to comply with Groom's instructions, but she also admitted to spending the money after receiving her reimbursement. The Grievant was reminded on March 22, 2007 by Groom that she owed \$550.00 to the Empowerment Fund. (JX 24).

The Grievant did not repay the cash advance until an internal audit was conducted by Human Resources regarding the overall status of ODDC's use and compliance with regulations concerning grant funds. According to Michael Rench (Rench), Deputy Director of Community Services, due to the overall concerns about the operation of the ODDC, the audit covered both programmatic and fiscal operations. The impetus of the audit was to review allegations of mismanagement by the ODDC. Diane Cavese (Cavese), Audit Manager, testified that she was the lead auditor and that the overall mission was to review compliance with federal funding regulations, Ohio Revised Code and internal policies of ODDC. Cavese added that the

Empowerment Fund was not the focus. Rather, the cash advancement practice became an issue during the audit's records review.

The audit revealed that four (4) employees had received cash advances that remained unpaid at the commencement of the audit. Alicia Jones (Jones), Pamela Carter (Carter) and the Grievant each received \$550.00 to attend the conference in Pittsburgh, Pennsylvania. The fourth employee, Leslie Paull's (Paull) advancement was to be paid through the State of Ohio Training Fund, and Paul did not receive reimbursement for the training. Paul is not similarly situated with the other employees and no audit finding occurred against her. Regarding Jones, Carter and the Grievant, Carter and the Grievant were removed and Jones was on disability leave and subsequently retired prior to discipline being imposed.

Overall the audit found that management was negligent in the operation and enforcement of internal and external controls. In the fiscal area, findings were issued regarding violations of various protocols, including the Empowerment Fund's use. Due to the severity of the audit findings, which included the Empowerment Fund, changes at the management level occurred. Zywer was replaced as Deputy Director and Groom received a five day suspension as a result of his involvement in the Empowerment Fund.

The evidence indicates that the Grievant's intent was to use the Empowerment Fund for purposes other than as a cash advance for travel-related expenses. The Grievant had over fifteen months of personal use of the funds and only reimbursed the Fund when the audit singled her out as one of the abusers. The Union's claim that Management caused the situation due to unclear or lax enforcement of policies does not exonerate the Grievant's misconduct. The Grievant, having administered the Empowerment Fund, was aware of the process and made decisions that deprived the Empowerment Fund of its assets.

The disciplinary grid of theft for a first offense indicates that a five-day suspension to removal is appropriate. The Grievant was in a position of fiscal responsibility requiring a higher degree of integrity and credibility. Theft occurs when anything of value is taken, and MRDD has disciplined other employees when theft allegations can be established.

The Employer has disciplined others charged with theft and cited prior authority that has upheld the removal even if the employee has a clean record and the Grievant was not found guilty of theft. Arbitrator Anna D. Smith concluded that a Grievant's failure to return client's funds in the amount of \$150.00 within ten days was egregious misconduct, although the element to establish theft was absent. *OCSEA (McAlpin) v. MRDD*, Grv. #24-03-19910260-0417-01-04(1992). Arbitrator Smith found that the Grievant did not intend to deprive, so theft did not occur, but that his willful failure to cooperate by returning the money was a serious offense. MRDD, in the instant case, seeks a similar result and points out that Shipp kept the monies for almost fifteen months ". . . and only returned the funds once she was under investigation and payment was demanded." (Employer Post Hearing Statement, p. 3).

The Grievance should be denied: otherwise, MRDD employees will receive the wrong message: that if restitution occurs one can avoid removal for the first theft offense.

THE UNION'S POSITION

The Grievant was hired in 1999 and was promoted to Grants Coordinator in 2003. Her duties included coordinating, monitoring and evaluating grant funded programs. (JX 33). At the time of her removal, the Grievant had seventeen years of service and no discipline of record.

From 2003 until late 2004, the Grievant was responsible for administering the Empowerment Fund. She was relieved of those duties when Groom was hired. The Grievant received little training regarding her duties as administrator of the Fund from either Pat Lytle

(Lytle), retiring manager or Alea Jones (Jones), Grant Administrator and received no formal training on those duties.

In 2004, the ODDC expanded the ability of staff members to obtain "up-front" money from the Empowerment Fund. (JX 15, pp. 16-18). Shortly thereafter, Groom was hired.

From July 2007 through February 2008, the Empowerment Fund's policy underwent several administrative changes regarding the number of days to submit receipts and returns of money and the number of days to submit a report. (JXs 14, 15, 16 and 17). The policies of the Empowerment Fund are silent on the number of days in which a user is required to reimburse the Empowerment Fund after receipt of their reimbursement.

The Union does not deny that Shipp received \$550.00 from the Empowerment Fund. It does, however, deny that the Grievant is guilty of theft for several reasons: (1) the Empowerment Fund was considered a short-term loan; (2) operating policies and procedures for the Fund were not fully developed or implemented; and (3) the Employer was aware that the Grievant had not reimbursed the Empowerment Fund but at no time expressed a sense of urgency for repayment.

Groom, called to testify in the Employer's case, indicated that the Empowerment Fund was used by employees and considered a short-term loan. Groom also prepared a written document that was submitted at the pre-disciplinary hearing which stated, in part,:

"Although approved, operating procedures and policies were never fully developed or implemented for the specific group of individuals to receive short-term loans from the Empowerment Fund Consequently, these policies could not be used as the sole guidance in its administration. Instead, as I had been instructed, situations arising from both staff and Council member usage were handled on a **case-by-case** basis This being the case, there was **never a sense of urgency expressed** by either my supervisor or APSI It was **only** ever indicated that the funds needed to be repaid." (JX 36) (Emphasis added).

Groom further added that it was unfortunate that Shipp did not repay the Empowerment Fund sooner, but it is his opinion that the Grievant intended to repay and would have repaid the money. (JX 36). On March 17, 2008, the \$550.00 was repaid to the Empowerment Fund.

The Union further argues that the Grievant was removed for theft even though she had no prior disciplinary record in over seventeen years of service with the State. MRDD's disciplinary grid for theft for a first offense carries a five day time-work suspension or fine to removal. Grievant's removal was not progressive and conflicts with past practice by ODDC, which allowed some employees to pay in installments or over time with no structured timeframe. The payment over time is commensurate with a form of progressive discipline and verifies that the Empowerment Fund was used as a loan program.

The Union also presented evidence that other employees and council members used the Empowerment Fund similarly as the Grievant regarding the repayment process. The Grievant testified that it was her intent to repay the loan prior to any future use of the Empowerment Fund.

As examples, on March 7, 2007, Jones reimbursed the Empowerment Fund ten (10) months after submitting expense receipts to ODDC (UN X 5). Paull has not reimbursed the Empowerment Fund for advances given on July 11, 2005 to attend a computer workshop; and Groom reimbursed the Empowerment Fund on September 12, 2005 after submitting expense receipts on June 16, 2005. The Union contends that the Employer was inconsistent in the use of the Empowerment Fund and that the audit placed a greater amount of fault on Management for not pursuing collection if either ODDC or APSI felt recipients were avoiding repayment.

Given the past practice of the Empowerment Fund's operations, the Grievant may have exercised poor judgment, but her conduct was consistent with that of other employees. The

Grievant and Groom testified that she was going to repay the advance prior to her next trip that would require her to use the Empowerment Fund.

The Union seeks reimbursement, back pay and any other make whole remedy, because the Employer did not have just cause to discipline the Grievant.

DISCUSSION AND CONCLUSION

Based upon the sworn testimony at the hearing, the exhibits, closing arguments presented by the parties and the post-hearing briefs submitted, the grievance is granted. My reasons are as follows:

The Grievant was removed due to theft of \$550.00 from the Empowerment Fund. To establish theft, the evidence must show that the Grievant intended to deprive ODDC of the funds. Both during the investigation (JX 7) and at the hearing, the Grievant stated that it was her intent to repay the Empowerment Fund. The Grievant stated that Groom told her that the Empowerment Fund did not have any policies "stating when, as far as timelines, the funds had to be returned." (JX 7, p. 2). Groom testified that the Grievant was aware of the process regarding the ODDC cash advance practice, and it was also his belief that she intended to repay the Empowerment Fund. (JX 36).

The Employer argues that the Grievant's use of the monies for purposes other than the conference and the length of time she did not reimburse the Empowerment Fund clearly establish the intent necessary for a finding of theft. The Employer cites several arbitration awards to indicate past precedent regarding theft matters. *MRDD & OCSEA (McAlpin)*, #24-03-920620-0417-01-04 (Arb. A. Smith, 1992); and *MRDD & OCSEA (Osborne)*, #24-14-950131-1214-01-04 (Arb. Mancini, 1995). Under other facts, I would agree with the Employer's position and uphold the discipline. As in *McAlpin*, the Grievant indicated she intended to repay the money

and coupled with Groom's testimony, supports a finding that the Grievant did not intend to deprive ODDC of its property. Moreover, several factors mitigate against Grievant's removal in this matter including the following: lax/inconsistent enforcement of rules/policies governing the Empowerment Fund; the Grievant's treatment of Empowerment Fund funds were explicitly or impliedly condoned by the Grievant's supervisor; and other similarly-situated users of the Empowerment Fund were treated differently than the Grievant.

A review of the audit and the numerous recoverable findings cited therein suggests that management at ODDC failed to ensure that laws and regulations were being followed in numerous areas of the Fund's overall operations. (JX 26, pp. 8-36). Appendix A of the audit contains over twenty areas where recoverable findings or noncompliance citations were issued against ODDC. (JX 26). Additionally, the Empowerment Fund was being operated contrary to the Ohio Administrative Code (OAC) travel and reimbursement requirements. OAC 128-01-02B(4). The audit also concluded that ". . . All Council members are viewed as state agents when determining eligibility for travel expenditure reimbursements. Therefore, the Ohio Administrative Code was viewed as applicable to Council members and employees of the Ohio Developmental Disabilities Council (ODDC)." (JX 26, p. 8). Therefore, all users were analyzed as being similarly-situated. The record is silent as to whether all Council members had fully paid the total amounts owed to the Empowerment Fund by the conclusion of the audit. Since Council members also used the Empowerment Fund, a review of their repayment practices may have been instructive to draw an inference regarding the repayment custom and practice.

At the hearing, Cavese testified that ODDC had "a lot" of issues and as lead auditor she found that management and employees had failed to properly comply with either external guidelines or internal procedures regarding grants of which ODDC was the recipient. Upon

cross examination Cavese admitted that management was apparently negligent and committed “a lot” of mistakes regarding the Empowerment Fund. Cavese concluded that she found findings against both management and employees regarding the operation of the Fund. (JX 26, pp. 8-36). Finally, due to ODDC’s operation of the “cash advance” component of the Empowerment Fund, Cavese recommended that ODDC cease this process since it was not legal to advance money to employees or Council members. (JX 26, p. 8). In other words, ODDC/MRDD’s cash advance practice was instituted and operated with less than clean hands.

At all times relevant in this matter, Groom was responsible for the Empowerment Fund’s administration. Groom admits that in March 2007 he emailed a reminder to the Grievant regarding the \$550.00, but, after that, “it fell off the table” and the reimbursement from the Grievant was not an issue of concern with him for over twelve months. This matter only resurfaced because of the audit. The facts are undisputed that Groom viewed the development and implementation of the internal policies to govern the repayment process as “. . . never fully developed or implemented for the specific group of individuals to receive short-term loans from the Empowerment Fund.” (JX 36). Groom reiterated the foregoing at the hearing and reaffirmed that no sense of urgency was communicated to him by Zywer or by APSI, the fiscal agent.

The effect of the above practice not only allowed each employee to determine when the cash advances were reimbursed but also allowed the practice of periodic payments to occur. The Empowerment Fund was considered and operated as a short-term loan per Groom, and the facts before this Arbitrator support that fact. Why would anyone have to make delayed and/or installment payments to the Empowerment Fund unless they had used their reimbursement from the State of Ohio for purposes other than to immediately reimburse the Empowerment Fund?

The Union presented unrefuted evidence of periodic payments made by recipients to the Empowerment Fund and a time variance of when repayments were made by the users. (UX 5). Repayment could occur in less than one month (UX 5) or as long as fifteen months. (UX 5). No written policy or consistent pattern is present regarding repayment by users, and the Employer's evidence fails to explain this anomaly. Therefore, it is irrelevant whether the Grievant repaid the Empowerment Fund in one day or one thousand days since the Employer essentially allowed each user to determine the date of repayment. The Grievant and Groom both testified that as long as repayment had occurred prior to "another request for Empowerment Fund usage, no problem." The record is also silent of **any** practice of the Employer that mandated repayment within a specified number of days after receipt of reimbursement. Moreover, the practice of "installment" payments supports the fact that the Empowerment Fund was operated as a short-term loan.

Finally, the lax/inconsistent enforcement of the internal policies governing the Empowerment Fund directly undermines any contention that the Grievant was put on notice regarding the possible consequences of her actions. I agree with the Union that the administration of the "up front" advances and the repayment process was inconsistent and clearly condoned by the Employer and the Grievant had no reason to anticipate she would be subject to discipline for her treatment of the funds. Simply, based upon all of the foregoing reasons no theft of public funds were proven in this matter.

Given the foregoing, discipline would still be appropriate if the Grievant had engaged in some other act of a serious offense to warrant her removal ". . . even for an employee with a clean record." *McAlpin* at p. 13. When confronted during the audit investigation, the Grievant stated that she had intended to repay the money and made immediate arrangements to repay. No

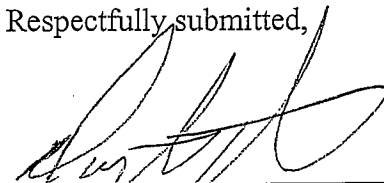
evidence indicates that the Grievant's conduct can be viewed as egregious when she was pressed to address the Empowerment Fund matter. In other words, when put on notice by Management that immediate payment was required, the Grievant complied and repaid the Empowerment Fund.

Given the foregoing, and considering the Grievant had no prior disciplinary record, the discipline issued was not for just cause. The Grievant shall be reinstated to her position, with all back pay, seniority and any other economic benefit to which she would have otherwise been entitled but for her removal.

AWARD

The grievance is granted, and the Grievant is entitled to reinstatement and to any economic harm, including back pay as a result of her removal. Jurisdiction is retained for sixty days to resolve any and all issues associated with the implementation of this award.

Respectfully submitted,



Dwight A. Washington
Arbitrator

Dated: April 29, 2009