

**ARBITRATION DECISION NO.:**

380

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

State Medical Board

**DATE OF ARBITRATION:**

August 27, 1991

**DATE OF DECISION:**

September 27, 1991

**GRIEVANT:**

Robert Howard

**OCB GRIEVANCE NO.:**

42-07-(91-03-22)-0001-01-07

**ARBITRATOR:**

John E. Drotning

**FOR THE UNION:**

John Gersper

**FOR THE EMPLOYER:**

Lou Kitchen

**KEY WORDS:**

Removal

Abuse of Telephone Card

Disclosure of Confidential

Information, Not Confidential

Documents

**ARTICLES:**

Article 24 - Discipline

Article 25 - Grievance

Procedure

**FACTS:**

The grievant had been employed as an Investigator for the State Medical Board since July 1987. In the fall of 1990, the grievant used his employer telephone card to make eight personal telephone calls. He offered to pay the employer for the calls after he was confronted by management about the calls. The grievant received a written reprimand in Oct. 1990 for disclosing confidential information. The grievant gave an inter-office memo concerning the confidential information disclosed to a union representative in the course of defending himself in the matter of the written reprimand. The memo contained the confidential information. The grievant was removed for abuse of his telephone card and disclosure of confidential

information.

**EMPLOYER'S POSITION:**

There was just cause for the grievant's removal. The grievant admitted using the employer's telephone card to make personal calls and giving a union representative an inter-office memo containing confidential information. He had been instructed on the proper use of his telephone card. He had received instruction that confidential information must not be disclosed and had received a written reprimand for disclosure. The grievant's excuse for using the telephone card (WBNS radio caused interference on his phone) and that he planned to repay the employer are not sufficient to reduce the penalty. The grievant knew what information was confidential, regardless of what type of document the information was contained in.

**UNION'S POSITION:**

The grievant did use the employer's telephone card to make personal calls and did give an inter-office memo containing confidential information to a union representative. However, mitigating circumstances exist which warrant a finding of no just cause for the discipline imposed. The employer's instruction on proper use of telephone credit cards and what constituted a confidential document was inconsistent. Thus, the grievant did not know that he was misusing the telephone credit card and that the inter-office communication was confidential. The grievant had intended to repay the employer for the personal calls made on the employer's card. The discipline imposed was neither corrective nor progressive. The grievant had two written reprimands in his file and he received the maximum penalty for minor violations.

**ARBITRATOR'S OPINION:**

The grievant cannot reasonably argue that he had no knowledge of the proper use of the employer's telephone credit card. Common sense leads to the conclusion that an employee does not make personal calls on an employer's card. His excuse that he used the card because WBNS radio caused interference was not credible. He had other means to remedy the problem without charging personal calls on the employer's credit card. However, his offer to pay for the calls may be given the benefit of the doubt although he only made the offer after being questioned about the calls. Additionally, the employer had concerns over other investigators using their cards for personal calls yet no other employee had received discipline. Therefore, there is no just cause for removal based on misuse of the employer's telephone credit card.

The grievant's explanation that he did not know the inter-office memo was confidential is credible. He had received a written reprimand for disclosing confidential information. While defending him, a union representative requested an inter-office memo concerning the disclosure. The memo contained confidential information, but was not a typical confidential document generated in an investigation. The employer's instruction regarding confidential information was inconsistent and not extensive as to confidential documents. Therefore, the employer failed to show that the grievant blatantly disregarded the employer's work rules. The employer did prove that there was just cause for discipline, but not for the grievant's removal.

**AWARD:**

The grievant was reinstated without back pay. Seniority and other benefits began upon his reinstatement.

**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:**

August 27, 1991

**GRIEVANCE:**

42-07-910322-0001-01-07

**ARBITRATOR:**

John E. Drotning

**I. HEARING**

The undersigned Arbitrator conducted a Hearing on August 27, 1991 at the OCSEA offices, Watermark Drive, Columbus, Ohio. Appearing for the Union were: John Gersper (OCSEA staff), Dane Braddy, Larry Dannals, and the grievant, Robert Howard. Appearing for the Employer were: Lou Kitchen, Paul Kirschner, John Rohal, Lauren Lubow, Mark Barr, and Jay Hunter.

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 August 27, 1991. The discussion and Award are based solely on record described above.

**II. ISSUE**

The parties jointly agreed on the issue which is:

“Was the Grievant (see Joint Exhibit #12), Robert L. Howard, removed for just cause? If not, what shall the remedy be?”

**III. STIPULATIONS**

The parties jointly submitted the exhibits marked Joint Exhibits #1 through #14.

The parties also stipulated the following:

1. Robert L. Howard was hired as an investigator for the State Medical Board of Ohio in July of 1987.
2. Mr. Howard was removed from his position effective 5:00 p.m. on March 19, 1991.
3. Mr. Howard used his state-issued telephone credit card to make eight personal long-distance calls.
4. Mr. Howard gave alleged Investigative materials to a union steward, Ms. Vickie Gray.

Signed by: Paul Kirschner for the State  
Dane Braddy for the Union

**IV. TESTIMONY, EVIDENCE, AND ARGUMENT****A. MANAGEMENT**

## 1. TESTIMONY AND EVIDENCE

Mr. Mark Barr, Administrative Assistant of the Program for the State Medical Board, testified that he oversees the fiscal office and the program office and he does bills and he indicated that he was an accountant.

Joint Exhibit #5 is a bill for December and that was turned in in December. Barr said that in his view the bill was excessive or "high". He went on to say that he compared that bill (Joint Exhibit #5) with Management Exhibits #1-#6 which shows all the bills are much less than the \$4700 bill noted on Joint Exhibit #5. He said he told John Rohal about the \$4700 bill which he felt was too high.

Mr. John Rohal, Assistant Director of the State Medical Board, testified he oversees investigations. He said there are eighteen investigators and half are upstate and half downstate and they are usually split by 1-70. He went on to say there is one supervisor for the upstate investigators and one for the downstate investigators.

Rohal said that Jay Hunter was Howard's supervisor. He noted that investigators work out of their homes and he assigns investigative material to them and he did so with Howard. Rohal said that investigators are not closely supervised.

Joint Exhibit #7, said Rohal, indicate telephone calls made by Howard and he noted that the calls to Cincinnati were made at odd hours so he gave the telephone call bills to Jay Hunter. He went on to say Howard told him that he (Howard) called his brother from his house.

Rohal went on to say that Hunter gave him materials on the calls. He said he issues credit cards to investigators and he tells them how to use it for State purposes. He went on to say that the State does not authorize personal calls. He was asked whether the employee could reimburse the State and he said No.

Rohal said that there is a training program for employees and the issue of confidentiality is noted in the Employer's Manual. He said that he discusses with investigators what they can and cannot release to others. He noted that a name of a patient and the name of a physician are kept confidential. Rohal noted that the grievant had been issued a written reprimand on October 18, 1990 (see Joint Exhibit #4).

Rohal said that Howard gave a copy of a memo to a Union representative, who did not work for the State Medical Board, and Howard did not white out the names which were confidential information.

On redirect, Rohal said that Howard volunteered to pay for the phone bills after the investigation. He said Howard did not offer to pay the bills before 1/1/91.

Mr. Jay Hunter, an Enforcement Supervisor, said he investigates as well as supervises other investigators. Hunter said that he asked Howard about the bills noted on Joint Exhibit #7 or Union Exhibit #1 and Howard told him the calls were made to his brother in Cincinnati. Hunter noted that Howard said that he would pay for the phone calls.

Hunter said that he first saw Joint Exhibit #12, a document to John Rohal from Jeffrey Compton, when he received it at an appeals hearing from Vickie Gray, a Union representative. He said he took the confidential information out of the document which had been given to him by Gray, although he said she had a copy with the confidential information. Joint Exhibit #11, said Hunter, is his letter to Vickie Gray which he wanted specific information returned and she did so.

Hunter went on to say that new hires work with other investigators. He said the State Medical Board does not mark "Confidential" on the documents since all the documents are confidential. Hunter indicated that an employee would know about confidentiality requirements after three years of work.

Hunter testified that he personally participated in Howard's training and he said he trained him on the issue of confidentiality.

Lauren Lubow, a Case Control Officer at the Medical Board, testified that she dealt with lots of issues, especially disciplinary actions. She said she had access to investigative material and she was aware of the State statutes.

Management also cross examined Union witnesses. Larry Dannals testified on cross that he was not aware of Joint Exhibits #13 and #14.

Robert Howard testified on cross that he gets a copy of the hearing officer's report.

Howard acknowledged that Union Exhibit #2 contained a copy of a past disciplinary hearing notice. He

said he never received investigative materials in the mail but rather he got them in the office.

Howard testified he was aware of Joint Exhibit #7 which involved telephone calls between 10/09 and 11/13. Joint Exhibit #10 is a document in which Howard said he offered to pay for phone calls which were to his brother.

He was asked why he charged the State for the phone calls and he said he had trouble with his line and he noted his phone is close to the WBNS radio station and apparently he had trouble with long distance phone calls.

He said he was to pay for the phone calls and he said he would pay and would have paid when he got notice of the calls in January and he noted that the calls were in October.

He was asked why he did not bring the phone calls to Management's attention and he said it was because he did not remember until it was brought to his attention.

## 2. ARGUMENT

Management asserts it has proved that Howard converted State property, his telephone card, for use in inappropriate fashion and therefore, he violated the use of State property. The State alleges that Howard charged telephone calls to his credit card and he also gave a Union representative confidential information and he knew that he should not do that. Therefore, the removal should be upheld.

The Employer asserts that the State Medical Board investigates complaints against licensed health care providers and absolute confidentiality is required of investigators who work on investigating the complaints.

Howard was terminated on March 13, 1991. The Employer also claims that Howard was issued a written reprimand for giving confidential information to unauthorized persons on or about October 18, 1990.

The Employer asserts that sometime between the 7th of January and the 10th of January of 1991, the Grievant gave a Union representative a copy of a memorandum dated 1/7/91 and that memorandum was from John Compton to John Rohal.

The Employer points out that the document contained Board investigatory information including the name and address of a licensee under investigation and the address of a potential witness and that information should be confidential.

The State argues that the Union steward who is not an employee of the State Medical Board was not authorized to receive that information.

The State also argues that the grievant converted a State issued telephone credit card for his own personal use and made eight long distant calls from his home to Cincinnati. The State argues that the employee cannot legitimately use the Employer's property for one's own personal benefit and therefore, the grievance should be upheld.

## B. UNION

### 1. TESTIMONY AND EVIDENCE

Mr. Larry Dannals testified he had been an investigator with the State Medical Board in July of 1987 and he met Howard at that time. He said he was trained by the State Medical Board and introduced to people in the community. He said he went out with another investigator for a one week period in order to learn the trade. He said he was given an ID card, a badge, and a phone card.

Dannals said he was not given any instructions about the use of telephone card, although he did say that he had some on-the-job training with Hunter.

Robert L. Howard testified that he was not now employed but he was an investigator from July of 1987 to March 15, 1991. Union Exhibit #2 does say "Personal and Confidential" and he got that document on March 8, 1991 and it contained a letter from the Ohio State Medical Board. He said he was disciplined two times and he grieved both written reprimands.

Howard said that Vickie Gray represented him in the second written reprimand. Howard said Vickie Gray requested Joint Exhibit #12 and he gave it to her. Howard said he has never been trained as to what constitutes a confidential document.

He said that Jay Hunter gave him his telephone card and he said he always follows his supervisor's advice and direction.

Howard said he had not received written work rules from the State of Ohio.

The Union cross examined Management witnesses. Mr. Mark Barr on cross testified that he separated the office staff from investigators. He said he also checked phone calls which concerned him.

Mr. Rohal on cross testified that Howard did not make any out-of-state calls and he noted Union Exhibit #1. He said that investigators make calls from their house and he issues the investigators a credit card.

Rohal said that he tries to conduct annual training, but he did say that prior to 1990, there was no training manual.

Rohal said that Union Exhibit #1 was not the basis for Howard's discipline. He reiterated that all employees were asked to verify calls as far as he knew.

The total cost of Mr. Howard's calls was \$69.30, said Rohal.

Rohal said that Howard paid the Agency for the calls.

Rohal also said that the Agency has eighteen investigators and each has to have some law enforcement experience or an academic degree. He went on to say that Howard was the only black male investigator who was not a former police officer.

Mr. Jay Hunter on cross testified that he may have made some comments on other bills but he did not know. He said a confidential document is usually a complaint against a doctor.

Hunter said that new hires go through a normal training program. He said he did not tell Howard to type his reports and he did not know who might have directed that statement.

Ms. Lubow on cross testified that she thought she might have conducted a training class for newly hired investigators. She said she did not know whether she trained Howard.

## 2. ARGUMENT

The Union asserts that Howard was charged with misuse of a credit card, but the State has failed to meet its burden. In addition, the Union claims the document identified as Joint Exhibit #12 was not a confidential document.

The Union asserts that Hunter's testimony lacked credibility. He supposedly trained Howard but that is not necessarily the case.

Moreover, Howard agreed to pay for the telephone calls. Moreover, Barr and Rohal also testified that there might have been late night calls by other employees. The Union noted that a Pat McMahon was not charged.

Moreover, the Grievant was not insubordinate. The charges against him were minor, yet he was given the maximum punishment; namely, fired. Thus, the penalty is far too harsh and not commensurate with the problem and therefore, the Union asks that the grievant be reinstated with full pay pay.

The Union in its opening statement noted that Howard had only had two reprimands since July of 1987 and the second reprimand resulted in his termination.

The Union said that the letter of termination does not cite the reasons for the discipline. Moreover, the Step 3 meeting failed to give grounds or reasons for the harsh discipline.

Article 24 of the Contract states that disciplinary action shall not be imposed except for just cause and the Union defines "just cause" in a number of ways in its opening statement. In short, the Union asserts that Howard was not guilty of actions amounting to just cause for termination and he was not adequately warned of the consequences of his conduct.

The Union points out that Howard did not receive adequate warning of his telephone calls.

Moreover, as alleged by the Employer, Howard filed a grievance on his second written reprimand and in attempting to explain the situation to his steward, she asked for and he gave her a copy of the document. In any event, the training that Howard received did not help him identify what was a confidential document.

Thus, the penalty is too harsh and the Union reiterates that Howard be returned to work with full back pay and benefits.

## V. DISCUSSION AND AWARD

The issue is whether Howard's termination is justified on the grounds that he used a State issued telephone credit card to make eight personal long distant calls and that he gave confidential investigative materials to Union steward, Vickie Gray.

It is fair to conclude that Howard or any employee provided with a telephone card to use when making calls on behalf of the Employer, should not use the State issued telephone credit card for personal calls. There is no question of proper training or that such a policy is explicitly stated in an employee manual. Rather, the proper use of the telephone card involves just plain common sense which obviously can be understood by all employees issued telephone credit cards. There is no need for an employer to train employees or to make clear that the cards are to be used for business purposes only. This is particularly true when the employer is a public entity such as in this case where Howard was an investigator for the State Medical Board of Ohio.

Howard testified he made these calls to his brother regarding a car accident. He said he used the credit card because of difficulties in making long distant calls from his house because it was near a radio station which interfered with his long distant calls to his brother. He further said that he did not remember to tell his Employer about the calls. The purpose of his calls to Cincinnati may be legitimate, but the difficulty with making long distant calls successfully without charging them a State credit card call is suspect. Certainly, an operator assisted call, obtaining a personal calling card, or just plain complaining to the phone company would solve the problem of not being able to direct dial personal calls from his house on his regular phone bill.

Although Howard testified that he was going to pay for the phone bills when he was presented with them in January, the Employer checked into them prior to Howard voluntarily paying for them. His intentions may have been to pay, but once the calls were checked out and questioned by Hunter and Rohal, the offer to pay for them was inadequate. Howard did, however, reimburse the State for the calls in question.

Furthermore, Joint Exhibit #9, a January 3, 1991 memo to all investigators, indicates that "a number of out-of-state telephone calls are being made by our investigators which have caused reason for concern." Apparently, there were more problems than the eight personal calls made by Howard and it is not clear if other such "crimes", if you will, resulted in discipline.

Thus, giving the benefit of the doubt to Howard's intention to pay for the phone calls and the unknown Employer response to other investigators who may have had suspect phone calls, there is not just cause for terminating Howard because of his misuse of the State issued credit card.

The State, however, alleged that Howard's termination was also based on his disregard for the confidential nature of investigatory documents. Howard had received a written warning on October 18, 1990 for giving copies of a memo containing the name of a complainant to the City Prosecutor. Furthermore, on December 26, 1990 Howard received another written reprimand for two incidents; one for not delivering subpoenas correctly and the other for leaving an assignment at the Ohio Exposition Center.

Howard grieved the second written reprimand and on January 7, 1991, Enforcement Coordinator Compton wrote a memo to John Rohal about the incident leading to Howard's written reprimand and the memo contained confidential data regarding name and address of the person being investigated and a potential witness (see Joint Exhibit #12). When the Union steward, Ms. Gray asked Howard for a copy of this memo, he either had it or obtained it and gave it to her without whiting out those names.

While Joint Exhibit #12 contains confidential information, it is an interoffice memo and not derived as part of an investigation of a case. While Howard, after having receiving one written warning and having worked three years as an investigator, may perfectly well understand that materials, files, and documents pertaining to and obtained during the investigatory process are confidential, he was not so keenly alert to the confidentiality standards as to white out the names and addresses on Compton's memo before giving Union Steward Vickie Gray a copy. This action, however, cannot be construed as a blatant disregard for the confidentiality aspect of performing his task as an investigator.

Furthermore, the Union argument that the training of investigators does not include strict guidelines as to what is and is not "confidential" is somewhat persuasive. The Union witnesses' testimony concerning training indicates that it is not consistent for all newly hired nor particularly long or extensive. Thus, it is not clear that

Howard was trained sufficiently to have been aware and alert to whiting out names on an interoffice memo connected to his grievance (see Joint Exhibit #12).

Thus, the charge by the Employer that Howard disregard for confidentiality was a major flaw in his work performance is not supported.

The combination of Howard's misuse of the credit card by using it for personal calls and his mistake of passing on a memo containing confidential data is cause for discipline but termination is, as the Union argues, too harsh.

There are two factors to consider when answering the question: If there is no just cause for Howard's removal, what shall the remedy be? First, is that Howard had been issued a written reprimand for the confidentiality problem. Second, is that using the State's credit card for personal phone calls is serious and the "saving grace" for Howard rests rather shakily on one giving the benefit of doubt to his intentions to repay were the calls not investigated and on the lack of knowledge of what discipline was meted out to other investigators who the testimony and evidence suggest may have also misused the State's telephone credit cards.

Thus, the appropriate remedy is to reinstate Howard within two weeks of receipt of the Award to his position as investigator with no back pay. The time from his termination to his return to work will be considered a disciplinary suspension without pay. His seniority and other time related benefits will commence again upon his reinstatement from where they were when he was terminated.

John E. Drotning  
Arbitrator

September 27, 1991