

IN THE MATTER OF ARBITRATION

BETWEEN

DISTRICT 1199/SEIU, AFL-CIO

AND

THE STATE OF OHIO/ODMH

Before: Robert G. Stein

Panel Appointment

Case # 03-00-990726-0017-0002-12

Grievant: Kwanz M. Obu

Principal Advocate for the UNION:

Harry W. Procter, Administrative Organizer

DISTRICT 1199/SEIU, AFL-CIO

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Principal Advocate for the EMPLOYER:

Shirley Turrell, LRS

Bill Fodor, LRS, 2nd Chair

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INTRODUCTION

A hearing on the above referenced matter was held on March 5, 2001 in Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted briefs in lieu of closing arguments. The hearing was closed on May 7, 2001. The Arbitrator's decision is to be issued by June 19, 2001.

ISSUE

The parties agreed upon the following definition of the issue:

Was the Grievant, Kwanz M. Obu, removed for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE/

See Agreement for specific language (Joint Exhibit 1)

BACKGROUND

The Grievant in this case is Kwanz M. Obu. He was employed as a Human Service Program Consultant with the Ohio Department of Aging (hereinafter "Employer" or "Department") for approximately nine years and was discharged on July 26, 1999. The Department coordinates and monitors programs and providers of services designed to facilitate choice and independence for the elderly in either home-based or community based living arrangements. Mr. Obu was terminated from his employment for the following reasons:

1. Failure to follow directives, policies, or procedures;
2. Falsifying payroll time sheets;
3. Misuse of state equipment or property for personal use;
4. Violation of Section 124.34 of the Ohio Revised Code;
5. Failure of good behavior.

The Employer charged the Grievant with the following: maintaining unauthorized and non-job related software and non-job related documents on his Department computer; spending excessive amounts of time logged onto the Internet in non-job related Websites during paid time; exceeding monthly limits on personal telephone calls; and completing daily time sheets so as to claim paid time hours

for hours actually spent on the Internet and engaged in personal phone calls. In the opinion of the Employer, the Grievant was using the state computer and the telephone to operate or set up a private business during working hours.

An investigation of the Grievant's activities took place when his supervisor inadvertently observed a rental application form on the screen of his computer. The rental application led the supervisor to believe the Grievant was using the form as part of a personal business that involved the rehabilitation of HUD repossessed properties. The supervisor also surmised the Grievant was involved in a housing rehabilitation business based upon prior conversations he had with him.

The supervisor informed his superiors, and the Employer launched an investigation in May of 1999. In its investigation the Employer used computer software that is designed to monitor and track computer files and Internet use. The MIS section of the Department was involved in the investigation. In addition to other discoveries, it determined that the history on the Grievant's computer had been reset to zero in violation of Department computer policies. However, the Employer was able to resurrect the information on the hard-drive of the Grievant's work computer. They discovered high Internet use to non-job related Websites and non-job related external software. Some of the documents appeared to be complete and some appeared to be works in progress. In the opinion of the Employer, however, all of them were non-job related.

Some of the specific documents found on the Grievant's computer or in his work area were as follows: rental applications, sample sales contracts, sample articles of incorporation, business consultant agreements, personal business cards, Internet hits on home improvement sites, City of Columbus, Housing and Urban development sites, a

small business administration site, African American Culture sites, News and Art, Bank One, Universal Pictures, Life Movie, and the Franklin County Auditor. The Grievant was monitored for a period of 18 business days as part of the Employer's investigation. During the 18 day period the Employer determined that the Grievant spent approximately 16.2% of his 144 working hours on non-job related Internet sites and another 3 hours and 28 minutes of paid time on non-job related telephone calls. The Grievant's rate of pay is \$23.68 per hour.

The Grievant was charged with the rule violations mentioned above and the Employer discharged him on July 26, 1999. The Grievant claimed, among other things, that the Grievant planted the evidence on his computer to discredit him. He filed a grievance on the same day, claiming he was discharged without just cause.

EMPLOYER'S POSITION

The Employer argues that it made a prima facie case for termination and has satisfied its just cause burden. The Employer points out that the Grievant was aware of the Department's computer usage policies and received training in them (JX 5). The Grievant was also aware of the consequences of violating the policies, contends the Employer. The policies specifically state that there shall be no personal use of State computers. Furthermore, the Employer argues that during its investigation the Grievant was given a full opportunity to explain his conduct. The Employer contends the Grievant was uncooperative, hostile, and dishonest in his responses.

The Employer also argues that the Arbitrator should give due deference to the rulings of other administrative agencies regarding the Grievant's claim of disparate treatment. The Employer points out that these agencies reached "no probable cause" findings. The Union made reference to disparate treatment during the hearing, but failed to provide evidence or testimony to support this accusation, contends the Employer.

The Employer argues that the Grievant's testimony prior to and during the hearing lacked credibility. He had a motive to lie in order to cover up his violations of Departmental policies, contends the Employer. The Employer adds that the Grievant's testimony contained numerous examples of inconsistency in his account of the events in this case.

The Employer argues that the appropriate level of review of the Employer's evidence is at the "preponderance of the evidence" standard. It contends that utilizing circumstantial evidence is sufficient to support a finding of just cause for termination. In conclusion, the Employer contends that when all of the Grievant's violations of policy are viewed together there is little question that termination and not progressive discipline is the appropriate response. The Employer strongly asserts that the Grievant would not be suitable for reemployment.

Based upon the evidence and testimony, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union argues the Employer did not prove its case. It contends that the testimony of the Employer's witnesses was untruthful, conflicting, and at times appeared to contain elements of collusion. There were rumors about the Grievant's outside business interests, and it appears the Employer was attempting to demonstrate that there was substance to these rumors, asserts the Union.

The Union argues that the Grievant testified that he has never bought or leased any property other than the home in which he lives, and the Employer failed to provide any evidence to the contrary. The Union also argues that the Grievant never received any counseling or corrective action prior to his discharge regarding Internet use or other computer related matters. In addition, coworker John Huffman of the MIS department violated the computer policies of the Department by downloading unauthorized and offensive software to Mr. Obu's computer yet received no discipline.

The Union argues the Employer was unable to prove that the Grievant made an excessive amount of telephone calls that violated Department policy. Also, it could not demonstrate which calls were personal and which ones were related to Department business, contends the Union. The Union argues that the Union's job duties and his telephone logs indicate he made an average of four telephone calls per day each of which average two minutes. This is a normal amount of calls in order for the Grievant to perform his job, contends the Union.

The Union defends the Grievant's use of the Internet to such sites as AFROnet, Blackpages.com, Black Enterprize.com, and The Nation of Islam.com as being important

to his education in serving minority aged clients. This knowledge lends itself to cultural sensitivity in order for the Grievant to be more effective in delivering social programming to the clients of the Agency, argues the Union. Finally, the Union argues that if the charges against the Grievant were true, then why didn't the Employer pursue criminal charges against him?

Based upon the evidence and testimony the Union requests that the grievance be sustained.

DISCUSSION

The Employer has the burden of proof in this matter; it must prove with clear and convincing evidence that the Grievant violated the following rules:

Failure to follow directives, policies or procedures;

Falsifying payroll time sheets;

Misuse of state equipment or property for personal use;

Violation of Section 124.34 of the Ohio Revised Code:

Failure of good behavior.

I found the Grievant's testimony in defense of himself to be inadequate at best. Clearly Mr. Obu is an educated and articulate young man, and he also appears to be a person with energy and ambition. Unfortunately, in this matter these qualities did not overcome his inability to satisfactorily explain why he was regularly engaged in non-work activity during working hours. I also found that Mr. Obu was at times untruthful and

evasive in his responses to reasonable questions posed to him regarding his accounting of time and the inappropriate use of his work computer for personal matters.

The Employer carries the burden of "just cause," and provided as a central piece of evidence its 18-day period of surveillance. During this time the Employer found the Grievant spent on average approximately 1.5 hours per day engaged in Internet activity for which there is little job related justification. The Employer proved that Mr. Obu visited numerous Internet sites that appear to bare little or no relationship to his job. His supervisor, Paul Gideon, testified that most of the data that Mr. Obu had to analyze to perform his job "*came in the form of hard copy.*" Furthermore, Mr. Gideon stated, "*...for the projects assigned to him it did not require him to use a computer.*" A review of the Grievant's job description (Human Services Program Consultant) contained in Joint Exhibit 3B substantiates Mr. Gideon's observations. It appears that word processing and knowledge of computer spreadsheet development would be helpful in performing his work. However, the research and information gathering components of the position focus on the analysis of existing reports and information and do not depend on Internet research.

During an eighteen-day monitoring period the Employer discovered that the Grievant was spending an average of 1.5 hours per day on the Internet, visiting various non-work related sites. Some of the time on the Internet may be explained by the Grievant's involvement in a pen pal program with inner city youth that the Department appeared to endorse. Mr. Gideon verified the Grievant's involvement in the pen pal program as well as his own participation. The Grievant stated his pen pal was an inner city African-American youth. It is at least plausible that a small portion of time spent at

African-American related sites such as blackinfotainment.com or AFROnet may have been activity connected to community service endorsed by the Employer.

However, an average of 1.5 hours per day over this eighteen-day period is a significant amount of time that cannot be justified by some background research involving a volunteer activity. The Employer's premise in conducting its investigation was that the Grievant was either running or preparing to start his own business, using state time and equipment to do so. Joint Exhibit 2 is a memo written by the Grievant's supervisor, Paul Gideon to Carla Dowling-Fitzpatrick, Chief ODA Legal Council. In this March 18, 1999 memo Mr. Gideon recounts in significant detail several conversations he had with the Grievant regarding an enterprise that involved the rehabilitation of HUD housing. Mr. Gideon recounts a conversation with the Grievant regarding a loan amount of \$50,000 from the Grievant's mother. On other occasions the Grievant outlined in detail a meeting with HUD-approved contractors regarding roofing, drywall, electrical, HVAC contracts. In another part of the memo, Mr. Gideon stated:

"At one time in December of 1998, Kwanz had mentioned to me in a hallway conversation that he was having a dispute with HUD officials who expected him to have each dwelling ready for sale or rent by 30 days after he completed the sale agreement with them"

The Grievant claimed he never had a conversation with his supervisor about working with HUD in buying and or rehabilitation of houses. This is in direct contrast with Mr. Gideon's testimony and his March 18, 1999 memo (JX 2A). These conversations with the Grievant were the genesis of the investigation that led to the Grievant's termination. It is important to evaluate the veracity of their existence.

Mr. Gideon supervised the Grievant for five years and arguably they knew each other well within a work context. While it is possible for an incompetent supervisor to lack knowledge about his or her staff, Mr. Gideon did not appear to project this image during his testimony. There was no evidence of animosity between these two men and neither spoke ill of one another during the hearing. However, during the hearing when asked about his relationship with his supervisor, the Grievant had one mildly negative comment. He stated that he and Mr. Gideon, "...*did not communicate much, he usually does it through e-mail. He is pretty standoffish.*" The Grievant was one of only four employees under Mr. Gideon's supervision. This is a small enough group to easily lend itself to the possibility of casual conversations. There was no evidence presented to demonstrate Mr. Gideon had any apparent motive for fabricating conversations with Mr. Obu. The amount of detail that Mr. Gideon recalled in his March memo about conversations that took place months earlier with the Grievant is impressive. It is also noted that Mr. Gideon had five years of experience in private residential construction, which presumably provided him with insight regarding what is involved in construction activities.

I found Mr. Gideon's testimony to be credible and consistent. His knowledge of Mr. Obu's work, his long experience in supervising Mr. Obu, the detail contained in his memo of March 18, 1999, and his testimony during the hearing lends support of his accounting of the circumstances leading up to the investigation of this matter. Even if Mr. Gideon is not a great communicator and is "*standoffish,*" as claimed by the Grievant, it does not mean he is unobservant or that brief conversations between these two men did

not take place. On the other hand, Mr. Obu's flat denial that any conversations with Mr. Gideon took place is less plausible.

When the information contained in Mr. Gideon's memo is compared with the facts gathered by the Employer in its investigation, a pattern of conduct regarding non-work activity becomes apparent. Mr. Obu's forays on the Internet did not represent the occasional inquires made by an employee who has a need for information or is simply curious. For example, an employee who is planning a vacation may be tempted against his better judgement to visit a web site like Priceline.com in order to compare airfares. Although this may represent a policy violation, it does not rise to the level of the facts in this case. It does not represent a purposeful and methodical use of state time or equipment over an extended period of time. What Mr. Obu did during the 18 days of monitoring represented such a pattern that was easily validated over a month of work time, leading one to speculate that it was as the Employer claims, "*the tip of the iceberg.*"

The evidence reveals that during the monitoring period the Grievant on every working day spent between 20 minutes and 3 hours on the Internet on non-job related sites during working hours. When the web sites are examined closely there is little doubt they are related to construction and the paperwork that corroborates his supervisor's suspicions. For example he visited sites related to: remodeling, window replacement, hardwood flooring, kitchen and bath, mortgage locator sites, HUD Homes Columbus/HUD Buying Guide (with available properties), Franklin County Auditor site with property information and tax information and Geopolymer information, just to name a few. This information is further corroborated by other circumstantial information collected in the Employer's investigation.

The Expert Software/ Home D software was found on Mr. Obu's computer. He placed it there himself and was asked during his investigative interview why it was there. He gave a curt and unconvincing response to the question. He stated that he used it "...to enhance my job." (See June 25, 1999 Investigative Interview). However, he never explained how it helps him to enhance his job. It appears more plausible that this 3-D house-building program would be of far greater assistance in the rehabilitation of housing than it would be in his assigned work.

The rental application that appeared on Mr. Obu's computer is another piece of corroborative evidence. When asked why this was on his computer he stated, "*Something else I was just playing with to see what it looked like to have, uh, if I had ever gotten any rental property.*" When asked about the address of 512 E. 4th Street that appeared on his computer's hard drive, the Grievant stated his Aunt lived there and that "*She owns it. I don't rent it. I don't do nothing. I just put some fictitious numbers in them. I'm from Lima, Ohio.*" If this were true, why would the Grievant be visiting the web site cityhall.lima.oh.us/economic/development and associated sub directories on his work time? Or why would he visit the Chamber of Commerce in Lima and the allencvb (See JX 3A, 6/9/99 17:11:37)? And why under cross-examination during the arbitration hearing did the Grievant say, "*...Leslie Long, she is my aunt she lives next door 514 or 518?*" This contradicts what he stated in his interview that Ms. Long lived at the address of 512 E. 4th street (See June 25, 1999 Investigative Interview, p. 13, 14). I find the Grievance's responses to questions regarding his Internet forays to be evasive, contradictory, and lacking in credibility.

During the hearing the Grievant under cross-examination admitted he attended training concerning the computer policies of the Employer. He also stated that an employee who lies should be disciplined. When all the information compiled by the Employer is weighed, there is substantial evidence that the Grievant methodically and unabashedly was either in the process of setting up or was operating an outside business during his working hours. Once again, this was not a case of a few errant miscues on the part of the Grievant where curiosity clouds judgement. The evidence paints a picture of a long term, purposeful, and routine misuse of time for personal gain. The Grievant's extensive non work Internet "research" appeared to be woven into the fabric of his daily employment routine.

Mr. Obu made things much worse for himself when he attempted to cover-up his use of the state computer by setting his computer history back to zero. What was a pattern of misuse now was compounded by deceit. When attempting to fix an appropriate penalty for a rule violation, an employer, under the requirements of a just cause standard, needs to make every effort to consider progressive discipline. However, when an employee takes extraordinary measures to cover up his wrongdoing, he is conveying a level of distrust that undermines any arguments that progressive discipline is a practical option.

Plainly and simply, what the Grievant did in this case was to steal time from his Employer and made an attempt to cover it up. This is an act of dishonesty that the Employer was justified in responding to before it got worse. The Grievant is a nine-year employee and had he come forward and admitted he made a series of mistakes he may have been able to salvage something better than a termination on his record. In spite of a

vigorous effort to defend the Grievant by the Union, his record of policy violations and his evasive conduct could not be overcome. The nature of the inappropriate computer files on his computer, the hours spent during working hours doing non work related activity and other evidence found at the Grievant's work station is weighty. In spite of the Grievant's efforts to argue a case of discrimination in other forums, there was no substantial evidence of discrimination placed before this Arbitrator. The reference to the conduct of fellow employee, John Huffman, who was not disciplined and who allegedly downloaded offensive bodily noises onto the Grievant's computer that 6th grade boys may find amusing, does not compare with the accusations levied against the Grievant. However, I do not agree with the Employer's arguments that I should be persuaded by the findings of other agencies concerning this issue.

I do not know why the Employer did not pursue criminal charges, however, that fact has no relevancy given what the Employer discovered regarding rule violations. I find that the Employer's actions to discharge the Grievant were reasonable and were supported by the evidence. Such evidence supported charges of a failure to follow directives, policies or procedures; falsifying payroll time sheets; misuse of state equipment or property for personal use and a failure of good behavior.

AWARD

Grievance denied.

Respectfully submitted to the parties this 18th day of June, 2001.

A handwritten signature in black ink, appearing to read "Robert G. Stein". The signature is stylized with a large, looped initial "R" and a long horizontal stroke extending to the right.

Robert G. Stein, Arbitrator