

ARBITRATION DECISION NO.:

363

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Workers' Compensation

DATE OF ARBITRATION:

June 17, 1991

DATE OF DECISION:

July 16, 1991

GRIEVANT:

Virgil Johnson

OCB GRIEVANCE NO.:

34-04-(90-07-25)-0105-01-09

ARBITRATOR:

John E. Drotning

FOR THE UNION:

Ron Stevenson

Robert Steele

FOR THE EMPLOYER:

Valerie Butler

Michael Duco

KEY WORDS:

Suspension

Neglect of Duty

Insubordination

Mitigating Circumstances

ARTICLES:

Article 24 - Discipline

 §24.04-Pre-Discipline

 §24.06-Prior

Disciplinary Actions

Article 43 - Duration

FACTS

The grievant, a Clerk 2 with the Bureau of Worker's Compensation, was given a fifteen day suspension by his employer for neglect of duty and insubordination. The grievant was responsible for marking codes on warrants which are returned to the BWC and logging them in and passing the warrants on to data support so that a record could be created and keyed into the computer. The employer claimed that the grievant failed to

meet the one day turn around standard set by the employer and, as a result, should be disciplined for neglect of duty. Additionally, the employer stated that the grievant was insubordinate for refusing to open the mail following a direct order by his supervisor to do so. The employer contended that upon his supervisor's request to do the work, the grievant responded, "If you want it opened, open it yourself."

EMPLOYER'S ARGUMENT

The employer stated that there was just cause for the 15 day suspension. The grievant had received several prior verbal reprimands for unsatisfactory work performance. The employer charged that the grievant had a pattern of failing to follow directions. Management denied that the grievant had received inadequate notice of the pre-disciplinary hearing or that the neglect of duty charges were added to escalate the penalty for the insubordination charge.

UNION'S ARGUMENT

The union argued that the grievant did not refuse to open the mail as directed by his supervisor but actually completed the task following the supervisor's request. The union also offered the testimony of another employee of BWC who stated that the one day turn around time for processing warrants was not possible. The union further argued that the grievant did not receive timely notice of the pre-disciplinary hearing. The grievant claimed that, although he knew of the hearing date, he did not personally receive written notice. For these reasons, the union asserted that the grievants fifteen day suspension was excessive and not issued for just cause.

ARBITRATOR'S DECISION

The arbitrator concluded that the grievant was given adequate notice of his pre-disciplinary hearing. The arbitrator found that the grievant received the notice of the pre-disciplinary meeting at least by June 8th and since the meeting was not held until June 20th, he had 12 days to prepare his case. The arbitrator also found evidence to indicate that it was not always possible to finish all warrants in one day. Even the grievant's supervisor said that she did not always issue discipline to employees who failed to meet her rules on warrant production. Thus, concluded the arbitrator, even if the grievant failed to meet the warrant schedule, there is no strong argument to issue him a fifteen day suspension.

The arbitrator found the insubordination charge involving the grievant's comment to his supervisor to be the more serious charge. The arbitrator stated that grievant's response to his supervisor was inappropriate and rude, even though he eventually opened the mail. The arbitrator concluded that these actions warranted discipline. However, the arbitrator did recognize that there were strained relations between the grievant and his supervisor which should be considered as a mitigating circumstance.

AWARD

The grievant's fifteen day suspension was reduced to a five day suspension.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

**OFFICE OF-COLLECTIVE BARGAINING
STATE OF OHIO**

AND

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION LOCAL 11, AFSCME**

ARBITRATION AWARD

HEARING DATE:

June 17, 1991

GRIEVANCE:

34-04-900725-0105-01-09

Virgil Johnson

ARBITRATOR:

John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on June 17, 1991 at the OCSEA offices, Watermark Drive, Columbus, Ohio. Appearing for the Union were: Ron Stevenson, Robert Steele, Carole Bell, Regina Saunders, Mark Tinscher, and the grievant, Virgil Johnson. Appearing for the Employer were: Valerie Butler, Michael Duco, Beverly Rogan, and Nancy Seman.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on June 17, 1991. The discussion and award are based solely on the record described above.

II. ISSUE

The parties asked:

"Was the grievant disciplined for just cause, if not, what shall the remedy be?"

III. STIPULATIONS

The parties joint submitted the exhibits marked Joint Exhibits #1 through #5(A-D).

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. MANAGEMENT

1. TESTIMONY AND EVIDENCE

Ms. Nancy Seman, Labor Relations Manager, testified that she hears grievances and that she knows Virgil Johnson. Seman testified that a disciplined employee receives a notice of discipline and the employee then has the option of attending a pre-disciplinary meeting (see Joint Exhibit #3).

Grievant Johnson's pre-disciplinary meeting was set for June 20th, Seman said, and the Employer grants extensions but the Union did not request a postponement. She indicated the Union and the grievant attended the pre-disciplinary meeting on June 20th.

Seman said that Management Exhibit #1 is part of the Employee's Handbook and grievant Johnson was charged with neglect of duty because of minor work production and insubordination. Seman went on to say the Union always receives copies of rules (see Article 43) and Management and the Union discusses the rules et al. before Management implements discipline.

Seman went on to testify that past disciplines are available to her. She also said that counseling is not part of one's disciplinary record. However, Seman testified that Management Exhibit #2 constituted verbal

discipline even though it is a record of a counseling interview.

Seman pointed out that Joint Exhibit #5C shows that the grievant's actual suspension date was changed. Seman went on to say that Management Exhibits #2, #3, and #4 are verbal discussions and are so noted in the employee's file. Informal counseling, said Seman, is noted in Management notes. She went on to say that informal counseling is not noted in the employee's personnel file. She said that Management Exhibits #2, #3, and #4, however, go into the employee's personnel file.

As of 1991, said Seman, documents like Management Exhibits #2, #3, and #4 no longer are used to document a personnel file.

On redirect, Seman said that there was a form used to document a written reprimand.

Beverly Rogan, Supervisor in the Return Warrant Section which is part of the Accounting Department, testified that she supervised four employees since 1984 and Virgil Johnson was one of those employees. She went on to say that Johnson was a Clerk 2 and Joint Exhibit #4 is his position description.

Rogan said that a returned warrant goes to the Bureau because the employee is deceased or there is an incorrect address. Rogan went on to say that a returned warrant goes from the Clerk 2 to the PC operator and it involves a three stage process from clerk to PC operators back to clerk who distributes the warrants.

Rogan said that when Johnson gets a canceled warrant, he comments on the return warrant and stamps the canceled document and it goes to the PC operator. The word processor creates three kinds of documents and after the PC operator completes his/her task, it goes back to Johnson and he distributes the documents. She stated that each stage of the process is carried out by a different employee.

Management Exhibit #5, said Rogan, is a daily log she keeps and it shows the warrants. She said she receives the information from employees and gets that data on a daily basis. Rogan went on to note that one prepares data entry, followed by final disbursing.

On 5/11/90, Johnson prepared warrants on the previous day, noted Rogan. She said that Johnson could process 100 to 120 warrants in a day and his cut-off time was 3:00 p.m..

Rogan testified that she sets performance goals for her employees. She said Johnson did not achieve a one day turn-around for warrant processing. No other employees have difficulty meeting the one day turn-around, said Rogan. As a result of Johnson's slow work, Rogan recommended discipline because of Johnson's neglect of duty.

Rogan also testified that at one point she asked Johnson to open some mail and he refused saying to her, "If you want it opened, open it herself".

Management Exhibit #6, said Rogan, is Johnson's annual evaluation which she discussed with him. Management Exhibit #7 is Johnson's 1989 evaluation where he met some standards but not others, said Rogan.

Rogan said she has counseled Johnson.

On redirect, Rogan said that no employees that she has ever counseled had a disciplinary record like the grievant's.

Management also cross examined Union witnesses. Carole Bell testified on cross that when she was a clerk, the word processors were in Building #2. She said that she did new business applications in her new job and in her old clerk job, she did warrants between 8:00 and 10:30 and she would get them back on the following day. Bell testified she thought she could do the total work in a day and one-half.

Neither Regina A. Saunders nor Mark Tinscher was cross examined.

Virgil E. Johnson, on cross, testified he was a Union steward between 1986 and 1989. He said there were arguments in 1990 raised against him and he was given a five day suspension which was upheld.

2. ARGUMENT

Management points out that the Union raised numerous procedural objections and it went on to say that the grievant received due process as outlined in Article 24.04 of the Contract (Joint Exhibit #1). The Employer claims that the Grievant said that he did not receive a meeting notice until 3 or 4 days before the hearing date, yet Johnson attended the meeting on June 20th and presented his case.

The Employer also states that the neglect of duty charges were not added to Johnson's situation; rather,

they were included and he was properly disciplined for his work performance. Moreover, Johnson has been counseled in the past, argued the Employer.

The Employer also states that the Union and the grievant argue that the hearing officer involved was biased, but that allegation was not established. The Employer points out that the pre-disciplinary officer takes into account the facts of the grievance regardless of his or her personal feelings. Moreover, a prior arbitration award upheld a suspension and discounted the same claim which was involved in the former five day suspension.

The Employer also claims that the Union asserts that the neglect of duty charges were added after the insubordination clause. However, the Employer points out that the grievant received the pre-disciplinary notice and he was put on notice that he was being disciplined for both insubordination and neglect of duty. Moreover, Ms. Rogan based her decision to recommend discipline on the log sheets which are kept for all employees in a unit. The Union never asked for a copy of the logs and if it had, they would have been given to the Union in its task of representing the grievant.

Management goes on to say that grievant Johnson was responsible for marking codes on warrants which are returned to the Bureau of Workers Compensation and he should log them in and pass those warrants on to data support so that a record could be created and keyed into the computer. Management asserts that the grievant's prior disciplinary record reflects the fact that Johnson did not perform his assigned duty at a satisfactory level and, in fact, he did not even follow directives.

For all these reasons, the Employer asks that Johnson's discipline be upheld.

B. UNION

1. TESTIMONY AND EVIDENCE

Ms. Carole Bell, a cashier at Workers' Compensation and an Account Clerk 2, testified that she canceled returned warrants. She said she receives a check and the materials, she splits the check and the stub and writes up reasons, etc. for the returned warrants.

Bell said that Rogan was her boss and she testified that when she was handling warrants, she would finish her work by 10:30 a.m. and then it would go to the word processor and she would get it back the next day.

Bell said she was promoted to Account Clerk 2 and she said that Michelle Maynard took her old job and the latter could not do the work in one day.

Bell said that Beverly Rogan had conflicts with other employees and that Rogan was power oriented and at times treated employees as children.

Regina A. Saunders testified that she had worked for the Ohio Bureau of Workers' Compensation for three and one-half years in the return warrant section and in that capacity she answered the phone and commented in writing on canceled warrants.

Saunders said that warrants could not be done in a one day turn-around time.

Saunders also said that she knows Beverly Rogan and she did not get along with her well although she did not know why.

Mr. Mark Tinscher, a Union steward, testified he was assigned to the pre-disciplinary hearing at the third step. He said he did not raise any pre-disciplinary objections and he was the steward of record at the Hearing.

Tinscher said he questions the evidence against Johnson and he questioned the two charges. He said the insubordination charge took 15 minutes and the neglect of duty charge took about 45 minutes. Tinscher said that Management asked for 15 day suspension for Johnson and he argued that 15 days was an unreasonable sentence.

Tinscher also claimed that a neglect of duty charge involved a written recommendation while the insubordination charge was not proved by the offense.

Tinscher testified that he did not think that the neglect of duty charge justified a 15 day suspension and Johnson should receive lesser discipline, if any.

Tinscher went on to say that he cited objections at the pre-disciplinary hearing and he noted Articles

24.04 and 24.06 of the Contract. Moreover, Tinscher said he objected to the specific hearing officer who was at the pre-disciplinary hearing because he felt that the hearing officer was not acting in an objective manner.

Tinscher also said the notice of discipline was not properly given to the Union and that additional charges were added at the pre-disciplinary hearing.

Virgil E. Johnson testified that he was a Clerk 2 and he said he never received the pre-disciplinary notice, although he was called by a Robert Blackwell and he eventually received the notice. However, Johnson said he did not recall when he got the notice although it might have been three or four days before the pre-disciplinary hearing.

Johnson said he was state-wide Assistant President for the Bureau of Workers' Compensation and was also a chapter vice-president and Chairman of the Stewards Committee between 1986 and 1988.

Johnson did not respond to the question as to when the neglect of duty charge was added. He did say that at the Hearing, more emphasis was put on the neglect of duty charge than was put on the insubordination charge which only lasted about 15 minutes whereas the neglect of duty charge interaction lasted about 45 minutes.

Johnson was asked whether he refused to open mail and he said he was doing warrants and he said Regina Saunders was coming in and he told Ms. Rogan he would not mind if she did the mail. He was asked whether he eventually opened the mail and he said he did.

Johnson noted some conflict between himself and Rogan which continued over some time. He said at times he was away from his job because he was on Union business and as a result, he was harassed by Rogan. Moreover, Johnson said that when he was on the negotiating team, he was continually harassed by Rogan.

Johnson testified that he requested that Hearing Officer Bavery remove herself from his case because of an incident involving a prior hearing. He said that Bavery had made disparaging remarks toward him such as why didn't the Bureau fire him. He said she got so upset that she (Bavery) actually left the room.

Johnson said that Bev Rogan did not personally hand him the notice. He said that at the Hearing, it was claimed that the notice was in his return basket but that does not make any sense, said Johnson, because others pick up the material from the basket.

Johnson said he never saw Management Exhibit #5 and that document had not been given to him.

Johnson said that he fills out production sheets and he must log in warrants which go to the word processor. He was asked whether Rogan ordered him to open the mail and he said "Not really".

The Union cross examined Management witnesses. Ms. Seman on cross said that Management Exhibits #2, #3, and #4 are verbal reprimands and that the Agency is training managers to issue verbal reprimands in a different form since January of 1991.

Seman said she was not aware whether employees knew that Management Exhibits #2, #3, and #4 were reprimands.

On recross, Seman said that Joint Exhibit #5A is a written reprimand.

Seman said that Management does not send pre-disciplinary notices through the mail but rather the supervisor hand carries such notices to the employee.

Beverly Rogan on cross testified that Management Exhibit #5 is from the accounting and she made it up and talks about canceled warrants. She said that the PC and the word processing employees are involved in Management Exhibit #5.

Rogan said that she arrived at a one day turn-around time for output by comparing Johnson's output with other prior output. Rogan went on to say that other employees had been counseled for not meeting one day turn-around but none were suspended.

Rogan said that the normal influx of warrants is 100 to 120 per day and she said she wrote up Joint Exhibit #3 which is disciplinary action noted on pages 1 and 2. Rogan asked why there was no neglect of duty charge and she did not respond. She said the neglect of duty charge was added on June 25, 1990 at the pre-disciplinary hearing. She said she did not know who added the charge.

Rogan said that after the confrontation between herself and Johnson, he did open the mail. She said she gave him a direct order to open mail and she said that she has had no other problems with other employees.

Rogan said that she herself has not been disciplined.

Rogan testified that she personally gave Johnson his pre-disciplinary notification but she could not remember when or how she gave it to him.

2. ARGUMENT

The Union testified that Rogan offered conflicting testimony because Johnson completed his task at Rogan's request.

The Union asserts that Virgil Johnson worked at his task 80% to 100% of the time.

The Union claims that Rogan indicated or said that she placed Johnson's notice of discipline in the return warrant basket.

In addition, the Union argues that Management did not persuade the Union that a one day turn-around time was possible.

For these reasons, the Union in its closing argument asks that the 15 day suspension be expunged.

V. DISCUSSION AND AWARD

Is Johnson's fifteen (15) day suspension justified?

Joint Exhibit #3, the Employer's request for disciplinary action dated 5/25/90, deals only with insubordination (see Work Rule #2, Management Exhibit #1). However, Management Exhibit #1 is a request for disciplinary action because of Johnson's uncooperative attitude in processing warrants and his "rude" comment toward supervisor Rogan (see Management Exhibit #1 - neglect of duty and insubordination charges under the Policy and Procedure Memo). In addition, the Union also argued that the Bureau did not properly notify the grievant of the pre-disciplinary meeting. Let me consider the latter issue first.

Joint Exhibit #3 contains a letter which requests disciplinary action dated May 25, 1990. In addition, Thomas J. Winters, Human Resources Director at the Ohio Bureau of Workers' Compensation, wrote Virgil Johnson asking the grievant if he wanted a pre-disciplinary meeting. Johnson elected to attend the meeting (see Joint Exhibit #3). The testimony appears to indicate that Johnson received the notice about the pre-disciplinary meeting at least by June 8th and since the meeting was not to be held until June 20th, he had 12 days to prepare his case.

Mark Tinscher who testified on behalf of the Union questioned the charges against Johnson, but Tinscher did not claim that Johnson's notice of discipline was too late. Even the letter of June 8th indicates that no continuances will be granted unless there was an emergency, etc. and there is no testimony or evidence requesting a continuance. Thus, the above correspondence indicates that all parties to the action appeared at the June 20th Hearing.

Now it is necessary to consider the neglect of duty and insubordination charges.

The Union's claim that the charges were "stacked" against Grievant Johnson is not supported by the document dated May 31, 1990 which indicates that the Employer is charging Johnson with insubordination 6.02(2)(a) and refusal to carry out assignments involving minor work productions as 6.02(1)(b) (See Joint Exhibit #3).

This latter charge was based on Johnson's inability to complete a one day turn-around on warrants. However, witness testimony supports a finding that it is not always possible to finish all warrants in one day. Even Supervisor Rogan said that she did not always issue discipline to employees who failed to meet her rules on warrant production. Thus, even if Johnson failed to meet Rogan's 100 to 130 warrant schedule, there is no strong argument to issue him a fifteen (15) day suspension.

The insubordination charge which is more serious focuses on Johnson's comment to Rogan when she asked him to open some mail and he said, "If you want it opened, open it yourself". Johnson's response to his supervisor was inappropriate and rude even though he eventually opened the mail.

The testimony also indicates that Johnson and Rogan had strained interpersonal interactions and there is some claim by Bell and Saunders that it was difficult at times to get along with Supervisor Rogan. Their testimony supports the difficult interactions between Rogan and Johnson.

Thus, Johnson's surly comments to Supervisor Rogan is cause for discipline. If Johnson's record showed no discipline, a written warning would suffice. But Johnson's past disciplinary record includes a three (3) day

suspension in November 1988, a five (5) day suspension in September 1989, and a ten (10) day suspension (reduced to three days) in December 1989. Thus, his rude behavior toward his supervisor supports the Employer's decision to suspend Johnson.

However, the two charges do not support a fifteen (15) day suspension. The minor work production only justifies a written warning, if that. The rude behavior toward his supervisor does not support a fifteen day suspension. However, given his record, a five (5) day suspension is justified.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
July 16, 1991