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ARBITRATION DECISION

July 8, 2009

In the Matter of:

State of Ohio, Department of Commerce)	
)	
and)	Case No. 07-00-20081110-0568-01-14
)	Sonja Armistead, Grievant
Ohio Civil Service Employees Association,)	
AFSCME Local 11)	

APPEARANCES

For the State:

Andrew Shuman, Labor Relations Officer, Department of Commerce
 Jessie Keyes, Labor Relations Specialist, Office of Collective Bargaining
 Lee Thatcher, Project Manager
 Geoff Eaton, Bureau Chief

For the Union:

Bill Anthony, Advocate
 Barbara Follman, Advocate
 Sonja Armistead, Grievant
 Ray Blackerby, Steward

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant is Sonja Armistead. She was hired by the Department of Commerce on August 14, 1989. She held a variety of positions including Typist 2, Word Processing Specialist 2, and Secretary. Most recently, the grievant was an Administrative Assistant 1 in the Bureau of Building Code Compliance.

The events leading to the grievant's removal took place on September 10, 2008. At 10:50 a.m. and 11:00 a.m. on that day, Geoff Eaton, the Bureau of Building Code Compliance Chief, who was the grievant's acting supervisor, went to ask her to process a refund but she was not at her desk. Shortly after 11:00 a.m. Eaton went on his usual morning walk around the parking lot. He looked for the grievant's car, which was recognizable because of her distinctive vanity license plates, but discovered that the grievant's car was not in the lot.

Between 11:20 a.m. and 11:25 a.m. Eaton got an email from the grievant asking him why he had been looking for her. He replied at 11:30 a.m. that he came by to ask her a question and asked her where she had been. The grievant answered at 11:36 a.m. that she had stepped away from her desk on a break. At 1:39 p.m. Eaton asked the grievant what time she left and what time she returned. The grievant's 2:24 p.m. response states that she left at 10:50 a.m. and returned at 11:07 a.m. Eaton then contacted Lee Thatcher, a Project Manager, and asked him to investigate.

Thatcher immediately began his investigation. He reviewed a video-recording from a surveillance camera at the entrance to the building and learned that the grievant left at 10:37 a.m. and returned at 11:17 a.m. Thatcher also examined the grievant's time

sheet and found that she had not taken leave to cover her 40-minute absence from the workplace.

On September 15, 2008, Thatcher interviewed the grievant. He asked her if it was possible that she left work earlier than 10:50 a.m. or returned later than 11:07 a.m. She initially responded that it was not possible. However, when he told her that a surveillance camera showed otherwise, she indicated that the times were approximate.

On the same day, Thatcher submitted his report to Gary L. Schaeffer, the superintendent. Thatcher indicated that the grievant left her work area for more than her break time and initially denied doing so. He noted that the grievant's time sheet had notations for two occasions when she requested and was granted leave for arriving late or leaving early due to an emergency but indicated no request was made for leave to cover the time at issue.

A pre-disciplinary meeting was held on October 10, 2008. The state charged that the grievant violated Policy No. 201.2, Rule #1, by leaving her work area without authorization and extending her break, and Policy No. 201.1, Rule #6, by providing false information during an investigation. The union argued that the grievant believed that she had been gone only 15 minutes and that since the FOCUS system was down and she had little other work to do, she decided to run an errand and work through her afternoon break to make up the time.

Andrew Shuman, a Labor Relations Officer, who served as the hearing officer, issued his report on November 3, 2008. He stated that the grievant was gone for 45 minutes and that she was not truthful during the investigation. Shuman found just cause

for discipline and indicated that based on her previous ten-day suspension, progressive discipline dictated her removal.

On November 6, 2008, Kimberly Zurz, the Director of the Department of Commerce, informed the grievant what she was being removed effective the next day for violating Policy No. 201.2, Rule #1, and Policy No. 201.1, Rule # 6. The union responded by filing a grievance on behalf of the grievant claiming that she was removed without just cause in violation of Article 2, Section 2.02, and Article 24, Sections 24.01, 24.02, and 24.06, of the collective bargaining agreement. It asked that the grievant be reinstated and made whole.

The step three grievance hearing was held on December 5, 2008. At that time, the union claimed that the grievant had "female problems" that explained her absence from the workplace. It stated that in any event, the penalty was not commensurate with the offense.

When the grievance was denied, it was appealed to arbitration. The hearing was held on June 24, 2009, and concluded with oral closings arguments.

ISSUE

The issue as agreed to by the parties is:

Was the Grievant, Sonja Armistead, removed for just cause for violation of agency policy, specifically Policy 201.2 #1 - Leaving the work area without authorization or extending a paid break with authorization and Policy 201.1 #6 Dishonesty - Providing false information in an investigation? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 2 - Non-Discrimination

* * *

2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, or shall reassignments be made for these purposes.

* * *

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

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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 there is just cause for the grievant's removal. It maintains that she did not tell any manager that she was leaving her work area or that she needed to be gone for longer than her regular break time. The state points out that Eaton was unable to find the grievant and that she sent no email to him and never requested leave to cover her absence.

The state contends that Thatcher's investigation established that the grievant extended her break. It indicates that a surveillance camera reveals that she left the building at 10:37 a.m. and did not return until 11:17 a.m. The state stresses that the grievant had no authority to extend her break or to combine her morning and afternoon breaks.

The state maintains that the grievant was dishonest during the investigation. It reports that when Thatcher asked her if she could have left for her break earlier than 10:50 a.m. or returned later than 11:07 a.m., she twice said that she did not. The state reports that it was only after Thatcher told the grievant about the video-recording from the surveillance camera that she stated that the times were approximate.

The state argues that the grievant's removal is consistent with progressive discipline. It observes that only three months prior to the incident at issue the grievant

was charged with insubordination and suspended for ten days. The state notes that the suspension was upheld in arbitration.

The state discounts the grievant's explanation that she had to leave work to attend to an urgent personal matter. It suggests that the grievant's problem did not excuse her failure to notify Eaton that she was leaving work or subsequently to request leave as she had done on two other occasions involving the same personal issue. The state acknowledges that the grievant claimed that she was too embarrassed to tell Eaton or Thatcher about her problem but asserts that it is more embarrassing to lose one's job.

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

UNION POSITION

The union argues that there is not just cause for the grievant's removal. It states that the grievant left work to attend to a personal matter and observes that other employees do the same. The union adds that the grievant called Eaton twice but was unable to reach him. It claims that after the second call the grievant had to leave immediately because of her personal problem.

The union contends that the grievant believed that she would be able to get to her home and back in her 15-minute break. It points out that she lives only 1.7 miles from the office. The union indicates that when the grievant realized that she would not be able to return to work on time, she planned to make up the time by working through her afternoon break.

The union rejects the charge that the grievant was dishonest during the investigation. It observes that she explained at the hearing that she experienced a heavy

menstrual flow and needed to go home to shower and change her clothes. The union reports that the previous month she had the same problem and was eager to avoid another embarrassing situation. It stresses that she felt uncomfortable explaining this to Eaton and Thatcher.

The union argues that the grievant is a valuable employee. It observes that she has 19½ years of service. It notes that over the past three years she has received positive performance evaluations and that in January of 2008, Kit Lloyd, her regular supervisor, rated her performance as nearly exceptional.

The union contends that removal is not commensurate with the grievant's alleged offense. It states that the only real charge against the grievant is that she left her work area and took an extended break. The union notes that the work rules indicate that the penalty for even the fourth offense is a ten-day suspension rather than removal. It emphasizes that since the grievant had no attendance-related discipline in her file, her discipline was not progressive.

The union concludes that one mistake should not eliminate 19½ years of service. It asks the Arbitrator to reinstate the grievant with back pay and benefits.

ANALYSIS

The grievant is charged with violating Policy No. 201.2, Rule #1, and Policy No. 201.1, Rule #6. Policy No. 201.2, Rule #1, prohibits:

Leaving the work area without authorization or extending a paid break without authorization.

Policy No. 201.1, Rule #6, prohibits dishonesty. It bars:

Dishonesty: To include, but not limited to, falsifying, unauthorized altering or removing an official document; Providing false information in an investigation or filing a knowingly false complaint/accusation.

The evidence establishes that the grievant violated Policy No. 201.2, Rule #1. A video recording from a surveillance camera indicates that she left the building at 10:37 a.m. and did not return until 11:17 a.m. If a few minutes is added to reflect the time it would take the grievant to get from her work area to the building exit, she took a break of approximately 45 minutes rather than the 15 minutes she was entitled to take.

The record also reveals that the grievant did not request extra time to attend to her personal problem. She testified that she called Eaton twice prior to leaving but acknowledges that when she was unable to reach him, she did not leave a message. Furthermore, the grievant did not send him an email or inform a co-worker that she was leaving the workplace.

While the Arbitrator recognizes that the grievant claimed that she was too embarrassed to discuss the nature of her personal problem with Eaton, it does not excuse her conduct. The problem relating to the beginning of her menstrual cycle is familiar to all adults and should not cause her embarrassment. In addition, there is nothing in the record to suggest that the grievant would have been required to offer a detailed explanation had she requested leave to cover her absence.

The Arbitrator dismisses the grievant's suggestion that her 45-minute absence from work was no problem because she intended to combine her morning and afternoon breaks to cover the time. Her claim ignores the fact that Section V of Policy No. DIC 115.0, which the grievant acknowledged that she received, authorizes 15-minute breaks in the morning and afternoon but allows employees to work through a break "only under

the most extenuating of circumstances.” Furthermore, even if the grievant were permitted to work through her afternoon break, the 30 minutes from combining her two breaks would not cover her 45-minute absence from work.

The Arbitrator rejects the grievant’s suggestion that she did not expect to be gone for more than fifteen minutes. While it is only 1.7 miles from work to her home, she testified that she intended to take a shower and change her clothes. The grievant could not have expected that she could walk to car, drive home, take a shower, get dressed, drive back to work, and get to her desk in 15 minutes.

The record also establishes that the grievant violated Policy No. 201.1, Rule #6. The evidence indicates that when Eaton asked her in an email what time she left for her break and what time she returned, she replied that she took her break from 10:50 a.m. to 11:07 a.m. When the grievant was interviewed by Thatcher, she again claimed that she left at 10:50 a.m. and returned at 11:07 a.m. She insisted that she could not have left earlier or returned later until she was told that a surveillance camera showed her leaving earlier than she claimed and returning later that she said.

The Arbitrator rejects the grievant’s assertion that her departure and arrival times were only approximations. As indicated above, she told Eaton and Thatcher that she left at precisely at 10:50 a.m. and returned at 11:07 a.m. Furthermore, the video-recording from a surveillance camera shows the grievant looking at her watch as she enters the building at 11:17 a.m., which suggests that she was aware of the time she returned. In any event, it is difficult to accept 17 minutes as an approximation for 45 minutes.

The remaining issue is the proper remedy. The state argues that the grievant’s removal is consistent with progressive discipline and is commensurate with her conduct.

The union contends that the grievant's removal is contrary to the contract requirement that discipline be progressive and commensurate with the offense.

The parties stipulated that at the time of the grievant's removal, she had two reprimands for inappropriate telephone usage and a ten-day suspension for insubordination in her file. The grievant challenged her suspension in arbitration where her case was heard by Arbitrator Dwight Washington. In his decision, he indicated that the grievant had refused a direct, written order of her supervisor and upheld her suspension.

The state's decision to remove the grievant is consistent with the disciplinary grid. A violation of Rule #6 of Policy 201.1 calls for a ten-day suspension followed by removal. Since the grievant had already been suspended for ten days, removal was the penalty specified by the grid.

The Arbitrator must reject the union's suggestion that the grievant's removal is inconsistent with progressive discipline because dishonesty and insubordination are different offenses. This contention is contrary to the accepted view of Arbitrators regarding progressive discipline. In addition, Policy No. 201.0 states that "discipline does not have to be for like offenses to be progressive."

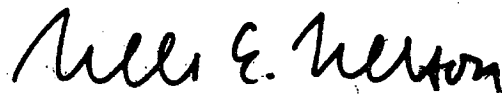
The Arbitrator also dismisses the union's argument that the grievant's only real offense was extending her break and that removal is not commensurate with that offense. The union's claim ignores the fact that the record clearly establishes that the grievant was guilty of dishonesty when she provided false information to Eaton and Thatcher. This serious offense coupled with her prior ten-day suspension provides just cause for her

removal and undermines any assertion that the penalty imposed on her was not commensurate with the offense.

The Arbitrator recognizes that the grievant has 19½ years of service and has had good evaluations. However, her extension of her break and, more importantly, her dishonesty in the subsequent investigation, following closely her ten-day suspension for insubordination, gives the Arbitrator no alternative but to deny the grievance and uphold her removal.

AWARD

The grievance is denied.



Nels E. Nelson
Arbitrator

July 8, 2009
Russell Township
Geauga County, Ohio