

ARBITRATION DECISION NO.:

321

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and
Corrections - NEPRC, Cleveland

DATE OF ARBITRATION:

DATE OF DECISION:

February 10, 1991

GRIEVANT:

Virginia M. Marcum

OCB GRIEVANCE NO.:

27-17-(90-04-11)-0086-01-09

ARBITRATOR:

Jonathan Dworkin

FOR THE UNION:

Steven W. Lieber

FOR THE EMPLOYER:

Robert Thornton,
Labor Relations Specialist
Tim D. Wagner,
OCB Representative

KEY WORDS:

Suspension
Gross Carelessness
Loss to Employer

ARTICLES:

Article 24 - Discipline
 §24.01 - Standard
 §24.02 - Progressive
Discipline
 §24.05 - Imposition
Of Discipline
Article 25 - Grievance
Procedure
 §25.03 - Arbitration
Procedures

FACTS:

The grievant was an Account Clerk 2 employed by the Department of Rehabilitation and Corrections beginning in October 1988. She was assigned to the business office and was responsible for preparing vouchers, invoices and remittances for the receiving and disbursement of funds. She received good evaluations and was considered a satisfactory employee during the first six months of her employment.

The Bureau of Fiscal Audits discovered discrepancies in the grievant's office in June 1989. The warden of the facility was notified of the condition of the office in June and again in August by the auditors. The audit revealed the office records to be in "total disorder." Overpayments to vendors totaled \$39,000.00 dollars, \$6,000.00 of which has not been recovered. Additionally, state purchasing procedures were not followed which resulted in extra costs for those items purchased. Based on this information the grievant was involuntarily transferred and in March 1990 she received the four day suspension covered by this grievance.

EMPLOYER'S POSITION:

There is just cause for a four day suspension of the grievant. The grievant was found to be grossly negligent in performing her job. This is evidenced by the Bureau of Fiscal Audit's discovery of the disorderly condition of the records maintained by the grievant. Her carelessness resulted in \$39,000.00 dollars overpaid to vendors of which \$6,000.00 has not been recovered. The grievant had been trained in the proper execution of her duties. A four day suspension for the grievant's first offense is reasonable because the consequences of the grievant's neglect were so serious. Discipline imposed nine months after discovery of the office conditions was timely due to the investigation necessary to establish the grievant's guilt.

UNION'S POSITION:

There was not just cause for a four day suspension. The grievant here was merely following the instructions of her supervisor. She was aware of discrepancies in the office and brought them to the attention of her supervisor. She was instructed to obscure rather than correct the problems. In addition, double payments were authorized and executed by her supervisor and the warden. Therefore, the employer and not the grievant was at fault for the office conditions.

The employer also acted improperly by not providing adequate training to the grievant and by making threats and attempting to intimidate the grievant. A prime procedural error is that the penalty was not progressive and not within the employer's own guidelines. The union was also denied access to witnesses in the pre-disciplinary hearing and the Hearing officer did not properly consider the grievant's case. Lastly, the discipline was not timely imposed. The latest investigation was completed in September or October 1989 yet discipline was not imposed until March 1990.

ARBITRATOR'S OPINION:

The arbitrator was concerned with two aspects of the grievant's case in particular. The first is the timeliness of discipline and second is the grievant's performance evaluations given only two months prior to the discovery of the office conditions. The grievant received excellent evaluations from her supervisor for the period for which she was accused of carelessness. The evaluations were done by the same supervisor who the grievant accuses of being at fault for the condition of the office records.

The inconsistencies present made it difficult for the arbitrator to determine whether the grievant was careless and at fault for the office conditions or whether she was merely following instructions from her supervisor. She may have been a good employee who was blamed by the employer for the bad conditions at the facility. The evidence was insufficient for the arbitrator to decide these questions. In discipline cases the employer has the burden of proof, therefore, there was not just cause for discipline.

AWARD:

The grievance is sustained. The employee's record should be purged of all record of this discipline and the grievant is to be compensated for all lost wages and benefits lost for the period. The union's demand for placing the grievant back into her prior position is moot due to her subsequent removal from state employment. (See arbitration #320)

TEXT OF THE OPINION:

OCB-OCSEA VOLUNTARY
GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

In the Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Rehabilitation
and Corrections

-and-

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, OCSEA/AFSCME
Local Union 11, State Unit 9

Case No.:
27-17(90-04-11)0086-01-09

Marcum Suspension

Decision Issued:
February 10, 1991

REPRESENTING THE EMPLOYER

Robert Thornton,
Labor Relations Specialist
Tim D. Wagner,
OCB Representative

REPRESENTING THE GRIEVANT

Steven W. Lieber,
OCSEA Staff Representative
Virginia M. Marcum, Grievant

ISSUE:

Article 24: Whether or not just cause existed for the four (4)day Suspension of an Employee charged with gross carelessness in her work performance.

Jonathan Dworkin, Arbitrator
9461 Vermillion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

The grievance protests a four-day disciplinary suspension imposed on an employee for negligent work

performance. Grievant, an Account Clerk 2, was hired by the Ohio Department of Rehabilitation and Correction on October 24, 1988. She was assigned to the business office of the Northeast Pre-Release Center (NEPRC) in Cleveland. Her classification description called for, "working knowledge of accounting support systems." Her job was to work "under general supervision . . . to prepare vouchers, invoices, remittances for receipt & disbursement of funds & other related materials." Although the Account Clerk Classification Series contains a lower position title (Account Clerk 1), the Clerk 2 job was an entry-level position in Grievant's case.

During her first six months on the job, Grievant was judged a very satisfactory employee by her supervisors. She was given glowing job evaluations. On March 6, 1990, however, she received a four-day disciplinary suspension on charges that her carelessness and failure to follow administrative procedures caused NEPRC to double-pay invoices amounting to \$39,000. While some of the overpayments were recovered, the Institution suffered permanent loss of approximately \$6,000. These and other problems in the business office were both costly and embarrassing to the Agency; Supervision determined that Grievant's negligent misconduct was largely to blame. The Suspension Notice, sent to the Employee on March 6, 1990, aptly summarizes the Employer's allegations:

You are to be Suspended for the following infractions:

Rule #4: Carelessness resulting in loss, damage, unsafe act or delay in work production.

Rule #6c: Failure to follow post orders, administrative rules and/or written policies and procedures.

During your tenure in the Business Office, your carelessness in work resulted in duplicate payments to OPI [Ohio Penal Industries] and Central Office Supply in the amount of \$39,000.00, \$6,000.00 [of] which was lost to NEPRC permanently. In addition, your carelessness resulted in the payment of medical bills for released inmates, and vouchers being sent to wrong vendors and wrong vendor addresses, resulting in delay of work. Your lack of organized records resulted in overpayments to some vendors and no payments to others, creating chaos in the Business Office.

The Union denounces the discipline as a smoke screen to cover up Management's careless supervision and incompetent record keeping. It contends that Grievant worked under a Supervisor and simply followed his directives; that the erroneous invoices, vendor records, etc. were approved in writing by the Supervisor and the NEPRC Warden. Grievant aptly summarized the Union's perceptions in a written statement submitted on her behalf:

[I]t was not my violation of . . . rules, but rather the incompetence and mismanagement of my superiors that subsequently led to the inconsistent, inaccurate record keeping which resulted in the overpayments and double payments to vendors. My only violation was that I followed their orders.

Grievant's suspension was compounded by an involuntary transfer from the business office to the commissary. The work in the commissary was more routine, less skilled, and the Employee apparently thought it demeaning. The remedies demanded by the grievance include reinstatement to the business office in addition to pay restoration and expunction of the discipline from Agency records.

The grievance was presented to arbitration in writing, without a formal hearing. The Representatives furnished the Arbitrator with briefs, affidavits, and documentary evidence. Their stipulated issues are whether or not the suspension was for just cause and, if not, "what shall be the remedy?" The reference to just cause focuses on Article 24, §§ 24.01 and 24.02 of the Agreement which define and limit the State's authority to discipline Bargaining Unit employees. Section 24.01 makes just cause the touchstone of every disciplinary occurrence and places a strict burden of proof on the Employer:

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.

Section 24.02 adds substance to the nebulous term, "just cause," by establishing a progressive-discipline requirement. It provides in part:

§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 verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- D. Termination

The Agreement gives significant additional definition to "just cause" in the following excerpt from §24.05:

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

The parties stipulated that the grievance was timely and met all procedural prerequisites. They agreed that the Arbitrator was authorized to issue a conclusive award on the merits subject, however, to the following restrictions on arbitral jurisdiction in Article 25, §25.03 of the Agreement:

"Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation specifically required by the expressed language of this Agreement."

ADDITIONAL FACTS AND CONTENTIONS

The business office discrepancies were discovered in June, 1989, nearly a year before Grievant was suspended. The findings were not made by the Institution, they came to light in an audit by the Department's Bureau of Fiscal Audits. On August 15, 1989, the Bureau Auditor sent a memorandum to the NEPRC Warden outlining the shambles she had uncovered in the Institution's financial records. The memo mentioned a previous letter written two months earlier. That document was not offered into evidence. It might have been helpful because it seems that some of the deficiencies were corrected between June and August. It is frankly inconceivable that things could have been any worse than what the August 15 memo outlined. Its opening paragraph is astonishing:

"In reference to our letter of June 28, 1989, concerning the Business Office, our preliminary findings of gross mismanagement were upheld by the total disorder found in the record keeping of this office. Although this condition has been improved by the change in personnel [*i.e.*, Grievant's transfer to the commissary], much confusion still remains concerning which invoices are outstanding."

The memorandum continued with three pages of criticisms and recommendations in single-space typed format. It noted that there were no files of closed or open purchase orders for the current fiscal year. It charged that when the double payments for which Grievant was disciplined were brought to her Supervisor's attention, before the audit, the Supervisor did not take proper action to correct the situation and recover the overpayment. Vendor records were incomplete and some contained thoughtless mistakes (such as address and zip-code errors). The Auditor found that, "[t]he internal controls of this office were non-existent." The Institution had been violating express procedures by purchasing food locally instead of through State contracts and Central Office Supply; as a result, according to the Auditor's memorandum, "Each time eggs

were ordered from a local vendor an average of \$16.00 . . . was lost.?"

The Agency investigated the matter. It could not help but observe that Grievant's responsibilities comprehended; issuing purchase orders, handling accounts payable, maintaining records, and dealing with vendors. While Supervision did sign the checks and purchase orders, she was the one who initiated the documents. She had been trained, supposedly knew her job, and it was apparent to the Employer that her carelessness was a major contributing factor in creating the difficulties. The Pre-disciplinary Hearing Officer agreed. He issued a report in which he concluded, "There is just cause for discipline."

A critical question which the Employer was compelled to answer was why the discipline took the form of a four-day suspension. Grievant's employment record was unblemished. The extent of discipline clearly fell outside the progressions required by Article 24, §24.02. Moreover, the Standards of Employee Conduct, issued by the Department of Rehabilitation and Correction, prescribe discipline ranging from a written reprimand to a one-day suspension for "Carelessness resulting in loss . . . or delay in work production . . ." On the face of the record, it seems that Grievant's suspension was harsh and not commensurate with the alleged infraction. But the Employer argues that it was entirely reasonable in view of the disastrous results of the Employee's neglect:

"The employer contends that the discipline imposed was for just cause and commensurate with the offense, especially in light of the significant sums of money lost to the institution budget as a result of the carelessness of the grievant."^[1]

As stated, Grievant contends she was guiltless -- that her only "crime" was following her "boss'" instructions. The Agency does not entirely disagree. It tacitly concedes that Supervision cannot escape some of the blame. It urges, however, that the problems started at Grievant's desk and she is answerable for her own blatant errors:

"The Union would have you believe that all of these mistakes are the responsibility of the grievant's immediate supervisor, simply because he or the institution warden signed the majority of the incorrectly completed forms. While the Employer recognizes the culpability of its managers in situations such as this, we do not believe that fact relieves the grievant of her responsibilities to carry out the duties of her position."^[2]

The issue of culpability is central to this dispute. Grievant introduced supporting evidence to prove her charge that the fault was entirely Management's. Most impressive was the established fact that, before the audit, she brought invoice improprieties to her Supervisor's attention at least twice and was instructed to handle them in a manner which obscured rather than corrected the flaws. Furthermore, she testified without refutation that the double payments of invoices were authorized and executed by her Supervisor and the NEPRC Superintendent (Warden).

In addition to alleging that Grievant was wrongfully accused, the Union answered the discipline with a potpourri of charges, all designed to achieve an arbitral finding that Grievant's suspension was contrary to contractual prohibitions against unjust and/or unduly punitive discipline. It contended that the Agency overreacted, ignoring the progressive-discipline mandate it accepted when it acquiesced to §24.02. The four-day suspension was not, in the Union's judgment, commensurate with the alleged offense. In fact, it violated the Department's own unilateral regulations.

The Union also made unconfirmed assertions that Grievant's training was inadequate and that the Supervisor threatened and intimidated her. It accused the Employer of violating Grievant's procedural due-process rights as well, by denying Union access to witnesses in the pre-disciplinary hearing and obtaining a "rubber-stamp" authorization for discipline from the Hearing Officer. In the Union's view, the Officer's findings lacked truly reflective, objective, judicious examination of the evidence.

A most influential aspect of the Union's case is the contention that the Employer inexcusably breached its contractual responsibility for timely discipline. Article 24, §24.02 imposes an unmistakable obligation in this regard:

“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.”^[3]

The audit leading to the suspension began in June, 1989 and ended in August. The Institution apparently investigated Grievant's contribution to the difficulties as early as September, 1989; yet it was not until February, 1990 that the disciplinary process commenced, and late March when the Employee finally served the penalty. Indeed, the Pre-disciplinary Hearing Officer commented on the delay in his findings:

Mitigating Circumstances:

Timeliness of any discipline must be examined. The latest investigation into [Grievant's] actions was completed, according to statements made, about September to October of 1989.

The Union insists that for all or any of these reasons, the grievance should be sustained in its entirety.

OPINION

Management's unexplained delay is one of the puzzling aspects of this dispute. Another is the fact that the Employee received the most flattering job appraisals from her Supervisor; during the very period that she was supposedly performing so carelessly. It is to be recalled that she was a short-term employee when the audits took place; she had been hired only eight months before. She received two formal evaluations, one in January, 1989 and the other in March. In the January performance report, the Supervisor wrote:

“[Grievant] does more than the expected amount of work. She goes beyond her daily assigned task and does work to improve on her overall mission.

[Grievant] takes the time to do a neat and through [sic] job on all of her assigned duties. She keeps a neat, clean work area and an orderly file system. [Emphasis added.]

Since [Grievant] was hired she has been a model employee.

[Grievant] keeps neat and accurate records. She has no problem maintaining, preparing documents or retrieving information that is required.”^[4]

Both appraisals rated the Employee as meeting or exceeding every expectation. The appraiser was the same Supervisor whom Grievant maintains was responsible for the record-keeping disasters. The March evaluation was fully as complimentary as the January one:

[Grievant] goes beyond expectations in the amount of work. She does much to improve on her daily task.

[Grievant] completes all work assigned to her in a neat and accurate manner.

[Grievant] maintains, transcribes, and prepares all her work in a neat and accurate record keeping system.^[5]

Frankly, inconsistencies are confusing to the Arbitrator. Was Grievant a "model employee" or an indifferent one whose carelessness placed NEPRC's financial records in wretched shambles? Was she hired into a situation which was already poorly administered and instructed by Supervision to continue

following improper procedures? Was she a good employee who unfortunately happened to be in position to catch the flack from a disparaging audit of the facility? Was she, as the Union suggests, a convenient victim whose discipline was calculated to draw Departmental attention away from Supervision's inadequacies?

The evidence is insufficient to provide the Arbitrator with a firm basis for answering these questions. In fact, it supports affirmative answers to all of them. Because the conflict cannot be resolved with any degree of certainty, it follows that the Employer failed to meet a critical Article 24, § 24.01 obligation -- "the burden of proof to establish just cause for any disciplinary action." Accordingly, the Arbitrator is compelled to sustain the grievance.

AWARD

The grievance is sustained. The Employer is directed to purge its records entirely of references to this discipline and compensate Grievant for whatever wages and benefits she lost on account of the four-day suspension.

In view of the decision in a companion case, conditionally sustaining Grievant's subsequent removal, the Union's demand that she be reinstated to the business office is moot.

Decision issued at Lorain County, Ohio, February 10, 1991.

Jonathan Dworkin, Arbitrator

[1] Employer brief, 3; emphasis added.

[2] Employer brief, 2.

[3] Emphasis added.

[4] Emphasis added.

[5] Emphasis added.