Voluntary Labor Arbitration Proceeding

In the matter of the Arbitration between:

The State of Ohio, The Ohio Bureau of Workers Compensation

-And-

Ohio Civil Service Employees Association, Local 11, AFSCME

Grievant: Robert White
Grievance No.: 34-26-090429-0036-01-09

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: May 10, 2010

Appearances

For the Employer

| | |
|---|---|
| Brian Watton | Director of Labor Relations |
| Steve Johnson | Administrative Staff |
| John Bittengle | Claims Supervisor |
| Ryan Sarni | Office of Collective Bargaining |
| Brad Nielsen | Advocate |

For the Union

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| Robert White | Grievant |
| Shirley Hubbert | Chapter President |
| Tim McAllister | Chapter Vice President |
| Lori Elmore | Advocate |

## Introduction

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/ Mediation Panel between the State of Ohio, the Ohio Bureau of Workers 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 of April 15, 2009 to February 29, 2012 (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 written closings in accordance with guidelines established at the hearing.

## Joint Issue

Did the Ohio Bureau of Workers' Compensation possess just cause to remove Claims Assistant Robert White from employment? If not, what shall the remedy be?

## Joint Stipulations

1. The grievance is properly before the Arbitrator.

2. The Grievant commenced employment with the Ohio Bureau of Workers' Compensation on as a full-time permanent employee on December 30, 1990.

3. On October 29, 2006 the Grievant promoted to a full-time permanent Workers' Compensation Claims Assistant (pay range 28) position.

4. On April 27, 2009 the State of Ohio-Bureau of Workers' Compensation removed the Grievant from Employment.

5. The Grievant possessed the following active discipline at the time of his removal:

   **Verbal Reprimand**- 3/19/2008 Discourteous and/or rude treatment of a fellow employee or manager

   **10 Day Suspension**- 1/15/2009

   Insubordination: a) Willful disobedience/ failure to carry out a direct order
   Dishonesty: f) Willful falsification of an official document

6. WC Claims Specialist Alberta Jones works on the 11th floor of the BWC-William Green Building.

7. The BWC Timekeeping System that records employee time entries function correctly and without error from February through March 2009.

8. The BWC Security Access System that records BWC employee ID badge access functions correctly and without error from February through March 2009.

9. The BWC Parking Garage Access System that records BWC employee vehicle access to the BWC Parking Garage functioned correctly and without error from February-March 2009.

Case History

Robert White, the Grievant, was originally employed on December 30, 1990. On October 29, 2006, he was promoted to a full-time permanent Claims Assistant position at the Columbus Service Office.

The Grievant, moreover, received a 10-Day suspension on January 15, 2009 for misconduct relating to timekeeping and failing to cooperate in an internal investigation. This administrative action was eventually grieved. An arbitrator, however, denied the grievance and upheld the suspension in an award issued on December 13, 2009 (Employer Exhibit 7). At the time of his removal, the Grievant possessed the previously mentioned 10-Day suspension and a verbal reprimand for discourteous and/or rude treatment of a fellow employee or manager.

At the time of the disputed matter, the Grievant's work schedule was Monday-Thursday, 7:00 AM to 5:45 PM with a forty-five (45) minute lunch period. He, moreover, enjoyed a fifteen (15) minute paid AM and PM break period.

The record clearly discloses that a timekeeping policy and/or memorandum were in effect at the time of the disputed matter. On September 4,

2008, Brian Walton, Director of Employee and Labor Relations, issued a memo

dealing with a Timekeeping Reminder it provides in pertinent part:

XXX

As discussed during the All-Hands Meeting earlier this afternoon, the Employee and Labor Relations Department has recently dealt with multiple cases of employees reporting their time inaccurately. To prevent other employees from suffering an embarrassing or unfortunate situation, here's a reminder on BWC's timekeeping policy and expectation of employees:

First and most importantly, please make sure you **enter accurate starting, ending, and lunch times** in the timekeeping system. Enter the actual time that you arrived at work, the actual time you departed for and returned from lunch, and the actual time you left for the day. Do not round or estimate your time.
To ensure accuracy, **we recommend that you enter your start time as soon as you arrive at work**. Enter your "lunch out" right before you leave and your "lunch in" as soon as you return. Finally, enter your ending time just before your leave for the day.

The policy does not require you to enter the time as it occurs, but entering all of the information at one time could lead to inaccurate timekeeping.
Please **use the "Daily Comments" section to document variations from your usual schedule** such as working through lunch, starting your day at a different location that you usually report to, etc.

Finally, **our policy does not allow you to use either of your paid 15 minute breaks to shorten the work day.** In other words, you cannot come in 15 minutes after your starting time or leave 15 minutes early and claim that as paid work time.

XXX

(Employer Exhibit 9)

This memo references Memo 4 .07 which deals with Hours of Work/Time

Accounting Policy.

It states in pertinent part:

XXX

Bureau employees are entitled to an unpaid lunch period of not less than thirty (30) or more than sixty (60) minutes, and up to two (2) separate fifteen (15) minute breaks (one break for every four hours scheduled/worked). Supervisors

may schedule breaks and lunch periods to ensure adequate coverage during core business hours. Supervisors and managers may permit an employee to "flex" his or her lunch period to the end of the day, but employees may not use either of the two (2) fifteen (15) minute breaks to shorten the workday (either used at the beginning or end of that work day); or combine the two fifteen minute breaks into one paid break. 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 timekeeping entry that he or she is "flexing." The supervisor's approval of the employee's time for the day will serve as confirmation to the employee and to the Payroll Department that he or she approved the employee's request to "flex."

XXX

IV. **TIMEKEEPING**- Employees must accurately record their actual starting, ending, and lunch times in the timekeeping system. Employees should enter their starting time when they begin their work day, enter their lunch time when they leave and return, and enter their ending time just before ending their day, It is strongly recommended that employees use the time displayed on their computer screen for timekeeping purposes.

If an employee is unable to record these times on the actual date and in a timely manner, the employee should use the "Comments" section to document any deviations from their normal work schedules (i.e., working through lunch, starting or ending earlier/later than normal etc.) and to explain work performed at locations other than their normal report-in location.

XXX

(Employer Exhibit 8)

On April 24, 2009, Marsha P. Ryan, Administrator, notified the Grievant that he was removed from his position effective close of business on Monday, April 27, 2009.The removal order cites several work rule violations.

XXX

....Insubordination (a) Willful disobedience/ failure to carry out a direct order and Attendance: (B) Leaving the work area without authorization. Specifically,

- On April 6, 2009, you failed to answer questions during an investigatory interview, even after receiving a direct order to answer questions fully and accurately

- On the following dates, you entered a work start time before parking your vehicle in the BWC Parking Garage: February 17, February 19, February 26, March 2, March 4, March 5, March 24 and March 30, 2009. You parked your vehicle in a no-parking zone and entered the building to work. You failed to obtain permission from your Supervisor to leave the work area to move your vehicle.

XXX

(Joint Exhibit 2)

The removal decision precipitated a formal challenge on April 29, 2009. The grievance filed by the Union contained the following allegations:

XXX

On April 27th, the Grievant was removed from his position without just cause. Management has continued to harass the grievant and treated him disparately until they finally removed him from his position.

XXX

(Joint Exhibit 3)

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 opines it had just cause to remove the Grievant. Attendance related misconduct and insubordination charges were supported by the record.

The Grievant was insubordinate when he failed to carry out a direct order to answer all questions during an investigatory interview fully and accurately. An investigatory interview was conducted on April 6, 2009 by Steve Johnson dealing with the alleged attendance related misconduct. Per the Employer's

protocol, Johnson read a prepared coversheet to the Grievant which gave him a direct order to answer all questions raised during the investigatory interview fully and accurately (Joint Exhibit 2).

During the course of the interview, the Grievant failed to answer certain questions. He gave varied responses in support of his unwillingness to respond. As such, his actions were clearly insubordinate.

The Grievant was placed on notice that insubordinate conduct could lead to disciplinary action. His prior 10-Day suspension (Employer Exhibit 7) dealt with identical forms of misconduct during an investigatory interview.

The questions asked were relevant and material to the investigation. As such, failure and an unwillingness to respond to material questions justify and support the insubordination charge.

A number of attendance-related misconduct allegations were used to support the leaving the work area without authorization charge. On eight (8) documented dates in February- March 2009, the Grievant parked his personal vehicle in a no parking zone in front of the BWC- William Green Building. He then entered the building to expedite a timely "in" punch into the timekeeping system.

On three dates (February 19, March 5 and March 30), the Grievant parked his vehicle in the no parking zone, arrived to his work area on the 27th floor, logged into his computer and entered his AM punch into the timekeeping system. He then left his work area retrieved his personal vehicle and parked it a block away in the BWC parking garage.

By engaging in these efforts, the Grievant took his fifteen (15) minute break upon arriving to work. This actions violated memo 4.07 (Employer Exhibit 8) because the Grievant took a fifteen (15) minute break upon reporting to work, which shortened his work day, and amounted to leaving the work area without authorization.

On other dates (February 17, February 26, March 2, March 4, March 24, and March 30), the Grievant took paid AM/PM break periods in excess of fifteen (15) minutes. These types of excesses are viewed as leaving the work area without authorization, and again, a violation of Memo 4.07 (Employer Exhibit 8).

Documents introduced at the hearing (Employer Exhibit 17) and admissions made by the Grievant support these onerous actions. Especially telling are admissions contained in an E-Mail (Employer Exhibit 11) sent to Administrator Ryan dealing with March 24, 2009 events, He admitted to taking a paid fifteen (15) minute pay period, after parking in front of the building and logging in. He then engaged in a number of activities, some of which involving his girl friend, moved his vehicle to the parking garage and then returned to work. This entire episode took approximately thirty-two (32) minutes. An amount of time clearly exceeding the allotted fifteen (15) minute paid AM break.

The Grievant's credibility was highly tarnished by a number of inconsistencies. First, the Grievant justified parking in front of the building on March 24, 2009 because he had to transfer several items in his vehicle.

Investigator Johnson, however, testified that he never observed any items taken from the vehicle. This testimony was supported by a videotape (Employer Exhibit 2) introduced at the hearing.

Second, the Grievant initially claimed he was disciplined in retaliation for filing a 2008 EEO complaint. Under cross-examination, however, the Grievant could not produce the 2008 complaint and eventually admitted the complaint was actually filed in April 2009. Thus, the retaliation charge proved truly unpersuasive.

Last, the Grievant provided different explanations regarding his refusal to answer questions during the investigatory interview. He provided three different justifications at various stages of the grievance procedure.

The imposed discipline in dispute does not reflect nor support an unequal treatment claim. Three employees in 2008 received suspensions for leaving the work area without authorization (Employer Exhibit 18). These employees, however, were not similarly situated because none had active prior disciplines on their disciplinary histories.

The Union's Position

The Union opines that the Employer did not have just cause to remove the Grievant. Several due process-related related arguments were raised by the Union, as well as a challenge to the proofs offered in the support of removal.

The Grievant was never provided complete and proper notice that his actions would result in removal let alone discipline. The Grievant never used

his break time to shorten his workday or combined his two breaks into one paid break.

He asked for clarification (Union Exhibits 1 and 2) regarding the application of memo 4.07 (Employer Exhibit 4) but was never provided with appropriated information. Bittengale opened and read his queries but never responded (Union Exhibit 4). The Employer was obligated to inform the Grievant that being away from his work area without authorization was a clear violation of memo 4.07 guidelines (Employer Exhibit 4). Without a timely response, the Grievant was misled and thought no violations had taken place.

The investigation, itself, was tainted. After the three-day suspension episode, Walton told Johnson to keep an eye on the Grievant. As such, the Employer was engaged in efforts to "get rid of" the Grievant. In fact, rather than informing the Grievant he could not park his vehicle in the loading zone, a supervisor called the Columbus Police Department and informed them of this infraction.

The work rule in contention was ambiguous and inconsistently applied. Bittengale, the Grievant's supervisor, testified he ran a "laid back" office environment. Employees were, however, expected to complete work assignments. He stated employees did not need to ask for permission when leaving the floor. The Grievant, moreover, was never assigned a designated break time until he received E-mail on April 6, 2009 (Union Exhibit 6). Prior to this designation, the Grievant flexed his breaks, which helped him care for his girlfriend's condition.

The Employer's timekeeping methodology did not accurately reflect the Grievant's activities. Employees do not have to use their personal badge when entering or exiting their floor. They often "piggy back" other employees actions. In fact, the Employer recommends the time displayed in the computer for timekeeping purposes (Union Exhibit 1). Walton, moreover, clarified his E-mail (Joint Exhibit 9) by noting supervisors used discretion when dealing with timekeeping issues.

Other employees engage in similar behavior and are not disciplined. Walton, himself, testified he has observed other employees getting coffee or something to eat, and then, taking it back to their office. Not all of these employees are on their paid breaks, and yet, they are not disciplined.

The insubordination charge is equally unsupported by the record. The Grievant was unaware that not adequately answering certain questions during an investigatory interview could result in removal. The potential consequence attached to this misconduct obligates the Employer to provide some prior notice.

The questions asked on April 6, 2009 were mere attempts to entrap the Grievant; and support a double jeopardy charge. They were virtually identical to questions asked during the investigation surrounding the ten-day suspension. The Employer, therefore, knew who the Grievant rode to work with, and the nature of his driving privileges. The Employer baited the Grievant knowing he would not answer these questions.

The imposed discipline was punitive rather than progressive. The record clearly indicated the Employer never gave the Grievant sufficient time to correct his behavior. He served the ten-day suspension January 19-24, 2009 and January 25-30, 2009; while he was removed on April 27, 2009. A mere three months lapsed between these episodes, an insufficient corrective span for an employee approaching nineteen years of seniority.

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 provisions and the parties' written closings, it is the Arbitrator's opinion that the Employer had just cause to remove the Grievant. Bother charges were completely supported by the record and justify removal.

A few preliminary comments are in order. The duration between the ten-day suspension and ultimate removal serves as an aggravating rather then a mitigating factor. It appears, for whatever reason, any future attempt to correct or rehabilitate the Grievant would prove uneventful. Both episodes involve similar types of transgressions. The insubordination charge involves failure to answer questions during an investigatory interview. The second charge deals with attendance related misconduct.

It should be noted, the Grievant was not charged with tardiness or parking illegally in a loading and un-loading zone. His admissions and the record, however, do indicate his activities were engaged in to avoid other tardiness episodes. His co-worker's condition does nothing to qualify this conclusion.

The Grievant could have merely dropped her off and continued to the parking garage. But this would have engendered another tardiness episode. Instead, he parked his vehicle, punched in and eventually moved his car.

The insubordination charge was strongly supported by evidence and testimony. Instructions contained in the investigatory interview contained a direct order to answer questions honestly and fully. The Grievant, moreover, acknowledged he understood the direct order (Joint Exhibit 2). Yet, he failed to answer certain questions all relevant to the investigation. As such, he was clearly insubordinate.

Varied responses regarding justifications for refusing to answer lessened the Grievant's credibility. During the predisciplinary conference he stated the questions were of a personal nature. At the Step 3 grievance meeting, however, the Grievant maintained the questions were vague or nonspecific. At the arbitration hearing, he maintained his failure to respond was caused by a desire to protect his sick girlfriend.

If the Grievant had indeed felt the questions to be inappropriate, he should have answered and grieved the propriety of the direct order. Waiving this option caused the Grievant to knowingly engage in the insubordinate conduct. Conduct he had been suspended for three months earlier.

The Union's double jeopardy argument does not comply with established arbitral principles. Double jeopardy deals with an employee being disciplined more than once on an identical set of circumstances or events. Here, the

conduct resulting in removal is separate and distinct from those involving the ten-day suspension.

On eight distinct dates the Grievant took an immediate fifteen-minute break upon reporting to work to move his personal vehicle. He, therefore, shortened his workday and left his work area without authorization. This misconduct is specifically prohibited by guidelines outlined in Memo 4.07 (Employer Exhibit 8) It was, moreover, admitted by the Grievant at the arbitration hearing, documented in an E-mail sent to Administrator Ryan on April 14, 2009 (Employer Exhibit 11) and additionally documented by a series of timekeeping documents (Employer Exhibit 17).

The Grievant also took paid AM/PM breaks in excess of fifteen minutes, which resulted in leaving the work area without authorization. This misconduct, which is disallowed by Memo 4.07 (Employer Exhibit 8), took place on six occasions. These actions were documented by timekeeping data (Employer Exhibit 7) some of which was admitted to by the Grievant.

A glaring example of this misconduct took place on March 24, 2009 when he took an approximate thirty-minute paid AM break. On this date, the Grievant returned to his illegally parked vehicle at 7:41 AM (Employer Exhibit 20) and received a parking ticket (Joint Exhibit 2). He then drove his personal vehicle to the garage and eventually returned to the BWC lobby at 7:57 AM. Rather than returning to his work location, he took the elevator to the 11$^{th}$ floor; the work location of his girlfriend and co-worker. The Grievant eventually returned to his work location at 7:58 AM (Employer Exhibit 17).

Memo 4.07 (Employer Exhibit 8) is clear and unambiguous and provided the Grievant with notice about inappropriate conduct surrounding AM/PM breaks. This notice was further reinforced in an E-mail (Employer Exhibit 9) dated September 4, 2008 sent by Walton to all employees reminding them of the proper use of the break periods. The Grievant admitted to receiving this E-mail. On December 29, 2008, Executive Secretary Debbie Zebar sent a copy of Memo 4.07(Employer Exhibit 8) to all employees (Employer Exhibit 10). Again, the Grievant admitted he received the policy on January 5, 2009 (Employee Exhibit 10).

Unequal treatment is not supported by the record. The Union failed to identify other similarly situated employees who had received lesser the discipline. Three bargaining unit members in 2008 were charged with leaving the work area without authorization, and received suspensions (Employer Exhibit 18). These employees, however, did not have any active disciplines at the time of the imposed suspensions.

Within the aforementioned context, the imposed discipline is not viewed as excessive. The Grievant decided to play the system within three months of an arbitration decision which denied his grievance and upheld a ten-day suspension. A portion of the misconduct, insubordination, was identical to actions which led to the ten-day suspension. A review of the Disciplinary Grid (Employer Exhibit 7) indicates the Employer properly applied disciplinary guidelines by removing the Grievant. In fact, actions which resulted in the ten-day suspension could have led to removal but for the Employer's leniency.

## Award

The grievance is denied. The Employer had just cause to remove the Grievant.

5/10/10
Chagrin Falls, Ohio

Dr. David M. Pincus
Arbitrator