#782

REVIEWED BY
NOV 15 2001
GRIEVANCE COORDINATOR

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – OFFICE OF COLLECTIVE BARGAINING

AND

62-00-(00-08-07)0004-01-09

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

Grievant: Selina Miller

Case No. OBR-004-200

Date of Hearing: August 28,2001

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Mark E. Linder, Attorney

Witnesses and Representatives:

Mike Rieser, Steward

Roderick G. W. Chu, Witness

For the Employer:

Advocate: Cynthia Sovell- Klein

Witnesses and Representatives:

Andrea Brooks – Witness

Ora McRae – Witness

Mary Harriel – Witness

Catherine Routte - Witness

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: November 13, 2001

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2000 through February 28, 2003, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support a suspension of forty-five (45) days due to certain inappropriate conduct of the Grievant. This matter was heard on August 28, 2001 and is properly before the Arbitrator for resolution. Post hearing briefs were submitted by both parties on October, 15 2201.

BACKGROUND

This matter involves Selina Miller, Grievant, a twelve (12) year employee of the State of Ohio. All events germane to this matter occurred while the Grievant worked at the Ohio Board of Regents ("OBR") as a receptionist and/or Customer Service Assistant.

OBR serves as the fiscal and policy agent for institutions of higher education in the State of Ohio regarding financial aid, grants and scholarships. The Grievant worked in various capacities and since December 2, 1999, was the primary receptionist for OBR. Typically, the Grievant would be the first person the public would encounter upon entering OBR main office located on the 36th floor, at 30 East Broad Street, in Columbus, Ohio.

On June 12, 2000, Andrea Brooks ("Brooks"), co-worker, testified that on her way to lunch she observed the Grievant leaving the restroom wherein the Grievant pointed her finger at Brooks and stated "You're going down if I found out you are behind this." Brooks asked the Grievant several times what she (Grievant) was talking about and what was wrong. The Grievant replied, "Oh you know- you know." Brooks entered the elevator on her way to lunch and while riding in the elevator decided that Mary Harriel ("Harriel"), supervisor, should be informed immediately of what happened. Brooks took the elevator back to OBR offices and informed Harriel of what occurred. Brooks testified

that she wasn't threatened by the exchange with the Grievant, but felt uneasy. Brooks further added she went to lunch, worked the rest of the day and didn't call security. Finally, Brooks added that she didn't have an escape plan if an emergency happened at work.

Ora McRae ("McRae") was the relief person for the Grievant and was at the receptionist's desk on June 12, 2000. The receptionist desk is located approximately forty (40) feet from the women's restroom. McRae testified that she heard the Grievant state the following "You're are going to get yours if I find out you're involved." McRae was uncertain to whom the Grievant was talking to until Brooks emerged from the hallway leading from the restroom. McRae also stated that she was not threatened or intimidated by the Grievant. With respect to if an emergency arose, McRae indicated that she had an escape route.

Mary Harriel ("Harriel"), the Grievant's supervisor on June 12, 2000, proceeded to the reception area with Brooks and Kay Routte ("Routte"), a co-worker. Harriel was uncertain as to the state of mind the Grievant was in and Routte's role was to observe. The Grievant initially denied to Harriel, but subsequently admitted making the statement to Brooks. According to Harriel, the Grievant stated that she had filed a compliant with the Equal Employment Opportunity Commission ("EEOC") against Harriel and that the EEOC would subpoena her and take her (Harriel) job. Harriel indicated that during the conversation, the Grievant stood up and took a step towards Harriel and stated, "you can't make me sit down and I'll have your job." According to Harriel the Grievant became more agitated during the conversation and felt threatened when the Grievant stood up and took a step towards her. Harriel further added that approaching the Grievant in her work area did not escalate the situation and that she never stood over the Grievant during their conversation, but was always at the Grievant's side. Harriel testified that Brooks never stated that she felt threatened by the Grievant's conduct on

June 12, 2000. Finally, Harriel testified that the Grievant gave false testimony during the investigatory interview regarding the event of June 12, 2000.

Routte testified that the Grievant was agitated and speaking loudly on June 12, 2000 during her conversation with Harriel. Routte further added, the Grievant denied any inappropriate behavior towards Brooks and stated to Harriel " You'll get yours, you have a subpoena coming!" Routte added that the Grievant moved within two (2) feet of Harriel and at that point she felt the Grievant's conduct was threatening.

Roderick G.W. Chu ("Chu"), Chancellor of OBR, testified that he relied upon staff to make appropriate recommendations regarding the length of the suspension after the matter was thoroughly investigated. Chu indicated that he was unsure of any similar conduct by another OBR employee, and the 45-day suspension was unprecedented at OBR. Chu added, that he did not review any relevant documents prior to imposing the suspension.

On August 7, 2000, grievance number 63-08-07-00-004-01-09 was filed alleging a violation of Article 24 of the CBA.

ISSUE

Was the Grievant, Selina Miller, suspended for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA AND OHIO REVISED CODE
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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

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 oral reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. Working suspension;
D. One or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB;
E. One or more day(s) suspension(s);
F. Termination

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 Employees decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages or rules, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine or;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, Employee, and the Union.

OHIO REVISED CODE
ARTICLE 124.34

124.34 (A) Pertinent Part

A) ... No such officer or employee shall be reduced in pay or position, fined, suspended, or removed, except as provided in section 124.32 .of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of this chapter or the rules of the director of administrative services **or** the commission, any other failure of good behaving, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.

POSITION OF THE PARTIES

POSITION OF THE UNION

The seven (7) counts of misconduct contained within ORC 124.34, were "stack" by listing general as well as specific charges. The conduct alleged should have been confined to no more than three (3) separate violations as opposed to seven (7). Additionally, ORC 124.34 language does not list intimidating or threatening conduct, as a violation, thereby requiring such charges be dismissed.

Regarding the charge of neglect of job duty, no evidence was offered by the Employer. The charge of giving false testimony by the Grievant is flawed in that the alleged dishonesty occurred during the pre-disciplinary conference under Article 24.04, and the Employer did not have the investigator testify, thereby defeating the Grievant's right to cross-examination.

OBR failed to demonstrate that employee Brooks was intimidated or threatened by the Grievant's conduct. With respect to Harriel, it was Harriel's conduct of approaching the Grievant in her work area that ignited the exchange, when an alternative course of conduct should have been pursued by Harriel. Namely, Harriel could have met with the Grievant in her (Harriel's) office.

Finally, the forty-five (45) day suspension fails to comply with the progressive discipline requirements of the parties. The Grievant had two (2) previous written warnings and three (3) corrective counseling memos issued prior to January 12, 2000. Since corrective counseling is not discipline under Article 24.02, the next step would have resulted in a suspension between one (1) and five (5) days, not forty-five (45). In absence of a discipline grid, the Employer was required to follow Article 24.02.

POSITION OF THE EMPLOYER

The Grievant, since November 20, 1997, was aware that disruptive and harassing behavior was not tolerated by OBR. The Grievant thereafter received two (2) written warnings (i.e. February 15, 2000 and July 10, 2000) for inappropriate and unprofessional behavior. Moreover, the Grievant had received three (3) corrective

counseling memos prior to June 12, 2000, regarding inappropriate conduct. Due to the Grievant's ongoing conduct, her workstation was changed December 2, 1999, at which time she was assigned to Harriel.

On account of her co-workers' concerns for their safety, escape routes from the Grievant were planned. Additionally, co-workers' family members were put on notice that if something happened to them at work, the Grievant was responsible. Safety concerns for co-workers and the public required an aggressive approach by OBR.

Finally, the Employer submits that given the nature of the Grievant's position and the past repeated warnings, termination as opposed to the suspension was an option.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. see, Elkouri & Elkouri – "How Arbitration Works" (5th ed., 1997)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. see, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984)

The evidence in this matter will be weighed and analyzed in light of the OBR burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. see, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984)

DISCUSSIONS AND CONCLUSIONS

Prior to the Arbitrator engaging in the substantive analysis, comments regarding the presentation of the case are appropriate. The Employer, through advocate Cynthia Sovell-Klein, made an opening statement and put on four (4) witnesses regarding the events preceding the Grievant's suspension.

The Grievant made an opening statement, through advocate Mark Linder, and put on one (1) witness, as upon cross-examination, Chancellor Chu. The Grievant, who was present through all steps of the process, opted not to testify.

The impact of the Grievant not presenting contra testimony regarding the events of June 12, 2000, is that the testimony of the OBR (i.e. Brooks, McRae, Harriel and Routte) is essentially unrebutted. see, Colgate Palmolive Co., 50LA504, 506 (McIntosh 1968;) and Michigan Employment Security Agency, 109LA178 (Brodsky 1997).

OBR's proof must be sufficient to justify a suspension of forty-five (45) days. Simply, the greater degree of discipline, the higher the proof. see, S.D.Warren Co., 89LA686, 702 (Gwiazda 1985).

After careful consideration of this matter including all testimony and evidence of both parties, I find that the Grievant's conduct violated ORC 124.34(A), but the suspension is reduced from forty-five (45) days to twenty-two (22) days due to lack of evidence to establish violations of certain of the seven (7) charges alleged.

The Grievant was charged with the following seven (7) violations:

1. The employee conducted herself unprofessionally and inappropriately;
2. The employee failed to exhibit good behavior;
3 The employee without justification, engaged in intimidating and threatening behavior towards a co-worker and a supervisor;
4. The employee neglected her job duty;
5. The employee was dishonest by giving false testimony during an interview conducted pursuant to Article 24.04 of the State of Ohio-OCSEA contract 2000-2003;
6. The employee was insubordinate to a supervisor; and
7. The employee's behavior was malfeasant.

The seven (7) violations in the Arbitrator's judgment correlated with the incidents on June 12, 2000 are therefore align as follows:

- Brooks incident - # 's 1, 2, 3 and 7
- Harriel incident - #'s 1, 2, 3, 6 and 7
- Pre-disciplinary process - # 5

(No evidence was offered to arguably support charge # 4 and therefore it's dismissed.)

With respect to Brooks, proof must exist to support each charge regarding the Brooks incident. In other words, if multiple separate acts of misconduct occurred on June 12, 2000, regarding Brooks, then multiple charges are appropriate.

The Grievant's conduct towards Brooks could be viewed as unprofessional/ inappropriate; lacked good behavior; and/or malfeasant. The evidence supports a finding that the Grievant's conduct towards Brooks was unprofessional and inappropriate –but not all three. However, the Grievant's conduct could have been intimidating or threatening as a separate charge if the facts were present. Brooks testified that the Grievant's conduct made her feel uneasy – but not threatening. Therefore, the evidence supports a violation of charge 1 regarding the Brooks incident.

The second incident on June 12, 2000, involved Harriel. Harriel approached the Grievant's work area with Brooks and Routte. The unrefuted testimony of Harriel and Routte indicates that the Grievant threatened to take her job, acted insubordinately by refusing to sit down in her seat when requested to do so and felt threatened when she took a step towards Harriel. Harriel's unrefuted testimony added that during the pre-disciplinary interview, the Grievant gave false testimony by denying any appropriate conduct had occurred between Brooks or Harriel on June 12, 2000. In her (Harriel's) statement written on June 12, 2000, Harriel's characterization of the events are consistent with her testimony.

Regarding the most serious of the charges, a threat must be specific and in the Grievant's power to carry it out. see, Walker Mfg. Co., 60LA645 (Simon, 1973). Additionally, the person threatened must have reason to fear for his/her safety. The context in which words or acts are used must be carefully analyzed in ascertaining the alleged threat.

With regard to the Harriel incident, I find that the Grievant's conduct was borderline threatening, but clearly intimidating. Harriel's conduct after the incident with the Grievant suggests concern but not overt fear for her safety. Additionally, no evidence

exists to suggest that the Grievant had power to direct the EEOC to issue subpoenas' or take Harriel's job. However, due to the previous unprofessional conduct of the Grievant, I believe that Harriel's apprehension of the Grievant was genuine. Therefore, I find the Grievant was in violation of charge #3 relating to Harriel.

Additionally, the unrefuted testimony of Harriel and Routte supports separate acts of misconduct regarding giving false testimony and being insubordinate. Therefore, with respect to the second incident involving Harriel, the proof supports charges 3, 5 and 6.

The evidence regarding Brooks, Harriel and the pre-disciplinary conference supports a violation of the following charges: 1, 3, 5 and 6. In the absence of a disciplinary grid, Article 24.02 is instructive. The Grievant had two written warnings regarding unprofessional and/or inappropriate conduct (February 15, 2000 and July 10, 2000). Since the July 10, 2000 written reprimand was issued after June 12, 2000, I will direct my attention to the February 15, 2000 reprimand. The Grievant was on notice as of February 15, 2000 that more severe discipline would occur if she acted inappropriately in the future. Clearly discipline commensurate with violations of the above charges is required. The most serious offense was the charge of threats /intimidation by the Grievant towards Brooks and Harriel. This allegation was diffuse considerably by Brooks testimony.

Suspensions are intended to be "corrective or rehabilitative, not punitive". see, Discipline and Discharge in Arbitration, (N. Brand, 1998), page 64. The length of the suspension must fit the circumstances. Chancellor Chu stated in the body of the disciplinary action form that "...[T]he Employer is instructed to follow the principles of progress discipline". I agree.

The facts indicate that the OBR acted in good faith and fixed a penalty it felt was justified. The reduction is not a substitution of the Arbitrator's judgment for OBR – but a reflection of the state of evidence. see, Interstate Brands, 97LA 675 (Ellman, 1991).

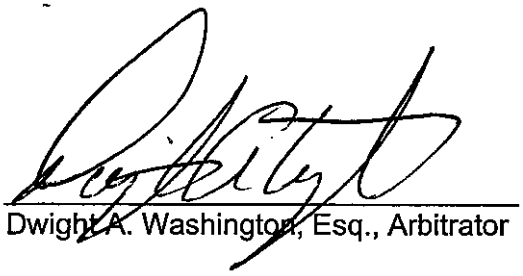
In this matter, the Grievant's misconduct is related to behavior, not performance. I am convinced that the misconduct of the Grievant, if continued, will surely lead to removal. My reduction in the suspension should not be interpreted as condoning the behavior of the Grievant in any respect.

The utilization of more charges than required and the failure of the proof to support the most serious offense required a reduction of the number of days the Grievant was suspended. In consideration of the total record, the suspension of forty-five (45) days is reduced to twenty-two (22) days.

AWARD

The grievance is sustained to the extent the suspension is reduced from forty-five (45) days to twenty-two (22) days.

Respectfully submitted this 13th day of November 2001.



Dwight A. Washington, Esq., Arbitrator