

ARBITRATION DECISION NO.:

402

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities
Columbus Developmental Center

DATE OF ARBITRATION:

October 23, 1991
November 12, 1991

DATE OF DECISION:

December 2, 1991

GRIEVANT:

Rosalyn Royster

OCB GRIEVANCE NO.:

24-01-(91-04-30)-0069-01-09

ARBITRATOR:

John Drotning

FOR THE UNION:

Robert Steele

FOR THE EMPLOYER:

Michael J. Fiscardo
Rachel Livingood

KEY WORDS:

Removal
Poor Work Performance
Insubordination

ARTICLES:

Article 24-Discipline
§24.01-Standard
§24.02-Progressive Discipline

FACTS:

The grievant had been employed as a Systems Analyst 2 with the Department of Mental Retardation and Developmental Disabilities for three years. She had four prior disciplines for similar offenses, up to and including a seven day suspension. Early in 1991, the grievant had been assigned a Personal Contract File project, a Cost Accounting System Report, and a Task Force Report to be delivered to the governor. The grievant failed to complete the report for the governor properly and on time. She also failed to complete the

Personal Contract File project or the Cost Accounting System report properly and on time. Another state employee completed the projects the grievant had been assigned. The grievant was instructed to stop working on other projects and complete a Restoration Purchase Order file. However, the grievant continued to work on the projects she was ordered to set aside. The grievant was removed for poor work performance and insubordination.

EMPLOYER'S POSITION:

There was just cause for the grievant's removal. She failed to properly complete the Personal Service Contract File project, the Cost Accounting System Report, the Purchase Order file, and the Task Force Report which were assigned to her. She also missed deadlines for completion of her work assignments. As a result, another state employee had to complete them. The assignments were within the grievant's job description and she was given sufficient instruction and training to carry them out, however, she failed to perform her job properly. Additionally, the grievant was ordered to set other assignments aside and complete the Restoration Purchase Order file. She disobeyed this direct order and continued to work on the prior assignments.

The discipline imposed was commensurate with the offense and was based on the disciplinary grid. The grievant has prior discipline including a seven day suspension for similar offenses related to neglect of duty, poor work performance, and insubordination.

UNION'S POSITION:

There was no just cause for the grievant's removal. Although she did not complete the Personal Service Contract File project, the Cost Accounting System Report, the Purchase Order file, or the Task Force report correctly or on time, the grievant had been set up to fail. She had not been given sufficient training on the assignments. The assignment codes needed to complete the work had been set up by the employee who actually completed the assignments and the employer assigned the same project to that employee, while they were still assigned to the grievant. The employer set deadlines for the grievant, then took the work away from her and accused her of not completing the work.

The grievant did not intend to be insubordinate. She was attempting to complete a project she had been assigned. Lastly, the penalty imposed was not commensurate with the offense nor with the disciplinary grid. She had prior discipline including a seven day suspension, however this offense calls for a suspension, not removal.

ARBITRATOR'S OPINION:

The employer has proven that the grievant was unable to carry out her assigned work within the deadlines set or in acceptable condition. The fact that another employee completed the same work does not change that finding. The grievant failed to properly complete the Personal Service Contract File report, the Cost Accounting System Report, Purchase Order File, and the Task Force Report. The grievant's performance evaluations show that she has been below expectations for a period of years. The union failed to prove that the discipline was not commensurate with the offense or that the employer had set the grievant up to fail. Her four prior disciplines for offenses related to job performance prove that the grievant has been consistently unable to perform her job. The work assigned to the grievant was within her job description and the grievant had been offered training to improve her abilities. Thus, the employer proved that just cause existed for the grievant's removal.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

**OFFICE OF COLLECTIVE BARGAINING
OHIO DEPARTMENT OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES**

AND

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME**

ARBITRATION AWARD

HEARING DATES:

October 23, 1991
November 12, 1991

GRIEVANCE:

24-01-(4-30-91)-69-10-09

ARBITRATOR:

John E. Drotning

I. HEARING

The undersigned Arbitrator conducted Hearings on October 23, 1991 at the offices of OCSEA, Watermark Drive and on November 12, 1991 at the Office of Collective Bargaining. Appearing for the Union were: Robert Steele, John Fisher, and the grievant, Rosalyn Royster. Appearing for the Employer were: Michael J. Fiscardo, Valerie Butler, David Cumming, Daniel Beck, and Rachel Livingood.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on November 12, 1991. The discussion and award are based solely on the record described above.

II. ISSUE

The parties jointly asked:

Was Rosalyn Royster terminated for just cause?
If not, what shall be the remedy?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1 through #7.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. MANAGEMENT

1. TESTIMONY AND EVIDENCE

Mr. David Cumming, Department of Mental Retardation and Developmental Disabilities (MR/DD), testified he was a program analyst supervisor and he actually was a working supervisor who oversaw employees, gave out work assignments, and set deadlines. Cumming said that he supervised Grievant Royster for about three years.

Royster, said Cumming, was a system analyst and on February 21, 1991, he assigned her a personal service contract file and there were deadlines for her to complete that assignment.

Management Exhibit #1, said Cumming, states what he wanted Royster to carry out and it identifies the task and the deadline and he noted that the deadline of 2/25/91 was not met. He said that the personal service contract file was not completed as of 3/12/91.

Cumming said that a personal service contract file is an arrangement between a private contractor and the agency (MR/DD).

Cumming said that State of Ohio uses a centralized cost system for all Ohio agencies. Cumming said Royster's task was to input previous monthly transactions for the cost accounting system and she must complete it so that users have access to the information.. Cumming noted that Royster was not about to complete the task and he said that he was asked by another employee why Royster did not complete the cost accounting system (CAS) report as of February 4, 1991. Cumming went on to say that as of 2/5/91, he learned that Royster had just begun the CAS.

Cumming said that Royster indicated that she forgot to do the CAS production.

Cumming was asked whether the personal service file that Royster was to carry out was not met and he went on to say that the file she implemented was incorrect and the data in her file was not able to be read. Cumming said that he gave Royster time to redo the file but she never was able to meet the March 1st deadline so that others could utilize that file. Cumming continued by saying that Royster finally finished the work on April 1, 1991 when it should have been completed by March 1, 1991. As a result, Cumming said Royster was fired.

Cumming went on to say that the Governor wanted Management Exhibit #5 which was a report on a task force by March 15, 1991 and he said he told Royster that it was necessary to meet the deadline and that she should start the task on 3/11/91. He went on to say the report came in on 3/15/91 but it was inadequate and he cited Management Exhibit #4 which was a report draft. Cumming said that Management Exhibit #4 is a totally inadequate report and he noted that, for example, column 3 is totally out of whack and the numbers are, in his words, "way out in left field" and he said he had to tell Royster to continue to work and to fix the document.

He went on to say he received Management Exhibit #5 on 3/22/91 and that document was also inadequate and made no sense.

Cumming went on to say that Management Exhibit #6 was a correction of Management Exhibit #5 dated 3/25/91 and it was done by a Randy Blackstone and he stated that Management Exhibit #6 is the way Management Exhibits #4 and #5 which were done by Royster should have been put together.

Cumming said that he asked Blackstone to do the job on 3/15/91 and the report was turned in on 3/16/91 as a first report and the final report was completed by 3/20/91.

Cumming said that Management Exhibit #7 was a sample of Royster's output on 4/1/91. He notes that columns 1 and 2 and apparently columns 8 and 9 are totally nonsensical and that Management Exhibit #8 is the final report written by Randy Blackstone. Cumming went on to say that Management Exhibit #8 shows arrows which indicate areas of the code which are different from the original program code. Cumming testified that Management Exhibit #7 which was Royster's output was, in effect, totally inappropriate.

Cumming said that Management Exhibit #10 is a note to Royster instructing her to incorporate changes in the CAS monthly production procedure. He went on to say that he told Royster on March 22, 1991 to stop doing certain kinds of work and to work on the restoration purchase order file. He said that he told her not to continue that work on a Friday and on a Monday, she apparently attempted to continue the work on Sunday as well as the following Monday. Management Exhibit #11 shows she worked continuously on the maintenance report. Cumming said that Royster continued to work after he had told her to cease that

particular activity.

Cumming said that a Mr. Beck was contacted by a Mr. Schifflette in order to set up a purchase order file (see Management Exhibit #13). He said he investigated and noted that on that file, there was no purchase order data. Cumming said that Royster should have known that the data was available for each month and he said he wasn't aware of that problem until he was told by Mr. Schifflette about the incident.

Cumming testified about Royster's performance reviews as noted on Management Exhibits #14A, #14B, and #14C. He said that he discussed the problems with her work. He said he wrote Management Exhibit #16 which is an interoffice memorandum to a number of people, including the grievant. Cumming said that at the meeting, Royster had Union representation and the parties discussed her work skills and what the Employer expected of her. Royster responded with Management Exhibit #17.

Cumming said that Management Exhibit #18 is a memo from Daniel Beck to Royster dated November 2, 1990 and it is a response to Royster's memo to Mr. Cumming and others on the same date.

Cumming said that Management Exhibit #19 was his memo to Royster about work assignments, materials, and areas of responsibilities and current tasks. He said that the purpose of that memo was to bring Royster up to speed because she had been off work on disability leave from April to November of 1990.

On redirect, Cumming said that the purchase order file is a "read only" file. Cumming also said that he did not believe that someone else had access to Royster's file and corrupted her work.

The Employer cross examined Ms. Royster who testified that Union Exhibit #2 is a cover page for an activity report and the time noted is 5:12 p.m.

Royster said that on direct testimony she said that she worked for the Department of Administrative Services and the Columbus Developmental Center MR/DD. Royster was asked whether she neglected to tell the Employer that she worked at the Columbus Developmental Center and was disciplined at that institution and she said she did not really neglect to tell the Employer about that incident.

2. ARGUMENT

The Employer points out that the Office of Information Systems assists the Department by virtue of utilizing computer technology in order to facilitate the collection, storage, retrieval, processing, communication, and reproduction of information. The Employer points out that Mr. Cumming provided detailed instructions to Grievant Royster with respect to the various projects and the deadlines required to complete those tasks. Moreover, Royster was given additional training so that she could update her skills in order to carry out the assignments but, she failed. In short, Royster was unable to provide acceptable work product for the Employer.

As of 3/22/91, Royster refused a direct order by her supervisor to stop work on a Developmental Center maintenance report which had been assigned to her earlier.

The Employer also points out that on 2/20/91, Royster was given a 3/1/91 deadline to complete work on a personal service contract file and as of 3/12/91, she had not finished the job. Moreover, the State goes on to say that as of 3/13/91, a user was unable to access the purchase order file which was supposed to have been available on 3/1/91.

The State asserts that Royster was not given assignments which were inconsistent with her classification. Moreover, Royster indicated on her application that she had the requisite training and experience to perform the duties assigned to her by her employer.

The Employer asserts that it has trained, offered assistance, and reassigned work to other employees, etc. and it has attempted to work with Ms. Royster but she has not been able to improve.

The Employer notes that the Union attempted to show through the testimony of Royster that she was not guilty of the charges brought by the State. However, Royster's testimony, argues the Employer, did not explain away the evidence and testimony of the State.

The Employer also asserts that the Union will ask that the Arbitrator find for the grievant based on the disciplinary grid (see Joint Exhibit #7). The grid, notes the State, is a guideline and Joint Exhibit #7 suggests the five steps of progressive discipline for offenses for which Royster was removed. The State took the five steps.

Grievant Royster's problems generally fall into the category of neglect of duty and in this case, the grievant was charged with insubordination as well as neglect of duty and that was her third occurrence in a period of less than two years.

Progressive discipline, asserts the Employer, did not serve to correct Royster's poor work. Royster, asserts the Employer, simply was unable to contribute acceptable work in a timely manner and therefore, the grievance must be denied as there is just cause for her removal.

B. UNION

1. TESTIMONY AND EVIDENCE

Ms. Rosalyn Royster testified that she worked for the Department of Mental Retardation (MR/DD) and had been a systems analyst 2 for three years. Prior to that, she said, she worked for the Department of Administrative Services as a program analyst 2 and then she was promoted to a program analyst 3.

Royster testified that she supplied attachments to Management Exhibits #14A, #14B, and #14C because she disagreed with the reports of Daniel Beck (7/31/89), Donald Wood (10/26/89), and David Cumming (8/6/90). Royster testified she thought that the reviews were a reprisal and that Beck should always rated her.

Royster said that supervisor Donald Wood simply put her employee performance review identified as Management Exhibit #14B on her chair.

Royster said that she received poor performance evaluations and that David Cumming retaliated against her.

Royster testified that she was given a personal service contract on January 28, 1991 in order to create a data base and no one gave her a deadline date until February 20, 1991. She said that she met the deadline but she did not carry out the security access portion. She said the reason for that was because she had lost the data while she was creating the file and that if she had not lost the data, she would have completed the job on time as noted on Union Exhibit #1. Royster testified that she stayed over late on March 1, 1991 to finish work.

Royster said the security access was not completed until April 1, 1991.

Union Exhibit #2, said Royster, is a weekly activity report which she produced and sent to David Cumming.

Royster said that she was given a new assignment on 3/12/91 and that delayed the work on the security access assignment. She said the new assignment lasted from 3/12/91 to 3/22/91 and then she was taken off that assignment.

Royster said she completed the purchase order file on 3/1/91 and she was told she had to restore the purchase order file but she said that she did not do that but rather back-up people take care of that task.

Royster acknowledged that David Cumming directs the cost accounting system (CAS). She said that she told Cumming that she could not do the task between 3/12 and 3/15, although she tried. Royster testified that she did submit Management Exhibit #4 which is all wrong.

Royster testified she met with her supervisor on 3/19/91 on a Tuesday and she gave him output that she had and she said that her supervisor told her to finish the task by Friday, 3/22/91 and she said that was difficult.

Management Exhibit #5, said Royster, was her only output and that when she met on Friday, 3/22, she said the task the 95% complete and she just had to check headers and she was told to drop the job. Royster said she could have finished the task by 5:00 p.m.

Royster said she did not know that Management Exhibit #5 report had also been implemented by another employee.

Management Exhibit #7, said Royster, is all wrong and she went on to say that she sent it out even though it was all wrong and then she asked a secretary for the report back so she could make the corrections. Royster said that she did not know that the information on Management Exhibit #7 was assigned to someone else.

With respect to the insubordination charge, Royster said that she continued to work on a report which she

was told not to continue because she did not know what else to do. Royster said she wrote Union Exhibit #3 to a number of people and she feels she has been "set up" and forced to do assignments which she doesn't understand.

The Union cross examined Mr. David Cumming who testified he originally assigned Royster the personal service contract file task. He said he amplified the assignment to her on 2/20/91 and the deadline date he gave her was not met, although he did not think the date was particularly critical. Cumming said that Royster apparently completed the first phase on 2/25/91.

Cumming said he added a new assignment to Royster on 3/1/91 and he said he did not talk to her about the new assignment.

Cumming said he might have talked to Royster and told her to talk to other people about the way in which to handle the personal service contract.

Cumming said he had three employees working under him and he had one vacant position.

Cumming said that Royster forgot to run a production which is something everyone does on a normal basis.

Cumming went on to say he had talked to Mr. Beck and Mr. Schifflette and the latter had said he could not access a data base. Cumming said that 20 by 20 is a software system and that system was not down and the data Schifflette wanted was not obtainable and it should have been updated by the second of each month. He went on to say that he signed on for the 20/20 software system and no data was in the 1991 file.

Management Exhibit #18, said Cumming, is correct and accurate.

Cumming said that Royster was assigned to the maintenance report on 3/12/91 and he told her she should have the job done on 3/15/91. He said he also gave Blackstone the report on 3/15/91 and that Royster gave him a report on 3/22/91 (see Management Exhibit #5). He said Royster did not say it was a complete report and he went on to say that Management Exhibit #5 was simply unacceptable because it was no good.

As a consequence, Cumming said he told Royster not to work on that report.

Cumming was asked whether he was deceptive in allowing Royster to continue on a task which someone else was also doing at the same time and he said No, it was not deceptive. Cumming said that Royster completed the project on 3/20/91.

Cumming was asked whether Management Exhibit #7 only identified a minor error and he said, No, it was major.

On recross, Cumming was asked whether other system analysts can access and change files and he said he did not know. He said he is aware of the projects assigned to system analysts.

Cumming also said that he cannot learn somebody else's password.

2. ARGUMENT

The Union asserts that Management has not proven its case against Royster. Moreover, the Union claims that Management specifically assigned Royster tasks which were impossible for her to meet.

The Union asserts that Royster's assignments were derived from programs or codes set up by a Mr. Randy Blackstone and the latter was given the same assignments as Royster and Royster was never told what was going on until she was disciplined.

The Union argues that Royster was set up to fail. Moreover, the discipline issued Royster indicates that she should have only received a suspension for her fourth offense.

The Union goes on to argue that it seems unusual for Management to make critical assignments to more than one employee, especially when the Employer already utilized an employee who knew how to carry out the task. Mr. Blackstone was the creator of the original code and, therefore, he could carry out the purchase order files presumably much faster than Royster.

The Union asserts that Management confused Royster and would assign her tasks with deadlines which she then could not make. They would then take that task away from Royster and find her guilty of not completing an assignment.

The Union goes on to say that Royster was asked to carry out the cost accounting system (CAS) by 5:00

p.m. on March 22nd and then she was told by Cumming for the assignment on 4:00 p.m. on 3/22, which was prior to the deadline of 5:00 p.m. and as a result, her report was completely unsatisfactory. The Union goes on to say that unbeknownst to Ms. Royster, that assignment was already completed by a Mr. Blackstone.

Royster testified, notes the Union, that she was not trying to be insubordinate but rather she was trying to complete her tasks and she could have completed that particular task on 3/22/91 but she was not allowed to.

Royster, notes the Union, made strong efforts to complete and carry out her tasks. She tried very hard to correct all of her problems which resulted in her seven day suspension.

For all these reasons, the Union asks that she be reinstated, given all back pay, and made whole.

V. DISCUSSION AND AWARD

The issue is whether Grievant Royster is to be terminated for just cause?

Article 24.02 notes the progressive discipline of the Collective Bargaining Agreement (see Joint Exhibit #1).

Royster's record shows that she received a verbal reprimand on 11/17/89 for inefficiency and poor work performance. She received a written reprimand on 1/3/90 for tardiness and neglect of duty. Royster was given a one day suspension for neglect of duty and poor work performance on 3/14/91. Royster was then given a seven day suspension on 11/30/90 for insubordination, neglect of duty, inefficiency, and poor work performance.

Effective 4/19/91, Grievant Royster was terminated as a result of incidents involving personal service contract file problems, cost accounting system problems, purchase order file data problems, etc. In addition, the Employer asserts that Royster was insubordinate on 3/22/91.

The Union's basic claim is that Royster was assigned to do tasks which essentially a Mr. Blackstone also carried out. However, the essential argument of the Union is not persuasive because the testimony and evidence of Mr. Cumming as well as Ms. Royster clearly indicates that she was unable to carry out tasks assigned to her between February 20, 1991 and March or April of 1991. The evidence indicates that she was unable to do the work required in an acceptable fashion. Management Exhibits #4 and #5 clearly show problems with Royster's ability to carry out the tasks required.

If one looks at Royster's performance reviews, it is clear that as far back as 7/31/89, her ratings are below in terms of quantity, quality, timeliness, problem solving, decision making, and communicating. It is noted that Royster disagreed with these comments noted on Management Exhibit #14A of 1989.

Management Exhibit #14B is a similar performance review and it notes that Royster was below the expectation on quantity, quality, timeliness, problem solving/decision making, communicating, planning and scheduling and again, Royster responded with a report in which she totally disagreed with the Employer's decision on her performance review. Management Exhibit #14C dated 8/6/90 signed by David Cumming shows that her ratings are below expectations in terms of quantity, quality, timeliness, team effort/cooperation, problem solving/decision making, and communicating. Again, Royster responded that she disagreed with all the evaluations.

Essentially, the issue is not that Royster is guilty of "illegal or unprofessional conduct"; rather, it is that she is not capable of carrying out the kinds of tasks required of her by her employer. The testimony and evidence indicate that she was unable to deal with the personal service contract file, the cost accounting system, purchase order file, and the ability to modify and existing cost accounting system report, as well as correcting a developmental center maintenance report. Thus, the Employer disciplined Royster because she was unable to do required work of a system analyst 2.

Given the discipline issued to her between November of 1989 and November 30, 1990 which resulted in a seven day suspension, there simply is no basis for the Union's argument that the reason for her discipline was because she was never given a chance to carry out her tasks and that the Employer in effect was making an effort to terminate Ms. Royster for whatever reason. That claim is not persuasive. The Employer's decision to terminate Royster is because she was incapable of doing the job required of her. The Employer disciplined her according to the Contract for a host of reasons, the last of which was a seven day suspension. The final decision focused on her performance in February and March of 1991 and as a result, the decision of the Employer to terminate Royster cannot be overridden by the Union's claim that Royster

was "set up" and given tasks which she couldn't do so the Employer could use her inability as a basis for termination.

The issue is Employer concern over the grievant's inability to perform her tasks effectively; it is not whether she willfully refused to do work asked of her by her Employer. The testimony of witnesses indicate that the grievant simply was unable to carry out assigned tasks (see Joint Exhibit #3A) even though the Employer provided training (see Arbitrator Rivera's decision [26-00-(09-07-90)-0041-01-06]). Accepting the training would have made sense and even a change in position would have benefited the grievant. However, these offers were apparently unacceptable to the grievant.

Thus, the Employer decision to terminate the grievant because of her inability to perform up to standards must be sustained.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
December 2, 1991