

ARBITRATION DECISION NO.:

332

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation and Developmental Disabilities
Central Office - Columbus, Ohio

DATE OF ARBITRATION:

March 1, 1991

DATE OF DECISION:

March 15, 1991

GRIEVANT:

Larry Reyka

OCB GRIEVANCE NO.:

24-01-(90-07-3I)-0056-01-04

ARBITRATOR:

Harry Graham

FOR THE UNION:

Maxine Hicks, Staff Representative

FOR THE EMPLOYER:

James Spain, Labor Relations Administrator

KEY WORDS:

Misuse of Computer
Suspension
Late Step 3 Response
Procedural Violations
Neglect of Duty

ARTICLES:

Article 24

§ 24.04 - Pre-Discipline

Article 25

§ 25.02 - Grievance Steps

FACTS:

The Grievant is a contract Evaluator/Negotiator. He is employed in the Central office of the Department of Mental Retardation and Developmental Disabilities. As part of his duties the Grievant makes extensive use of the Departmental computer system. He is familiar with the system and knowledgeable about its capabilities.

Upon reporting to work on June 4, 1990, the Grievant discovered that his supervisor had changed his

password. It had come to the supervisor's attention that the Grievant was using the State computer for other than what she regarded as proper State business. More specifically, the supervisor had learned that the Grievant had used the computer to send graphic jokes and had transmitted a bill for time spent on Union business over the State computer system. The Department determined that these uses of the State computer were inappropriate and administered a 20-day suspension to the Grievant. A grievance was filed over this suspension.

EMPLOYER'S POSITION:

The State alleges that it acted correctly in administering the suspension to the Grievant, insisting that the department possessed the just cause necessary to support the discipline.

The State maintains it sent a notice which specified 1) the charges against the Grievant, 2) indicating where the pre-disciplinary hearing was to be held and 3) that the Grievant had the right to avail himself of Union representation. On July 31, 1990 the grievance was filed and the Step 3 meeting was not held until November 30, 1990. In the interim, the grievance was appealed to arbitration pursuant to Section 25.05 of the Contract which permits a Grievant and the Union to appeal to the next step if a grievance response is not received in a timely fashion. The State claims this delay in processing the grievance did not prejudice the Grievant's rights in any way.

UNION'S POSITION:

The Union urges that this grievance be sustained because the discipline lacks merit and because the State erred in processing the grievance.

In the Union's view, the computer system of the State is routinely used by employees for personal activities. The Union points to the fact that in the Grievant's fourteen years of service with the State he has never been disciplined. moreover, the Union alleges the discipline was improperly administered because a document was withheld prior to the pre-disciplinary meeting and the Step 3 meeting was not held until 122 days after the grievance was filed.

ARBITRATOR'S OPINION:

The Arbitrator found that the failure of the State to produce a specific document prior to the pre-disciplinary hearing did not compromise the Grievant's rights in any way. Also, the material in that document was not crucial to the outcome of the dispute. The fact remained that the Union and Grievant were aware of the nature of the charges against the Grievant.

While the Arbitrator found that the State failed to hold a timely third step hearing, thereby detracting from the smooth functioning of the grievance procedure, the procedural violations of the Contract which occurred in this case were minimal and did not compromise the rights of the Grievant.

No serious doubt exists but that some of the personal work done on the State's computer system was done by the Grievant on State time. The Grievant stands guilty as charged of neglect of duty. The State had ample grounds to administer discipline to the Grievant.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department
of Mental Retardation and
Developmental Disabilities

Case No.: 24-01-(07-31-91)-0056-01-04
Before: Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:
Maxine Hicks
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, Ohio 43215

For Department of Mental Retardation and
Developmental Disabilities:
James Spain
Labor Relations Administrator
Department of Mental Retardation and
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30 East Broad St.
Columbus, Ohio 43266-0415

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present evidence and testimony. No post hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument on March 1, 1991.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:
Was the Grievant suspended for just cause? If not, what shall the remedy be?

Background: The parties agree upon the events that give rise to this proceeding. The Grievant, Larry Reyka, is a contract Evaluator/Negotiator. He is employed in the Central Office of the Department of Mental Retardation and Developmental Disabilities located in Columbus, OH.

As part of his duties Mr. Reyka makes extensive use of the Departmental computer system. He is familiar with it and knowledgeable about its capabilities.

Upon reporting to work on June 4, 1990 the Grievant experienced difficulty in operating his computer. It rejected his password. He brought his problem to the attention of his supervisor, Karen Mayer. Ms. Mayer was aware of his problem as she had changed his password. It had come to her attention that Mr. Reyka was using the State computer for other than what she regarded as proper State business. more specifically, Ms. Mayer had learned that the Grievant had used the computer to send graphic jokes in the form of cows with captions, correspondence regarding a laptop computer group and material regarding the Humanist Community of Central Ohio. He had also transmitted a bill for time spent on Union business to his union over the State computer system. This activity had involved use of such State provided facilities as Internet and CompuServe, computer communication networks. Some of the material had been produced by Mr.

Reyka on his home computer and entered into the State's system via modem.

It was the opinion of officials in the Department of Mental Retardation and Developmental Disabilities that use of the State computer facilities is such a fashion was inappropriate. Accordingly it administered a 20 day suspension to Mr. Reyka. That suspension was protested in the grievance machinery of the parties without result. They agree that it is now properly before the Arbitrator.

Position of the Employer: According to the State it acted correctly in the manner in which the suspension was administered to Mr. Reyka. It also insists that it possessed the requisite just cause to impose the suspension at issue in this proceeding.

At Section 24.04 the Agreement concerns itself with the pre-disciplinary procedure to be followed when the State is contemplating issuance of discipline. On June 22, 1990 Mr. Reyka was sent notice of a pre-disciplinary meeting to be held on July 2, 1990. That notice specified a charge of "Neglect of Duty/Inappropriate Use of State Equipment/Insubordination." It indicated where the hearing was to be held and pointed out to the Grievant that he had the right to avail himself of Union representation should he desire to do so. The various State witnesses who were in attendance at the meeting were available for cross-examination by the Grievant or Union officials. Relevant documents were provided to the Union three days prior to the meeting. The pre-disciplinary meeting was proper in every respect the State insists.

On July 25, 1990 the suspension at issue in this proceeding was administered to the Grievant. On July 31, 1990 the grievance was filed. As provided by the Agreement it was entered into the Grievance procedure at Step 3 as it involved a suspension. In fact, a Step 3 meeting was not held until November 30, 1990. In the interim, on September 7, 1990 the grievance was appealed to arbitration. Section 25.05 of the Agreement permits a Grievant and the Union to appeal to the next step if a grievance response is not received in timely fashion. The Grievant availed himself of this right. The delay in processing his grievance through the system did not prejudice his rights in any respect according to the State. He appealed to the next step in the procedure, arbitration. The State does not contest his right to do so nor neutral review of this event on its merits.

The State insists it had just cause to administer the suspension under review in this proceeding. On November 10, 1987 Mr. Reyka attended a Labor-Management meeting in which he was informed that the State computer system was not to be used for Union business. On December 6, 1988 he was again informed of that fact by the Department Labor Relations Office. On a written third step grievance reply on March 29, 1989 he was once again informed that the State computer system should not be used for Union business. In the June 4, 1990 meeting with his supervisor, Ms. Mayer, Mr. Reyka was told in no uncertain terms not to use State computer equipment for union business. He continued to do so, generating a bill to the Union for time spent on Union business. This constitutes insubordination according to the State.

Furthermore, the Grievant accessed the State's computer system from home by using a modem. When he entered the system, he used it to produce material not related to his job duties. Voluminous material was found in the State computer system relating to the Humanist Community of Central Ohio. Additional material was found relating to a laptop computer society. These organizations represent the off-duty interests of the Grievant. They have nothing to do with State business. The State also points out that the amount of material was voluminous. We are not dealing here with a stray entry or two. Reams of paper constituting the printout of his materials were produced at the arbitration hearing. Use of State equipment to produce this amount of material for personal use is completely unacceptable the State insists.

Some of the personal material produced by Mr. Reyka was generated on State time. This sort of behavior is inappropriate in the State's view. People are expected to work at the business of the State while at work. Use of State time to conduct personal business is inappropriate according to the State. As this is the case, the State insists it had the requisite just cause to administer the suspension under review in this proceeding. It urges the Arbitrator deny the Grievance.

Position of the Union: The Union urges that this grievance be sustained for two reasons: it lacks merit and it was processed incorrectly.

In the Union's view, the computer system of the State is routinely used by employees for personal activities. In fact, upon entering the system employees see a bulletin board inviting them to post jokes, exchange recipes, and attend potluck dinners. Mr. Reyka posted his stick figure cows as an effort to

welcome his supervisor, Ms. Mayer, to the Department. There is nothing wrong with that according to the Union. No other employee who uses the notes section of the system for personal messages has ever been disciplined.

The Grievant has a total of fourteen years of service with the State. He has never been disciplined. The Department's internal disciplinary guidelines indicate that employees who commit an offense that results in bodily harm to residents or employees receive a suspension. Offenses involving improper use of State equipment are due a verbal or written reprimand. In the Union's view, the suspension at issue here represents an overreaction that should Prompt an award of its position.

The discipline was improperly administered in the opinion of Union. There was a memo generated by Karen Mayer, Mr. Reyka's supervisor, to Mike Fuscardo, Labor Relations Officer of the Department, prior to the pre-discipline meeting. It was not given to the Union prior to or at the meeting. In fact, the Union was unaware of its existence until the arbitration hearing was held when it was introduced into evidence. Section 24.04 of the Agreement provides that the Employer is to provide "documents known at that time used to support the disciplinary action." As the Union was not provided a memo which was used to support discipline the suspension must be overturned according to the Union.

The Union points out that the Step 3 meeting established by the grievance procedure was not held until 122 days after the grievance was filed. This is not contemplated by the Agreement in the Union's view. In fact, the Union never received a third step answer to Mr. Reyka's grievance. At Step 3 of the Grievance Procedure the Agreement provides that the Union is to receive a response to its Step 3 grievance within 35 days of the Step 3 meeting. To this date no response has ever been received. This clear-cut violation of the Agreement must prompt a conclusion that the suspension should be overturned in the Union's view.

As the employer lacked the requisite just cause to impose discipline and committed procedural violations of the Agreement, the Union urges the grievance be sustained.

Discussion: The Union is overreaching when it asserts that the Grievance should be sustained as the State did not comply with the provisions of Section 24.04 of the Agreement. It is correct that the State did not provide Ms. Mayer's memo to Mr. Fuscardo to the Union. Its failure to do so did not compromise his rights in any way. The evidence available to the Arbitrator indicates that he was afforded the due process rights contemplated by the Agreement. Furthermore, the material in that memo is not crucial to the outcome of this dispute. It is concerned with explaining to Mr. Fuscardo what was found in the State's computer system and how it was found. The fact remains that the Union and the Grievant were aware of the nature of the charges against Mr. Reyka. There was no damning material contained in Ms. Mayer's memo whose withholding undermined his rights. The failure of the State to provide the memo to the Union is a de minimus violation of the Agreement which has no bearing upon the outcome of this dispute.

The pre-disciplinary notice furnished to the Grievant did not itemize each and every offense Mr. Reyka is alleged to have committed. He cannot claim to have been surprised by the charges of "Neglect of Duty/Inappropriate use of State Equipment/Insubordination." Ms. Mayer had discussed her findings with him on June 4, 1990. Any reasonable person would have been of the view that the pre-discipline meeting scheduled for July 2, 1990 would be concerned with the concerns raised by Ms. Mayer on June 4, 1990. Any claim of surprise is a post-event rationale proffered by the Grievant to serve as a excuse for his behavior. It is rejected.

If the Employer had strictly complied with the provisions of the Grievance procedure it would have made an expeditious effort to hold the Step 3 grievance meeting upon receipt of the Grievance. It did not do so. The Grievance was received by Labor Relations on July 3, 1990. The Third Step meeting was not held until November 30, 1990. No response was ever made by the State. That sort of behavior is not conducive to smooth functioning of the grievance procedure. That observation is tempered by the language of the Agreement at Section 25.05. It provides that the parties may mutually extend the time limits of the grievance procedure. They did not do so in this case. The language continues to specify that in the absence of such extensions the grievance may be appealed to the next step. This was done. The grievance was appealed to arbitration on September 7, 1990. The State did not then and does not now contest the arbitrability of the grievance. To the contrary, it desires that the case be determined on its merits. The procedural violations of the Agreement that occurred in this case are minimal in nature. They did not compromise the rights of the

Grievant. This case must be decided on its merits.

Mr. Reyka was well aware that the computer system of the State was not to be used for union business. He was told of this in 1987, 1988 and 1989. That instruction was plain and not susceptible of interpretation. Use of the State computer system for union business is prohibited. The fact of the matter is that the Grievant used the facilities of the State to generate his invoice to the Union. That he did not send it on E-mail cannot obscure that fact. The State's facilities were used for Mr. Reyka's personal business with the Union. That is not permissible and was well known to the Grievant.

On June 4, 1990 Mr. Reyka was informed by his supervisor, Ms. Mayer, that he was not to use the State computer system for personal business. That directive should have been unnecessary. There is a generalized prohibition in society against use of an employer's equipment, supplies or facilities for personal business. When employees do so against that prohibition it is known as theft. It is unnecessary for an employer to issue a policy against such activity. The moral compass of people should serve to guide them not to do so. When on June 12, 1990 he once again used the State's computer facilities he was obviously guilty of insubordination. That the State chose not to charge him with theft and subject him to the well-accepted penalty associated with that charge, discharge, is its own concern.

The Grievant was also guilty of inappropriate use of state equipment. To use State facilities, its computer equipment, to conduct the business of the Humanist Society and a Laptop Computer society is beyond doubt inappropriate use of State equipment. The State's equipment is to be used for State business, not the private business of its employees. In this regard the use of the computer system as done by Mr. Reyka is analogous to personal use of such equipment as an office copier, use of the State's paper for personal business or the making of personal long distance telephone calls using a state supplied telephone. Once again, were an employee to do so, a charge of theft which warrants discharge would be sustained without question by the arbitration community of the nation. There can be no doubt whatsoever that use of the State's computer facilities for Mr. Reyka's personal business, the Humanist Society and the Laptop Computer society constitutes inappropriate use of State equipment.

No serious doubt exists but that some of the personal work done on the State's computer system was done by the Grievant on State time. To term that sort of behavior neglect of duty is putting it mildly. Mr. Reyka is guilty as charged of neglect of duty.

Accepting that sending the stick figure cows to Ms. Mayer represented a welcome to the Department and not personal business does not serve to diminish the serious nature of Mr. Reyka's activities. The State had ample grounds to administer discipline to him. Section 24.05 of the Agreement permits the State to administer discipline "commensurate with the offense." Mr. Reyka committed a very serious offense when he used the State computer system for his personal business. In another setting it is unlikely he would have received a suspension. Discharge is the normal and well accepted penalty for the activities in which he engaged.

Award: The grievance is denied.

Signed and dated this 15th day of March, 1991 at South Russell, OH.

Harry Graham
Arbitrator