

ARBITRATION DECISION NO.:

226

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Employment Services
Toledo Office

DATE OF ARBITRATION:

January 10, 1990

DATE OF DECISION:

January 24, 1990

GRIEVANT:

Leroy Williams

OCB GRIEVANCE NO.:

11-09-(88-12-20)-0064-01-09

ARBITRATOR:

Harry Graham

FOR THE UNION:

Lois Haynes

FOR THE EMPLOYER:

Victoria Ullman

KEY WORDS:

Suspension
Insubordination
Accurate Work Records
Leave Authorization
Ethics
Conflict of Interest

ARTICLES:

Article 24-Discipline
§24.02-Progressive Discipline

FACTS:

The grievant is a Field Examiner employed by OBES. He was involved in several personal businesses as well. The grievant was denied approval by the employer to continue his

connections with those businesses yet he allegedly did continue his association until the present time. The grievant's daily work log contained inaccurate reporting of dates and times. The grievant used personal leave without authorization. The grievant received a fifteen day suspension.

EMPLOYER'S POSITION:

That the grievant's OBES position and his personal business connections create a conflict of interest. The grievant violated his agreement with the employer to stop his outside activities. The grievant completed his daily log of activities with false and inaccurate entries. The grievant used two hours of personal leave to participate in improper activities. The personal leave was not approved prior to the grievant taking it.

UNION'S POSITION:

There is no conflict of interest between the grievant's OBES position and his outside activities. The grievant agreed not to engage in outside "public accounting, bookkeeping or tax service(s)," or to provide services to persons in those occupations. His personal business connections do not violate that agreement. The grievant had prior approval for his outside activities and the employer changed its policy by imposing discipline. The grievant received disparate treatment compared to similarly situated employees. The employer knew that its conflict of interest policy was ambiguous. Therefore, discipline for the grievant's activities is improper.

The grievant spent the time marked on his work log on the accounts listed. Mistakes on daily logs are inadvertent and due to medication grievant is taking. Approval for leave was not possible as supervisory personnel were unavailable. Past practice was to complete leave forms after the leave. Progressive discipline is violated by this fifteen day suspension.

ARBITRATOR'S OPINION:

That the grievant continued his outside activities after agreeing to stop opens him up to discipline. The fact that actual conflict is minimal and that prior supervision ignored the violation weighs against discipline. The grievant's daily work logs are inaccurate. Medication or inadvertence are not an excuse. Reports must be accurate. The grievant did not have approved leave and it is unlikely that leave would have been granted. Additionally, the leave form was inaccurate. He was absent without leave and medication does not excuse inaccuracies. The employer had just cause for discipline.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

**In the Matter of Arbitration
Between**

OCSEA/AFSCME Local 11

and

The State of Ohio,

Bureau of Employment Services

Case No.:

11-09-(12-20-88)64-01-09

Before:

Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

Lois Haynes
Staff Representative
OCSEA/AFSCME Local 11
77 North Miller Rd., Suite 204
Fairlawn, OH. 44313

For Ohio Bureau of Employment Services:

Victoria Ullmann
Ohio Bureau of Employment Services
145 South Front St.
Columbus, OH. 43216

Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter on January 10, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present evidence and testimony. The record was closed at the conclusion of oral argument.

Issue:

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was Leroy Williams suspended for just cause?
If not, what shall the remedy be?

Background:

The events that give rise to this proceeding are not in dispute. The Grievant, Leroy Williams, has been employed since June, 1981 as a Field Examiner with the Ohio Bureau of Employment Services. He works out of the Toledo, OH. office. In December, 1988 Mr. Williams was suspended for 15 days. It was the opinion of the Bureau that he had engaged in activity which constituted a conflict of interest after approval for such activity had been denied. The Bureau also took the position that Mr. Williams had been absent without leave on June 28, 1988 and that on June 23 and 28, 1988 he had improperly charged time and mileage to the State for trips that the

he had not made.

A grievance protesting the suspension was promptly filed. It was processed through the procedures of the parties without resolution. The State and the Union agree that the grievance is properly before the Arbitrator for determination on its merits.

Position of the Employer:

According to the State it had ample cause to administer the suspension at issue in this proceeding. In April, 1983 the Grievant was informed by the Bureau that he had to disclose to it his involvement in Williams Construction Supply MBE Services, Williams MBE Consulting and WCSS Business Enterprises, Inc. (Employer Ex. 2). Subsequently, on April 11, 1983 Mr. Williams requested approval to engage in employment with WCSS Business Enterprises, Inc. He indicated he would serve that entity as a consultant. (Employer Ex. 5). Later that month Mr. Williams' request was denied. (Employer Ex. 7). In June, 1983 he was specifically directed to cease any connection with Williams MBE Consulting and Williams Construction Supply MBE Service Co. (Employer Ex. 8). In fact, Employer's Contribution Reports to OBES for WCSS Business Enterprises, Inc. were received in 1984, 1985, 1986, and 1988. These were signed by Mr. Williams in his capacity as President of that entity. This represents a blatant disregard by Mr. Williams of his commitment not to engage in outside work according to the State. The record shows that he continued to be associated with WCSS Business Enterprises in violation of his agreement not to do so.

Documentation (Employer Ex. 14) also indicates that in his capacity as an Examiner Mr. Williams audited the accounts of WCSS Business Enterprises, Inc. in 1987. He did this on Bureau time and was paid his salary for his work. This is highly improper according the State. The conflict of interest inherent in this situation is obvious it asserts.

On June 23, 1988 Mr. Williams' daily report indicated he had visited the Toledo Police Federal Credit Union. He had spent two hours at that enterprise according to his report. In fact, he did not visit the Toledo Police Federal Credit Union on June 23, 1988 as he indicated on his daily log. Employer Exhibit 17 is the statement of the Manager of the Toledo Police Credit Union. She states that Mr. Williams was not at the credit union on June 23, 1988 as claimed on his report. Rather, he picked up records on June 24, 1988 and again on June 27, 1988. He did not spend two hours at the credit union as claimed on his report. The manager of the facility estimated he spent no longer than 30 minutes there on June 27, 1988.

The activity report filed by Mr. Williams for June 28, 1988 indicates that he used two hours of personal leave on that date. In fact, on that date he was arrested along with other people for his participation in a sit-in demonstration in Toledo. He did not request leave to participate in the sit-in. Use of State time without authorization to participate in a sit-in is simply improper according the State. Under these circumstances the Employer asserts that the fifteen day suspension under review in this proceeding was appropriate.

Position of the Union:

In the Union's view the suspension under review in this proceeding is inappropriate. No conflict of interest exists with respect to Mr. Williams' activities in the private sector according to the Union. Union Exhibit 1 is the statement signed by Mr. Williams on June 8, 1981 reflecting his understanding of the limits his outside activity. It indicates that he will not engage in any outside business in the form of "public accounting, bookkeeping, or tax services. . . ." Mr. Williams also agreed not to provide any services to any person "engaged in such occupation or business." Mr. Williams lived up to the spirit and the letter of his pledge to avoid conflict of interest situations. He

did not engage in any public accounting, bookkeeping or tax work on behalf of any entity while serving the State. He received no outside income whatsoever from any of the various Williams enterprises for completing their unemployment compensation reports. His work on behalf of those enterprises was of a pro-forma nature. No conflict of interest exists in that work according to the Union.

In fact, to the time of this event at least one other person in the Toledo OBES office has done work of a similar nature for her own business. Patricia Moore, an employee of the Bureau at Toledo since 1973, has consistently filed the appropriate forms with OBES on behalf of her enterprise. She told the Bureau about her work in 1976 and again in 1979. That activity was expressly approved by the relevant officialdom of OBES. In 1984 the Employer told her to dispose of her interest in her outside work. When she informed the Bureau that her activities had been approved on prior occasions the matter was dropped. As activity of the sort engaged in by Mr. Williams has been accepted by the State he cannot be disciplined for doing what other people in his office do in the Union's view.

During much of Mr. Williams tenure with the Bureau in Toledo his supervisor was Robert Long, since retired. Long was aware of Williams' activity on behalf of the various Williams enterprises for many years. He never viewed that activity to be improper. He did not raise the issue of conflict of interest at any time with Williams. The Union insists that it is improper for the State to impose different standards and immediately move to discipline. This is particularly true when the discipline at issue in this proceeding is a suspension involving substantial time off work.

Subsequent to this event OBES modified its policies regarding conflict of interest situations in an effort to clarify them. On December 29, 1988 the Bureau issued a memo on conflict of interest. (Union Exhibit 10). It sets forth a number of possible conflict of interest situations including that where an examiner might be involved with an account where they are personally involved. This might cover such situations as when they are a corporate officer or partner. People who find themselves in such situations are directed not to work on those accounts but rather to return them to the supervisor for reassignment to another employee. The Union stresses this clarification of Bureau policy came out after the incident involving Mr. Williams. It asserts this must be viewed as meaning that the employer had some reservations about its policy. Consequently, the strict interpretation of conflict of interest applied to Mr. Williams in this incident should not be permitted to stand according to the Union.

With respect to the two hours shown on the Daily Field Report for June 23, 1988 as being devoted to the Toledo Police Federal Credit Union, the Union insists they are accurate. According to Mr. Williams that entry does not reflect the time he spent at the Credit Union. Rather, he picked up the requisite paperwork on that date, returned to the office and worked on it there. He did spend two hours on the Toledo Police Credit Union account on that date. There is no inaccuracy or fabrication on his Daily Report. Absolutely no grounds for discipline exist with respect to that document in the Union's view.

The Union acknowledges that a number of discrepancies exist with respect to Mr. Williams daily report for June 28, 1988. He properly requested leave for June 28, 1988. One of his colleagues, Thomas Dempsey, was acting as though he were in charge of the Toledo office. This was due to the absence of supervision. Dempsey knew about Williams absence and acquiesced. Approval could not have been secured from the proper supervisory authorities as none were available. Practice involved completion of the request for leave form after the leave was used. In fact, on June 28, 1988 Mr. Williams injured his back. He was taken to the hospital by ambulance on June 29, 1988 and was released on July 4, 1988. He remained at home, on medication for some time thereafter. While at home he completed his June 28, 1988 daily report. As he did it from memory, while under medication, any mistakes were inadvertent and should not be held

against the Grievant according to the Union. As in the situation involving conflict of interest, the Bureau subsequently issued additional guidelines regarding requests for leave. This is indicative of the uncertainty that surrounded such requests prior to this incident and must prompt a conclusion that whatever discrepancies exist cannot be used against Mr. Williams in the opinion of the Union.

At Article 24 the Collective Bargaining Agreement provides for the concept of progressive discipline. That has not occurred in this situation. Mr. Williams had no prior discipline on his record. To impose a fifteen day suspension in the circumstances of this case is unwarranted and a violation of the concept of progressive discipline the Union insists.

Discussion:

Completion of the Unemployment Compensation contribution reports by Mr. Williams for his various enterprises skirts the edge of conflict of interest. Putting to one side for the moment the actuality of conflict of interest, his signature on the reports and the audits he conducted on behalf of OBES of his business presents an appearance of conflict of interest. That activity, occurring as it did after Mr. Williams had been directed to cease association with the various Williams firms (Management Exhibit 8) and had signed the directive indicating he understood it opens him to discipline. In reality, such conflict as exists is minimal. The Employer's Contribution Reports signed by the Grievant involve either no amounts of remittance to the Bureau or very small amounts at best. The agreement signed by the Grievant concerning conflict of interest in June, 1981 bound him not to perform public accounting, bookkeeping or tax services for outside entities. Preparation of the Contribution Reports on behalf of the Williams businesses arguably represents public accounting and tax services. His involvement with his enterprises after he had been directed to cease such involvement is a direct violation of his representation to OBES that he would, indeed, halt that activity. Consequently, discipline is warranted. Set against that conclusion is the fact that the tasks he performed on behalf of his businesses were minimal in nature. In addition, management authority in the Toledo office in the person of Mr. Long was aware of his activity and chose to ignore it. These observations must be set against the conflict of interest charge against Mr. Williams and serve to reduce its impact.

Documentation received from the Manager of the Toledo Police Federal Credit Union indicates that Mr. Williams did not visit the premises on June 23, 1988 as indicated on his daily log. Similarly, he indicated he had visited that Employer on June 28, 1988. That was not confirmed. (Management Exhibit 17). The Union's claim that these errors should be excused due to Mr. Williams back injury must be viewed with skepticism. That excuse does not cover June 23, 1988 as his injury did not occur until June 28th, 1988. That he completed the reports several days after the fact does not serve to justify inaccuracy. The reports have a purpose. They serve to document activity of State employees. They may not be completed in random fashion, replete with errors. The fact of the matter is that those reports were completed incorrectly by the Grievant and indicate work on June 23 and 28, 1988 that he did not perform. Mr. Williams illness does not serve to justify those errors. If he was well enough to complete the reports he was well enough to complete them accurately. While the reports may not reflect daily activity in the order in which it was performed the State certainly can expect accuracy with respect to the record of the date on which activity occurs.

On June 28, 1988 Mr. Williams participated in a demonstration in downtown Toledo. He did not secure leave for that participation. He was absent without leave. Had leave been sought in advance it is unlikely that it would have been granted. At the arbitration hearing Mr. Williams testified he understood a demonstration was to occur on June 28, 1988. The fact of the matter is that he absented himself from work in order to participate in the demonstration. His request for leave indicates he wished to be absent from 11:00 AM to 1:00 PM when he was, in reality, absent

from 9:00 AM to 11:00 AM. Mr. Williams back injury on that date cannot serve to excuse his late filing of his leave request nor the inaccuracies contained on it.

Arbitrators should be reluctant to modify penalties imposed by employers when it is determined that the actions that prompt discipline have actually occurred. In this case Mr. Williams did continue his association with the various Williams enterprises after he had affirmed to the State he would not do so. He did not visit the Toledo Police Federal Credit Union on June 23 and 28, 1988 as he claimed on his daily report. He absented himself from work on June 28, 1988 in order to attend a demonstration and sought use of leave after the fact. A fifteen day suspension is a very severe penalty. In order to survive neutral review an Employer must meet the test of just cause. In this instance, that has indeed occurred.

Award:

The grievance is denied.

Signed and dated this 24th day of January, 1990 at South Russell, OH.

Harry Graham
Arbitrator