

**STATE OF OHIO, OHIO DEPARTMENT OF ADMINISTRATIVE SERVICES
AND OHIO CIVIL SERVICE EMPLOYEE ASSOCIATION
VOLUNTARY LABOR ARBITRATION PROCEEDING**

**IN THE MATTER OF OHIO, OHIO DEPARTMENT
OF ADMINISTRATIVE SERVICES**

-AND-

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

Grievant: Holly Yeh
Grievance No.: 02-01-(04-05-12)-0011-01-14

1804

**ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE:**

APPEARANCES

For the Employer

Tammy Marcum
Anne VanScoy
John Scott Seilhamer
Michele Ward

Procurement Support Manager
DAS Manager
M/S Administrator
Advocate

For the Union

John Cunningham
Kenny Kerins
Holly Yeh
John Porter
Annisia Goodwin

Manager Central Service Agency
Union Steward
Grievant
Second Chair
Advocate

INTRODUCTION

This is a proceeding under Article 25-Grievance Procedure, Section 25.03 – Arbitration Procedures, of an agreement between the State of Ohio, Ohio Department of Administrative Services (hereinafter referred to as the Employer), and Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO (hereinafter referred to as the Union), for the period March 1, 2003 through February 28, 2006 (Joint Exhibit 1).

An arbitration hearing was held on September 21, 2004, at the General Services Division. The parties had selected Dr. David M. Pincus as the Arbitrator. At the hearing, the parties were allowed to examine and cross-examine witnesses, and to proffer any other evidence and testimony deemed necessary to establish or rebut necessary proofs and arguments. The parties, moreover, were asked by the Arbitrator at the conclusion of the hearing if they wished to submit post-hearing briefs. They agreed to submit briefs.

Neither party raised substantive nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

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 agreed to between the Employer, employee, and the Union.

STIPULATED ISSUE

Was the Grievant removed from her position as a Network Administrator I from the Ohio Department of Administrative Services for just cause? If not, what shall the remedy be?

JOINT STIPULATIONS

1. The issue is properly before the Arbitrator.
2. The Grievant was hired to a permanent position with the State of Ohio on July 17, 2000.
3. The Grievant was removed from the position of Network Administrator I on May 10, 2004.
4. At the time of her removal, the Grievant did not have any active discipline in her personnel file.
5. Both parties jointly stipulate that the Grievant provided satisfactory service to John Cunningham, Manager of Central Services, and Sally Llaneza of the GSS Business Office.

CASE HISTORY

At the time of her removal, Holly Yeh, the Grievant, was employed as a Network Administrator 1 by the Ohio Department of Administrative Services, Administrative Support Division.

The Grievant, as a desktop support technician, utilized the GSD MIS Service Request System to facilitate timely service to end users. The system, more specifically, allows GSD employees to submit via Internet interface computer-related problems and service requests. Desktop Support Technicians can enter service requests on employee's behalf, research problems, review open tickets and close out tickets. Typically, once an employee submits a problem, an e-mail message is generated to the technician that is assigned to handle the request. Scott Seilhamer, the GSD/MIS Administrator and the Grievant's supervisor, not only makes assignments, but can generate reports to review the number of service requests, the responding technician, customer feedback ratings and comments.

The disputed incident took place on January 12, 2004. Tammy Marcum, the Grievant's co-worker, had four (4) active service request tickets on her computer screen. Upon returning from lunch, one (1) service request ticket remained. She searched the system and determined whether the missing tickets existed and/or were reassigned. Marcum concluded they were no longer in the system. The remaining ticket, moreover, virtually disappeared "before her eyes." This confusing situation caused Marcum to go to the Grievant's work station to determine whether the Grievant was experiencing similar problems.

Marcum testified an allegedly strange circumstance arose upon her arrival at the work station. The Grievant had the problem table open and a record highlighted while pressing the

delete key. When she asked the Grievant what she was doing, the Grievant hid the screen by clicking other programs.

Further evaluation of the database surfaced additional deleted records. As such, a total number of twelve (12) records were deleted, and all were originally assigned to Marcum.

On or about May 10, 2004, the Grievant was removed from her position at the Ohio Department of Administrative Services. She was removed for violating DAS Work Rule 30 – violations of ORC 124.34 - Failure of Good Behavior and the DAS Notice Concerning Use of the Internet and State Issued Property.

The above mentioned administrative action was protested by the Grievant. The grievance contained the following Statement of Facts:

Statement of facts (who, what, where, when?): Grievant was removed from her position May 10, 2004. Grievant has no discipline in file. Discipline is not corrective; it's being used solely for punishment. Employer is not following principles of progressive discipline. There are records missing from GSD MIS Service Request Database, but no evidence grievant deleted them. DAS has a discipline grid, which has punishment for 1st offense (for destruction of documents or improper use of state computers) being a written reprimand to a 5-day suspension.

(Joint Exhibit 4)

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

MERITS OF THE CASE

The Employer's Position

The Employer maintained the removal was for just cause. The Grievant did, indeed, delete twelve (12) records from the Service Request System database.

Tammy Marcum credibly testified regarding the circumstances which surfaced the egregious activity. She viewed the Grievant deleting a highlighted record from the problem table on or about the same time she was experiencing her own computer problems. Seilhamer supported Marcum's observations. He noted once a record has been written to the database, it can only be removed by being manually deleted.

Seilhamer also testified to other intervening circumstantial evidence. The disputed deletions only occurred once the Grievant was assigned to the desktop support role. Also, once the Grievant's access to the database was terminated, no additional records were deleted.

Clearly, the Employer's position is supported by the record. The Union never properly rebutted the tendered accusations by offering plausible alternative explanations for the disputed deletions.

The Grievant possessed a clear and unambiguous motive for engaging in the egregious behavior. The Grievant is a highly educated and skilled employee. As a result of a reorganization, she was displaced into a lower paying position. While in her new position, Seilhamer informed her that based on customer feedback, she was ranked behind Marcum on several critical criteria. This circumstance irked the Grievant based on Marcum's inauspicious qualifications and educational attainment.

The sequence of several critical events further supports the disputed administrative decision. On December 12, 2003, (Employer Exhibit 3), Seilhamer recognized the Grievant as

the number one technician for the reporting session in question, thus “dethroning” Marcum who had historically attained this status. By deleting Marcum’s records, the Grievant wished to insure her continued supremacy.

The Grievant’s actions were premeditated and calculated to discredit a coworker’s performance history. By deleting open work records, the Grievant undermined one of the organization’s primary missions; and jeopardized any future employment by severing the trust necessary for any employee-employer relationship. The Grievant had access to the system in question, and related official state records. Employment within this setting requires significant trust and honesty. The Grievant has shown she cannot be trusted and this circumstance cannot be restored.

Various just cause principles were met by the Employer when imposing the disputed penalty. The Grievant was forewarned of the possible consequences attached to her misbehavior. The Grievant understood the differing responsibilities and authorizations related to the System Analyst 2 and Network Administrator classifications. She reviewed the job description prior to exercising her bumping rights, and conversed with Seilhamer during the reorganization regarding programmer versus desktop support responsibilities.

Instructions dealing with database access were not necessary since the Grievant did not have permission to be in the database. Her duties and responsibilities were limited to the web-interface program, nothing more. Marcum testified that direct access was restricted because the database contained confidential information. Marcum only accessed the database directly when directed to do so by a member of management.

The Grievant was provided with proper and complete notice. She signed off on the policy (Joint Exhibit 5) she was charged with violating. Also, the Grievant violated other IT policies provided during the pre-disciplinary process.

The Grievant's misconduct, however, does not require a specific work rule violation. By intentionally and maliciously deleting records of a coworker for personal gain, the Grievant knew or should have known that misconduct of this sort would lead to automatic removal.

Removal was imposed properly by applying the proper charge. Sielhamer testified the entire disciplinary grid was considered prior to the imposition in question. The Grievant's conduct was viewed as extremely serious. As such, the Grievant was charged with violating ORC 124.34 – Failure of Good Behavior for Violating DAS Notice of Use of the Internet and State-Issued Property.

The Grievant's "test" record justification appears to be fabricated. She never had a justified reason for being in the database. The Employer was never informed that the system was working improperly. Her duties at the time in question were limited to desktop support, which do not entail any programming responsibilities. Entering the word "test" into the data fields of the database did not comply with proper troubleshooting protocols. Seilhamer noted this approach would determine nothing, which the Grievant should have known as an experienced programmer. The appropriate approach requires access to a copy of the program code and database. Testing should be conducted on existing copies then moved into production.

The multiple user argument also lacks veracity. Granted, the Grievant, as well as other employees, had access to the database as a consequence of access to the domain password. Seilhamer explained he provided this access for business, operational requirements, and that he trusted his employees.

The Union's Position

The Union opined the Employer did not have just cause to remove the Grievant from her position as a Network Administrator I. Several due process and evidentiary concerns were raised in support of this premise.

The Grievant was not forewarned of the possible or probable disciplinary consequences associated with her misconduct. Seilhamer acknowledged that no one was authorized to edit the Service Request System Database. As such, there were no written guidelines or instructions (Joint Exhibit 14) barring such activity. The Grievant, moreover, maintained she was never informed that she lacked authorization to access the database.

Another unwritten policy further confused the situation. Seilhamer admitted he supported his employees in their efforts to obtain professional growth. They were encouraged in these efforts when their normal projects were completed, and all had computer clearance.

Within this context, the Grievant's conduct was reasonable and legitimate. The Grievant's customers advised her they could not provide feedback regarding her work performance. She, therefore, thought there was an interface problem with the database and web-based applications. The Grievant maintained the following protocol. She made a copy of the database and placed it on a memory stick. She then tested the program by using the copy. The Grievant continued her investigation by attempting a test with a line application. She added and then deleted the test information when she realized she did not have the authority to save data to the line application. Seilhamer demonstrated that deleting a test record led to the screen equivalent of deleting an actual record in the accessed database.

The Employer's investigation was flawed causing the Employer's failure in obtaining substantial evidence or proof that the Grievant was guilty as charged. Marcum's observations

never established that the Grievant deleted one of her files. The other reported deletions were never specifically attributed to the Grievant's misconduct.

The Union offered an argument in the alternative. It argued the degree of discipline administered was not reasonably related to the seriousness of the employee's offense. The charges articulated in support of removal are too vague; other less severe penalties could have been selected. Rules 5 and 6 (Joint Exhibit 12) could cover the alleged inappropriate conduct, but have penalties for first offenses ranging from a written reprimand to a five (5) day suspension. These options were reasonably plausible alternatives since the records in question were easily recreated.

THE ARBITRATOR'S OPINION AND AWARD

In evaluating discharge cases, this Arbitrator has repeatedly required evidence, "sufficient to convince a reasonable mind of guilt." Most arbitrators justify a stricter standard of proof based on the social stigma attached to a discharge for misconduct, such as theft or fraud, rather than for performance reasons. *Kroger Co.*, 25 LA 906 (Smith, 1955); *Valley Steel Casting Co.*, 22 L.A. 520, 524 (Howlett, 1952). The charges under review fall within this standard. In this Arbitrator's opinion the Employer has not met this standard for a number of reasons.

The Employer never provided the appropriate level of proof to establish the Grievant was guilty as charged. As such, the Employer did not have just cause to remove the Grievant. Here, the sum of the evidence does not lead to the desired conclusion. The record is clear that the Grievant was not removed for deleting a "test" record or for being on the database without proper permission. The submitted circumstantial evidence, however, failed to establish a significant inference that the Grievant engaged in the proposed misconduct.

At the time of the disputed incident, the Employer did not have a system in place which could trace, in unambiguous terms, employee access to the database and what activities were being performed. In fact, the Grievant and other employees had the domain password, which provided access. As such, the Grievant or other employees had an equal opportunity to delete the records in question. Nothing in the record, other than Marcum's observation, directly and unambiguously identifies the Grievant as the culprit. Marcum, moreover, never identified any of the deleted records as being on the Grievant's screen. She only observed a highlighted record which was deleted. No other identification was offered. With multiple access opportunities, the Employer failed to determine whether other employees with the domain password had accessed the database around the time of Marcum's observation.

Seilhamer's testimony further pierced the Employer's circumstantial net. He asserted no one was to be working on the Service Request System Database. But there were no written instructions or guidelines to the contrary. And yet, a number of employees had the domain password, and were encouraged to develop professionally by working on projects when time permitted.

Within this context, the Grievant's justification for working on the database makes sense. Since customer feedback was very important to the organization's mission, customers' inability to provide the Grievant with feedback regarding her performance was quite disconcerting.

At the hearing, the Grievant credibly explained her situation and what tasks she undertook to explore this problem. Nothing in the record discredits the feedback problem experience by the Grievant. Unlike the Employer's review of the actions engaged in by the Grievant, this Arbitrator concludes that the Grievant's attempt to clarify the matter appear plausible, although somewhat unusual.

With this existing possibility and the domain authority given multiple employees, the Employer's ability to remove the Grievant, under these circumstances, becomes quite difficult.

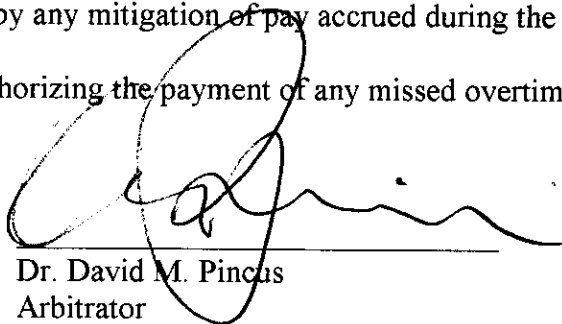
The motive argument proposed by the Employer only weakened its case in chief. The Grievant was cast as some diabolical, conniving employee who was fixated on Marcum as the "best" technician in several areas of expertise. She wished to dethrone Marcum because of education and skill level differences, and would do anything to outperform Marcum

This argument in its entirety, filled with inferences and related motivations, is totally unsupported by the record. Granted, any motivated employee, based on the periodic statistical feedback provided by Seilhamer, would strive to improve his/her ranking on the performance criteria. Nothing, but conjecture and innuendo were introduced to support this argument. The Employer never supplied any testimony or evidence suggesting any animus toward Marcum by the Grievant. Other coworkers, moreover, never testified to circumstances which could have supported this argument in an attempt to bolster a relatively weak record in support of removal.

AWARD

The grievance is upheld. The Grievant shall be returned to her former position as a Network Administrator I. She shall be reinstated with full back pay, contractual benefits, and seniority. The Grievant's back pay shall be offset by any mitigation of pay accrued during the interim period. The Arbitrator, however, is not authorizing the payment of any missed overtime.

February 7, 2005
Moreland Hills, OH



Dr. David M. Pincus
Arbitrator