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STATE OF OHIO
VOLUNTARY RIGHTS ARBITRATION

REVIEWED BY

IN THE MATTER OF ARBITRATION BETWEEN:

THE STATE OF OHIO, THE OHIO DEPARTMENT OF HEALTH

NOV - 7/2002
G 11/7/02
GRIEVANCE COORDINATOR

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME

GRIEVANT: BRIDGET EDWARDS
GRIEVANCE NO.: 14-53-001109-0047-01-14

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: NOVEMBER 5, 2002

APPEARANCES

For the Employer

Debra Payne

Lee Matson

David A. White

Keri Valentine

Chris Keppler

Chief of Equal Employment Opportunity

Chief of Grants Administration Unit

Chief of Labor Relations

Office of Collective Bargaining

Advocate

For the Union

Bridget Edwards

Melvin Stallworth

Brenda Goheen

Grievant

Chapter President

Staff Representative and Advocate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Rehabilitation and Correction, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period March 1, 2000 through February 28, 2003 (Joint Exhibit 1).

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post-hearing briefs. Both parties submitted briefs in accordance with guidelines agreed to at the arbitration hearing.

STIPULATED ISSUE

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

Joint Stipulation of Fact

Grievant received a fifteen-day suspension without pay in November 2000 for neglect of duty. The Parties agree the grievance is timely and the issue is properly before the Arbitrator.

The Grievant is a ten-year employee with prior, active discipline for performance problems (four reprimands and two suspensions); grievant was classified as a Fiscal Specialist 1 in the Grants Administration Unit at the time of this Grievance.

PERTINENT CONTRACT PROVISIONS

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(1).

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 Employer's 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 fines, 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 agree to between the Employer, employee, and the Union.

(Joint Exhibit 1, Pgs. 64-65)

CASE HISTORY

At the time of the disputed incident, Bridget Edwards, the Grievant enjoyed ten years of service and was classified as a Fiscal Specialist 1. She was assigned to the Office of Financial Affairs. This work location requires Fiscal Specialists to process and maintain complex sub-grantee grant records using a step-by-step approach. Expenditures are eventually entered, payment documents assembled, and payments initiated.

On June 9, 2000, Lee Matson, Chief of Grants Administration, contacted Greg Glass, Director of Human Resources, for technical assistance regarding the Grievant's alleged performance difficulties. He identified six transactions which identified types of errors which should not be occurring for a Fiscal Specialist with the Grievant's experience.

A pre-disciplinary meeting was held on July 20, 2000. Evidence was provided in support of several charges dealing with neglect of duty.

On November 6, 2000, the Employer imposed discipline regarding the Grievant's conduct. The suspension order contained the following relevant particulars:

This is formal notice that you are being suspended, without pay, for fifteen (15) working days. I have read the hearing officer's and investigative reports and find your neglect of duty inexcusable. You will serve the suspension beginning Thursday, November 9, 2000 and ending Wednesday, November 29, 2000. You are to return to work at your regular report-in time on Thursday, November 30, 2000.

(Joint Exhibit 9)

The parties were unable to resolve the disputed matter. Neither party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined it had just cause to suspend the Grievant for neglect of duty. Specific references were made regarding six errors made between April and June 2000. Unequal treatment charges were rebutted as well as reliance on the Grievant's prior Performance Reviews.

The six separate instances of neglect were not contested by the Grievant and Union. As such, the submitted proofs justify the imposed suspension. Several of these errors were payout related items (Employer Exhibit 1). The Grievant failed to initiate a payment, which resulted in a local project experiencing a negative cash flow (Employer Exhibit 1, K and L). Another error dealt with failure to initiate payment when processing the expenditure report, which interrupted the cash flow to one project (Employer Exhibit

1, R). The final payment related error dealt with an inappropriate payment. Here, the Grievant initiated payment to a project where certain conditions had not been met (Employer Exhibit 1, S).

The other identified errors dealt with process and procedure related matters. On one occasion, the Grievant failed to reconcile documentation contained in a project's folder with information in the mainframe data base system (Employer Exhibit 1, L). On another occasion, the Grievant failed to reconcile an address and address code on a project's pay list with a central master accounting file address (Employer Exhibit 1, W). Finally, the Grievant caused duplicative efforts among several processing units because she failed to file documents in a timely fashion (Employer Exhibit 1, V).

Attempts to minimize the Grievant's performance deficiencies were countered by the Employer. The Grievant's most recent Annual Performance Review for the period 1998-1999 (Union Exhibit 1). Certain consistent performance deficiencies were identified in this particular performance review. These include in pertinent part: inconsistency in meeting production standards, following procedures, organizing work and making deadlines and getting along with other employees. These problem areas were identified in the narrative portion of the document, even though the rating designations rated the Grievant at "meets" or "above." The review (Union Exhibit 1) itself does not properly reflect the Grievant's most recent performance problems. The evaluation timeframe precedes the most recent misconduct by six months.

Similar problems limit the import of a reference (Union Exhibit 2) submitted in support of the Grievant's performance.

Dana Carr, the Grievant's Supervisor, wrote an undated reference letter. But the letter was written four months after the Grievant served her suspension.

The Grievant's disciplinary history reinforces the imposed discipline. Prior to the most recent fifteen-day suspension, the Grievant experienced a verbal reprimand, three written reprimands, and two suspensions for neglect of duty related misconduct. A review of the Conduct Grid (Joint Exhibit 2) indicates a certain leniency engaged in by the Employer. The Grievant could have been terminated at a much earlier time, and here, she is grieving a suspension, which could have easily been designated as a termination.

The Union was unable to support an unequal treatment claim. Comparables submitted failed to establish that similarly situated employees are treated differently. Four examples (Union Exhibits 3, 4, 5, 6, 7) were provided at the hearing, but each exhibited one processing error. As such, employees with no prior discipline history, experiencing one processing error, should not be viewed as similarly situated to a chronic poor performer.

The Employer did, in fact, investigate the disparate treatment claim. Payne noted the Grievant only mentioned one employee, Dick McClure, in her OCRC complaint and no others. By authoring a "No Probable Cause" recommendation (Employer Exhibit 4), OCRC supported the Employer's equitable treatment of the Grievant.

The Union never offered a more extensive list of comparable employees; those that have committed similar errors without being disciplined. The OCRC complaint merely listed one allegedly comparable employee, David A. White, Labor Relations

Administrator, testified only McClure was identified at the pre-disciplinary hearing. The Step 3 response mentions an allegation of unequal treatment without referencing any particular individuals. The Employer should not be required to undertake an open-ended investigation without prior specification by the Union regarding comparable types of misconduct.

The Union's Position

The Union opined that the Employer did not have just cause to suspend the Grievant. Certain proof and due process issues were raised in support of this position.

Granted, the Grievant admitted to the errors raised by the Employer. These errors were partially the consequence of existing process related issues. The Employer was converting to an electronic system or methodology, which generated confusion surrounding the changeover. Other employees were experiencing similar problems and errors. Documents (Union Exhibits 3, 4, 6, and 7) and testimony provided by the Grievant identified these circumstances. The errors came to her attention as she corrected various process related shortcomings.

These other errors served as the foundation for the Union's unequal treatment claim. None of these other employees were ever disciplined, yet were similarly situated.

The Employer failed to conduct a fair and impartial investigation regarding these matters. The names of these error-prone employees were provided by the Union at the pre-disciplinary hearing and third step of the grievance procedure. Unfortunately, the Employer failed to properly investigate these allegations resulting in a superficial and shoddy assessment. White remarked the reliance was placed on the investigation conducted by Debra Payne, the EEOC officer. She, however, merely received

McClure's personnel file, which included his most recent performance evaluation. Matson, moreover, testified he did not investigate the unequal treatment claim.

Neglect of duty charges was defective for other reasons. Rather than relying on previous discipline and related misconduct to support the propriety of the imposed discipline, previous acts of misconduct were relied on as proof of the disputed misconduct.

One element proposed as justification for the discipline dealt with failing to meet production standards (Employer Exhibit 1, D). Matson, however, did not know whether the Grievant met the production standards of sixteen processed reports per day on the days she was charged with making the particular errors.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record including pertinent contract provisions, it is this Arbitrator's opinion that the Employer did not have just cause to suspend the Grievant. Matters regarding inadequate notice, faulty and inconsistent performance standards, and inadequate investigation methodologies caused this finding.

It is axiomatic that a proper defense can only be accomplished if the Grievant and the Union are properly notified regarding the misconduct and change underlying any disciplinary imposition. Without a clearly articulated charge, moreover, the Employer can fall into an equally disagreeable disposition regarding the development of a record without the necessary proofs.

Here, the Suspension Order (Joint Exhibit 9) specifies the following charge:

This is formal notice that you are being suspended, without pay, for fifteen (15) working days. I have read the hearing officers and investigative reports and find your neglect of duty inexcusable.

This specification is clearly troublesome and tainted with due process deficiencies. The Neglect of Duty charge is too vague and general considering the alternatives contained in the Employer's Conduct Grid (Joint Exhibit 2). The possibility of alternative charges was articulated in an Inter-Office Communication from Chris Keppler, Labor Relations Officer to Williams S. Lee, Chief, Office of Personnel Services, on July 12, 2000.

Keppler remarked in particular part:

One of more of the following specific violation codes could apply to the facts established in the investigation of those issues:

- N1 failure to follow established policies/procedures/rules/regulations, etc.
- N7 failure because of employee neglect or without good cause to timely complete work assignment.
- N9 any improper, inappropriate or negligent action that could compromise or impair the ability of another employee to effectively perform.

The Suspension Order, however, failed to formally convey any of the previously described alternative charges. Each of these charges requires different proofs, and the Union must use different defenses to rebut the Employer's claims. This type of exchange cannot take place unless all of the interested parties are clearly aware of the particular type of neglect of duty in dispute.

At the hearing, the Employer charged the Grievant with a production violation. Again, a N7 charge was not articulated in the Suspension Order (Joint Exhibit 9), which in isolation exposed a due process deficiency. The record, moreover, was incomplete regarding this claim since the Employer was ill prepared to support the “unarticulated” charge. The Employer relied on a Performance Standard for Fiscal Specialist 1’s developed in December 1997 (Employer Exhibit 1, G). The Standard in question for processing expenditure reports was sixteen per day. Yet, these Standards had been revised on two subsequent occasions (Union Exhibits 10 and 11), and might have been developed specifically to heighten the Grievant’s performance. The record, as such, is unclear regarding the particular standard in use at the time of the disputed misconduct.

The proper application of this, or another performance standard, was also exposed as a potential deficiency at the arbitration hearing. Under cross-examination, Matson was asked whether the Grievant met production standards on the days where the errors were identified. Matson testified he did not know whether the Grievant met or exceeded the sixteen per day standard (Employer Exhibit 1, G). Even if she had met or exceeded this daily standard, her documented errors would have caused her to fall below the standard. Clearly, Matson’s explanation commingles quality and quantity expectations, which weakens the propriety of the Employer’s allegations.

This testimony directly supports the Arbitrator’s finding regarding notice-related due process deficiencies. Whether these particular errors dealt with N1, N7, or N9 charges is hard to discern from the record. And, lack of specificity makes it virtually impossible for the Union to develop any defense strategy.

Proof of misconduct was muddied further by circumstances surrounding the alleged errors. Matson testified that during the time of the misconduct, the existing manual system was being automated. Much of the existing system was still in place. On occasion there was some interplay between the existing manual system and the automated system. A good portion of the Grievant's errors were made when interacting with the manual system.

Discipline within these circumstances seem strained since the Employer acknowledged problems with the manual system. Matson concurred with a statement made by Carr at the third step hearing (Joint Exhibit 9). Carr maintained the manual system was flawed. It becomes difficult to discipline the Grievant for errors, when these errors were at best partially the result of manual system deficiencies.

The Employer, moreover, relied on the Grievant's prior discipline as proof of the disputed misconduct. These prior events, and related penalties, can be used for progressive discipline purposes and to determine the proper level of the imposed penalty. Here, it appears, the prior disciplines had a dual purpose. Clearly, reliance on prior discipline as proof of pending misconduct determinations is a blatant example of misguided management rights.

In my opinion, the Union was able to support the argument dealing with the unequal treatment claim. The Arbitrator is unwilling to conclude that the Employer engaged in unequal treatment practices. I do, however, conclude that a proper and impartial investigation should have taken place, but did not. Sufficient forewarning regarding this particular allegation was provided by the Union. At the pre-disciplinary and third step of the process the Union identified fellow employees who had engaged in

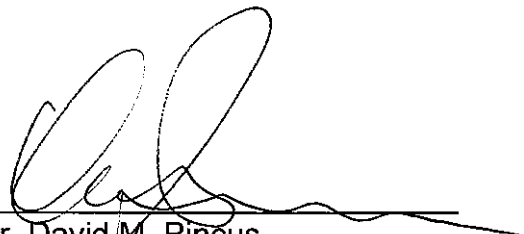
similar forms of misconduct. Work produced by these individuals was not analyzed for comparability purposes. Rather, the Employer relied extensively on a collateral investigation conducted by Payne for OCRC purposes. She merely addressed the one charge identified by the Grievant dealing with McClure. A claim identified in a collateral setting does not limit a more extensive listing for arbitration purposes.

Similarly, an arbitrator is not bound by an administrative ruling, which may use a different standard of proof, and may base its finding on a completely dissimilar record. The Employer is still obliged to undertake an independent investigation when provided with potential employees engaged in similar misconduct.

AWARD

The grievance is sustained. The Employer did not have just cause to suspend the Grievant for fifteen (15) days. She shall be made whole for all lost back pay and benefits. The suspension, moreover, shall be removed from her disciplinary record.

November 4, 2002
Moreland Hills, OH 44022


Dr. David M. Pincus
Arbitrator