#1807

OPINION AND AWARD

In the matter of Arbitration

Between

SEIU/District 1199
The Health Care and Social Services Union, AFL-CIO

And

The State of Ohio, Office of Collective Bargaining and the Department of Job and Family Services

Regarding

Grievance # 16-11-20040730-12-02-12
Kim Crosswhite-Reedy (Grievant)

APPEARANCES:

FOR THE STATE:

Richard Corbin, Advocate
Jennifer Keyes, Second Chair
Pam Fisher, Labor Relations Officer
Terri Dickerson, Supervisor
Rock O'Claire, Investigator
Kathy Bolton, Investigator

FOR THE UNION:

Lee Alvis, Advocate & Organizer
Michael Robinson, Delegate
Dwayne Knowles, Delegate
Kimberly Crosswhite-Reedy, Grievant

An arbitration hearing was conducted February 1, 2005 at the Offices of SEIU/District 1199, Columbus, Ohio. The parties provided the arbitrator with a list of stipulated documents which included the Collective Bargaining Agreement, The Work Rules Grid, The Grievance Trail, The Internal Investigation Report of the Chief Inspector, ODJFS Policy and Procedure regarding Telephone Usage, and a Warning Notice Dated 12-17-03 as well as Performance Evaluations for 2003 and 2002.

After opening statements the Arbitrator invited the parties to attempt to mediate the matter. All parties agreed to do so but were unsuccessful in reaching an agreement.

The Arbitrator asked if either the grievant, the Union or Management objected to the Arbitrator hearing the grievance following the mediation effort. All parties stated that they wished the Arbitrator to decide the matter.

The matter came to arbitration as the result of a grievance filed July 30, 2004. That grievance asserts management violated Articles 1, 5 and 8 of the Collective Bargaining Agreement when they terminated Ms. Crosswhite-Reedy.

All parties agreed the matter was properly before the arbitrator for determination and were given full opportunity to examine and cross examine witnesses, present evidence, and arguments which they did competently and professionally.

The parties stipulated that the issue before the arbitrator could be phrases as: *Was Grievant Kim Crosswhite-Reedy terminated for just cause? If not, what shall the remedy be?*

RELEVANT CONTRACT SECTIONS:

ARTICLE I - PURPOSE AND INTENT OF THE AGREEMENT

It is the purpose of this Agreement to provide for the wages, hours and terms and conditions of employment of the employees covered by this Agreement; and to provide an orderly, prompt, peaceful and equitable procedure for the resolution of differences between employees and the Employer. Upon ratification, the provisions of this Agreement shall automatically modify or supersede: (1) conflicting rules, regulations and interpretive letters of the Department of Administrative Services pertaining to wages, hours and conditions of employment, and (2) conflicting rules, regulations, practices, policies and agreements of or within departments/agencies pertaining to terms and conditions of employment; and (3) conflicting sections of the Ohio Revised Code except those incorporated in Chapter 4117 or referred to therein.

This may be amended only by written agreement between the Employer and the Union. No verbal statement shall supersede any provisions of this Agreement.

Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement and which are not specifically provided for or abridged by this Agreement, will be determined by the Ohio Revised Code.

The Employer will satisfy its collective bargaining obligation before changing a matter which is a mandatory subject of bargaining.

Mid-Term Contractual Changes

The Employer and the Union have the power and authority to enter into amendments of this Agreement during its term constituting an addition, deletion, substitution or modification of this Agreement. Any amendment providing for an addition, deletion, substitution or modification of this Agreement must be in writing and executed by the President of the Union or designee and the Director of the Depai Unent of Administrative Services or designee. Upon its execution, such amendment shall supersede any existing provision of this Agreement in accordance with its terms and shall continue in full force and effect for the duration of this Agreement. All other provisions of this Agreement not affected by the amendment shall continue in full force and effect for the term of this Agreement.

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08 (CXl)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this Agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

ARTICLE S - 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 fme from the employee's paycheck.
If a bargaining unit employee receives discipline, which includes lost wages or fme, 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 receive only a: working suspension, i.e., a suspension on paper without time off, 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.

BACKGROUND INFORMATION:

The Grievant has been an employee of the Ohio Department of Job and Family Services for approximately twenty-five years. She was terminated from employment on July 30, 2004. The Grievant is also a travel agent. Management terminated her for activities related to the operation of her travel business and other non work activities on work time. Specifically management charged the grievant with violation of five rules contained within the *ODJFS STANDARDS OF EMPLOYEE CONDUCT.*

F9 *Violation of the ODJFS Computer Systems Usage Policy.*
F15 *Unauthorized use or abuse of state equipment, property, state paid time or the property of another.*
F21 *Refusal to fully cooperate, interfering with and/or providing false, incomplete or misleading information in an investigation or inquiry.*
F27 *Any failure of good behavior that may discredit, embarrass or interfere with the mission of ODJFS.*
D4 *Use of state phones, supplies, equipment or state paid time for personal gain.*

MANAGEMENT POSITION:

Management asserts that this is a very serious matter. It goes far beyond merely surfing the Internet at lunch. The grievant spent great amounts of time utilizing the employer's computer and telephone for her personal business and to

pursue her travel agency purposes. The employer argues that the extent of her misuse of time and equipment is "intolerable."

Supervisor Terri Dickerson testified that she had received complaints from other employees about the amount of time the Grievant was spending on the computer and phone. She testified that she put the grievant on notice as early as 2002 regarding this problem.

Investigator Kathy Bolton testified that the grievant was evasive when confronted. She testified that one investigation was initiated in June 2003. During this first investigation Ms. Bolton found an extensive abuse of the computer and the telephone. In December Supervisor Dickerson issued a "counseling" to the grievant. Ms. Bolton was under the impression that discipline had been issued December 17, 2003, rather than a counseling. Based upon this understanding she decided not to proceed further at that time, believing that to do so might lead to double jeopardy.

She testified that following December 2003 concerns again surfaced and a second investigation was undertaken to determine if the grievant had changed her behaviors.

Ms. Bolton testified that the grievant admitted she operated a travel agency but denied she did anything to support it at work.

Grievant was adamant that she did not do any Travel Agency work on State time and that she had reimbursed the State of long distance telephone calls.

Ms. Bolton testified that she took lunch between 11:30 and 2:00 and occasionally as late as 2:30. Ms. Bolton's investigation shows that between December 16 and June 1 the grievant used her cell phone in excess of 18 hours excluding a three hour period in the middle of the day during which the lunch period *might have occurred.*

Ms. Bolton introduced records showing use of the State Phone for long distance calls to a cruise ship on some occasions.

Agency computer investigator Rick O'Claire discussed in depth his analysis of the grievant's computer between December 2003 and May 2004. He detailed hundred of web site hits related to travel information during work hours. He noted that these "hits" occurred at various times throughout the work day. In addition Mr. O'Claire documented hundreds of other web site hits on home shopping sites, music sites and other non work related sites.

In response to a question from the management advocate to compare this investigation to others, Mr. O'Claire responded: "In the hundreds of cases I have investigated this is the most serious."

Management argues that they considered the possibility of mitigation due to the employee's long tenure with the Department but that they concluded the infraction was too great. In addition the unwillingness of the grievant to accept responsibility for her actions led management to determine they must terminate her.

---

[1] At hearing Ms. Bolton attempted to exclude telephone call from December 16 because they occurred prior to the Counseling session. Because the counseling did not constitute discipline, the arbitrator considered the document as submitted and did not attempt to differentiate any data regarding calls that took place on December 16.

UNION POSITION:

The Union argues that the allegation against the Grievant that she conducted travel agency business at work is simply not true. They note the grievant had received no prior discipline. [2]

The Union notes the grievant's employee evaluations in 2002 and 2003 rated her as "on target and satisfactory."

On the grievant's behalf, the Union has attempted to rebut the charges levied by management by arguing the following:

1. Ms. Reedy's personal cell phone use took place during her lunch period. Even if some of the cell phone use occurred on State time, the amount was so small that it should not be a problem. It was noted that the majority of the calls ranged from 1 - 3 minutes.
2. The personal use of the internet is not prohibited by ODJFS. Ms. Reedy also stated that she did not know her computer usage was in question until after the investigatory hearing on 6/22/04. The Union notes that at no time did the Agency revoke internet privileges from the grievant.
3. The Union and the grievant argue that her travel business is not a "for profit" enterprise but is rather a means by which the grievant is able to secure less expensive travel for herself. They argue that this fact removes the consideration that any calls or internet contacts are for personal gain.

---

[2] The grievant received a verbal counseling on 12/17103 which was incorrectly recorded on a Verbal Reprimand Form, but all parties agreed this document was NOT discipline.

4. The grievant testified that the phone calls she made to Florida were to a friend who was on a cruise ship and not in connection with her travel business.

5. Finally the union argues that a twenty five year employee with no prior discipline should not be terminated for the alleged infractions.

DISCUSSION:

There is no question in the mind of this arbitrator that the grievant misused her state computer, her state telephone and her time when using her personal cell phone.

Whether of not her travel agency is making a profit is irrelevant. The review of her computer records shows a massive amount of computer use that is not related to her work for the State of Ohio.

Under cross examination the grievant admitted that she was in violation of the agency computer policy. She also admitted that her cell phone use and phone use was excessive.

Even at the hearing the grievant continued to deny that she had done any travel related work on her office computer.

This testimony of the grievant simply does not meet the common sense tests of credibility.

An example of the misleading testimony is the recitation of the fact she "paid the state for her personal phone calls." A close examination of the record shows that she paid for them only after she had been charged with the various rule violations.

Let us examine each of the alleged violations.

F9, *Violation of the Computer Systems Usage Policy.* The employee admits she violated the policy.

F15 *"Unauthorized use or abuse of state equipment, property, state paid time or the property of another."* The evidence is overwhelming. Clearly the grievant violated this work rule.

F21. *Refusal to fully* cooperate, *interfering with and/or providing false, incomplete or misleading information in an investigation or inquiry."* The most troubling part of this case is that the grievant fails to realize the gravity of her infractions. She would "split hairs" about the notice given her by her supervisor. Whether or not she is selling travel to others, or arranging it for herself or members of her church, there can be no question that she knew she was not giving her full attention to her job. The grievant stated that most of her web surfing took place after 6 p.m. That was simply not true. She was not honest and forthcoming in her testimony. I find she did violate F21.

F27. Any failure of good behavior that may discredit, embarrass or interfere with the mission of ODJFS. This is a more general charge and probably not needed in light of the other four more specific charges.

D4. Use *of state phones, supplies, equipment or* state *paid time for personal gain.* The employee experienced personal gain even if she merely got discounts on her own travel. She did use state resources in furtherance of her own goals.

In light of the massive amount of evidence presented there is no question that the grievant has violated at least four important work rules of the employer.

I understand the desire of the union to vigorously represent one of their members but I simply cannot give credence to the argument advanced which stated "if the grievant had known her computer use was a problem, she would have changed her behavior." This grievant had to know the excessive amount of time being spent on non work related tasks was a problem.

I am more interested in the union's position regarding the level of discipline imposed. In the union closing statement it was stated: "We are not saying Kim is an angel. We are not saying Kim is a saint. We are simply saying termination is excessive."

This is an appropriate matter for this arbitrator to review. The Fifth Edition of *How Arbitration* Works states at page 905 *"There are two* areas *of proof in the arbitration of discharge and discipline cases. The first involves proof of wrongdoing;* the second, *assuming that guilt of wrongdoing is established and the arbitrator is empowered to modify penalties, concerns the question of whether the punishment* assessed *by management should be upheld or modified. "*

The employer acknowledged the severity of the penalty and explained that they had not imposed a lesser penalty because they did not believe the grievant would alter her behavior and correct her infractions with an additional chance.

There is some support for this point of view. The Arbitrator, in the

Bellingham Cold Storage case, considered a similar question regarding another grievant who apparently would not change his behavior.

"The Grievant responded to each attempt to correct the problem by defiantly stating that he would not change his behavior. When questioned following the incident which led to his termination, the Grievant reiterated this, and gave no indication that he was prepared to obey the instructions of his superiors in the future. This is not a situation where one more chance for the employee is called for, since the Grievant has been given a number of additional chances, despite his repeated statements that he was not about to correct his behavior Given the Grievant's *oft expressed and unchanging attitude that supervision cannot tell him what* to do, *management cannot be faulted for responding that it need not maintain in its employ* someone *who is not receptive to its directives. ,* [3]

Likewise, there are certainly many cases in which arbitrators support termination for a first offense. The OCSEA case [4] submitted by management and decided by Arbitrator Anna Smith, is such a case.

This arbitrator has upheld terminations in serious cases without any progression in the discipline imposed.

At least as many arbitrators have reinstated terminated parties when progression has not been followed.

The standard used by most arbitrators was first articulated by Arbitrator Whitney P. McCoy in 1955 when he said: "Offenses are *of two general* classes *(1) those extremely serious* offenses *such* as *stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less serious infractions of plant rules or proper conduct..."* [5]

---

[3] Bellingham Cold Storage and General Teamsters, Local 231, 81 LA 1243, December 7, 1983

[4] Case No. 31-02-(01-12-91)-03-01-06, State of Ohio, Department of Transportation and Ohio Civil Service Employees Association, Local 11,

[5] Huntington Chair Corp., 24 LA 490, 491 (1955)

While the infractions committed by the grievant were serious, in the mind of this arbitrator they do not rise to the level of theft, violence or direct insubordination.

Unlike the Bellingham Cold Storage Case, Ms. Reedy has never defiantly stated she will not follow orders. Rather she has attempted to rationalize that she has done nothing wrong.

The second problem is the record does not convince this arbitrator that anyone in management every directly and clearly made the grievant aware that a failure to discontinue her infractions would lead to her termination. The warning given by the supervisor was less that clear and convincing when she said "If you are doing travel agency work on your state computer, please stop." While such a statement may technically meet the notice test for *just* cause, it lacks the clear and demanding notice necessary to terminate a twenty five year employee.

Further the record offers no evidence that this employee was a bad employee in any other aspect of her employment relationship. The performance evaluations submitted show an employee who was doing her job. I must assume that her twenty five years of service were of value to the employer.

I frankly do not know if this experience will serve as a wake up call to the grievant and that she will strictly adhere to all the rules and expectations of the employer, but I do believe a twenty five year employee must be given an opportunity to correct before she is summarily discharged without any prior discipline.

I will therefore order her reinstated to her former position without back pay and her time separated from employment shall be recorded as a suspension. The employer can, and in my opinion should, impose restrictions on computer and phone use.

I therefore find there is *just* cause to support discipline in this matter but that the penalty imposed is too severe and a violation of the progressive discipline language of the collective bargaining agreement.

AWARD:

The grievance is granted in part and denied in part. Kim Crosswhite-Reedy is ordered reinstated to her previous position no later than April 1, 2005 without back pay.

Respectfully submitted this 15th day of March, 2005 at London, Ohio.

N. Eugene Biggie,
Arbitrator