**OCB AWARD NUMBER: 2081**

|  |  |
| --- | --- |
| **SUBJECT:** | **ARB SUMMARY # 2081** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **34-26-20090429-0036-01-09** |
| **DEPARTMENT:** | Bureau of Workers Compensation |
| **UNION:** | OCSEA |
| **ARBITRATOR:** | Dr. David M. Pincus |
| **GRIEVANT NAME:** | Robert White |
| **MANAGEMENT ADVOCATE:** | Brad Nielsen |
| **2ND CHAIR:** | Ryan Sarni |
| **UNION ADVOCATE:** | Lori Elmore |
| **ARBITRATION DATE:** | January 21, 2010 |
| **DECISION DATE:** | May 10, 2010 |
| **DECISION:** | DENIED |
| **CONTRACT SECTIONS:** | Article 2.00, Article 24.00 |
| **OCB RESEARCH CODES:** | 106.01—Discrimination—In General; 118.01—DisciplineIn General; 118.6521—Insubordination; 115.217—Breaks |
|  |  |

**HOLDING: Grievance DENIED. The Arbitrator rejected the Grievant’s position that he was unaware that his actions could result in removal. The allegations were supported by the facts and the Grievant had been disciplined for virtually the same behavior only months earlier. The Union did not present evidence to support an allegation of disparate treatment. The Grievant tried to “play the system” in the opinion of the Arbitrator.**

The Grievant was employed as a Claims Assistant at the Bureau of Workers’ Compensation at the time of this incident. At the time of the alleged violations, Memo 4.07 was in effect and stated in part: “…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…” On eight different occasions the Grievant entered his work start time before parking his vehicle in the BWC Parking Garage. As such, the Grievant took a fifteen minute break upon reporting to work, which shortened the Grievant’s work day, by parking in a no-parking zone, clocking in for work, and then leaving to park his car in the garage. The Grievant failed to obtain permission from his Supervisor to leave the work area to move his vehicle. Further, during the investigatory interview, the Grievant disobeyed a direct order by failing to answer all questions during the investigatory interview. The Grievant had an active discipline that included a verbal reprimand (3/19/2008), and a ten (10) day suspension (1/15/2009). The Grievant was removed from employment on April 27, 2009.

The Employer arguedthat it had just cause to remove the Grievant. The Grievant was insubordinate when he failed to carry out a direct order to answer all questions during an investigatory interview fully and accurately. The Grievant was placed on notice that insubordination could lead to disciplinary action.

Evidence of attendance-related misconduct was presented to support the allegation that the Grievant left the work area without authorization. On three different dates (February 19, March 5 and March 30), the Grievant parked his vehicle in a no parking zone near the BWC building and proceeded to his work area on the 27th floor where he 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 doing so, the Grievant took his fifteen (15) minute break upon arriving at work in violation of memo 4.07., a violation that shortened his work day, and constituted leaving the work area without authorization. On other dates the Grievant took paid AM/PM break periods in excess of fifteen (15) minutes. The Grievant admitted that he engaged in such actions.

The Union arguedthat the Employer did not have just cause to remove the Grievant. The Union maintained that the Grievant was never provided complete and proper notice that his actions would result in discipline let alone removal. They contend the Grievant never used his break time to shorten his workday nor combined his two breaks into one paid break. The Union contends 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. The Union also argued that the investigation itself was tainted. They believe the Employer was trying to “get rid of” the Grievant. The Union also argued that the work rule in contention was ambiguous and inconsistently applied. Other employees engaged in similar behavior and were not disciplined. Prior to this imposition of discipline the Grievant was allowed to flex his breaks, which helped him care for his girlfriend’s condition. Also, the Employer’s timekeeping methodology did not accurately reflect the Grievant’s activities. Finally, the Union maintained that the Grievant was unaware that not adequately answering certain questions during an investigatory interview could result in removal. The questions asked on April 6, 2009 were mere attempts to entrap the Grievant, and support a double jeopardy charge. The Employer baited the Grievant knowing he would not answer these questions. The discipline imposed was punitive rather than progressive.

The Arbitrator foundthat the Employer had just cause to remove the Grievant. Both charges were completely supported by the record and justify removal. His admissions and the record indicate his activities were engaged in to avoid other tardiness episodes. The insubordination charge was strongly supported by the evidence and testimony. The Grievant acknowledged he understood the direct order and failed to answer certain questions relevant to the investigation. If the Grievant 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. The Union’s double jeopardy argument does not comply with established arbitral principles. On eight distinct dates the Grievant took an immediate fifteen-minute break upon reporting to work to move his personal vehicle. This misconduct is specifically prohibited by the guidelines outlined in Memo 4.07. Memo 4.07 is clear and unambiguous and provided the Grievant with notice about inappropriate conduct surrounding AM/PM breaks. The Union failed to identify other similarly situated employees who had received lesser discipline. A review of the disciplinary grid indicates the Employer properly applied disciplinary guidelines by removing the Grievant. The grievance was denied.