

#739

REVIEWED BY

JAN 17 2001
Ce 1/17/01
GRIEVANCE COORDINATOR

IN THE MATTER OF ARBITRATION
BETWEEN
THE OHIO DEPARTMENT OF TRANSPORTATION
AND
THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/
AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 31-03-(99-07-30)-0017-01-14
Christini T. Howard, Grievant

Advocate(s) for the UNION:

Butch Wylie, Staff Representative
OCSEA Local 11, AFSCME, AFL-CIO
390 Worthington Rd. Ste. A
Westerville OH 43082-8331

Advocate(s) for the EMPLOYER:

Ed A. Flynn, Advocate
Clayton Morris, Advocate
OHIO DEPARTMENT OF TRANSPORTATION
Jeff Wilson, 2nd Chair, OCB
106 North High Street, 7th Floor
Columbus OH 43215-3009

INTRODUCTION

A hearing on the above referenced matter was held on November 1, 2000 and November 27, 2000, in Fairlawn, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties made closing arguments in lieu of submitting briefs. The hearing was closed on November 27, 2000. The Arbitrator's decision, by mutual agreement of the parties, is to be issued no later than January 11, 2001.

ISSUE

The parties stipulated to the following definition of the issue:

Was the Grievant removed for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

The issue in dispute in this matter involves the termination of Christini E. Howard, an EEO Construction Coordinator, with the Ohio Department of Transportation (hereinafter referred to as "ODOT). At the time of her termination, June 14, 1999, she had worked for ODOT for 14 years. Ms. Howard was terminated from her position for violations of ODOT Directive WR 101, specifically:

Item 2b, Insubordination/refusal of an order or assignment by a supervisor;

Item 7, Unauthorized/misuse of State equipment and;

Item 27, Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee (JX 3C).

On February 12, 1999, an anonymous letter received by ODOT triggered an investigation into the instant matter. In the letter the author alleged that the Grievant was involved in unethical activity. The Employer conducted an investigation that led to the following charges that were used as a basis for the Employer's July 16, 1999, action to terminate the employment of the Grievant:

Item 2 b Insubordination/refusal of an order or assignment by a supervisor

The Employer claims that on Wednesday, June 23, 1999, the Grievant refused to follow a direct order from her supervisor, Chris Boyd, and a second direct order from Deputy Director, Mary Ellen Kimberlin. The direct orders dealt with turning over her laptop computer to an ODOT investigator. The investigator, Matthew B. Long, was

investigating the allegation that the Grievant was using her ODOT computer to prepare documentation for an outside activity, Women in Construction Conference, held March 25-26, 1999, at Lorain Community College (UX 1). This conference, in part, came about through the efforts of a womens' advocacy group, Hard Hatted Women. The Grievant served on the board of the advocacy group.

Mr. Long had previously analyzed the hard drive of the Grievant's desktop ODOT computer and found she had used it for non ODOT activity and suspected her ODOT laptop may have been used in the same manner. Ms. Howard, after considerable discussion with management officials, continued to refuse to turn over the laptop computer to management. She returned it on the next day, June 24th, and afterwards the investigator found evidence that at 9:20 p.m. on the evening of June 23, 1999 there was an attempt to delete files from the hard drive through the use of a scan disk (See Attachment F, JX 12).

Item #7 Unauthorized/misuse of State Equipment

The Grievant was charged with the misusing of state computers and a state fax machine.

She was charged with having used this equipment to support a non-ODOT activity.

Item # 27 Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee.

The Grievant was charged with soliciting donations from contractors to support the above mentioned Women's Conference that was held in late March, 1999.

EMPLOYER'S POSITION

The Employer contends the Grievant, who has served the Agency for many years, simply went too far in this matter. It argues the Grievant put herself and the Agency in a compromising position when she used her position, and that of the Agency, to solicit funds for a non profit agency. When this action is considered along with repeated acts of insubordination and the misuse of equipment for non-ODOT activities, the Employer asserts that it had no choice but to terminate the Grievant's employment.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union views the Employer's actions as excessive and misplaced. Ms. Howard has had problems getting along with management for the past several years, claims the Union. As a result she feels she has been singled out for closer scrutiny and does not trust the Employer. For example, on June 23rd when she was requested to turn over the laptop to management, the Union argues the Grievant was not provided with the basis for this request and she felt intimidated by what she viewed as heavy handed tactics of management. Futhermore, the Union points out that the use of her ODOT computers for activity related to the Hard Hatted Women organization was approved by management, and this group was a primary sponsor of the women's conference.

The Union views Ms. Howard's participation in Hard Hatted Women and in the March 1999 Women's Conference as working on women's issues, something the Employer was well aware of during the past several years. The Union argues that management did not ask the Grievant about the women's conference until some 90 days after it took place and more than 130 days after management received the February 12th

anonymous complaint letter. The Union asserts that during this entire time no one from management talked to Ms. Howard about her involvement in the women's conference. In addition, no one from management even talked to the Lorain Organized Labor/Management Council, sponsors of the conference, until some 15 months after the pre-disciplinary hearing. The Union argues that this demonstrates that management conducted a flawed investigation. In addition, the Union asserts that when the Grievant contacted contractors and asked for donations, she never promised or suggested to any contractors that they were going to receive any benefits because they contributed money to the women's conference.

Based upon the above, the Union requests that the grievance be sustained.

DISCUSSION

Ms. Howard appears to be an intelligent, sophisticated, and industrious person. However, she also appears to be highly opinionated, strong willed, and not readily amenable to following rules that interfere with her own agenda. There is little question in the mind of this Arbitrator that Ms. Howard is not afraid to stir things and can get people to pay attention to her ideas and efforts. I applaud her for her spirit, but her conduct must be viewed in the context of her employment and the rules that govern it.

When one works for a powerful, complex and large organization, such as ODOT, behavior and conduct that conflict with the steady and careful use of power becomes a liability. ODOT is an agency that deals with millions of dollars annually, and it plays a very significant role in the success of many private sector firms. These firms count on ODOT to be evenhanded and predictable in its actions.

During working hours, when the Grievant contacted contractors to solicit funds, she used her position, and more importantly the power of ODOT, to influence contractors to give money to the women's conference. Notwithstanding the important and progressive nature of such a conference, such a blatant exercise of coercion was inconsistent with the mission of the agency. As stated above, an agency that wields considerable economic clout must by definition be conservative in its actions. It must be careful of whom and what it endorses and supports. And it can be assumed that the Grievant's enthusiasm for women's issues led her to use her position to influence others and to rationalize her use of ODOT computers and fax machines to support a cause she championed.

From the testimony and evidence it is reasonable to assume this is not the first time an employee used the fax machine and his/her computer for other than ODOT work (e.g. lunch orders, non work related e-mails, computer games, etc.). It's one thing to be careless, or to assume particularly when management is lax, that it is okay to occasionally use your work computer for personal reasons. This is no different than the innocuous act of taking a sheet of paper from a legal pad and jotting down a grocery list using a company pen.

However, when there is evidence of an unbridled use of ODOT equipment for non-ODOT activity, the Employer has a right to curtail such activity. It should be noted that such activity can be the case of an employee acting in defiance of clear directives and rules or it may result from a permissive atmosphere that does little to discourage employees from taking advantage of the convenience of technological equipment. This is an important distinction when it comes to judging an employee's conduct.

However, what is more disturbing about this matter is the cover-up that was attempted by the Grievant. The evidence is clear and convincing that on the evening of June 23, 1999, the Grievant intentionally attempted to destroy evidence that was part of an investigation. If an employee is made fully aware of an employer's investigation of an event, taking action to cover-up or act in a deceptive or dishonest manner to inhibit that investigation is a serious transgression. The action of the Grievant to destroy evidence being sought as part of an official investigation is inexcusable. And, it substantiates the Employer's contention that she knew she was using ODOT equipment without authorization.

The Grievant's refusal to retrieve her laptop computer represents another example of the Grievant making a situation far worse than it may have been when all factors were considered. I find the Employer demonstrated unusual patience in making its request to obtain what rightfully belonged to ODOT. It made repeated verbal requests as well as putting the request in writing. It took the extraordinary step of obtaining the written directive from a higher level manager, Deputy Director, Kimberlein. When the Grievant refused all of these efforts to comply with a legitimate order of management, she took a risk that no employee should consider taking unless they are fully prepared for the consequences. I find the Grievant left the Employer with little choice but to find her to be insubordinate.

The weight of the evidence and testimony in this case supports the findings of the Employer. The irony of this case is that had the Grievant not destroyed evidence and not blatantly refused the direct order of her supervisor and district deputy director, she would have been facing far less serious charges. There is no evidence that she solicited

contractors with any attempt to “line her own pockets.” This is not to minimize the seriousness of using one’s position to support a non ODOT activity, yet there was evidence presented by the Union to support the Grievant’s contention that ODOT had information regarding her efforts as they related to Hard Hatted Women and the Women’s in Construction conference. Ms. Howard appears to be a forceful and serious minded person; it is not hard to imagine that at times she lets her enthusiasm run ahead of her judgment. However, as stated above, this case went far beyond the exercise of poor judgement when the Grievant directly challenged the Employer’s authority.

It is also clear that Ms. Howard had some unresolved issues with her Employer. The presence and circulation of a crude composite depiction of her performing a sex act circulated by someone in the workplace was understandably upsetting. In addition, there was the presence of notes on her car window and desk using the word “nigger” and designation “KKK.” Something as personally degrading and racially vicious as these senseless acts and the anger it generates is not easily forgotten. No employer in the 21st century should ever let such actions go unchecked. However, there was no evidence presented at the hearing to suggest that ODOT did not investigate these matters or acted with insensitivity. The Ohio Civil Service Commission reviewed ODOT’s actions and there was no finding of probable cause levied against the Employer (See testimony of Clay Morris).

The Union was unable to provide evidence that the Employer has been unresponsive to the Grievant regarding these outrageous acts in spite of the Grievant’s testimony to the contrary. The assertions of the Grievant regarding discrimination are to be taken seriously, but without corroborative evidence or testimony, the Union was

unable to create an explanation of the Grievant's acts of insubordination. The Union's arguments regarding the impropriety of management's investigation are not relevant to charge of insubordination. I find the Employer had a legitimate basis to request Ms. Howard's laptop computer. When Ms. Howard obstructed an official investigation and flatly refused to comply with repeated management directives, which included a clear statement of the consequences of such a refusal, she "crossed the line." Her Steward, Mark Mayer, stated he advised the Grievant to comply with the Employer's request to retrieve her laptop. He stated he was advising her to obey now and grieve later. This well-known axiom of labor relations was good advice. Unfortunately for the Grievant she chose not to follow it.

AWARD

The grievance is denied

Respectfully submitted to the parties this 11th day of January, 2001.

A handwritten signature in black ink, appearing to read "Robert G. Stein". The signature is written in a cursive style with a large initial "R" and "S".

Robert G. Stein, Arbitrator