

Arb Decision # 1030

STATE OF OHIO VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF ARBITRATION BETWEEN:

THE STATE OF OHIO, DEPARTMENT OF DEVELOPMENT

- AND -

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

GRIEVANT: JAMES FRANKLIN
GRIEVANCE NO.: 09-00-(08-08-20)-0409-01-14

RECEIVED / REVIEWED

MAY 22 2009

OCSEA-OFFICE OF
GENERAL COUNSEL

ARBITRATOR'S OPINION AND AWARD

ARBITRATOR: DAVID M. PINCUS

DATE: MAY 21, 2009

APPEARANCES

For The Employer

Carolyn A. DeLong
Nick Sunday
John Bowen
Daniel K. Workman
Victor Dandridge

Human Resource Director
Office Chief of Community Services
Internal Auditor 3
Special Projects Coordinator
Advocate

For The Union

James Franklin
Jacqueline r. Milson
Freida Smith
John P. Gersper
Thomas Cochran

Grievant
Assistant Director of Human Resources
Physical Specialist 1 & Union Steward
Staff Representative
Advocate

INTRODUCTION

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panel between the State of Ohio, Department of Development, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period March 1, 2006 to February 28, 2009 (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing written closings. The parties selected this option and submitted closings in compliance with guidelines established at the hearing.

JOINT ISSUE

Was the Grievant, James Franklin removed from his Internal Auditor 2 position for just cause, If not, what shall the remedy be?

CASE HISTORY

The Employer's mission is to attract, create, grow, and retain businesses in the State. It primarily accomplishes these tasks by distributing Federal and State grants. The audit section with the department conducts audits which determine whether grantees are operating and distributing funds in accordance with grant guidelines.

The Grievant was originally hired by the audit section in 1983, but only became a member of the bargaining unit in January of 2004. As such, when he was removed on August 14, 2008, he had accumulated four years of bargaining unit seniority. As an Internal Auditor 2, he conducted internal and field audits of grantor performance.

The Grievant had an active disciplinary record at the time of his removal. For the period September 14, 2007 to April 16, 2008, the Grievant accumulated a written reprimand; a two-day suspension and a five-day suspension. These disciplinary actions, moreover, all involved the identical charges; a violation of Work Rule 1b - Neglect of Duty, Minor-Poor/Substandard Work Performance.

In June of 2008, the Grievant and John Bowen, an Internal Auditor 3, were conducting a field audit at the East Akron Developmental Corporation. Bowen was the Lead Auditor, while the Grievant assisted Bowen as the Staff Auditor.

Bowen testified the Grievant experienced a number of difficulties performing some critical auditing functions. The Grievant did not ask any questions during the audit which Bowen reviewed. Bowen maintained he found numerous errors which caused him to re-work much of the audit. He took copious notes (Joint Exhibit 4) which he turned into Daniel K. Workman, the Special Projects Coordinator.

The previously described episode led to the Grievant's eventual removal. Again, he was charged with his final Work Rule 1b - Neglect of Duty violation.

The parties were unable to resolve the contested grievance during subsequent stages of the grievance procedure. Neither party raised procedural nor substantive procedural issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined it had just cause to terminate the Grievant for violating Work Rule 1b - Neglect of Duty, Minor-Poor/Substandard Work Performance. The audit at the East Akron Neighborhood Development Center served as the triggering event for removal. The incident in dispute was the fourth incident involving the same infraction.

Bowen provided documentation and testimony regarding the errors made by the Grievant. He was the lead Auditor in Akron and viewed the Grievant as an incompetent auditor based on his performance. Bowen maintained that on the audit in question, the Grievant was unable to complete the simplest task. The payroll test sheet (Joint Exhibit 4, Pg. 8) completed by the Grievant was error-ridden; which Bowen had to correct and finish (Joint Exhibit 4, Pg. 9). The same outcomes related to work done involving the cash disbursement test (Joint Exhibit 4, Pgs. 14 and 10). Other basic accounting errors were also testified to by Bowen (Joint Exhibit 4, Pgs. 10-13 and Pgs. 18-19).

These errors were pervasive and not isolated events. Workman testified that similar types of errors were identified during annual evaluations for the period 2006-2008 (Employer Exhibit 1, Pgs. 14-30).

Training was required and encouraged throughout the disciplinary period identified by the Employer and stipulated to by the Union. Bowen testified he provided the Grievant with extensive on-the-job training during various field audits. Workman, moreover, testified the Grievant was initially asked and subsequently ordered to participate in training sessions (Employer Exhibit 2, Pg. 3). None of these attempts corrected the Grievant's performance. He was unable to accomplish basic auditing assignments.

Nick Sunday, the Office Chief, testified about potential liabilities involving compliance audits. He noted these audits require accuracy and cannot be ridden with errors. Audit failures may result in a loss of funds to the State of Ohio, and possible sanctions against the facilities being audited.

The Union failed to introduce any evidence or testimony which contradicted the Employer's allegations. The performance-related misconduct and related documents were not sufficiently rebutted to support reinstatement.

The Grievant's years of service served as an aggravating circumstance in support of the removal decision. A person with this length of service should be well-equipped to complete, without any meaningful errors, any tasks assigned during a field audit.

The Union's Position

The Union maintained the Employer did not have just cause to terminate the Grievant. The Employer failed to meet its' burden of proving he engaged in wrongdoing requiring termination. If the Employer had met its burden of proof, the penalty of removal is mitigated by a number of factors.

The Employer failed to provide benchmark data to establish the severity of the Grievant's error rate. His error rate over a period of time was never compared against other similarly situated auditors. DeLong and Workman never testified about an objective standard for the auditing profession. Jeff Bankey determined the errors were excessive, but Bankey was never called to testify.

The Grievant was not given a final warning making the discharge decision improper. The Grievant, more specifically, should have been told what was expected of him, but also what he could expect in terms of discipline if his performance did not improve. Each of the Grievant's prior disciplinary actions were merely enclosed with "boilerplate" language and did not provide unequivocal notice. Several of the Union's witnesses, Smith and Gersper, expected a more severe suspension but not removal.

The imposed discipline, removal, was not progressive but excessive. All of the prior disciplinary actions were cast as minor infractions in field audits including the last offense. As such, it becomes difficult for the Employer to establish just cause for removal.

The Grievant was not given an opportunity to correct his behavior. If the Employer was truly interested in rehabilitating the Grievant, the training offered would have been more structured and extensive.

The Employee Assistance Program (EAP) was another rehabilitative format not considered by the Employer. Article 9, Section 24.10 contemplates the use of this option where disciplinary action is being considered, and may mitigate disciplinary action. Again, the Employer merely decided to forego any opportunity to save the Grievant's working relationship with the Employer.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, a complete review of the record including pertinent contract provisions and the parties' written closings, it is this Arbitrator's opinion the Employer had just cause to terminate the Grievant. The Grievant's disciplinary record exhibits several progressive attempts to modify his behavior; with the hope that progressive penalties for the same offense might lead to positive performance outcomes. As such, the Grievant was placed on clear notice that continued identical misconduct would lead to removal.

The Union's attempt to characterize the Employer's removal decision as arbitrary and capricious is unpersuasive. The Grievant admittedly engaged in Neglect of Duty on a number of prior occasions (Employer Exhibit 1). Just because the disciplinary grid references this form of misconduct as "minor" does not mean more severe forms of discipline are inappropriate; up to and including termination. An alternative interpretation, one the Union wishes to exploit, would never result in removal for a series of "minor" offenses. The Employer's grid does not call for immediate removal for a "minor" offense. Rather, it places the Grievant, and other employees, on clear and unambiguous notice regarding the number of like offenses which will be tolerated, and the critical mass of violations which may result in removal. The Grievant, in the Arbitrator's view, accumulated a critical mass of identical misconduct, involving serious field audit errors, resulting in just removal.

The East Akron Neighborhood Development Corporation audit served as the "last straw" culminating in his eventual demise. John Bowen, an Internal Auditor 3, was the lead auditor on the East Akron audit, while the Grievant served as the staff auditor. His unrebutted testimony, which was supported by extensive documentation (Joint Exhibit 4), evidenced the severity of the Grievant's errors. Errors involving basic auditing practices; and errors made in prior field audits over an extended period of time. Quite surprisingly, unlike prior field audits, the Grievant did not ask any questions. He merely turned in his work which Bowen subsequently reviewed and had to alter by re-doing his worksheets (Joint Exhibit 4).

The Union placed a great deal of reliance on a Mendlowitz¹ decision. The Arbitrator does not support this view nor its application in this instance. It is axiomatic that prior arbitration awards dealing with disciplinary matter may have an impact on an arbitrator's analysis when dealing with unequal treatment charges. Thus, prior awards dealing with similarly situated employees may enjoy the desired application. Here, the Grievant and Mendlowitz were not similarly situated. In fact, they were employed by different departments, and this attempt to draw comparisons leads to an utterly futile effort.

¹ The State of Ohio, Office of Budget and Management, OCSEA/AFSCME, Local 11, Case No. 08-00-(06-04-02-0001-01-09 (1997, Mancini)

The conclusion drawn by the Union has greater application when dealing with contract interpretation disputes. These awards tend to become part of the collective bargaining agreement in the broadest sense of that term. Their application may cut across departments for the duration of an agreement. In this limited sense, a prior arbitration award may serve as an influential element.

Most vexing to this Arbitrator was that many of the Union's arguments were not supported by the record. In the Arbitrator's opinion, the Grievant received extensive training which should have corrected his performance problems. Daniel K. Workman served as the Grievant's direct supervisor. He testified that after each field audit, a meeting takes place where the audits are reviewed with participants. Problems are identified and positive reinforcement distributed where appropriate. The Grievant's errors were identified during these meetings. Many of these errors were repetitive and reflected in the East Akron audit (Employer Exhibit 2). Workman also provided the Grievant with individualized training with lead auditors.

In-service training, which all auditors attended including the Grievant, discussed field audit procedures and requirements. These took place periodically, which again the Grievant attended. In order to retain certification, Workman advised the Grievant had to ensure his "yellow book standard." These

standards are established for government auditors which require continuing education credits. Auditors are required to attend forty hours of training per year. The Grievant met this standard each year since 2005. None of this testimony was rebutted by the Grievant.

Troubling testimony was provided by Workman. He noted that on several occasions the Grievant stated he did not need additional training "because he had the number of years of service that he had." Obviously, Workman held an opposing point of view and directed more training.

Section 24.10 discusses Employee Assistance Programs. Arbitrator's have interpreted this provision as initiated primarily by employees and agreed upon, on a permissive basis, by the Employer. The record does not reflect any attempt to initiate this process "within five (5) days of the pre-disciplinary meeting or prior to the imposition of discipline, whichever is later. Inaction, as a consequence of non-participation, barred the Union mitigation attempt.

The Union's own witnesses partially supported the Employer's disciplinary action. Frieda Smith, a Union Steward, maintained no other employee had been removed after realizing a five (5) day suspension. Yet she testified she knew of no other employee who had been penalized for an identical violation on four separate occasions. John Gersper, a Staff Representative, acknowledged no other employee was similarly situated to the Grievant.

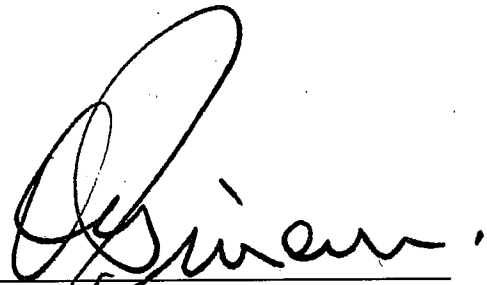
The disputed work rule was properly administered based on the circumstances surrounding the disputed matter. A work rule does not become unreasonable, nor its application tenuous, because it has never been applied in a particular manner. Much more evidence than this record represents needed to be introduced by the Union to serve as appropriate rebuttal or at least shift the burden back to the Employer.

AWARD

The grievance is denied. The Employer had just cause to remove the Grievant.

5/21/09

Date



Dr. David M. Pincus
Arbitrator