

**Ohio Civil Service Employees Association, AFSCME Local No. 11, AFL-CIO, and
State of Ohio, Department of Public Safety**

Grievance Number: 15-02-20140905-0082-01-09

**Opinion and Award
Arbitrator Sarah R. Cole**

Appearances

For the Union

Patricia Howell, OCSEA Staff Representative
Donna Howard, OCSEA Steward

Witnesses for the Union: Marina Combs, Grievant
Don Burris, Manager of Document Management Unit
Gabe Geig, CSA ODPS

For the Employer

Tyrone Reynolds, ODPS Management Representative
Julianne Lee, ODPS HRA
Jessie Keyes, OCB, Management Representative, Second Chair
Sarah Lemenski, observer
Krysten McElfresh, observer

Witnesses for the Employer: Kathy Corrigan, Chief of Dealer Licensing, ODPS
Ted Wendeling, Administrative Investigative Supervisor, ODPS

Background

Marina Combs, the Grievant, worked for the Ohio Department of Public Safety (ODPS), in the BMV (Bureau of Motor Vehicles) Titles Section. She has worked as a customer service assistant (CSA) for ODPS for the last two years. She is a native of Russia, but has lived in the United States for over ten years. On March 31, 2014, she arrived at the Shipley Building, where she works. As she walked in the door, Don Burris, then the Chief of the BMV Customer Service Center, called her over to help with a customer, Cam Atkinson, a hockey player for the Columbus Blue Jackets. According to Burris, BMV routinely provided special services to “VIP”

customers, such as professional hockey players, highly placed political figures and Ohio State University football players. According to Burris, a representative from one of these organizations would contact him before the VIP arrived so that he could ensure that the VIP could avoid waiting in a long customer service line. Thus, Burris knew in advance that Cam Atkinson would be coming in that day. When he saw the Grievant, he called her over and introduced Atkinson to her. The Grievant agreed to help him with his title transfer, even though this was not normally part of her job. During the course of the transaction, the Grievant obtained Atkinson's phone number and provided him with her number, to continue to assist with the transactions. At the end of the transaction, Grievant obtained a hockey puck from the office and asked Cam Atkinson to sign it. He acquiesced.

Over the next several days, the Grievant exchanged professional phone calls and texts with Atkinson and, eventually, his father, Tom Atkinson. The transcript of texts between Tom Atkinson and the Grievant reflect a professional interaction focused on facilitating title transfers and the purchase of license plates (Union Ex. 1). At some point in the course of the phone calls and texts, Grievant claims that she asked Tom Atkinson if he was aware of a source that might offer free or discounted tickets to Columbus Blue Jackets hockey games. Management contends that Grievant asked Tom Atkinson for free or discounted tickets, not a source where she might purchase them. According to Ted Wendling, ODPS Investigator, Grievant admitted that she asked both Cam and Tom Atkinson about obtaining free or discounted tickets from them. Both Tom and Cam Atkinson, however, corroborate the Grievant's version of the facts. (Union Ex. 3).

In the course of the ODPS investigation, Wendling interviewed the Grievant, Cam Atkinson and several other witnesses, none of whom testified at the arbitration hearing. Wendling concluded that the Grievant was untruthful during her interview because she denied

allegations but later admitted to some of the claims against her. As a result, he did not interview Tom Atkinson to assess his recollection of the events. As part of the investigation, the contents of Grievant's computer drive were also imaged and reviewed. This imaging revealed that Grievant had stored personal material on her computer.

After conducting an investigation of this incident, the Ohio Department of Public Safety determined that Grievant had violated three work rules:

1.7 Failure of Good Behavior- Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties. Any act that would bring discredit to the employer or actions that could harm or potentially harm the employee, fellow employees or member of the general public. Conduct unbecoming, immoral or indecent conduct.

1.12 Unauthorized use, misuse, abuse, neglect of or loss of any state property or issued equipment. (Included but not limited to, computer hardware, software, email, internet, phone, vehicle, fax, etc.)

1.20 Falsification. Falsifying or altering employment applications or any job related document, record or statement, failure to cooperate in or lying in an official investigation or inquiry.

Employer's Position

ODPS claims it is justified in terminating the Grievant because she violated the work rules identified above when she took Cam Atkinson's phone number off paperwork he submitted to convert his out-of-state title and used that number to contact him. ODPS also justifies Grievant's termination on the grounds that Grievant contacted both Cam Atkinson and his father, Tom Atkinson, using her personal cell phone, asked Cam and/or Tom Atkinson for free or discounted tickets to Blue Jackets games, continued to use her state computer for non-work related purposes after being disciplined for the same conduct and lying about her conduct during the investigatory interview of the incident. ODPS cites Grievant's previous behavior, when she accessed a state database for non-business related purposes, as additional justification for termination for the current infractions.

ODPS relies heavily on Ted Wendling's investigation of the incident to support its termination decision. In particular, ODPS placed great weight on Grievant's changed responses to Wendling's interview questions. First, during the interview, Grievant denied that she asked the Atkinsons for free or discounted ticket but, later in the interview, admitted that she had made that request. ODPS also relied on the imaging of Grievant's computer, which revealed that she maintained non-work material on her work computer, to justify the termination.

In light of Grievant's admission during the investigatory interview that she asked Tom and/or Cam Atkinson for free or discounted hockey tickets using her personal cellphone, the personal material on her computer, and her short time working for ODPS, ODPS concluded that the appropriate discipline was termination.

Union's Position

The Union contends that the Grievant's termination was unjustified because the Grievant did not obtain Cam Atkinson's phone number without his permission, but, instead, was given that number by Cam Atkinson. Moreover, Grievant used that phone number to make calls and send texts for business reasons only. The Union also contends that Grievant did not ask Cam Atkinson or his father for free or discounted Blue Jackets tickets. Instead, according to the Union, Grievant simply asked Cam and his father if they were aware of a source where the Grievant might obtain free or discounted tickets for a Blue Jackets game. The Union also contends that ODPS's investigation of the Grievant was incomplete in some respects and overly aggressive in others. The Union argues that the failure to interview Cam's father, Tom Atkinson, renders the investigation incomplete and, thus, biased and subjective. The Union also contends that the manner in which the investigation was conducted was unfair to the Grievant. ODPS

investigator Wendling interrogated the Grievant, not a native English speaker, asking the same questions over and over again until he finally elicited a confession from the Grievant. The Union contends that this confession should be ignored because it was the result of misleading, repetitive and confusing questions. Finally, the Union contends that the imaging of Grievant's computer revealed only that, at one time, she maintained non-work related materials on her work computer. Grievant deleted this material long before the imaging took place.

Discussion

I find that ODPS's decision to terminate the Grievant was unjustified. In its brief, ODPS claims that it proved that the Grievant obtained Cam Atkinson's phone number from official work related documents without his permission, used her personal cell phone to text and/or call Cam Atkinson and his father, Thomas, for non-work related purposes, used her position to solicit discounted and/or free tickets to Columbus Blue Jackets games, used her work computer for non-work related purposes and provided false and/or misleading testimony during the investigation of this incident. Although ODPS established that Grievant used her personal cell phone to conduct business and used her work computer for non-work related purposes, ODPS did not satisfy its burden of proof regarding the other allegations. Thus, the Grievant's termination cannot be upheld.

Don Burris, then Chief of the BMV Customer Service Center, testified that ODPS gives preferential treatment to VIP customers, like Columbus Blue Jackets' players. Consistent with this approach, a Blue Jackets representative notified Burris in advance that Cam Atkinson, a Blue Jackets player, was coming in to transfer title from an out-of-state vehicle. Burris's uncontroverted testimony was that he called Grievant over to help with this transaction, even

though the Grievant did not typically conduct such transactions. By offering preferential treatment to Cam Atkinson, ODPS created an environment in which an employee would have difficulty discerning what behavior was appropriate from behavior that was inappropriate, at least when assisting a VIP customer. Making a VIP customer's life easier might not only include permitting him to skip the lines but might also include providing him a personal cell phone number to facilitate the efficient resolution of the VIP customer's transactions.

While both parties concede that Grievant used her personal cell phone to conduct business with the Atkinsons, it is not clear that the Grievant illicitly obtained Cam Atkinson's cell phone number from his paperwork. Investigator Wendling concluded that this must be what happened but was unable to corroborate his belief. Grievant's testimony, by contrast, was that Cam Atkinson gave Grievant his phone number. No other evidence contradicts this testimony; thus, ODPS is unable to establish that Grievant took Cam Atkinson's phone number off his paperwork. Grievant's use of her personal cell phone to conduct business, however, appears problematic. Kathy Corrigan, Chief of Dealer Licensing for ODPS, testified that employees are not to use personal cell phones to conduct business. Grievant testified that she was aware of this policy. But, here, Burris, the head of the Customer Service Center, asked the Grievant to go out of her way to help a VIP customer. That VIP customers exist at the Bureau of Motor Vehicles suggests to all concerned, whether employees or customers, that the normal rules do not apply. Thus, I do not find that Grievant's use of her personal cell phone when assisting a VIP customer was a violation of ODPS rules.

ODPS is also unable to establish that Grievant used her position to ask for free or discounted tickets from Cam or Tom Atkinson. Cam Atkinson stated during the interview with Wendling that Grievant did not ask him for free or discounted tickets. Wendling did not believe

Cam Atkinson's statement because Cam Atkinson laughed nervously during the interview and, according to Wendling, equivocated and demurred. These actions, Wendling testified, indicated that Cam Atkinson might not be telling the truth. As part of the investigation, Wendling also interviewed the Grievant. Grievant is from Russia and is not a native English speaker. During the lengthy interview, Wendling asked Grievant over and over again whether she had asked the Atkinsons for free and/or discounted tickets to Blue Jackets' games. Wendling testified that he "asked [grievant] twenty times to get you [Grievant] to give [me] an answer." Wendling asserted that his repeated questions were justified because he had "reason to believe she wasn't telling the truth." Presumably, this "reason to believe" came from his interview with Cam Atkinson. Ultimately, during the investigatory interview, Grievant admitted to asking for tickets. Reflecting on this admission, Grievant testified at the arbitration hearing that she was confused by the questions. She testified that she was not asking the Atkinsons for free or discounted tickets, but, instead, was asking the Atkinsons to help her find a source where she might obtain free or purchase discounted tickets to Blue Jackets' games. Following the interview of the Grievant, Wendling concluded that he did not need to interview Tom Atkinson to assess whether he remembered Grievant asking for free or discounted tickets. Wendling believed that Grievant's admission during the interview was sufficient to justify termination.

Grievant's interview, in which she gave contradictory answers to various iterations of the same question, created ambiguity regarding what actually occurred. In light of that ambiguity, it would have made sense to interview Tom Atkinson, who also had repeated interactions with the Grievant. The failure to do so, particularly in light of the affidavit Tom Atkinson later submitted indicating that the Grievant did not ask him for free or discounted tickets, but rather a source for obtaining them, raises concern about the investigatory approach in this case. The interview of

Grievant, a non-native English speaker, contained confusing questions that may have misled her into offering an admission. Her “admission”, therefore, does not prove that she asked for free or discounted tickets from the Atkinsons. Her own testimony, where she asserts that she asked only for a source from which to obtain such tickets and both Cam and Tom Atkinson’s denial that she asked for tickets, leads to the conclusion that ODPS was not justified in concluding that the Grievant solicited free or discounted tickets from Tom or Cam Atkinson.

The imaging of the Grievant’s computer, done as part of the investigation, revealed that the Grievant stored “selfies, lists of vacation locations” and other personal information on her work computer in violation of Rule 1.12. Grievant admits that she stored personal material on her work computer, but that she had deleted it before her computer was imaged. According to Grievant, imaging a computer reveals both deleted and non-deleted material. Whether that is true or not is immaterial as it is a violation of Rule 1.12 to store personal information on a work computer. However, ODPS cites violation of all three work rules as the basis for Grievant’s termination. Because I find that the only work rule she violated was Rule 1.12, I cannot uphold the termination.

Remedy

The grievance is sustained. The Grievant is entitled to back pay, seniority and leave accruals retroactive to the date of her termination.

____Sarah R. Cole_____

Sarah Rudolph Cole, Arbitrator

October 1, 2015

