

STATE OF OHIO,
THE OHIO BUREAU OF WORKERS' COMPENSATION AND
DISTRICT 1199, SEIU, VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, THE OHIO BUREAU OF
WORKERS' COMPENSATION

-AND-

DISTRICT 1199, SEIU

GRIEVANT: RODNEY METCALF
GRIEVANCE NO.: 34-22-9905-04-051-01-12

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: September 18, 2000

APPEARANCES

For the Employer

Kim Hudak
Roger Coe
Beth Lewis
Judy Brabb

Advocate
Labor Relations Officer
Labor Relations Specialist
Former Chief of Rehabilitation

For the Union

Harry W. Procter
Rod Metcalf

Advocate
Grievant

INTRODUCTION

This is a proceeding under the auspicious of Article 7 – Grievance Procedure, Section 7.06 – Grievance Steps of the Agreement between the State of Ohio, Ohio Bureau of Workers' Compensation (hereinafter referred to as the "Employer") and District 1199, SEIU (hereinafter referred to as the "Union") for the period August 3, 1997 through May 31, 2000 (Joint Exhibit 1).

An arbitration hearing was held on July 24, 2000 at the District 1199 office in Columbus, Ohio. The parties had selected David M. Pincus as the Arbitrator. At the hearing, the parties were allowed to present and introduce documents, testimony and evidence. They were, moreover, allowed to cross-examine witnesses. At the conclusion of the hearing, the parties were asked if they wished to provide post-hearing briefs. The parties declined, and concluded their presentations with verbal closings.

PERTINENT CONTRACT PROVISIONS

ARTICLE 8 – DISCIPLINE

8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

- A. Verbal Reprimand
- B. Written Reprimand
- C. A fine in an amount not to exceed five (5) days pay
- D. Suspension
- E. Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

The employee's authorization shall not be required for the deduction of a disciplinary fine from the employee's pay.

(Joint Exhibit 1, Pgs. 22-23)

JOINT STIPULATIONS

1. The Parties agree that Rodney Metcalf began work with the Bureau of Workers' Compensation as a Rehabilitation Program Specialist on November 15, 1982.
2. The Parties agree that Rodney Metcalf's last position held at the Bureau of Workers' Compensation was Industrial Reemployment Specialist, a position which he began on April 29, 1984.

3. The Parties agree that the Bureau of Workers' Compensation Rehabilitation Center is a fee for service Rehabilitation Center and derives its funding from employee billing.
4. The Parties agree that Industrial Reemployment Specialists complete Charge Tickets to log and/or track billing charges.
5. The Parties agree that Mr. Metcalf was removed from employment with the Bureau of Workers' Compensation effective April 26, 1999.
6. The Parties agree that Ms. Judy Brabb was the Director of Rehabilitation Services from January 3, 1999 until April 14, 2000.
7. At the time of the removal, no other active disciplines were on file other than a verbal reprimand.

STIPULATED ISSUE

Was the Grievant, Rodney Metcalf, removed for just cause, and if not, what shall the remedy be?

CASE HISTORY

Rod Metcalf, the Grievant, has served as an Industrial Reemployment Specialist since April 29, 1984. His duties were to service clients attempting to reenter the labor force. Although the Grievant's job required some degree of travel, his reporting location was the Rehabilitation Center of the Bureau of Workers' Compensation.

The Rehabilitation Center's funding mechanism has changed through the years. Initially, it was state-funded by the Employer. In 1996, however, as a result of House Bill 107, the Rehabilitation Center became a fee-for-service operation. Market competition and statutory requirements caused the Employer to implement a process where clients would pay for any services rendered.

The record indicates all Industrial Reemployment Specialists were trained in a new billing process. Charge tickets would be completed tracking the amount of time spent with a client. This data would then be computed into billable time.

It appears that the Grievant, for some time, experienced some difficulty fulfilling his billing responsibilities. On February 25, 1999, the Grievant and his supervisor met to discuss why the supervisor had not received any charge tickets based on an earlier request made during January of 1999. The Grievant responded he was still working on charge tickets dated prior to January of 1999. He acknowledged that his efforts would be directed on the January and February tickets once the others were completed.

On March 8, 1999, Michael Gutherie, the Grievant's supervisor, authored an e-mail which provided the Grievant with the following set of instructions:

I have verbally requested from you over the past 2 months that you submit charge tickets for the services which you have rendered in returning injured workers to work. I have also shared with you that 3 case managers whose clients you have assisted in the past 2 months have stated that they are pleased with your services. But you have not submitted any charge tickets.

I am requesting that you have all of the charge tickets and weekly billing summaries for the months of January and February of 1999 in my office by 5:00 p.m. on March 15. If you are unable to meet this deadline, then I request that you come to the BWC Rehab Center at 8:00 a.m. on March 16 with your appointment calendars for Jan. and Feb. and I will furnish you an office where you can compose the charge tickets.

For future months you are required to have the charge tickets in by the end of the 5th business day after the end of the preceding month.

Your cooperation in this matter is vital to our successful operations in Vocational Services.

(Joint Exhibit 5 (C))

A number of e-mail exchanges and related discussions arose as a consequence of this initiating directive. The Grievant, more specifically, argued about the deadline established by his supervisor and competing objectives dealing with client-related services.

The established deadline and an extension passed, with the Grievant failing to submit the charge tickets as requested. On March 22, 1999, Guthrie issued a verbal reprimand. It contained the following charges and allegations:

This document is to document that you received a verbal reprimand for violation of BWC Progressive Disciplinary Guidelines for **(bargaining unit)** employees, Neglect of Duty (c) Work production/Failure to comply with performance improvement plans.

Specifically, you have not turned in any charge tickets for the months of January 1999 and February 1999. In a series of e-mails from March 8, 1999 through March 10, 1999, I gave you an assignment to complete charge tickets for January and February. I gave you a deadline of Monday, March 15, 1999. You were given an extension until Wednesday, March 17, 1999, to complete the assignment. You still have not turned in charge tickets of January and February. This is wholly unacceptable and constitutes neglect of your duties.

Further incidences of this nature will result in stronger disciplinary action.

(Joint Exhibit 4)

Guthrie, moreover, authored a written Direct Order on March 22, 1999. The order contained the following directives:

As a result of your refusal to complete an assignment given to you on March 8, 1999, you have left me no other option but to put you on notice of the following direct order:

This memorandum constitutes a direct order. Your failure to abide by this order will result in disciplinary action, up to and including your termination from employment with the Ohio Bureau of Workers' Compensation.

You are to COMPLETE charge tickets and weekly billing summaries for the months of January and February of 1999, by close of business 3/25/99.

In addition, in the future charge tickets and weekly billing summaries for all work performed by you are due to me by the close of business on the 5th business day after the end of the month.

If you have any questions about this directive or need additional clarification please contact me.

Thank you in advance for your cooperation on this matter.

(Joint Exhibit 2 (A))

Circumstances caused Guthrie to issue an addendum to the Written Direct Order authored on March 22, 1999. He and Brabb had received certain inquiries from clients stating the Grievant had suspended services, and had been reprimanded. The addendum, authored on March 23, 1999, contained the following prohibitions:

This is unprofessional and inappropriate and I do not expect it to happen again. You are to treat customers with the utmost respect. You are not to discuss internal issues with customers. As we discussed this yesterday, you are to complete charge tickets along with your normal client contacts. You are to cease and desist telling customers you are suspending services for any period of time. From this point forward, if you run into any specific problems with completing a client referral you are to speak with me so that we may develop a plan of action.

Again, you are to complete your charge tickets and billing summaries for the months of January and February of 1999 as directed in yesterday's meeting. Also you are to continue to maintain your client contacts. Effective immediately, if you need to reschedule a particular meeting in order to complete

your assignment you are to let me know prior to rescheduling.

You should consider this a direct order. Failure to follow this direct order will be considered an act of insubordination and will result in disciplinary action up to and including your termination from Ohio Bureau of Workers' Compensation employment.

Please be advised that I have scheduled a meeting for you and I on 3/29/99 at 8:30 a.m. in my office, to discuss your current caseload, outstanding appointments and referrals.

(Joint Exhibit 2 (A))

On March 23, 1999, a meeting was held to address some of the Grievant's concerns and the Employer's expectations. Present, as participants were the following individuals: the Grievant, Union Delegate, Guthrie and Brabb. At this meeting, the Grievant purportedly became belligerent while mocking Brabb.

The Grievant failed to complete his past due charge tickets for January and February 1999 by the close of business on March 25, 1999. This inaction, in addition to his conduct during the March 23, 1999 meeting, caused the Employer to issue a Removal Order on April 15, 1999. He was charged with the following offenses:

...The charges you have been found in violation of are under BWC Work Rules – Progressive Disciplinary Guidelines, Insubordination, (a) Willful disobedience/failure to carry out a direct order, Failure of Good Behavior (o) General.

(Joint Exhibit 2 (B))

On April 30, 1999, the Grievant and the Union formally contested the Employer's administrative action. The Statement of Grievance specifies the following:

The Grievant was unjustly disciplined. No just cause and the discipline was not progressive, management was arbitrary and capricious in methods of discipline.

(Joint Exhibit 2 (C))

The parties were unable to resolve the disputed matter through subsequent steps of the grievance procedure. Neither party raised procedural nor substantive arbitrability issues. 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 remove the Grievant for insubordination and failure of good behavior. The record clearly indicates the Grievant violated a direct order by failing to submit the requested billing by March 25, 1999. He did, however, submit the paperwork by April 1, 2000. His actions during the course of a meeting held on March 23, 1999, are viewed as highly unprofessional and a failure of good behavior.

The Grievant has steadfastly refused to comply with the established billing procedures. Throughout this ordeal, the Employer has attempted to work the Grievant to gain compliance. The Grievance, however, defiantly refused to comply, provided excuses for his failure to bill and eventually failed to provide billing in a timely fashion.

The behavior in question becomes more onerous when one determines what the Grievant did do after the issuance of the direct order. He unilaterally decided to suspend all client contact, informed clients about internal billing problems and the issuance of discipline.

His actions generated a financial hardship on the Employer. By failing to bill in a timely manner, the Employer lost revenue necessary for the continued existence of the Rehabilitation Center. Also, his actions led to a loss of client base once he suspended services to clients while the billing matter got rectified.

There is no doubt the Grievant could have easily complied with the Employer's order. No other Reemployment Specialist had failed to complete his charge tickets for billing purposes. The procedures in place were adequate to accomplish the desired outcomes. The Grievant himself was the sole cause for the contested difficulties. His reliance, moreover, on the vacation he took during the period in question seems unpersuasive. Brabb advised the Grievant against taking his prior approved vacation. The warning, however, did not achieve its intended result.

The Union's Position

The Union opines that the Employer did not have just cause to remove the Grievant. The Grievant never directly refused to complete his billing obligations. Rather, he was unable to comply because he received conflicting directions from a variety of supervisors. The record clearly exposes differing expectations shared by Guthrie and his superior, Diane Tedeschi. Guthrie and Brabb, without any justifiable reason, undermined an agreement reached by the Grievant and Tedeschi. Guthrie issued his direct order in total isolation of this prior agreement. These conflicting expectations, more than anything else, caused certain expectations, which were impossible to achieve. Without clear and concise direction, it becomes virtually impossible to establish willful neglect and disobedience.

By approving the Grievant's vacation, the Employer lessened the perceived import of its billing demands. If the billing was such a glaring problem, then Guthrie or someone else in a supervisory capacity should have cancelled the vacation.

The incident involving the Grievant and Brabb does not serve as proper justification for any disciplinary action. Any altercation that did take place was partially the result of Brabb's non-professional demeanor. Her approach provoked and created a negative atmosphere.

The imposed discipline was not progressive in violation of Section 8.02 – Progressive Discipline. Even if the Grievant engaged in some form of behavior requiring discipline, the Employer is unable to support a progression from a verbal reprimand to removal. This is especially true considering the Grievant's years of service and outstanding performance record.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, an impartial and complete review of the record, including pertinent contract language, it is this Arbitrator's opinion that the Employer did not have just cause to remove the Grievant. Neither charge was properly supported by the record causing the Grievant's reinstatement.

The Employer's cause had a recurring evidentiary defect. A party to a dispute may jeopardize its case when it fails to call a critical witness available to it. Such a circumstance may give rise to a presumption that the witness's testimony would be adverse to the position of the party who could have called him/her.¹ A defect of this sort

¹ Autodynamics, Inc., 99 LA 705 (Kanner, 1992); Southern Cal. Permanente Med. Group, 92 LA 41 (Richman, 1989).

may not totally devastate a party's case in chief, but it certainly infringes on the Party's ability to present the quantum of proof necessary to establish the elements of the case.

Here, we have several evidentiary disputes that were recognized by the Employer, but discounted and un rebutted. The neglect of duty charge deals with conflicting views of the events held by the Grievant and Brabb. Guthrie, who was a party to the discussion, could have bolstered Brabb's allegations, but was not called to testify. Brabb's view and characterization of the events did not provide sufficient proof that the Grievant acted in a manner requiring discipline.

Insubordination is the refusal by an employee to work or obey an order given by the employee's superior. This definition, however, is subject to several qualifications or exceptions. Several exceptions apply in this instance.

The Employer has tolerated similar misbehavior in the past.² The questioned billing behavior had gone on for well over a year when the Employer issued a verbal discipline on March 22, 1999. This initial action provided the Grievant with a form of negative notice, leading to expectations that continued misbehavior would not potentially result in discharge, but possibly a lesser form of discipline. If the alleged misconduct was so wanton and unacceptable, then more drastic progressive discipline should have been imposed much sooner.

An employee must be given or have time to correct his/her purportedly insubordinate behavior.³ The direct order in question was issued on March 22, 1999, with completion of charge tickets on March 25, 1999. Even if the Employer engaged in all of the professed practice efforts, the order and related completion date did not

²International Harvester Co., 13 LA 582 (McCoy, 1949).

³Tension Envelope Corp., 99 LA 1208 (Bankston, 1992.)

provide the Grievant with sufficient time to complete the instructions. The Employer's frustration does not justify establishing a goal, which is virtually unattainable and leads to self-fulfilling prophecy.

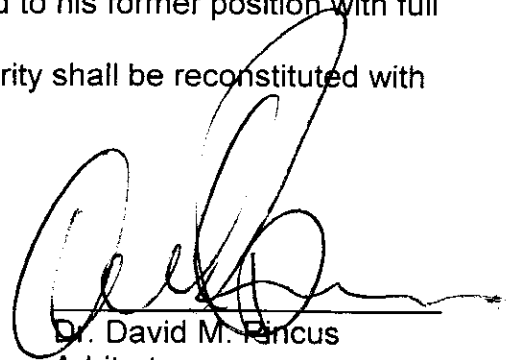
An employer must establish that the order is reasonable in order to support a disciplinary action. Here, the order was unreasonable based on certain assurances granted the Grievant by Guthrie's superior, Tedeschi. The Grievant asserted that Tedeschi offered Mack's assistance to accomplish the requisite billing. Whether Guthrie was initially aware of this arrangement is unclear. What is clear, however, is that the offer was eventually unilaterally withdrawn by Guthrie.

Nothing in the record rebuts the nature of the offer and the Grievant's assertion that he was progressing prior to its withdrawal. Neither Tedeschi, Guthrie nor Mack were present at the hearing to rebut these critical assertions. The Arbitrator has no choice but give the Grievant's testimony and supporting documentation a great deal of weight. As such, the direct order within this context is viewed as blatantly unreasonable.

AWARD

The Employer did not have just cause to remove the Grievant. The status quo ante should be restored. The Grievant shall be reinstated to his former position with full back pay, less any offsets for interim earnings. His seniority shall be reconstituted with all other related benefits.

September 18, 2000
Moreland Hills, Ohio



Dr. David M. Pincus
Arbitrator