
In the Matter of Arbitration	*	Before: Harry Graham
	*	
Between	*	Case Number:
	*	
OCSEA/AFSCME Local 11	*	19-00-(2005-04-04)-0175-
	*	01-14
and	*	
	*	
The State of Ohio, Department	*	
of Insurance	*	
	*	

APPEARANCES: For OCSEA/AFSCME Local 11:

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INTRODUCTION: Pursuant to the procedures of the parties two days of hearing were held in this matter. At those hearings the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on February 24, 2006 and the record was closed.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the Department of Insurance remove the Grievant for just cause? If not, what shall the remedy be?

BACKGROUND: The Grievant, Chantana Kung, was initially employed by the Ohio Department of Insurance in April, 1998. He was classified as a Network Administrator 3 in the Office of Information and Technology. (OTIS). He subsequently was promoted to an Information Technology Consultant 1 in October, 2002. As an Information Technology Consultant 1 Mr. Kung was responsible for leading a team "in assessing, designing, monitoring and maintaining site preparations with state staff, vendors...." He also was responsible for monitoring and maintaining the network and servers and troubleshooting and resolving network and server problems. (Jt. Ex. 3, p. 100). As an employee of the Department of Insurance Mr. Kung maintained a good work record.

In March, 2005 the Department's Assistant Director of Information Technology Tim Ameredes, was informed by another Department employee, Tim Crouch, that Mr. Kung was accessing employee e-mail accounts. An audit was performed. It revealed that Mr. Kung had accessed employee e-mail accounts 106 times in the December 15, 2003-March 1, 2005 period. Authorization could be found for 4 of the 106 e-mail accesses.

Mr. Kung was asked to explain this discrepancy. He was unable to explain it to the satisfaction of the Department. His inability to explain his accessing accounts without authorization was regarded as breaching the trust reposed in

him by the Department. Mr. Kung was discharged on April 1, 2005. A grievance protesting that discharge was filed. It was processed in the procedure of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE EMPLOYER: At arbitration the Union raised the issue that Mr. Kung and the local union official on the scene were prohibited from investigating this matter prior to the pre-disciplinary interview. That is simply not so according to the State. The Pre-D was initially scheduled for March 15, 2005. Proper notice was provided as was a list of exhibits and witnesses. The Union on March 15, 2005 objected that it had not been provided HEAT tickets (internal tracking documents) nor was it provided sufficient time to investigate this situation. The March 15, 2005 meeting was continued for three days, to March 18, 2005. Mr. Kung did not appear on March 18, 2005 and the meeting was rescheduled for March 22, 2005. That was eleven days after the original notice of a pending Pre-Disciplinary interview. The action of the State was more than reasonable in this situation. Further, the Agreement provides for time to investigate a grievance. Time is not provided under the Contract for investigation for a Pre-Disciplinary interview. Consequently, any procedural challenge along these lines is not meritorious and should be

dismissed the State contends.

Subsequent to Mr. Kung's discharge the Department engaged the firm of Crowe Chizek and Company to review transactions on its e-mail system. It reported on October 18, 2005. Included in its examination were "Exchange Event Logs" for Mr. Kung for the period January, 2004 - March, 2005. This shows 108 accesses of e-mail accounts. In contrast, another Department mail administrator, Mark Hutchison, had 25 occurrences in the same period. This disparity is indicative of the fact that the Grievant was accessing e-mail accounts improperly according to the Employer.

The Crowe Chizek report enunciated the industry standard with respect to access to e-mail accounts. Microsoft indicates:

Do not use this procedure (unrestricted e-mail access) in a production environment to allow unauthorized access to user data in violation of corporate policies regarding privacy and security. Implement an auditing plan on your network to detect and record improper use of network privileges by your system administrators.

With that in mind, Crowe Chizek was of the view that "it is not a common activity for a system administrator to open the mailbox of another user without their knowledge and consent." (Er. Ex.3, p.3). That view was seconded by Mr. Ameredes and Mr. Hutchison of the Department. Both experienced professionals in Information Technology, they agreed it was normal practice for employers to require staff

with unrestricted access to other employees' accounts to secure authorization before accessing those accounts. That did not occur in this instance.

Furthermore, Mr. Kung was in receipt of various Departmental policies which required that he not access e-mail, data or other sensitive information without prior authorization.

The Department tracks access to other accounts and documents authorization to access those accounts via the HEAT system. A HEAT ticket is to be completed each time an account is accessed. Felix Chrappah, a witness on behalf of the Union, testified that HEAT tickets were utilized 80%-90% of the time an account was accessed to memorialize such access. That did not occur in this situation.

Other employees routinely record their access to others accounts. For instance, Mark Hutchison accessed others accounts 25 times over the January, 2004 - March, 2005 period. (Er. Ex.3, p.3). The record shows he had verified authorization to do so 23 times. In contrast, Mr. Kung accessed accounts 108 times with 4 HEAT tickets recorded. It must be concluded that his failure to document those account visits means they were unauthorized the State asserts.

For instance, on August 9, 2004 the Grievant accessed the account of the Director of the Department of Insurance, his

supervisor and several other accounts. These accesses occurred over a roughly two hour period, from 5:58 - 7:46 p.m. No documentation was made by the Grievant nor was he able to explain his accessing those accounts. Similarly, on February 18, 2005 Mr. Kung accessed various accounts. Included among them were those of Messrs. Ameredes and Hutchison. They specifically testified they had not authorized Mr. Kung to access their accounts.

The Department has lost trust in Mr. Kung. That loss of trust is understandable and defensible in light of the events under review in this proceeding. In Case No. 02-02-(20021122)-0078-01-14 involving these parties Arbitrator Robert Brookins found that when the Employer lost trust in an employee for a bona-fide reason, discharge was appropriate. That should be the case in this instance as well in the State's view.

The defenses raised by the Union in support of the Grievant should be disregarded according to the Employer. While Mr. Kung's position description gives him the authority to access others' accounts, it does not permit him to do so without authorization.

Nor can it be correctly said that Mr. Hutchison was out to get Mr. Kung. He acted properly in this situation. Knowing he was to have prior authorization and record access to

others' accounts he did so. He generated the data on Mr. Kung as directed. He testified under oath at arbitration. He cannot be held responsible for the discharge of Mr. Kung.

It cannot be said that the Department altered the Access database. It could have been altered, but there is no evidence that it was altered. The Crowe Chizek report agreed with the Access report. To find that report had been altered it would be necessary to find that the Department and Crowe Chizek had colluded. Such a notion is ridiculous.

That in some instances the log-ins were in close proximity to one another does not necessarily show the Grievant spent only a few seconds in an account. The system does not track log-offs. It only tracks log-ins. A claim that the record thus shows only a short time for some log-ins is factually not supported.

Among those who testified at arbitration only Mr. Kung claims that use of the HEAT system was not routine. He was aware of the need to utilize the HEAT system to document his access to the accounts of others. His 2003 performance evaluation reiterated that to him.

It cannot be the case that Mr. Kung was checking for SPAM or viruses. Those are dealt with automatically by SPAM and virus filters.

The Department of Insurance deals with confidential

information. It reviews rate filings, the solvency of insurers licensed in Ohio and complaints of agent misconduct. It must be able to trust its employees. Mr. Kung had access to all confidential data on the computer network of the Department. He was never authorized to access co-workers e-mail boxes without authorization. He signed the various Departmental policies designed to ensure confidentiality. He knowingly breached them. As the lead administrator in the Department Mr. Kung should have been well-aware of Departmental confidentiality policies and followed them scrupulously. That he did not opens him to discharge in the opinion of the Employer. It urges the grievance be denied in full.

POSITION OF THE UNION: The Union stresses that it is the Employer that bears the burden of proof in this situation. The State should be held to a very high standard as Mr. Kung is accused of actions amounting to moral turpitude. At a minimum, the standard of "clear and convincing" should apply. Consideration should also be given to use of "beyond a reasonable doubt." In either case, the State cannot meet its burden in the Union's view.

There are a number of reasons why the discipline must fail according to the Union. Initially, aspects of the discipline were untimely. The Pre-Disciplinary packet

references that on March 2, 2005 the Assistant Director of Information Technology requested the log file for analysis. That request implies that the file was available. It was not analyzed to September, 2005 by an outside vendor, Crowe Chizek. Their report was not completed to October 18, 2005. They examined the period January 1, 2004 - March 15, 2005. This period, 1.25 years, was untimely and/or unreasonable. It was impossible for Mr. Kung to recall events over such a great length of time.

Further, the Crowe Chizek report identified five transactions that caught their attention. Three occurred in March, 2004. The other two took place in February, 2005. Crowe Chizek determined that a support record did not show a problem being reported by the employee whose mail was allegedly being opened by Mr. Kung. The data was available in March, 2005 when Mr. Ameredes requested the log for analysis. Mr. Ameredes knew, or should have known, of the results of that analysis well before receiving the Crowe report in October, 2005.

At arbitration the Employer relied heavily upon the Crowe Chizek report in support of its action. That reliance was misplaced according to the Union. Crowe received the raw data from Mark Hutchison of the Department. Upon Mr. Kung's discharge Hutchison was promoted to fill his position. Crowe

found that prior to March 18, 2005 the Department was not properly backing-up "the Exchange Mail Service (including event logs." Crowe was of the view that it was unlikely that the logs could have been altered or modified by anyone at the Department. In fact, they could have been according to both Mr. Kung and Mark Davis, President of the Local Union at the Department of Insurance.

Prior to his discharge Mr. Kung had a good work record. In this instance the State moved directly to discharge. The concept of progressive discipline was disregarded. In his job Mr. Kung had unrestricted access to e-mailboxes. The Employer should have had in place a system to prevent such access were it improper. Crowe Chizek recommended as much when it urged an auditing plan be implemented to detect and record improper use of the network by systems administrators.

When Mr. Kung was discharged the Employer cited two violations. They were both for the same alleged behavior. This is a form of stacking the charges. The State cannot show the Grievant used state time or property for personal reasons or non-work matters.

A distinction must be made between a mail account and accessing e-mail. They are not the same. Mr. Kung can access a mail account but not view the e-mails that are in it. Accessing a mail account does not violate Mr. Kung's network

privileges.

In this situation the Employer cannot prove the Grievant acted as charged. Nor can it prove his actions were outside the scope of his job description. As a result Mr. Kung should be restored to employment with a make-whole remedy the Union contends.

DISCUSSION: The claim by the Union that the action of the Employer was untimely is rejected. The data log file was secured by Tim Ameredes on March 2, 2005. It was examined and to his satisfaction showed inexplicable access by Mr. Kung of other Insurance Department employee electronic accounts. A pre-disciplinary meeting was held on March 22, 2005 and the Grievant was discharged on April 1, 2005. The Employer moved expeditiously when it was satisfied the Grievant had acted improperly. Furthermore, the record shows that the Employer provided the Union time to investigate this situation. The initial pre-disciplinary meeting was scheduled for March 15, 2005. It was rescheduled for March 18, 2005 to provide time for the Union to prepare. Mr. Kung did not arrive for the scheduled March 18, 2005 meeting. It was rescheduled for March 22, 2005. The Union cannot plausibly assert the action of the Employer was untimely.

Subsequent to Mr. Kung's discharge the Employer engaged the consulting firm of Crowe Chizek to analyze the

Departmental e-mail transactions with specific reference to Mr. Kung. The Crowe report (Er. Ex. 2) was submitted at the hearing and referenced by the Employer in its post-hearing brief. Note well that Crowe started its review on September 26, 2005 and submitted its report on October 18, 2005. The Grievant was discharged effective April 1, 2005. The discharge notice referenced "unexplained patterns of access by your personal administrative account, including but not limited to accessing other Departmental user accounts in Outlook. Further investigation did not provide any reasonable or work related explanations for the found patterns. Such activity was not authorized." Those are the offenses with which Mr. Kung was charged on March 31, 2005. The Employer acted based on the evidence available to it at the time. It cannot now come to arbitration armed with a report compiled approximately six months after the fact to justify its action. The well-accepted rule is that discharge must rise or fall on the facts as they are known to the Employer at the time of the discharge. The Crowe report was belatedly commissioned and produced and is of no worth in this proceeding. It is not considered by the Arbitrator.

It is the case that from time to time employees of the Department log on to e-mailboxes other than their own. Attention is directed to Joint Exhibit 5. For example at page

9 MDHuch logged on to the mailbox of Tehisha Kynard at 1:24:58 p.m. on April 20, 2004. He was not the primary Windows 2000 user on that account. Similarly, on that date at 1:26:15 p.m. he logged onto the mailbox of Whitney Hadanek. At 2:58:29 p.m. he logged on to the account of Kim Lowry. On June 22, 2004 he logged on to the account of Michael Arndt. He was shown not to be the primary account holder on those accounts.

The entries made recording Mr. Hutchison's entries to accounts not his own are in the identical format to the entries made recording Mr. Kung's entries recorded in Joint Exhibit 3. It is the case that Mr. Kung visited accounts other than his own more often than did Mr. Hutchison. That said, the former was discharged and the latter was not. Nor was Mr. Hutchison disciplined in any fashion. If it is a serious offense to log on to accounts other than one's own the question arises as to why one employee was discharged and the other was neither discharged nor disciplined.

Examination of many visits by Mr. Hutchison to accounts other than his own as reflected in Joint Exhibit 5 shows handwritten notes in the right margin. These indicate that oftentimes Mr. Hutchison did not complete a HEAT ticket documenting his access. At arbitration the Employer made much of Mr. Kung's failure to complete such forms. The record

demonstrates that as late as January, 2005 the usage of the HEAT recording system was under discussion. Union Exhibit 10, the minutes of a staff meeting held on January 24, 2005, show that the Information and Technology Section was actively discussing when to use HEAT. Resetting passwords and the time constraint for HEAT were issues that remained to be discussed. The Section also decided to wait to advertise HEAT until it was unveiled on the Intranet. Similarly, on January 26, 2005 (Un. Ex. 9) HEAT remained under active discussion. The Minutes of that meeting further reflect that a meeting was to be held the following week to discuss customizing HEAT. At the second day of hearing testimony was received concerning the utilization of HEAT. Felix Chrappah indicated that it was used 80-90% of the time. He also testified that HEAT was not used consistently. The record does not demonstrate that any requirement to document activity in the HEAT system was consistently enforced.

The notice of discharge provided to Mr. Kung referenced his alleged failure of good behavior and his alleged use of state time/property/resources for personal use or non-work reasons. Those offenses have not been proven by the Employer. It has not been proved that Mr. Kung engaged in a failure of good behavior when the record shows that his colleague, Mr. Hutchison, engaged in the same sort of access to accounts not

his own without adverse consequences. Nor was it shown that by accessing those accounts Mr. Kung was using state resources, time etc. for personal reasons or non-work matters. It was not shown that Mr. Kung secured any personal gain or advantage from accessing accounts as shown in Joint Exhibit 3.


The record, (Jt. Ex. 3) shows that Mr. Kung logged on to many accounts for which he was not the primary user. What the record does not show is that he entered those accounts. It is possible that he visited those accounts but did not enter them. The State has hypothesized, it has conjectured, it has inferred, that Mr. Kung read e-mail directed at others. The State has fallen short by any standard of proving that he did so.

AWARD: The grievance is sustained. The Grievant, Chantana Kung, is to be immediately restored to employment to the position he held prior to his discharge. He is to be paid all straight time earnings he would have been paid but for this incident. At the request of the Employer the Grievant is to supply a record of all income from wages and unemployment compensation, if any. That income may be used by the Employer to offset its obligation to the Grievant. All seniority and pension credit is to be restored to the Grievant. Any expenditures for health incurred by Mr. Kung that would have

been covered by State-provided health insurance are to be reimbursed to the Grievant. All leave balances in Mr. Kung's account at the day of his discharge are to be restored to him as if this incident had not occurred. All reference to this incident in any personnel records maintained by the State is to be stricken.

Jurisdiction is retained for 60 calendar days from the date of this award to resolve any issues concerning remedy.

Signed and dated this 20th day of March, 2006 at Solon, OH.



Harry Graham
Arbitrator