

IN THE MATTER OF ARBITRATION

BETWEEN

INDUSTRIAL COMMISSION OF OHIO

AND

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

Grievant: Jaimee Touris

Case No. 17-09-071109-0095-01-14

Date of Hearing: April 10, 2008

Place of Hearing: Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: Anissa Goodwin, OCSEA Staff Representative

2nd Chair: Jennie Lewis

Witnesses:

Jaimee Touris - Grievant

Judy Velten - Hearing Officer

Melissa DiSalvo - Hearing Officer

Regina Miller - Hearing Officer

Christina Matthews - Hearing Officer

For the Employer:

Advocate: John Dean, Labor Relations Officer

2nd Chair: Jessie Keyes, Office of Collective Bargaining

Witnesses:

Ray Mussio - Investigator

Ellen Dickhaut - Regional Manager

Rachel Black - Hearing Officer

Mark Collins - Administrative Assistant

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: May 27, 2008

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GENERAL COUNSEL

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2006 through February 28, 2009 between the Industrial Commission of Ohio ("IC") 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 the removal of the Grievant, Jaimee Touris ("Touris"), for violating the following Industrial Commission of Ohio work rules: Neglect of Duty (d), sleeping while on duty; Failure of Good Behavior (a) making false, abusive, inflammatory or obscene statements toward or concerning another employee, supervisor or member of the general public and, (e) menacing or threatening behavior toward an employee or manager.

The removal of the Grievant occurred on November 6, 2007 and was appealed in accordance with Article 24 of the CBA. This matter was heard on April 10, 2008, and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing oral statements were agreed to by both parties with the record being closed on April 10, 2008.

BACKGROUND

The Grievant was employed for over eleven (11) years at the Industrial Commission of Ohio. The Grievant is an attorney and was classified as a District Hearing Officer 2 at the time of her removal. The Grievant made determinations regarding injured workers' claims, and she received satisfactory performance evaluations.

At the time of her removal on November 6, 2007, the active discipline on Grievant's record included an oral reprimand and two (2) written reprimands, the first being assessed on May 7, 2007.

During a training session involving hearing officers at Maumee Bay Lodge on May 5, 2007, the Grievant was observed sleeping by several individuals including the Chairman and Executive Director of the Industrial Commission. The Grievant initially denied sleeping at any time during the conference. IC disagreed and instituted disciplinary proceedings. Prior to discipline being imposed on that matter, the Grievant was observed sleeping on October 2, 2007 in her work area. The Grievant does not dispute these incidents but contends that her medical conditions and medications caused her to sleep on duty. Sleeping on duty is the basis for the Neglect of Duty charge levied against Grievant.

The Failure of Good Behavior charge resulted from two separate incidents. On October 12, 2007, the Grievant received notice that a pre-disciplinary meeting was to occur due to her sleeping incidents. Apparently upset, Grievant stated to co-worker Rachel Black ("Black"), "that fucking cunt" wrote me up again. Black inquired about whom the Grievant was referring and the Grievant stated, "Ellen." Ellen Dickhaut ("Dickhaut"), Columbus Regional Manager, was Grievant's direct supervisor. Black reported this comment to Human Resources, which commenced an investigation that ultimately resulted in the Grievant's removal.

While the investigation was pending, Black reported that the Grievant engaged in harassing and menacing conduct toward her on several occasions.

The Employer contends that the discipline was not punitive and the Grievant refused to alter her behavior. The Union contends that mitigation applies and argues that Grievant was treated differently from supervisors who engaged in similar conduct.

ISSUE

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

RELEVANT PROVISIONS OF THE CBA AND INDUSTRIAL COMMISSION RULES

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).

INDUSTRIAL COMMISSION RULES

Progressive Disciplinary Guidelines

VIOLATIONS	1 ST	2 ND	3 RD	4 TH	5 TH
NEGLECT OF DUTY					
d) Sleeping while on duty	Written	Suspension	Suspension or Removal	Removal	
FAILURE OF GOOD BEHAVIOR					
a) Making false, abusive, inflammatory, or obscene statements toward or concerning another employee, supervisor or a member of the general public	Written or Suspension	Suspension or Removal	Removal		

VIOLATIONS**1ST****2ND****3RD****4TH****5TH**

e) Menacing/
threatening behavior
toward fellow
employees, manage-
ment or the public

Determination
based on severity
of incident

POSITION OF THE PARTIES**EMPLOYER'S POSITION**

Dickhaut received a telephone call on October 2, 2007 from the hearing section supervisor advising her of Grievant's absence, and this prompted her to locate the Grievant. It was approximately 9:05 a.m., and the Grievant had failed to arrive in the hearing section as scheduled to begin hearing matters on her docket. Dickhaut located the Grievant and observed her sleeping at her desk.

On October 12, 2007, the Grievant received notice that a pre-disciplinary meeting was scheduled regarding her sleeping on duty in violation of IC's Neglect of Duty (d) rule. The notice stated, "Specifically, it is alleged that you were observed sleeping in your work station while you were supposed to be at hearings." (Joint Exhibit (JX) 2B, p. 28). Upon receipt of the October 12th pre-disciplinary notice, the Grievant approached Black and stated "that fucking cunt" (Dickhaut) had written her up for sleeping. (JX 2C, p. 37).

Black testified that the Grievant was upset and believes Dickhaut should have pardoned Grievant's conduct due to ongoing issues regarding the possibility of losing her home and arguments with her mother. Black and the Grievant were professional colleagues as well as social friends. Black informed the Employer of the Grievant's comments, which led to another pre-disciplinary meeting which included the charge of Failure of Good Behavior (a): making false, abusive, inflammatory, or obscene statements toward or concerning another employee, supervisor or a member of the

general public.¹ The pre-disciplinary meeting regarding the above charges occurred on October 24, 2007.

Beginning October 12th, the Grievant began to engage in a series of threatening/menacing events targeted at Black as follows:

1. Threw money at Black, toward her face, in front of co-workers.
2. While exiting an elevator, Black was required to step aside so Grievant would not physically touch her.
3. Told third parties that Black could not be trusted and was attempting to get her fired.
4. Called Black the "accuser" when they were the only ones present.

Black testified that she considered this conduct threatening and inappropriate. Black felt compelled to inform her supervisors and discontinue all social interaction with the Grievant.

Consequently, another pre-disciplinary meeting occurred where the Grievant was charged with Failure of Good Behavior (e): menacing or threatening behavior toward a fellow employee or manager.

As a result, a recommendation was made to remove the Grievant for violation of Neglect of Duty (d), Failure of Good Behavior (a) and (e). On November 6, 2007, the Grievant was removed. IC contends that just cause to discharge Grievant exists and seeks a dismissal of the grievance in its entirety. The Employer contends that the Grievant's prior discipline of an oral and two written reprimands served as ample notice, but the Grievant refused to correct her behavior. Removal was the only option.

¹ The Grievant was also charged with lying during an official investigation, which was dismissed due to lack of just cause by the pre-disciplinary meeting officer. (JX 2C, p. 46).

UNION'S POSITION

The Grievant had worked for over eleven (11) years for the IC prior to her removal. As a Hearing Officer 2, the Grievant made determinations on claims by workers alleging work-related injuries. The Union admits that the Grievant was not faultless regarding some of the allegations but denies that her removal was for just cause.

Regarding the sleeping on duty charge, on October 2, 2007, the Grievant wrote Dickhaut and indicated that she had less than ten hours of sleep in five days due to migraines and personal problems she was having at home (JX 2C). Furthermore, the Union presented a statement from Mark D. Ricaurte, M.D. which indicated the Grievant was being treated for migraines and other conditions, and her medications could cause drowsiness or sleep during her normal daily activities (Union Exhibit (UX) 7). Her medical condition and medications caused her sleep episode, not her neglectful behavior. Mitigation on this charge is sought and should not be part of a finding of just cause due to the facts.

The Failure of Good Behavior charge also fails to satisfy the contractual standard of just cause. The charge regarding the obscene statement was not made to Dickhaut but to a personal friend, in confidence. The Grievant was upset and frustrated when she spoke to Black. A large part of the Grievant's negative behavior toward Dickhaut was due to their past history and the Grievant's belief that Dickhaut was harassing her.

The Union contends that IC, under Dickhaut's leadership, has been a cauldron of claims of harassment by other employees against Dickhaut and Mark Collins ("Collins"), Administrative Assistant. Regina Miller ("Miller"), Hearing Officer, filed a harassment

and workplace violence complaint against Collins and Dickhaut due to a series of hostile events involving the parties.

Miller's chief concern centers on an understanding regarding scheduling of hearings that would allow her flexibility on travel as well as hearings on Fridays. Apparently, Collins took exception to what he perceived as preferential treatment towards Miller and, on April 7, 2007, replied in an email that insinuated Miller: was receiving special treatment; was viewed as the teacher's pet; and that her low leave balance was the problem instead of the hearing schedule. Miller filed a complaint against Collins. Tanya Carmichael ("Carmichael"), EEO Administrator, determined that the Collins email was inappropriate because of its content. Carmichael also indicated that Dickhaut was not consulted by Collins prior to sending the email.

Other examples of a hostile environment were offered by Judy Velten ("Velten") and Melissa DiSalvo ("DiSalvo"). Both testified that they were fearful of retaliation and could not trust Dickhaut and/or Collins based upon their past relationship. DiSalvo indicated that Dickhaut stated Velten was not "well-liked by her peers" prior to Velten's transfer from the Dayton office to Columbus. According to DiSalvo, Dickhaut did not like Velten, and this was obvious after Velten's transfer occurred.

DiSalvo also indicated that Collins and Dan Broyles ("Broyles") confronted her at her work station and used hostile and threatening behavior on July 23, 2007. DiSalvo had refused to acknowledge the receipt of an oral reprimand given earlier, and Broyles and Collins approached her pod and stood in the doorway with the intent of obtaining her signature. According to DiSalvo, when she refused to sign and sought Union assistance, Broyles and Collins became agitated and displayed hostility towards her. DiSalvo felt threatened by their conduct and filed a workplace violence complaint on

July 27, 2007. After an internal investigation, IC concluded that Broyles' and Collins' behavior did not violate the workplace violence policy. (Management Exhibit (MX) 2).

Velten indicated that Black made several negative comments about the Grievant's use of sick leave and sent an email to Velten dated May 31, 2007 stating that the Grievant was calling off sick all the time requiring other Hearing Officers to handle her docket. Velten also believed that Dickhaut's comments about not being "liked by her peers" was another example of Management talking about its staff, behind its back.

The Grievant testified that, due to medications, she fell asleep at her desk on October 2, 2007. She was having chronic migraines at that time and was, admittedly, not sleeping well at night. Regarding her comment to Black, the Grievant did not think this comment would be repeated and stated it to Black because of their past close relationship. The Grievant denies throwing money at Black and indicated that she placed the money on the desk. Finally, she did not recall the alleged elevator incident but indicated that the elevators automatically rotate so it would be virtually impossible to block passengers exiting the elevator.

The Union contends that the evidence fails to support a removal based upon "just cause" and the Grievant should be reinstated and made whole.

DISCUSSION AND CONCLUSIONS

Based upon the sworn testimony at the arbitration hearing, the exhibits, and the post-hearing oral statements, the grievance is granted in part. My reasons are as follows:

The Grievant admitted to the sleeping incident but seeks acknowledgement that her medical condition and medications contributed to the October 2, 2007 incident.

The IC's position is clear that discipline is warranted due to her neglect of duty regardless of the circumstances. The Grievant's admission is sufficient to find a violation of Neglect of Duty (d). This charge, in and of itself, would not have been grounds for removal because this violation coupled with Grievant's active discipline fails to reach the termination level. IC's rules require four (4) separate offenses prior to removal. Given the Grievant's disciplinary file, she would have been suspended -- but not removed -- for the October 2, 2007 incident. Therefore, the Failure of Good Behavior charges coupled with the sleeping violation must support the removal by reliable evidence if the discharge is to stand.

The comment Grievant made to Black on October 12, 2007 was allegedly made in confidence to a professional colleague and personal friend. The evidence is unrefuted that, prior to October 2nd, Black and the Grievant interacted socially and considered themselves friends. However, a closer look at the record indicates that, on May 31, 2007, Black felt compelled to warn Velten, prior to her arrival from Dayton, that the Grievant still had an "... ongoing saga of calling of [sic] sick all the time supposedly based on her FMLA headaches." UX 1(A). Therefore, unknown to the Grievant, Black was not hesitant to convey her feelings, positive or negative, to others regarding the Grievant. Although the Union contends that the Grievant told Black in confidence, the record is void of any evidence that in the past the Grievant shared similar words or thoughts with Black that were not disclosed to Management. The Grievant was upset with Dickhaut upon receiving the pre-disciplinary hearing notice and simply expressed herself to a co-worker inappropriately. Black also testified that she had "vented" to co-workers in the past but no evidence indicates that Black or anyone else referred to Dickhaut in such abusive terms. The use of the word "cunt" is abusive, obscene and

violates Section (a) under Failure of Good Behavior. Initially, the Grievant couldn't recall what she said to Black, but Black credibly testified to what happened on October 12, and no rational reason exists for Black to lie. Therefore, the evidence supports a violation of Section (a). Black, in immediately reporting this incident to Management, lends further credence to Black's version. It's also fair to assume that Black was aware that, due to the emotional roller coaster that the Grievant was experiencing, she (Grievant) would not be pleased upon learning that Black shared their conversation with Management.

IC also presented evidence asserting that, after October 12, the Grievant engaged in either menacing and/or threatening behavior towards Black. The four incidents include allegations of money throwing, the elevator incidents and informing non-employees that Black could not be trusted.

Regarding the money incident, Black testified that Teri Nye ("Nye") and Felicity Hillmer ("Hillmer") were present. Black indicated that the Grievant threw the money at her face. (JX 2D, p. 56). The Grievant denies throwing the money and stated she placed the money on the corner of the desk. Neither Nye nor Hillmer testified regarding this incident, but in a written statement dated October 24, 2007, Nye indicated that the Grievant slammed the money on the ledge of the desk. (JX 2D, p. 57). Given Nye's statement, the evidence fails to establish that the Grievant threw money at Black.

With respect to the elevator incident where Black, Nye and Barb Hoylman ("Hoylman") were in one section, the Grievant, according to Black, stepped in front of Black and almost caused a physical contact. According to Nye's statement, the Grievant hopped into the section in front of herself and Black and glared at them. (JX 2D, p. 51). The Union presented evidence that suggests that the elevator operates automatically

and the Grievant would have been in the other section and could not have been in Black's path. The second elevator incident occurred when the Grievant and Black were alone in front of the elevator, when the Grievant called her "the accuser." The Grievant testified she did not recall this incident. Black added that, after October 12, 2007, the Grievant would glare at her and she felt threatened.

Considering the seriousness of these allegations, all the evidence presented by the Employer was carefully scrutinized. Admittedly, the Grievant was angry and used offensive words towards her supervisor on October 12th. However, the Grievant's conduct after October 12th included glares and slamming money on a desk. The evidence fails to demonstrate any words or conduct that rises to the level of a threat. In other words, the evidence fails to establish that the Grievant menaced or threatened Black.

Regarding statements made by the Grievant to non-employees indicating that Black could not be trusted, these can be viewed as other indicia of harassment towards Black or, maybe, making a false statement against another employee. As presented at the hearing, the alleged statements were intended to harass and embarrass Black. For the reasons previously discussed, the evidence fails to support a violation of section (e), Failure of Good Behavior.

Finally, the Union offered evidence that the Employer has acted disparately in issuing discipline. Union Exhibits 2, 3, 4 and 5 are examples of complaints from DiSalvo and Miller alleging workplace violence against Dickhaut, Collins and Broyles involving separate matters. After internal investigations, only Collins received a written reprimand for an inappropriate email sent to Miller. The Union argues that Collins and Broyles displayed aggressive hostile behavior towards DiSalvo when they blocked her

ability to leave her pod and during an emotional discussion involving a grievance. The Union, through witness Velten, also testified that Black had called the Grievant inappropriate names such as "a druggie" and "weak lesbian." Velten did not report this conversation(s) to Management.

Miller indicated that Collins always glares at her in a hostile manner. Miller also indicated that Dickhaut called her a liar at a training session. On the other hand, Collins testified in rebuttal that he does not glare at Miller and attempts to avoid any contact with her due to their past history. Dickhaut also denied calling Miller a liar or being confrontational with her.

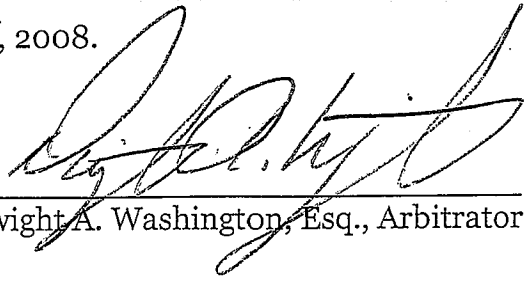
The Employer has established just cause to discipline the Grievant for Neglect of Duty (d) and Failure of Good Behavior (a). The Union asserted disparate treatment as a defense in that Management employees engaged in similar conduct but were treated differently. The Union contends that primarily Dickhaut and Collins engaged in conduct that violates sections (a) and (e) of the Failure of Good Conduct policy but were treated differently.

A review of Miller's and DiSalvo's claims against the Employer are not sufficiently similar to allow an analysis as comparables. OCSEA-Jennings and OCB, Grv. No. G-23-06(89-11-13)01-21-01-03, October 5, 1990 (Arbitrator Rivera). Although Miller's/DiSalvo's allegations involved workplace violence, I cannot find that a reasonable basis exists to conclude that the Grievant's conduct was the same or similar to allegations toward Dickhaut or Collins. However, all of the Union witnesses expressed a grave concern for the hostile environment knowingly or benignly fostered by Dickhaut and Collins. Although the disparate treatment affirmative defense is rejected in this case, under different facts in the future it may be appropriate.

Considering the record, discipline was issued for good cause; however, the removal was excessive due to the following: the Grievant's medical condition; the Grievant's acute personal issues in October 2007; relatively minor discipline of record at time of removal; the eleven years of satisfactory service; and no threatening conduct. Therefore, the Grievant shall be reinstated with the following conditions:

- (1) The Grievant shall enroll and successfully complete an EAP program associated with anger management and stress. The Grievant shall enroll in an EAP program no later than thirty days from the date of this Award. Failure to enroll or successfully complete the EAP program shall be grounds for immediate removal.
- (2) The discipline for violating Neglect of Duty (d) and Failure of Good Behavior (e) shall be a fifteen (15) day suspension without pay.
- (3) The Grievant shall receive no back pay, seniority and/or any other economic benefit she may have been entitled to.
- (4) Within thirty days of the date of this Award, the Grievant, Union and IC shall enter into a Last Chance Agreement providing that any subsequent violation of Neglect of Duty (d) or Failure of Good Behavior (a) by Grievant during the twelve month period following her reinstatement will result in Grievant's immediate removal with no recourse to the grievance procedure.
- (5) The Arbitrator retains jurisdiction for a period of sixty (60) days to resolve any dispute that arises in the implementation of this Award.

Respectfully submitted this 27th day of May, 2008.

A handwritten signature in cursive script, appearing to read "Dwight A. Washington". The signature is written in black ink and is positioned above a horizontal line.

Dwight A. Washington, Esq., Arbitrator