

ARBITRATION DECISION NO.:

619

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Bureau of Workers' Compensation - Akron Service Office

DATE OF ARBITRATION:

September 11, 1996

DATE OF DECISION:

November 14, 1996

GRIEVANT:

Harold T. Wilson

OCB GRIEVANCE NO.:

34-18-(95-12-06)-0235-01-09

ARBITRATOR:

Anna DuVal Smith

FOR THE UNION:

Steven W. Lieber, Staff Representative

FOR THE EMPLOYER:

Roger A. Coe, Labor Relations Officer

Tom Gulla, Second Chair

KEY WORDS:

Delay

Criminal Charges

Removal

Circumstantial Evidence

Fairness of Investigation

45-day Time Limit

Commensurate Discipline

Just Cause

ARTICLES:

Article 24 - Discipline

§ 24.01 - Standard

FACTS:

The grievant was employed as a Clerk 3 in the Akron Office of the Bureau of Worker's Compensation. He was dismissed from his job on December 1, 1995. The incidents from August 1 through September 20, 1995 led to the removal of the grievant. The grievant had stated that he would tear up certain records and throw them away because he believed that it was a "waste of time" to copy them. Management made a decision to

monitor the grievant's wastebasket in order to document the destruction or disposal of any records. This surveillance began on August 3, 1995. Management never confronted the grievant about his destruction of documents, claiming that it was preparing the evidence for a potential criminal trial.

The grievant had received the following discipline: (1) March 16, 1995, a written reprimand for discourteous treatment of customers; (2) April 6, 1995, nondisciplinary counseling on job performance issues and an order not to "second guess" Claims Service Specialists; (3) May 11, 1995, a suspension of seven (7) days for insubordination and failure of good behavior. The grievant's performance evaluation indicated that he was performing at or below expectation in every dimension. The grievant was removed from his job on December 1, 1995 for "Neglect of Duty, Failure to Follow the Policies of the Bureau; Carelessness with Agency Information; and Failure of Good Behavior, Destruction and/or Damage of Claims, Tools, Equipment." This removal was based on his alleged destruction of agency documents.

EMPLOYER'S POSITION:

The State argued that the grievant was a "difficult employee" who showed contempt for his superiors and failed to follow orders. Further, the State contended that the destruction of the Employer's documents was an aggravating circumstance that led to his discharge. The State conceded that the evidence presented was purely circumstantial, but argued that "circumstantial but cumulative evidence can persuade the fact finder."

In defense of the Employer's delay in imposing discipline, the State argued that it was conducting a full and fair investigation and was considering bringing criminal charges. Further, the State contended that the Union has the burden of raising the 45-day time limit, and this issue was never raised.

Finally, the State disputes the Union's claims that the Employer "planted" evidence in order to provide a reason for discharging the grievant. The State asserted that the grievant had his own motivations for destroying the documents, which demonstrated a complete disregard for the orders of his supervisors.

UNION'S POSITION:

The Union argued that the State presented contradictory evidence and emphasized that the evidence presented by the State was merely circumstantial at best. Further, the Union disputed the State's characterization of the grievant as a "difficult employee." Evidence was presented demonstrating the positive work ethic of the grievant. The Union argued that the grievant had no reason to act against his self-interest, since he knew that he could lose his job if he commits another infraction of the agency's rules. Secondly, the Union alleged that the State did not conduct a full and fair investigation with respect to the charges against the grievant. In addition, the Union claimed that the State violated the 45-day discipline deadline prescribed in Article Section 24.05. Finally, the Union contended that the grievant's removal was not commensurate with the alleged offense and that the Bureau lacked just cause to remove the grievant.

ARBITRATOR'S OPINION:

The Arbitrator noted that two opposing views existed in this case: from one perspective the grievant was a problematic employee who resisted orders from Management; and on the other hand, Management seized on an opportunity to discharge an employee it disliked. With respect to this viewpoint, the Arbitrator stated that the Employer "must not allow its desire to rid itself of a problem to taint its investigation."

Further, the Arbitrator held that even with the lengthy investigation conducted by the State and the strong circumstantial evidence accumulated, the investigation was not a full and fair investigation since it was one-sided. As an example of the partiality demonstrated in the investigation, the Arbitrator pointed out that Management did not collect material from the grievant's wastebasket on the days the grievant was not at work and noted that Management also did not observe his work area during the day. In the Arbitrator's opinion, either of these procedures might have produced evidence of the grievant's innocence. The Arbitrator also noted that the decision to discharge the grievant was extreme since the purpose of imposing discipline is to attempt to rehabilitate the employee. The Arbitrator determined that the grievant should be given an opportunity to correct his behavior.

AWARD:

The grievance was granted in part and denied in part. The removal was reduced to a suspension of thirty

(30) days. The Arbitrator held that the grievant was removed without just cause. He was reinstated to his former position with full back pay, seniority and benefits, less thirty (30) days. A record of this action was placed in the grievant's personnel file.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration
Between

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

and

**OHIO BUREAU OF WORKERS
COMPENSATION**

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No.:

34-18-951206-0235-01-09

Harold T. Wilson, Grievant

Discharge

Appearances

For the Ohio Civil Service Employees Association:

Steven W. Lieber

Staff Representative

Ohio Civil Service Employees Association

Columbus, Ohio

For the Ohio Bureau of Workers' Compensation:

Roger A. Coe, Labor Relations Officer

Tom Gulla, Second Chair

Bureau of Workers' Compensation

Columbus, Ohio

Hearing

A hearing on this matter was held at 9:10 a.m. on September 11, 1996, at the offices of the Ohio Civil Service Employees Association in Fairlawn, Ohio and continued on September 16 at the State Office Building, Akron, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties by direct appointment, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter was properly before the Arbitrator and presented one issue on the merits, which is set

forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. Testifying for the Bureau were Victoria Bartel, William Orosz, Melissa Wilkinson, Cynthia Risby, Jody Hentosz, and Lora Hunt, the latter three by subpoena. Also present were Dan Neubert (Agency Representative) and Rodney Sampson (Ohio Office of Collective Bargaining). Testifying for the Union were Teresa E. Gallagher, Carol Totten, Mildred Kolinoff, Jane Kapsa, Dorothy Jannie, Barbara Moran (by subpoena) and Harold Wilson (Grievant). Also present was Elise Schorr (Chapter President and Steward). A number of documents were admitted into evidence (Joint Ex. 1-7, Bureau Ex. 1-32, and Union Ex. 1-7). The oral hearing concluded at 4:00 p.m. on September 16. Post-hearing briefs and replies were timely filed with the Arbitrator and directly exchanged, whereupon the record was closed on October 4, 1996. This opinion and award is based solely on the record as described herein.

Statement of the Case

At the time of his dismissal on December 1, 1995, the Grievant was a Clerk 3 in the Akron Service Office of the Bureau of Workers' Compensation. The record does not reveal any difficulty with his job performance from the time he was hired on May 17, 1982, until 1995, shortly after he came under the supervision Melissa Wilkinson, a person with whom he had worked when she was a college student in 1994 and whom he once reported for irregularities in taking her lunch break. The Grievant then accumulated the following record: on March 16, he received a written reprimand for discourteous treatment of customers (Joint Ex. 5); on April 6, he received nondisciplinary counseling on a number of job performance issues, most particularly mail backlog, and was directed to keep a log of his activities and not to "second guess" Claims Service Specialists (Management Ex. 2 & 32); on May 11, he was suspended for seven days for Insubordination and Failure of Good Behavior (Joint Ex. 5). Ms. Wilkinson prepared his performance evaluation for the year in June, rating him at or below expectations on every dimension and providing a written explanation of these ratings, to which the Grievant responded, also in writing (Joint Ex. 6).

During the summer of 1995, Ms. Wilkinson went on leave and the Grievant came under the supervision of Victoria Bartel. The incidents that gave rise to his removal thus occurred while Ms. Wilkinson was not at work. What happened is this: on August 1, self-insurance team employees came to Ms. Bartel, informing her that the Grievant had said it was a waste of time to copy certain records and that he would "tear them up and throw them away," (Union Ex. 2). These employees testified they were concerned because if he did so, this would mean additional work for them. Ms. Bartel reported this to her superior, William Orosz, who then conferred with staff in Labor Relations. A decision was made to monitor the wastebasket kept in the Grievant's open pod and to document any destruction or disposal of records. Ms. Bartel and Mr. Orosz began this surveillance on August 3, removing the contents of the wastebasket each day but skipping those days when the Grievant was not at work (Management Exs. 4-10, 14-28). Ms. Bartel prepared several memoranda detailing the documents found and her comparison of them with the contents of the claims files (Management Ex. 11-13). In addition, on August 4, Ms. Bartel wrote a memorandum to the Grievant confirming conversations of August 2 and 4 in which, amongst else, she reminded him not to be "second guessing" the work of the Claims Service Specialist (Management Ex. 12). By August 7, she had concluded that the Grievant was consistently disposing of claim file information in contravention of a Bureau rule prohibiting "destruction and/or damage of claims," and was "prepared to ask for progressive discipline" (Management Ex. 12). On August 8, Mr. Orosz documented an incident with the Grievant on that date during which he observed the Grievant rip an internal routing sheet from a file, stating, "You don't need this," upon which Mr. Orosz told him documents were not to be removed from Bureau files (Management Ex. 12). However, neither Bartel nor Orosz confronted the Grievant with their evidence, but continued to empty his trash can until September 20, testifying that they did not confront him because there might be a criminal investigation. However, the Grievant was never prosecuted.

For his part, the Grievant testified he had been told by his former supervisor, Barbara Moran, that it was alright to dispose of duplicate copies, something she confirmed in her own testimony. He went back and verified this sometime later after he heard arumor to the contrary. A number of witnesses testified that there was no written policy concerning the destruction of duplicates and some testified they had done so

themselves or had seen a supervisor do so. The Grievant also testified he never discarded originals, Ms. Moran agreed that she did not think he would, and all witnesses who were asked said they had not seen him throw any documents away.

The Grievant further testified that he assumed the "second guessing" he was admonished to stop meant helping others with problems they encountered. Indeed, several witnesses testified to the knowledge, helpfulness and conscientiousness of the Grievant, and others submitted affidavits to the same effect (Union Ex. 1).

The Grievant also said that although he was aware his wastebasket was being monitored, he did not know he was in trouble for throwing documents away until the prediscipline. He did, however, know that if he got in trouble again he would be fired.

On September 19, Mr. Orosz conducted an investigatory interview with the Grievant, and Ms. Wilkinson, who had since returned from leave, issued a report of her opinion regarding the seriousness of the destruction of the documents found. The three employees who had heard the Grievant say he would "tear up and throw away" unnecessary copies were ordered to provide affidavits and, on September 20, did so (but later asked to have them withdrawn) (Union Ex. 2-4). In addition, Mr. Orosz confiscated a cartoon from the Grievant's pod about destroying "useless" work documents (Management Ex. 29). A predisciplinary meeting notice was issued on October 3, followed by a corrected one on October 4 seeking his removal. Prior to this meeting Chief Steward Carol Totten conducted her own investigation, comparing Management's list of what was retrieved from the Grievant's wastebasket with the contents of the files (Union Ex. 7). Following the October 12 pre-disciplinary meeting, the Grievant's employment was terminated effective December 1, 1995 for "Neglect of Duty, Failure to Follow the Policies of the Bureau; Carelessness with Agency Information (e.g., mail, warrants, claim files); and Failure of Good Behavior, Destruction and/or Damage of Claims, Tools, Equipment" (Joint Ex. 3).

A grievance protesting this action was filed on December 2, 1995. Being unresolved at lower steps of the grievance procedure, it came to arbitration where it presently resides for final and binding decision, free of procedural defect.

Stipulated Issue

Was the Grievant, Harold Wilson, removed for just cause?
If not, what should the remedy be?

Arguments of the Parties

Argument of the Employer

Management's position is that this was a difficult employee who showed contempt for his superiors, consumed an inordinate amount of supervisory time, and substituted his own judgment for that of his superiors. It contends it had cause to collect evidence from the co-workers' reports and to do so over a period of time, being under an obligation to conduct a full investigation and to provide evidence for the Highway Patrol's investigation. What it found was both copies and original documents, the latter of which the arbitrator should consider an aggravating circumstance.

Conceding that the evidence is circumstantial, the Bureau nevertheless claims it is cumulative, arguing that "circumstantial but cumulative evidence can persuade the factfinder" (Ohio Department of Rehabilitation and Correction v. OCSEA/AFSCME, Sampson and Lawson, Grievants (1993) (Rivera, Arb.)). It does not need direct evidence to prove the Grievant's culpability. It points out that all documents found came under the Grievant's control in the ordinary course of business, were interspersed with wrappers of food he was known to consume at work, and were reviewed by at least two Bureau officials on a daily basis over a period of time. The Union's challenges to the Bureau's evidence and motive fail, contends the Bureau. Ms. Wilkinson does not even recall the incident of the lunch reporting time and the allegations of her use of Bureau time for personal business has no relevance. Regarding the statements of the self-insurance team,

the Bureau says the order to write them was legitimate and in no way vitiates their probative value. On the other hand, the Grievant's testimony lacks credibility. His claim of inadequate training contradicts witness testimony about his expertise, and the categorical nature of his denial that he threw original documents away is too strong to be believable. In addition, the Bureau raises a number of questions about the Grievant's claim that he never received direction not to discard this kind of material, among them a lame excuse of the rumor that he used to explain why he consulted his former supervisor. The Bureau asks the Arbitrator to find the weight of the evidence is that the Grievant disregarded an explicit order by Ms. Wilkinson not to do so.

The Bureau defends its delay in confronting the Grievant and in imposing discipline, saying it needed to conduct a full investigation which involved the collection of cumulative evidence, and was under the instructions of Labor Relations to continue the effort pending a Highway Patrol decision on the matter. It says the Union should be barred from making the 45-day argument because the Union itself bears responsibility for the delay and never raised the issue prior to arbitration.

The Bureau disputes the Union's allegation that it set up the Grievant, planting evidence to get him. The Grievant is the one guilty of misconduct for which he had two possible motives. First, discarding documents offered itself as a solution to the backlogged mail problem for which he had been recently disciplined. Second, the Grievant arrogantly and falsely believed he better knew the appropriate contents of claims files than did the supervisor from whom he was unwilling to take direction.

In conclusion, the Bureau says the weight of the evidence is that the Grievant is guilty. The Arbitrator should therefore sustain Management's action and deny the grievance.

Argument of the Union

The Union attacks the quality of the Bureau's evidence. It points to contradictions in Ms. Wilkinson's testimony, saying not only was she not a credible witness but her testimony showed her to be unavailable to the Grievant even though she had time to conduct her personal affairs and business on Bureau time. Mr. Orosz, too, had holes in his testimony which he attributed to faulty memory. No one testified they saw the Grievant throw away the documents the Bureau relies on. No one testified to their accuracy or importance, a significant lapse since the material included worksheets, internal notes and "original" yellow sheets. No one rebutted the Union steward's testimony about the results of her investigation, which yielded, amongst else, discovery of some of the allegedly missing material, and no credible explanation of the Bureau's possession of the steward's meeting notes was given. The Bureau's evidence is circumstantial at best, contends the Union.

The Bureau has attempted to portray the Grievant as an employee with a bad attitude who is therefore guilty, but the truth, contends the Union, is that the Bureau singled out the Grievant. Other employees had messy pods, but no action was taken against them. Other employees had cartoons, but did not have them confiscated as evidence of misdeeds. Even though the pod was open and anyone might have placed the documents in the Grievant's wastebasket the Bureau was only interested in him. If it had conducted a full and fair investigation, it would have discovered that the Grievant was innocent. Instead, the Bureau set out to get him, ordering Ms. Bartel to spy on him, using co-workers of the Grievant for their own ends by ordering them to submit statements after six weeks of surveillance failed to produce any more than flimsy evidence, and never confronting the Grievant until the pre-discipline, weeks after the investigation started. The alleged Highway Patrol investigation is just a smokescreen, claims the Union, of which there is no proof. In addition, the Bureau exceeded the 45-day discipline deadline prescribed in Section 24.05 of the Collective Bargaining Agreement.

The Union challenges the Bureau's portrayal of the Grievant as a problem employee, offering the testimony of witnesses who stated he was a good, honest, reliable, responsible and thorough employee who would do no harm to injured workers. He would never throw away original documents and certainly not when he knew he was being monitored. His motive was to keep his job and he knew he could lose it with his next infraction. Why would he act against self interest?

As far as duplicate copies are concerned, the Grievant admits he did dispose of unneeded ones. However, his former supervisor told him this was alright and he never received orders or written policy

otherwise. All he received was a vague caution not to "second guess" claims representatives about their cases.

The Union argues removal is not commensurate with the alleged offense, and says the case cited by the Bureau supports this claim. The Department of Rehabilitation and Corrections case involved interference with U.S. Mail and grievants of less service to the State than Mr. Wilson who were only suspended--not removed--for their alleged infraction. Giving consideration to having only circumstantial evidence and the grievants' seniority, the arbitrator overturned one suspension entirely and reduced the other by half. In the instant case, the Arbitrator should find the Bureau lacked just cause and return the Grievant to work, possibly with back pay and benefits.

Opinion of the Arbitrator

This has been a long and arduous case, not just in arbitration, but from beginning to end. In the final analysis, though, very little is clear. On the one hand, the Bureau has submitted a mountain of material it retrieved from the Grievant's wastebasket over a long period of time and it offers plausible explanations for him being responsible. On the other hand, "second guessing" cannot fairly be characterized as clear directions not to throw away any file documents, copies or originals, particularly in the face of the former supervisor's instructions. It is also hard to see why, knowing he was under surveillance and faced removal in his next infraction, he would persist with activities he knew were wrong. Perhaps this explains why he went back to check with his former supervisor.

There are two aspects of the case that are evident to me, however. One is that this was a problematic employee who was resisting various changes at the Bureau, including direction from management he did not respect. The other aspect is that Management seized the opportunity of what it found early on to get rid of him. One can understand having less tolerance for a difficult employee than for an exemplary one, but it is precisely for this reason that it is incumbent on Management to make a full and fair investigation. It must not allow its desire to rid itself of a problem to taint its investigation. It is clear to me that it did allow it here, for it only looked for evidence of guilt and never for evidence of innocence. It did not collect material from the wastebasket when the Grievant was not at work and it took no pains to observe his pod during the day, either of which might have produced evidence to clear him. Thus, although the investigation was lengthy and produced a substantial accumulation of circumstantial evidence--even strong circumstantial evidence--it was neither full nor fair for it only looked at one side of the case. As such, while it seems more likely than not that the Grievant is guilty, it is not clear that he is.

Another difficulty with prejudice is that it can taint not just the investigation, but also the ultimate disciplinary decision. Under the corrective discipline concept the guiding issue must be whether the employee can be rehabilitated. In this case, the question is whether there is a reasonable possibility the Grievant will take direction from legitimate authority if he is returned to work. Searching the record for indicators, I take note that he is a long-term employee with only a recent record of poor performance and disciplinary actions. Many spoke to his conscientiousness, either in oral testimony or affidavit. Moreover, if returned to work he would come under the supervision of a different individual than the person with whom he has had a troubled relationship. Under these circumstances, the Grievant is deserving of another chance as there is a reasonable likelihood he will be responsive. While I am fairly well convinced by the evidence that he was discarding claim file documents outside his authority to do so (the intermixing of food wrappers and other extraneous trash with the documents is telling) and with potential consequences for the Bureau and its clients, I am also persuaded that removal was too harsh an action. I therefore reduce the removal to a suspension of thirty days.

Award

The grievance is granted in part, denied in part. The Grievant was removed without just cause. He is to be reinstated to his former position forthwith with full back pay, seniority and benefits, less thirty days. A record of this action will be placed in his personnel file.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
November 14, 1996