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VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 07-00-991124-193-01-14
and	*	
	*	
OHIO DEPARTMENT OF	*	Oscar L. Morgan, Grievant
COMMERCE	*	Suspension
	*	

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Robert Steele, Sr., Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

Shirley Turrell, Labor Relations Specialist
Ohio Office of Collective Bargaining

For the Ohio Department of Commerce:

John Paul Downs, Labor Relations Administrator
Ohio Department of Commerce

I. HEARING

A hearing on this matter was held at 10:00 a.m. on February 12, 2002, and continued on April 23 at the offices of OCSEA/AFSCME Local 11 in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is 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 excluded, and to argue their respective positions. Testifying for the Ohio Department of Commerce (the "Management") were James F. Hunt, Jr. Chief Counsel, Division of Financial Institutions; Kevin Allard, Chief Examiner for Savings and Loans and Savings Banks; Paul F. Albin, Field Supervisor; Neil Danziger, Deputy Superintendent for Savings and Loans and Savings Banks; and Samuel McKee IV, Field Supervisor. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Noel Williams, Chapter President and the Grievant, Oscar L. Morgan. A number of documents were entered into evidence: Joint Exhibits 1-4, Management Exhibits 1-21 and Union Exhibits 1-4. The oral hearing was concluded at 4:15 p.m. on April 23. Written closing statements were timely filed and exchanged by the Arbitrator on May 16, whereupon the record was closed. This opinion and award are based solely on the record as described herein.

II. STATEMENT OF THE CASE

This case concerns a 10-day suspension of a 25-year field examiner employed in the Ohio Department of Commerce's Division of Financial Institutions. The basis for this suspension was plagiarization from an FDIC examination report of a savings bank after the Grievant had been counseled and warned not to do so.

The Grievant's performance problems go back to 1997 when his classification was Financial Institution Examiner 4 ("FIE 4"), a level which is assigned as Examiner-In-Charge

("EIC") of specific institutional examinations. Chief Examiner for Savings and Loans and Savings Banks Kevin Allard testified the Grievant was first counseled not to copy in February of 1997 and sent to a writing seminar. In March of that year he was evaluated under a performance plan and twice told not to copy. However, his report of the savings bank he examined during July and August was, according to Management witnesses, 70 percent copied from the FDIC's September 1997 report of the same savings bank. Allard testified this was very serious because the Division has to rely on its field examiners to report accurately and completely. Plagiarizing from the report of another examining agency could affect the Division's relationship with that agency and the institution examined. The result of this incident was an agreement between the Division, the Grievant and the Union to demote the Grievant to FIE 2 (who assists in examinations rather than being in charge of them), a written reprimand for violation of Rule 1 (inadequate job performance) and Rule 3 (exercising poor judgment in carrying out work assignments), and a 180-day performance improvement plan.

Pursuant to this agreement, the Grievant was evaluated in November 1998 at the end of the performance plan. Since his performance was unsatisfactory in the eyes of his superiors, he remained in the FIE 2 classification rather than being returned to FIE 4. A grievance was filed over this decision, but the decision was upheld by an arbitrator on September 9, 2001.

While that grievance was pending, the Grievant continued to receive feedback from EICs and field supervisors. His 1999 annual appraisal in April still found him below or barely meeting expectations on every dimension and again mentioned the copying issue. His performance improvement plan, which was revised and continued without consultation with the Union, but with the knowledge of the Grievant, restated "Mr. Morgan's examination report comments shall only contain his own independent conclusions and supportive analyses, and shall not be copied from any comments or analyses prepared by the Division's federal regulatory counterparts" (Management Ex. 12).

In June 1999, the Grievant was assigned to the Earnings, Liquidity and Sensitivity to Market Risk areas of the examination of the same savings bank he had examined in 1997, the report of which had led to his demotion. Field Supervisor Paul F. Albin testified that when he reviewed the 1999 examination he realized the Grievant had once again copied from the 1997 FDIC examination report of this savings bank. He discussed the matter with Thomas W. Stephens, the EIC on the examination, but since Stephens had not participated in the 1997 examination he was not aware of the reports that came out of it. On August 16, Albin reported to Field Supervisor Samuel McKee IV, who had been the Grievant's supervisor in 1997, that the Grievant had copied "verbatim substantial portions of the September 1997 FDIC examination report" (emphasis in the original) and that his workpapers for the areas he had been assigned reflected "little or no evidence of 'independent' analysis" (Management Ex. 19). An investigatory interview was conducted on September 23, 1999. According to the pre-disciplinary conference report, the documents at issue were reviewed with the Grievant and his Union representative at this time. On October 11, Allard recommended a 10-day suspension for the Grievant's "disregard of repeated directives not to copy his examination report comment from another source and his failure to assess the Sensitivity to Market Risk and/or the interest rate risk exposure" during his examination. A pre-disciplinary hearing was conducted on November 4, 1999, at which the Union made several procedural objections, including untimeliness of the pre-disciplinary hearing, Mr. Downs presenting Management's case when he was also the Step 3 designee, and not having been provided with the documents Allard mentioned during his testimony. Chapter President Noel Williams testified she had difficulty understanding Allard's testimony, but was silenced by the hearing officer when she asked Allard to repeat portions of his testimony. The pre-disciplinary hearing officer found the Grievant guilty of three rule violations, inadequate job performance (Rule 1), insubordination (Rule 2), and poor judgment (Rule 3) in that he failed to independently analyze the savings bank's sensitivity to market risk and interest rate risk and copied substantial portions of these two sections from a "November [sic] 1997

FDIC report" and failed to comply with directives not to copy his work product from any source. A 10-day suspension notice was issued on November 15, citing plagiarism. This action was grieved on November 24, 1999, at Step 3. At the Step 3 hearing, in addition to other points, the Union renewed its objections to not having been provided documents it sought under Article 24.04 of the Contract.

Throughout the discipline and grievance process, Union access to financial institution examination reports relevant to the case has been an issue with Management claiming that since the Division's examination records are privileged and confidential under 1155.16 and 1163.20 of the Revised Code they could not and would not be provided. Financial institution examination reports prepared by federal regulatory agencies are similarly protected under federal statute (12 C.F.R. 309.6 and 12 C.F.R. 510). However, some time after March 27, 2000, Chief Counsel James F. Hunt, Jr. rethought the issue with the result that the Division sought and ultimately obtained the FDIC's and Office of Thrift Supervision's ("OTS") consent to limited disclosure of redacted portions of the two reports the Grievant is alleged to have copied from for his own report. Redacted portions of the reports prepared by the Grievant were also prepared. These documents were made available to the Grievant and his union representatives on July 12, 2000, upon their agreement to terms regarding the use and confidential nature of the documents.[1] Having viewed the parts of the reports that were provided, the Union sought full reports for the same institutions for four years regardless of who had examined the institution in those years. Williams testified that once it was made clear what was wanted, Allard and others seemed agreeable, but she later learned the request was denied. According to Danziger, the Division never went back to the FDIC to ask their consent for what the Union wanted. In any event,

[1]The Arbitrator signed the same Confidentiality and Use Agreement and is thus under the same constraints. She was accordingly permitted to review the documents at the hearing and to take general, non-content-specific notes which were destroyed on the date this Opinion and Decision was rendered.

despite the Union's repeated requests, the examination reports were never provided in any form other than as described above.

For his part, the Grievant testified he was unaware anyone had problems with his work until he heard rumblings in 1994. He felt the 1997 Performance Improvement Plan was a tool to assist him to better himself. McKee was helpful, he said, giving him good, constructive criticism. But he also thought, the Performance Plan was used unfairly against him. He said he was not aware of the second performance plan until a performance evaluation made reference to it. He did get a letter saying the plan was being continued, but he assumed the Union would have to concur for it to be valid. The Grievant testified he believes he is being held to a higher standard than are other examiners. Others copy and joke about doing so. He offered a letter from David Heddleson, a former administrative assistant in charge of scheduling and personnel recruiting as well as other positions with the Division before his retirement. In this letter Heddleson states that many examiners copy comments from previous examination reports and that McKee was one of the worst offenders and has abused the Grievant for many years. The Grievant further testified he understood his report was "only a draft" and that it is inappropriate to be disciplined on a draft report since the EIC has the option of making changes to the report. He does, however, admit that he was put on notice not to copy, but says Management elected to share only the parts of the reports it had trouble with. One complete section of the 1997 report he did was totally missing from the documents admitted into evidence. Full reports would show that other examiners were doing the same as he. Finally, he believes a 10-day suspension on a clean record is not fair.

III. ISSUE

Was the discipline for just cause. If so, what shall the remedy be?

IV. PERTINENT PROVISIONS OF THE CONTRACT

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.

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24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense....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.

24.04 - Pre-Discipline

...When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee.

Article 25 - Grievance Procedure

25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

V. ARGUMENTS OF THE PARTIES

Argument of Management

Management argues that it made its prima facie case, satisfying the just cause standard. The Grievant clearly violated three reasonable work rules. He is guilty of neglect of duty through inadequate job performance in that he twice plagiarized/copied from an FDIC examination report. He used poor judgment in that he was on notice not to plagiarize. He was insubordinate in that he repeatedly violated written and clearly defined work rules. These rules are reasonably related to the performance of his duties because the Division cannot issue a substantially copied/plagiarized report. In this instance, by copying comments written in 1997 into a 1999 report, the document fails to account for changes that had occurred since the first report was written and that were material to the financial position of the institution. The Grievant was on notice through the Performance Improvement Plan which the Grievant kneew had been continued. Although the Grievant said he believed it was not fair to use his mistakes against him, he did admit he was on notice not to copy. A 10-day suspension is commensurate with the offense and within the range permitted by the Department's disciplinary grid. The Grievant was directed a number of times not to plagiarize and there was serious potential for financial instability of the institution had the error not been disclosed. An employee of the Grievant's

years of service is expected to perform accurate and acceptable work, whether in draft or final form. Management submits that the Arbitrator should not substitute her judgment for Management's since Management has not abused its discretion or acted arbitrarily, unreasonably, capriciously or discriminatorily.

The Union has failed to meet its burden to establish disparate treatment, says Management. There was no credible evidence presented of other similarly situated employees, though the Union was given access to other employees performing the same work. The examination reports are confidential, but Management got consent to provide redacted copies of the Grievant's work, and these prove Management's case. Management distinguished permissible use of style guidelines from copying substantial portions of others' work. Its witnesses testified they knew of no other examiner who plagiarized their reports, but had they become aware of others, they would have treated them the same way they did the Grievant. Management did give the Grievant more personalized attention and specialized training than given to others, but this is not "disparate treatment." It represents a long term effort to salvage a marginal employee.

Management also submits that the Union failed to establish a violation of Article 25.08. The documents requested by the Union are specifically protected by Federal and State statute. Management treated the Union's request the same way as any request from an outside entity and the approvals given by OTS and FDIC were limited to the Grievant's work, redacted and under various limitations as to their use. In addition, since the Chapter President admitted that advance knowledge of the numbers in the documents would not have kept the case out of arbitration, there was no harm to the Grievant.

Finally, Management asserts that the Union failed to establish that Article 24.02 requires that disciplinary action be taken within 45 days of the actual infraction. Forty-five days is the required time frame under Article 24.05, but it is for imposition of discipline *following* the pre-disciplinary conference.

In light of the fact that the Union failed to bring any mitigating factors and in the face of the Grievant's own admissions, Management urges the Arbitrator to deny the grievance in its entirety.

Argument of the Union

The Union submits that Management failed to meet its burden under Article 24.01 to show just cause for the suspension. Management claims it tried to help the Grievant in every way, but this is not true. The Grievant testified he was only criticized and the training records submitted to do not prove he attended the sessions listed. The Performance Improvement Plan which Management says the Grievant was under was not in effect because it expired at the end of 180 days and there was no discussion with the Union about its continuance. What is more, when the Union signed the Plan, there was no policy on copying and the Union was not aware others were allowed to copy, as Heddleson's statement now establishes. Therefore, the Grievant was held to a higher standard. This constitutes disparate treatment. The Grievant had no active discipline in his file, therefore a 10-day suspension is not progressive and violates Article 24.02. It is also not commensurate with the offense because the Division suffered no harm in that the reports were only drafts subject to revision before being issued.

The Union has two procedural objections. First, Management discovered the alleged misconduct on July 30, 1999, but there was no pre-disciplinary hearing until November 4. There were no criminal charges or other investigations to cause a delay of more than ninety days, and there was no need to collect documents or gather other evidence because nothing was presented at the pre-disciplinary hearing. Therefore the delay was longer than reasonably necessary. The Arbitrator is obliged to take this into account and should find a violation of Article 24.02.

Second, throughout the case Management claimed the examination reports were confidential and protected, but suddenly after two years it sought permission from OTS and FDIC to release some material. When the Union finally was allowed to view them it discovered they were only partial reports, not complete ones. The Union needed other reports to resolve the

issues and was told it would get what it needed if it put its request in writing. The Union did as requested but never got the reports. Management claimed that if the Union provided it with the names of others who copied, it would have settled. But it was impossible for the Union to do that when it was not allowed to examine other reports, and the names of examiners and the institutions were withheld as being confidential. The Union also requested the correspondence between the Division and OTS/FDIC. It never got it until one week before the arbitration hearing. The Union's suspicion that Management was hiding something was confirmed when Danziger confirmed in his testimony that had he requested a properly redacted complete report, he would have gotten it. The Union submits that failure to provide documents used to support the suspension constitutes a violation of Article 24.04 and failure to provide the documents the Union needed to determine the disparate treatment argument constitutes a violation of Article 25.08.

For all these reasons, the Union asks that the grievance be granted in its entirety and that the Grievant be made whole.

V. OPINION OF THE ARBITRATOR

There is no question that the Grievant did, in fact, copy comment material from the 1997 FDIC examination report on the savings bank to his own assigned area of the Division's 1999 examination report on the same savings bank. Neither the Grievant in his testimony nor the Union disputes what is evident from the redacted documents. The Union's challenge is on other fronts. For one, the Union and the Grievant in his testimony appear to be saying that because there is no written policy about copying, other examiners copy all the time, and the Performance Improvement Plan extension was not agreed to by the Union, the Grievant was not on proper notice and should be excused. I disagree. Management does not need the consent of the Union to issue work-related directives. Employees who are experiencing job performance difficulties may receive directives different from what adequately performing employees do in order to help them improve their performance. Is this differential treatment? Yes, but it is not unfair or

impermissible differential treatment. Such was the case here. The Grievant was having performance problems and had proven difficulty knowing the limits of acceptable copying. Under the circumstances, the directive contained in the Performance Improvement Plan not to copy "from any comments or analyses prepared by the Division's federal regulatory counterparts" (Management Ex. 12) was entirely appropriate. The Grievant was clearly on notice by a legitimate directive from his superiors as well as from the incident that led to the 1997 Performance Improvement Plan and his demotion.

The Union also minimizes the seriousness of the Grievant's copying. Having some similar, even identical phrases, in both reports is not the issue. Even if the examiner did a thorough and competent analysis, wholesale lifting of blocks of text (such as is evident on page 8-1 of Management Exhibit 13) would bring discredit to the Division if the report were sent to the institution and federal regulator because it gives the appearance of a lack of independent analysis. In this case it is even more serious because the Grievant lifted language used to convey an analysis of one set of circumstances (those in 1997) and passed it off as if it accurately portrayed a very different set of circumstances (those in 1999). The result gives a misleading picture of the institution's financial position. In other words, what the Grievant did was copy someone else's language relevant to a prior year, passing it off as the result of his own independent analysis of the current year. This is plagiarism, not simply appropriate copying of boilerplate. Just because the Grievant's work product was a draft does not make the offense a trivial one To be sure, since the problem was detected before the report went out there were no external repercussions, but there was further erosion of Management's faith in this employee and the need to make extensive revisions to the draft. It is a serious matter when a 23-year employee whose job it is to produce draft reports requiring only minimal revisions does not do his job. If this were where the case ended, Management would have been justified in administering the discipline it did. However, there are some procedural issues that must be considered. It is to these I now turn.

First there is the role the May 1998 written reprimand may have played in choosing the level of discipline. Allard's recommendation for discipline refers to this reprimand and the suspension letter calls the 1999 incident a "second offense." I am forced to conclude that Management did not use the written reprimand simply as an indicator of notice, but that it used it to affect the level of discipline in contravention of Article 24.06. The Grievant should have entered the grid as a first offender or "clean record employee" of long service who was on notice, not a second offender.

Second, there is an open question as to whether discipline was administered even-handedly. On the one hand, Management claims the Grievant was in a class by himself. On the other hand, because the Union was denied access to the documents that might have rebutted this claim, the Union was hamstrung in its investigation. Disparate treatment is an affirmative defense, but Management has an obligation under Article 25.08 to supply materials and make witnesses available which may assist the Union in meeting its burden of proof. This obligation is limited to materials and witnesses "reasonably available from the Employer and relevant to the grievance under consideration." The question then is whether the materials and witnesses requested (specific Division examination reports including the names of the examines and the matching federal examination reports) were "reasonably available from the Employer and relevant" and, if so, was the request "unreasonably denied." They were unquestionably relevant to the issue of disparate treatment, for if other examiners were copying to the same extent the Grievant was and were not disciplined, Management would have a hard time justifying the Grievant's 10-day suspension. The fact that Management successfully went to OTS and FDIC, not once but twice, to get clearance of the documents it needed to prove its own claim undermines any argument it might make to the effect that what the Union sought was not "reasonably available." Management seeks refuge in privilege. However, a party waiving privilege cannot pick and choose what they wish to disclose, revealing only what helps their own case, concealing what may harm it. If it sought for its own case the release of properly redacted

documents for inspection by the Union under conditions of proper safeguards, it was unreasonable of it to refuse to do the same for the documents the Union needed for its case. The accommodation Management made–interviews with examiners who were not free to discuss their reports on pain of felony charges–was simply inadequate. I am thus compelled to draw an adverse conclusion from Management's unwillingness to seek release of the subject documents under the same terms and conditions it got the documents it needed for its own case. I conclude that the documents in question would support the Union claim that other examiners were copying from one report to another with impunity. However, if, as the Union claims, the Grievant was the only examiner under orders not to copy, any other examiners who copied others' material would not be guilty of insubordination. They might be guilty of neglect of duty or poor judgment, but not of defying an order like that contained in the Grievant's Performance Improvement Plan, which order the Grievant clearly disregarded. I therefore direct that the offenses of neglect of duty and poor judgment be stricken from the Grievant's record, but do find discipline for insubordination justified.

Two other procedural issues remain. One is the timeliness of the pre-disciplinary hearing. Article 24.02 does not have the bright line 24.05 does, saying only that "disciplinary action shall be initiated as soon as reasonably possible." Management has no excuse for taking three months from Allard's discovery on July 30 to schedule a pre-disciplinary hearing. It certainly did not use this time to secure the cooperation of the federal agencies, nor were there any impediments such as a criminal investigation. However, the Union does not explain how the Grievant was harmed by the delay. The violation is therefore a technical one. As for the absence of documents accompanying the pre-disciplinary notice, if Management chooses to proceed with a claim of plagiarism without relying on the documents, it does so at its peril for it has the burden of proof. In any event, it eventually thought better of it, secured the necessary releases and shared the documents with the Union months before the arbitration hearing. While the Arbitrator takes a dim view of withholding relevant and material evidence known of at the time of the pre-

disciplinary notice, the Union and Grievant were not harmed by the later disclosure, particularly since the Grievant and his Union representative saw the reports at the investigatory interview.

VI. AWARD

The grievance is granted in part, denied in part. Discipline for neglect of duty and poor judgment is without just cause. There is just cause for discipline for a first offense of insubordination, which shall be a three-day suspension without pay. The Grievant's record shall be adjusted accordingly and he shall be paid seven (7) days back pay and made whole.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
July 22, 2002

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