

Voluntary Labor Arbitration Proceeding

In the matter of the Arbitration between:

The State of Ohio, Ohio Lottery Commission

-And-

Ohio Civil Service Employees Association, Local 11, AFSCME

Grievant: Jeanett Lewis

Grievance No.: 22-10-(10-02-08)-0001-01-14

#1071

Arbitrator's Opinion and Award

Arbitrator: David M. Pincus

Date: October 1, 2010

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DCSEA-OFFICE OF
GENERAL COUNSEL

Appearances

For the Employer

Traci L, Pikney

Liz Popadik

William Newsome

Cark Ketterer

Shanika Hardaway

Antwan Booker

David Long

Deputy Director-General Services

Deputy Director- Human Resources

Labor Relations Officer

Investigator

Intern

OCB-Intern

Advocate

For the Union

Jeanett Lewis

Jackie Wright

Reynaldo Acosta

Rieshell Taylor

James LaRocca

Robert Robinson

Grievant

Chapter President

Observer

Administrative Assistant

Researcher 3

Advocate

Introduction

This is a proceeding under Sections 2.5.03 and 25.05 entitled Arbitration Procedures and Arbitration/ Mediation Panel between the State of Ohio, Ohio Lottery Commission, 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 of April 15, 2009 to February 29, 2012 (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 submitted written closings in accordance with the guidelines established at the hearing.

Joint Issue

Was the Grievant, Jeanett Lewis, removed from her position as an Administrative Assistant for just cause? If not, what shall the remedy be?

Joint Stipulations

1. The Grievance is properly before the Arbitrator.
2. The Grievant was hired in a full time, permanent position on June 28, 1991.
3. The Grievant was removed on January 30, 2010.
4. The Grievant had no active discipline prior to January 30, 2010.
5. On July 17, 2009 the Grievant went to Northfield Park.
6. The Grievant was removed for violating the following work rules:
 - a. Rule VI-K, Dishonesty
 - b. Rule III-E, Failure of Good Behavior
 - c. Rule II-B, Insubordination
7. Prior to July 17, 2009 the Grievant had an excellent work record and held a position of trust at the Ohio Lottery Commission
8. The Grievant received the email dated March 31, 2009 from Michael Dolan.
9. On March 31, 2009, Michael Dolan was the Director of the Ohio Lottery Commission and as such was a superior of the Grievant.
10. The Grievant has not used the name "Janet Jones" in any capacity connected with her employment at the Ohio Lottery Commission
11. "Keno" is a product marketed and sold by the Ohio Lottery Commission and was being played at Northfield Park on July 17, 2009 while the Grievant was there.
12. The penalty for an employee of the Ohio Lottery Commission attempting to play an Ohio Lottery Commission game is removal for the first offense.
13. When an employee of Ohio Lottery Commission disregards an order from a superior, it constitutes insubordination.
14. The penalty for an employee of the Ohio Lottery Commission committing insubordination ranges from a 5 day suspension to removal.

Case History

The facts, for the most part, are in dispute. The following version of events represents the Employer's perspective regarding the disputed incident.

Jeanett Lewis, the Grievant, was originally hired as a full time employee on June 28, 1991. Upon her removal on January 30, 2010, she had realized nineteen years of state service with an exemplary work record.

On March 31, 2009, Director Michael Dolan sent an email (Joint Exhibit 12) to all employees regarding an Inspector General's investigation of his use of promotional tickets. The Inspector General concluded his actions were not in good judgment and constituted an act of wrongdoing. He cautioned all employees with the following Statement:

XXX

Until further notice do not distribute or utilize any promotional tickets. Marketing will be completing an analysis to determine the usefulness of the program in meeting our stated objectives and goals.

XXX
(Joint Exhibit 12)

The Grievant testified that she had a turbulent relationship with Velina Gross, her granddaughter's mother. It appears that Gross was limiting her access to her granddaughter.

In an attempt to gain more access, and to improve the relationship, the Grievant invited Gross to Northfield Park on July 17, 2009 to play Keno. Keno is a product which is marketed and sold by the Employer.

The Grievant had a significant number of Keno promotional tickets which she gave Gross. These promotional tickets are critical to the present dispute.

A \$1 claim form can only be obtained if a customer presents cash or a promotion ticket. The claim form is necessary to play Keno and must be signed.

Northfield Park personnel informed the Employer that one of its employees and a compatriot played nineteen promotional tickets and received an equal number of claim forms. The Grievant and Gross were subsequently identified as the culprits. The Grievant also admitted to signing four claim forms with a fictitious name with Gross signing the remaining claim forms.

On January 29, 2010, the Employer issued a removal order. It states in pertinent part:

XXX

This termination is based on documentation and evidence presented at the pre-disciplinary hearing conducted on January 13, 2010. You were found to be in violation of:

- A. Purchasing or Cashing Ohio Lottery tickets, accepting any Lottery prize other than a gift or an attempt to do so. Human Resources Policy, HR-09-01 Work rule IV-K, Dishonesty.
 - B. Any violation of Ohio Revised Code 124.34 Conduct of public employees. Human Resources Policy, HR-09-01 Work Rule III-E, Failure of Good Behavior.
 - C. Insubordination: willful disobedience of a direct order by a superior.
- You will be notified by the Office of Human Resources concerning your benefits and final pay.

XXX
(Joint Exhibit 3(B))

On February 6, 2010, the Union contested the removal by filing a grievance (Joint Exhibit 2(B)). The parties were unable to settle the grievance in subsequent stages of the grievance procedure. Neither party raised substantive

or procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

The Merits of the Case

The Employer's Position

The Employer did not mismanage the grievance. The process was not procedurally defective in violation of Section 24.02. The Employer initiated the disciplinary action as soon as reasonably possible. Any delays were justified and not contrived.

The July 17, 2009 episode was brought to the Employer's attention in September of 2009. Interviews were initiated and analyzed which surfaced a number of discrepancies. These discrepancies caused another round of interviews.

A number of collateral investigations were also underway. The first investigation dealt with a potential forgery charge being evaluated by the Employer's legal department. The previously described discrepancies caused an analysis of the Grievant's computer.

Scheduling a pre-disciplinary hearing also became problematic. An attempt was made to schedule a hearing in December of 2009. It was eventually held in January of 2010 once the parties were able to coordinate their calendars.

The Grievant was clearly insubordinate in violation of HR-09-01 work rule II-C (Joint Exhibit 4 pg. 3). She willfully disobeyed a direct order by a supervisor. Directory Dolan, in his email (Join Exhibit 12), ordered all employees not to

distribute or use any promotional tickets. The Grievant's "failure to understand" defense was not supported by the record.

The Grievant also violated HR-09-01, work rule IV- Dishonesty (Joint Exhibit 4, pg 10). This provision deals with in pertinent part:

XXX

K, Purchasing or cashing Ohio Lottery tickets, accepting any Lottery prize other than a gift or an attempt to do any of the above, having a proprietary interest...

XXX

(Joint Exhibit 4, Pg 10)

The Grievant admitted to signing the claim forms, even though she used an alias somewhat related to her prior common law relationship. Traci Pickney, Deputy Director, maintained that the Grievant's actions amounted to attempting to claim a prize. Also, William Newsome testified having someone play for you is still a violation of the work rule.

The Grievant offered inconsistent explanations for her actions. She originally denied signing any claim form, then acknowledged that she did, but could not produce any viable explanation. The Grievant eventually admitted signing the claim forms by using an alias related to a prior common law relationship.

Her varying versions were not supported by her diabetes defense. A reference in Gross's statement (Joint Exhibit 8) served as the sole supporting evidence, and yet it only referenced a "diet pop." A beverage that would not reverse any diabetic episode

The Grievant's last preposterous explanation dealt with the woman who disrupted her common law relationship. She ran into her at Northfield Park on the day of the episode. The confrontation caused the use of the alias.

These various explanations greatly reduce the Grievant's credibility, and thus, her general trustworthiness. An attribute clearly required based on the Employer's mission which is highly dependant on the public's perception.

The Union's Position

The Union opines the Employer did not have just cause to remove the Grievant. A procedural defect was raised, as well as questions regarding the charges in support of removal.

The Employer violated Section 24.02. The six months delay caused the untimely removal of the Grievant. None of the offered justifications substantiate the disputed delay. As of November of 2009 (Union Exhibit 3), the Employer was still attempting to surface violations regarding the Grievant's use of her computer. Clearly, these extracted inquiries underscore the weakness of the original charges.

Section 24.02 requirements should not be viewed any differently than other timeliness deadlines contained in the Agreement (Joint Exhibit 1). When the Union violates a timeliness deadline, it may forgo arguments on the merits. The Employer should be penalized for similar procedural defects.

The Section 124.34 claim was cited but not properly supported. The record fails to identify specific acts of misconduct in violation of this provision.

The Grievant was not insubordinate. Dolan's email (Joint Exhibit 12) was not a directive in a classical sense, as such it could not be used to support removal. If the directive was so important, all employees should have been required to return all promotional tickets. Also, such a critical directive should have been inserviced to eliminate any possible ambiguities.

The Grievant did not violate Work Rule IV(K)- Dishonesty. Nothing in the work rule equates signing a coupon as an act of dishonesty, The Employer is obligated to inform all employees that signing a coupon is equivalent to purchasing or cashing a lottery ticket. Since notice of this sort never took place, a removal for this violation was misplaced in this instance.

The Employer relied on a series of statements to support removal, while discounting others that supported the Grievant's version. Jeffery Stark's statement completely supports the Grievant's and Gross's versions. It raises certain suspicions regarding the accuracy of the statements provided by Connie Paolucci (Joint Exhibit 7) and Michael Colacarro (Joint Exhibit 6).

The Grievant did sign the claim forms, but there were documented mitigating circumstances which faded her recollection. It was well-known within the work setting that the Grievant was a diabetic. Her diabetic condition was extensive requiring insulin injections as well as medication (Union Exhibit 7).

On the date in question, the Grievant was experiencing a diabetic episode. She became confused, a known symptom (Union Exhibit 6), which could have caused her signing of the forms with an alias. She also saw a female who had disrupted her common law relationship causing the reference to her prior affair.

The Grievant is trustworthy and her work record supports this conclusion. Her prior performance was exceptional; and she was highly regarded by peers and management personnel.

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record including pertinent contract provisions and the parties' written closings, it is the Arbitrator's opinion that the Employer had just cause to discipline, but not remove the Grievant from employment.

Section 24.02 States in pertinent part:

XXX

An Arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the discipline process.

XXX

(Joint Exhibit 1, Pg. 85)

Here, the Employer did not violate this provision. The Employer's decision to initiate the discipline process was timely. Most of the initial delay was outside the Employer's control. The incident took place at a non-state location. Some witnesses, moreover, worked for Northfield Park. The Employer only became aware of the incident, and those potentially involved, when informed by Northfield Park personnel. Collecting statements, their clarifications and investigating other potential violations caused the delays which were reasonable and justified.

The Grievant did not violate Work Rule B- Insubordination, although her conduct deserved some form of discipline. Here, the Employer failed to demonstrate that all the requisite elements of insubordination had been met. Insubordination normally involves the refusal by an employee to work or obey an

order given by the employee's superior. The basic definition however, is subject to one critical qualification. An employee must be made aware of the consequences of failing to perform the work or follow the directive.

Here, it is clear this critical notice element was not met by the Employer even though the Grievant acknowledged receiving and understanding Dolan's email (Joint Exhibit 12). She and other employees should have been advised of the disciplinary consequences associated with this form of misconduct. This requirement is born by the Employer and not the Grievant.

The removal order references a violation of HR-09-01-E- Failure of Good Behavior. Still, other than this reference, nothing in the record identified the specific acts of misconduct used to support this charge. Neither documents nor testimony were submitted at the hearing.

The Employer must understand its obligation regarding the charges articulated in any removal order. All charges used to imposed discipline must be supported. It cannot pick-and-choose the charges to be litigated hoping to pre-select the strongest charges. Otherwise, an employer can be accused of "stacking" violations; because fashioning a defense becomes quite difficult. A Union, moreover, is placed at a disadvantage, which sometimes reduces the strength of a case.

The dishonesty charge is a bit more elusive, and yet, discipline is unavoidable but somewhat mitigated. The Grievant did not purchase or cash a lottery ticket or accept any lottery prize other than a gift, Rather, her companion stood in line, attempted to sell promotion tickets and submit claim forms. Some of those claim

forms had been signed by the Grievant using an alias. As such, the Grievant had her companion attempt to purchase or play Keno on her behalf.

The Arbitrator stands by the concluded finding but feels some discretion is warranted by the circumstances surrounding this episode. The Grievant hoped the trip would enhance her ability to maintain and continue her relationship with her granddaughter. In no uncertain terms she was attempting to buy access and remembered she had an abundant number of Keno promotion coupons. She was under tremendous emotional stress and responded badly.

The Arbitrator is also convinced that on the day in question she experienced some form of minor diabetic episode. This condition caused confusion which resulted in the use of the alias. An alias which would have prevented her from cashing any winning Keno ticket if it had been played by her companion.

The Grievant's coworkers and management personnel know of her condition. Her testimony and a document (Union Exhibit 2) submitted at the hearing support the severity of her diabetes.

The Grievant's length of seniority, untarnished disciplinary record and strong prior performance record require the Arbitrator to modify the removal. The Arbitrator believes that it is highly unlikely that the Grievant would repeat the misconduct. She should, however, note that the suspension articulated below places her on notice that any form of future misconduct could result in removal.

Award

The grievance is upheld in part and denied in part. The removal shall be modified to a thirty day suspension with back pay for any time served beyond the suspension period. She shall be reinstated to her former position with no loss of seniority and all prior benefits shall be restored.

October 1, 2010
Moreland Hills, Ohio

Dr. David M. Pincus
Arbitrator