

#1989

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, BUREAU OF WORKER'S COMPENSATION

- AND -

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME

GRIEVANT: MARIE DUBOSE

CASE NO.: 34-03-20080115-0109-01-09

ARBITRATOR'S OPINION AND AWARD

ARBITRATOR: DAVID M. PINCUS

SEPTEMBER 8, 2008

Appearances

For the Employer

Paul Werstler
Leon Gerig
Elise Schorr
Diane Crofur
Victoria Bartel
Buffy Andrews
Ruth Renak

Witness

Team Leader
Assistant SO Manager
Injury Management Supervisor
Injury Management Supervisor
Second Chair
Advocate

For the Union

Marie Dubose
Sharon E. Lipps
Lori Tudor
David Hill
Lynn Kemp
Peggy Tanksley

Grievant

BWC Claim Service Specialist
BWC Claim Service Specialist
BWC Claim Service Specialist
Advocate
Second Chair

INTRODUCTION

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panel between the State of Ohio, Bureau of Worker's Compensation, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period March 1, 2006 to February 28, 2009 (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing written closings. The parties submitted closings in compliance with guidelines established at the hearing.

JOINT ISSUE

Was the grievant discharged for just cause? If not, what shall the remedy be?

JOINT STIPULATIONS

1. The grievance is properly before the arbitrator.
2. The State of Ohio - OCSEA Collective Bargaining Agreement (3/1/06 - 2/28/09) is included herein by reference.

3. Grievant was charged with Dishonesty (f) Willful falsification of an official document, and was discharged from employment effective 12/31/07.
 4. Grievant was a Claims Service Specialist with State service from November 13, 1984.
 5. On October 22, 2007, Grievant entered a starting time of 12:45 p.m. into the timekeeping system.
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6. The grievant had the following active discipline:
 - a. 20-day suspension imposed 10/23/06 for late call off.
 - b. 10-day working suspension imposed 2/7/05 for unexcused absence and improper call-off,
 - c. 5-day fine imposed 8/21/04 for unexcused absence and improper call-off,
 - d. 3-day fine imposed 7/24/04 for insubordination (willful disobedience/failure to carry out a direct order), unexcused absence and improper call-off,
 - e. 1-day working suspension imposed 7/31/03 for unexcused absence and improper call-off,
 - f. 1-day suspension imposed May 14, 2002, unexcused absence and improper call-off.

CASE HISTORY

Marie Dubose, the Grievant, was serving as a Worker's Compensation Claims Specialist (WCCS) at the time of her removal on December 31, 2007. She served in this capacity for approximately twenty-four years, while her last appointment was at the Canton Service Office.

On October 22, 2007, the Grievant was scheduled to report to work at either 12:00 p.m. or 12:45 p.m. It should be noted the Grievant was on an approved request for leave (Joint Exhibit 10) from 9:00 a.m. to 12:00 p.m. Employer witnesses verified an office practice which allows any employee to report to work 45 minutes beyond the end of the approved leave period. As such, the Grievant was due back to work by 12:45 p.m.

The Grievant arrived to work at approximately 1:00 p.m. Per the Employer's investigation, the Grievant entered a start time of 12:45 p.m. on the computerized timekeeping record (Joint Exhibit 10), while making the entry at 1:02 p.m. (Joint Exhibit 11).

This discrepancy caused the Grievants' eventual removal. On December 27, 2007, Marsha P. Ryan, the Administrator, authored a removal order. It contained the following relevant particulars:

XXX

This letter is to inform you that you are hereby **removed** from your position of Claims Specialist from the Canton Service office of the Ohio Bureau of Workers' Compensation effective December 31, 2007. You have been found to be in violation of the BWC's Progressive Disciplinary Guidelines (Work Rules) for Bargaining Unit Employees: Dishonesty (f) Willful falsification of an official document...

Specifically, on October 22, 2007, the time you entered as starting work was earlier than the time you actually began work.

XXX

(Joint Exhibit 4)

On January 10, 2008, the Union responded to the Employer's administrative action. It denied the dishonesty allegation and requested a series of related remedies (Joint Exhibit 3(a)).

The parties were unable to settle the disputed matter in subsequent stages of the grievance procedure. Neither party proposed any procedural nor substantive arbitrability arguments. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined that it had just cause to remove the Grievant for violating Dishonesty (f) Willful falsification of an official document.

Any reasonable employee should anticipate severe disciplinary consequences for dishonesty or time falsification whether articulated as a specified work rule violation or just understood as a general norm accepted by all employees. Here, notice issues are not apparent since the Employer has a designated disciplinary grid which specifies this offense (Joint Exhibit 16). Also, the Grievant admitted to receiving a copy of the handbook.

The charge in question is reasonably related to business efficiency. The Employer must have timely and accurate time reporting to ensure employee accountability and service to the customer. As such, the policies in dispute require documentation and permission. Here, the Grievant understood the documentation process but failed to accurately depict her arrival time. Also, she failed to explain her late arrival in the "comments" section of the timekeeping form.

The Employer argued it obtained substantial evidence of the Grievant's guilt. The Grievant submitted a starting time of 12:45 p.m., but arrived at work at approximately 1:00 p.m. Internal computed reports support the falsification charge. Observation by several management representatives also support the falsification charge. Supervisor Leon Gerig testified he walked into work with the Grievant and they both checked the wall clock which indicated "three till one" (Joint Exhibit 14). Supervisor Diana Crofur provided additional testimony. She noted that she looked for the Grievant at her pod at 12:42 p.m. and again at 12:50 p.m. Crofur maintained she stayed at the pod until 12:55 p.m. At 1:01p.m., Crofur returned to the Grievant's pod and found her at the pod (Joint Exhibit 15).

The Union could not properly support its unequal treatment claim. A number of similar discrepancies were identified (Union Exhibits 3-7). The

Employer had no prior notice of these discrepancies nor did these individuals appear to be similarly situated. Many of the identified individuals did not have active discipline on their record.

Several arguments were proposed regarding the lack of notice about the nature of the investigatory interview. The Union never articulated how the Grievant's case was harmed. Lack of specific notice, in this instance, did not constitute a due process violation. Union representation was granted, and the Union was advised the interview was investigatory. If the Arbitrator determines a procedural defect was engaged in by the Employer, this element of the dispute should be viewed as de minimus. As a consequence, the Employer's imposed penalty should not be modified.

The Grievant also violated the Hours of Work/Time Accounting Policy (Joint Exhibit 6a). It states in pertinent part:

HOURS OF WORK/TIME ACCOUNTING POLICY

XXX

I. WORK HOURS - All Bureau employees shall document that they have worked and/or accounted for a forty (40) hour work week. With the exception of employees who work flexible schedules, Bureau employees will be expected to work one of the following shifts:

7 AM to 3:45 PM
7:30 AM to 4:15 PM
8 AM to 4:45 PM
8:30 AM to 5:15 PM

Bureau employees are entitled to a forty-five (45) minute lunch and two (2) fifteen (15) minute breaks. Bureau employees may opt to combine their morning

or afternoon break with their lunch period for a total of sixty (60) minutes for lunch **provided** they properly document their exercise of this option on the daily attendance sheet. Although supervisors and managers may occasionally permit an employee to "flex" his or her forty-five (45) minute lunch period to the end of the day, employees may not be permitted to use either of the two (2) fifteen (15) minute breaks to shorten the workday. If an employee is "flexing" his or her lunch period (or some other period of time) to make up for normal work hours, the employee must indicate on his or her sign-in sheet that he or she is "flexing". The supervisor's signature on the actual time sheet will serve as confirmation to the employee and to the Payroll Department that he or she approved the employee's request to "flex".

All Bureau employees reporting to work before 6:00 AM or after 6:00 PM or during weekends must log in and out of their work locations using their building key cards (at Bureau locations which utilize such equipment).

XXX

(Joint Exhibits 6a and 6b)

Several witnesses for the Employer, including prior and current supervisors, rebutted the Union and Grievant's interpretation of the Work Hours Policy. They maintained that breaks may not be used to shorten the workday either at the beginning or end of the day, regardless of RFL status. Moreover, they noted that none had ever approved the use of a break at the beginning of the work day. These supervisors would never approve an employee taking a break before they ever started to work.

The Grievant's use of the break at the start of her work day did shorten the work day. On the day in question, she "worked" seven hours and forty-five minutes, but was paid for eight hours. This resulted in direct violation of the Hours of Work/Time Accounting Policy.

The record clearly identified an additional policy violation. The Grievant failed to document the break in the "comments" section of the timekeeping entry form or ask for pre-approval from a supervisor.

The Union's Position

The Employer did not have just cause to terminate the Grievant for violating work rule memo (01-Dishonesty (f) Willful falsification of an official document. The Union offered several just cause violations in support of this conclusion.

The Grievant never violated the Hours of Work/Time Accounting Policy (Joint Exhibits 6a and 6b). Nothing in the policy prevents an employee from linking an afternoon break with your lunch period if an employee is on approved leave in the morning. Notwithstanding the supervisor's testimonies, the very fact that no other employee has ever proposed such a link does not mean the policy precludes this option. Also, nothing in the policy requires an employee to "earn" his/her break before using it in conjunction with lunch.

The Employer's attempt to minimize the Grievant's credibility was clearly unpersuasive. She easily explained why she never offered the combination of her break with lunch as justification during the investigatory interview. The number of allegations raised were veiled with uncertainty; and the Grievant was told a number of times she could not be told the purpose of the hearing. Thus, she was unable to provide the justification at that point in time. It should be noted she did provide the questioned justification at the pre-disciplinary hearing.

The Union opined that the Employer failed to prove that the Grievant willfully falsified an official document. Problems with the time accounting process prevent the establishment of necessary proofs. The language in the policy does not disallow the linking of lunch with an afternoon break if an approved leave in the morning has been authorized. Just because no other employee had configured such an arrangement, does not make it improper. Both the Grievant and Lori Tudor described a timekeeping system in disarray preventing the proper documentation of time. This circumstance prevents employees from using elements of the tardiness policy if combined with a break and lunch. The Grievant testified supervisors had told her only to enter 45 minutes for her lunch. Paul Werstler, the Grievant's prior supervisor, appeared to approve the methodology employed by the Grievant. He would have advised her to have combined the lunch and break and not take an afternoon break.

The Grievant, in fact, never took an afternoon break on October 22, 2007. She never shortened her work day. The Employer approved leave for three hours and she worked for five hours.

The Employer violated Section 24.04. Neither the Grievant nor the Union were made aware of the nature of the investigation after asking for clarification on several occasions. This defect harmed the Grievant. The Union was unable to properly represent, counsel or advise the Grievant of her rights.

The falsification charge focused on a starting time entry as opposed to an actual starting time. The Union, however, rebutted this claim by arguing an unequal treatment claim. David Hill, a steward, reviewed a number of timekeeping documents (Union Exhibits 2-6). His review disclosed a number of employees who had entered erroneous times, and yet, were not disciplined.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, it is this Arbitrator's opinion that the Employer did not have just cause to remove the Grievant for falsification. The only way the Employer could have supported its disciplinary action was to prove that the Grievant violated the Hours of Work/Time Accounting Policy (Joint Exhibits 6a and 6b). Here, the administration and interpretation of this policy were inconsistent. Also, the Section 24.04 particulars, which the Arbitrator does not view as de minimus, and the unequal treatment claim were properly supported by the Union.

Nothing in the record properly supports the falsification charge. The Employer did not properly rebut the allegation that the Grievant worked a total of five hours on October 22, 2007 with three hours of leave time. As such, she only had to arrive at 12:45 p.m. because this allowed for lunch, which she supplemented with a 15 minute afternoon break. This arrangement was congruent with testimony provided by her prior supervisor. This scenario was offered as a hypothetical which he endorsed.

This arrangement, moreover, does not violate the Hours of Work/Time Accounting Policy (Joint Exhibit 6a and 6b). Regardless of the Employer's argument regarding an existing practice, the policy in no way restricts an employee's ability to supplement an approved leave and lunch with an afternoon break. Even if few or any other employees have sought this approach, it does not make it inappropriate, in this instance, based on the language contained in the policy. If the Employer wishes to remove this option, then it needs to change the policy.

At the hearing, the Employer admitted violating Section 24.04 by failing to inform the Union about the purpose of the interview. It viewed the violation as de minimus. This provision states in pertinent part:

XXX

When employees have a right to and have requested a steward, stewards shall have the right to be informed of the purpose of the interview...

XXX

(Joint Exhibit 1, Pg. 83)

As such, the parties negotiated this language which requires the Employer to inform any steward about the purpose of the interview. They viewed these rights as important which mirrored identical standards articulated in NLRB v. Weingarten, Inc. 420 U.S. 251 (1975) and by the State Employment Relations board in In re Davenport, SERB 95-023 (12-29-95). This violation, moreover

cannot be viewed as a mere procedural defect. Many state and federal unfair labor practices have focused on this specific violation often resulting in sanctions. Various rulings in the Union's favor focus on statutory and contractual rights of union representation and rights to engage in concerted activities for mutual aid and protection. Without prior specification of the nature of the matter being investigated, the right of "representation" becomes a hollow shell.

The matter under investigation provides an explicit example of what can happen if the Employer fails to identify the purpose of the interview. At the investigatory interview, the Employer raised a number of allegations, one of which was the falsification charge; the only charge used for removal purposes. At the arbitration hearing, the Employer attempted to raise certain credibility concerns because the Grievant provided differing justifications for her action at the investigatory interview versus the pre-disciplinary hearing.

This outcome appears highly plausible when the purpose requirement of Section 24.04 is violated. Without a "purpose" specification, interviews become an unfocused information gathering forum and can often lead to ambiguous results. A contractual violation of this sort represents a severe due process abridgement, which the Ohio Revised code, state and federal courts view as a critical element of representation rights.

Another critical reason for enforcing Section 24.04 deals with the scope of an arbitrator's authority. Section 25.03 states in pertinent part:

XXX

...the arbitrator shall have no power to add to, subtract from or modify any terms of this Agreement...

XXX

(Joint Exhibit 1, Pg. 91)

Some procedural defects may, depending on the circumstances, be viewed as de minimus. But not when the violation is a recognized critical aspect of due process. An alternative disposition would violate Section 24.04.

Investigation defect allegations dealing with the Union's unequal treatment claim were supported by the record. The Employer's notice defect arguments were unpersuasive. On November 21, 2007, the Grievant wrote a statement (Joint Exhibit 6) to Ruth Rehak, the pre-disciplinary hearing officer. She identified other similarly situated bargaining unit members who had not been disciplined for similar offenses:

XXX

The charges and contemplated disciplinary action should include every member of my team, including my team leader, Victoria Bartel (with the exception of possibly 1 team member)

XXX


(Joint Exhibit 6)

The Employer did nothing to investigate this unequal treatment claim even though the Grievant identified potential policy abusers. Also, evidence (Union Exhibits 2-6) and testimony provided by the Union provided clear and

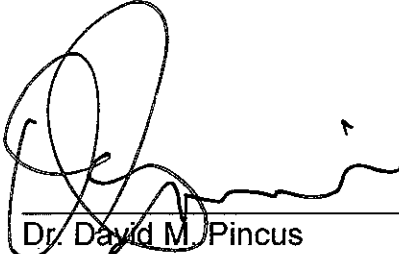
unambiguous examples of other employees engaging in similar forms of alleged misconduct without any resulting discipline.

AWARD

The Employer did not have just cause to remove the Grievant. She shall be returned to her former position with full back pay less any offsets realized during the interim period. The Grievant, moreover, shall have her seniority and leave balances restored and otherwise made whole.



Chagrin Falls, Ohio



Dr. David M. Pincus
Arbitrator