

ARBITRATION DECISION NO:

525

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Workers' Compensation
Cleveland Service Center

DATE OF ARBITRATION:

November 10, 1993

DATE OF DECISION:

December 6, 1993

GRIEVANT:

Wasył Parfejewiec

OCB GRIEVANCE NO.:

34-22-(93-05-24)-0149-01-09

ARBITRATOR:

Nels Nelson

FOR THE UNION:

Steve Lieber

FOR THE EMPLOYER:

Thomas V. Gulla
Edith Bargar

KEY WORDS:

Removal
Progressive Discipline
Confidential Information
Misuse of State Funds/Property
Ethics Violation

ARTICLES:

Article 24 - Discipline
 § 24.01 - Standard
 § 24.02 - Progressive Discipline

FACTS:

The grievant, a BWC Claims Representative 3, was removed for violations of the Employee Handbook. Specifically, the grievant allegedly violated the code of ethics; he misused confidential information, misused state property, and intentionally misused state funds. The grievant admitted that he made 250 copies of a chain letter, placed the copies in BWC envelopes and ran them through the Bureau's postage meter.

EMPLOYER'S POSITION:

The Bureau removed the grievant for just cause. The grievant breached the Bureau's code of ethics and his duty of confidentiality by making a list of clients which he attempted to use for personal gain. In addition, the grievant acted contrary to the mission of the Bureau. That the grievant was unsuccessful is immaterial, because his intent was to collect money from Bureau clients. The Bureau did not consider the grievant's emotional state as a mitigating circumstance. Instead, the Bureau charged that the grievant violated the public trust and preyed upon citizens in dire straits.

The Bureau rebutted the Union's claim that the grievant was treated in a disparate manner. The Bureau emphasized the facts that the other Claims Representative used the postage meter for only one envelope and there were no BWC clients involved. Further, the incident to which the Union refers took place twelve years prior to the parties, first collective bargaining agreement.

UNION'S POSITION:

The grievant acknowledged that his actions were wrongful; however, the Union emphasized that the grievant's actions were not intentionally criminal. In addition, the grievant had no prior discipline and had been going through a stressful time both financially and emotionally. The grievant's removal was neither just nor progressive. The disciplinary grid revealed that the penalty for a first time offense could have been less than removal, and the Internal Security Commission's report recommended that the grievant only be demoted and suspended for 15 days. Further, the grievant offered to make restitution to the Bureau for the expenses he created.

Lastly, the grievant was treated disparately. Another Claims Representative who improperly used the Bureau's postage meter only received a five day suspension.

ARBITRATOR'S OPINION:

The grievant was admittedly guilty of very serious misconduct. The grievant intentionally used the Bureau's office facilities for private gain, used confidential client records for an improper purpose, and intentionally misuse of state funds. More importantly, the grievant did all of this while being paid to perform Bureau work. The argument by the Union that the grievant was subjected to disparate treatment was not well made. The Arbitrator accepted the State's distinction between this grievant and the other situation.

Further, the Arbitrator believed that the grievant's offer of restitution may have been motivated more by a desire to avoid criminal prosecution than by any real feelings of remorse. Finally, while the Arbitrator noted the grievant's long seniority and discipline-free work record, he held that the grievant's misconduct in the instant case was too severe to be overcome by these factors.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:**ARBITRATION DECISION**

December 6, 1993

In the Matter of:

State of Ohio, Bureau of Workers' Compensation

and

**Ohio Civil Service Employees Association,
AFSCME Local 11**

Case No. 34-22-930524-0149-01-09
Wasył Parfejewiec, Grievant

APPEARANCES

For the State:

Thomas V. Gulla, Labor Relations Officer
Edith Bargar, Second Chair, OCB
Dan Neubert, Service Office Director
C. Stanley Wilder, Labor Relations Officer

For the Union:

Steve Lieber, Staff Representative
Robert Means, Jr., Steward
Wasył Parfejewiec, Grievant
Joanne Philbin, Witness

Arbitrator:

Nels E. Nelson
BACKGROUND

The grievant, Wasył Parfejewiec, was hired by the Bureau of Workers' Compensation in December 1986 to work in the Cleveland Service Center. He began work as a clerk 1 and was promoted and reassigned on a number of occasions. At the time of his removal he was a claims representative 3 working under the supervision of John Filligen.

The events leading to the grievant's removal began in October 1992. At that time the grievant received a chain letter asking him to send \$1.00 to a list of five names, to remove the first name on the list, to add his name to the list, and to send 200 or more copies of the letter to others. The letter promised that within 60 days he would receive \$50,000.

Sometime in November 1992 the grievant decided to follow the instructions in the chain letter. He signed an affidavit indicating that he made 250 copies of the chain letter on his copier, generated address labels for 250 Bureau of Workers' Compensation clients, placed the letters in bureau envelopes with his return address label pasted over the bureau's address, and ran them through the bureau's postage meter.

On January 11, 1993 the bureau received information from a client that he or she had received a chain letter in one of its envelopes. The Internal Security Committee notified Dan Neubert, the director of the Cleveland Service Center, of the complaint and began its investigation. The grievant was interviewed by Internal Security and admitted to what he had done. Its final report dated March 15, 1993 stated that the possible criminal charges were theft in office, using public office for private gain, unauthorized use of state property, and misuse of confidential information. Internal Security recommended that criminal charges be held in abeyance until labor relations actions were determined.

On March 31, 1993 Neubert was notified of Internal Security's final report. An investigation interview was conducted on April 2, 1993 where the grievant's affidavit was reviewed and the grievant was given the opportunity to add information and/or to explain his actions. On April 6, 1993 Filligen wrote a memorandum to Jacqueline Williams, the director of human resources, requesting disciplinary action be taken which was

commensurate with the offense. It was signed off on by Neubert and several other bureau officials.

On April 28, 1993 a pre-disciplinary hearing was held. At that time a recommendation was made that the grievant be removed for violation of Employee Handbook Memo 1.06 (3E) - violation of BWC/IC Code of Ethics; (4B) - dishonesty - misuse of state property, public property or the property of another employee; (4C) dishonesty - intentional misuse of state funds; and (15B) - violation of the Ohio Revised Code 124.34 - misfeasance. The union stated that the grievant's actions were not intentionally criminal, that he had no prior discipline, and that he had been going through a stressful time both financially and emotionally.

On May 10, 1993 the grievant was notified by Wes Trimble, the chief executive officer of the bureau, that he was being removed effective May 12, 1993. The removal was based upon the violations of the Employee Handbook that had been alleged at the pre-disciplinary hearing. The union was informed of the grievant's removal at the same time.

On May 18, 1993 a grievance was filed by the grievant. The grievance charged that the bureau's action violated Sections 24.01, 24.02, and 24.05 of the collective bargaining agreement. It asked that the grievant be reinstated with back pay, benefits, and no loss of seniority. The grievance was denied at level III on July 20, 1993 and was subsequently appealed to arbitration by the union.

The arbitration hearing took place on November 10, 1993. At the conclusion of the hearing the record was closed.

ISSUE

The issue as agreed to by the parties is as follows:

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

RELEVANT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

* * *

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall include:

- A. One or more oral reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- D. Termination.

* * *

24.05 - Imposition of Discipline

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Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

POSITION OF THE STATE

The state argues that there is just cause to remove the grievant. It contends that he breached confidentiality by making a list of clients which he used for his personal gain. The state maintains that the grievant took advantage of clients who are at their lowest point financially and are apt to be reaching for straws. It stresses that the grievant's actions were contrary to the mission of the bureau which is to minimize the financial and emotional impact of a work related injury or illness.

The state charges that the grievant's conduct violated the code of ethics. It points out that Neubert testified that employees are given a copy of the code when they are hired. The state notes that the grievant signed an acknowledgment indicating that he received the code of ethics. It indicates that the grievant admitted that his conduct was wrong and that it violated the code. The state stresses that it is irrelevant that he may have received no money as a result of his conduct because his intent was to collect money from bureau clients.

The state rejects the union's claim that there were mitigating circumstances. It asserts that the grievant's state of mind relating to his divorce and the fact that he admitted to his conduct is not sufficient to overcome the seriousness of his offense. The state accuses the grievant of violating the public trust and preying on citizens in dire straits. It characterizes the chain letter sent by him as a cruel hoax.

The state disputes the union's claim that the grievant was subject to disparate treatment. It acknowledges that Joanne Philbin, a claims representative, improperly used the bureau's postage meter but maintains that it involved different circumstances than the instant case. The state indicates that the incident involving Philbin occurred approximately 12 years ago which was prior to the first collective bargaining agreement between the parties. It emphasizes that her offense consisted of mailing only one envelope and did not involve any bureau clients.

The state asks the Arbitrator to deny the grievance in its entirety.

POSITION OF THE UNION

The union argues that the grievant was removed without just cause. It charges that he was subject to disparate treatment. It states that Philbin, a claims representative like the grievant, was involved in a similar situation. The union indicates that she used the bureau's postage machine and an envelope to mail out material. It emphasizes that Philbin received only a five day suspension.

The union contends that the grievant's removal is not commensurate with his offense. It points out that the disciplinary grid reveals that the penalty for a first offense could have been less than removal. The union notes that the Internal Security Committee's final report states that Neubert wanted the grievant to be demoted and suspended for 15 days. It observes that the bureau enjoyed the grievant's efforts at work from March 4, 1993 when he admitted to his conduct until his removal on May 12, 1993 even though he could have been placed on administrative leave until the investigation was completed.

The union stresses that the grievant is a good employee. It indicates that Robert Means Jr., the union steward, testified that the grievant is an asset to his co-workers and the department. The union observes that the grievant has good evaluations and that Neubert acknowledged that he is a good worker. It emphasizes that the grievant has no other discipline in his file.

The union maintains that the grievant cooperated fully in the investigation. It points out that he admitted he sent a chain letter to 250 clients and that he used the bureau's postage meter. The union notes that the grievant testified that he did not receive even one reply from the chain letter. It reports that he offered to make restitution to the bureau for the expenses he was responsible for creating.

The union contends that there are mitigating circumstances which make the removal penalty too harsh. It indicates that the grievant stated that at the time of the incident he was getting a divorce and that his wife was pressuring him for money. The union notes that he stated that he attended an employee assistance program but was unable to continue when his insurance was terminated and he could not find another job.

The union asks the Arbitrator to sustain the grievance. It requests him to return the grievant to work with whatever back pay and benefits he sees fit.

ANALYSIS

The facts in the instant case are not in dispute. The grievant accessed client records to generate a mail list of 250 names, printed address labels, placed the labels on Bureau of Workers' Compensation envelopes, and used the bureau's postage meter to mail a chain letter asking the 250 clients to send him \$1.00. This conduct resulted in the grievant's removal for violating rules 3(e), 4(b), 4(c), and 15(b) of the Policy and Procedures Memo.

The facts establish that the violations with which the grievant is charged did in fact occur. Rule 3(e) requires employees to adhere to the code of ethics which among other things prohibits the use of state property for private purposes. Rule 4(b) bans the misuse of state property. Rule 4(c) forbids the intentional misuse of state funds. Rule 15(b) makes the violation of Section 124.34 a violation of Policy and Procedure Memo. The penalty for a breach of the first three rules is suspension to removal. The penalty for a violation of rule 15(b) is to be based upon the severity of the incident.

The Arbitrator believes that the grievant is guilty of very serious misconduct. First, the intent of the chain letter was to put money in the grievant's pocket at the expense of the bureau's clients who are likely to be under significant financial pressure due to an industrial injury or illness. Second, the grievant used confidential client records for an improper purpose. Although no sensitive information was revealed in this incident, any unauthorized access to the bureau's records is a serious matter. Third, the grievant's use of the bureau's resources cannot be dismissed as trivial. He used 250 envelopes and labels and ran the envelopes through the postage meter. Furthermore, it appears that the grievant did this while he was being paid to perform work. Based upon these considerations, it would appear that removal is appropriate.

The union charged, however, that the grievant was subject to disparate treatment. The Arbitrator must disagree. While it is true that Philbin used a Bureau of Workers' Compensation envelope and the postage meter, it involved very different circumstances than the instant case. She used only one envelope and mailed only one envelope. The envelope contained some kind of horoscopes. Most important, Philbin's actions did not involve any Bureau of Workers' Compensation clients or information.

The union stressed that the grievant admitted his misconduct and offered to make restitution. While the Arbitrator must acknowledge that this is true, the fact of the matter is that it would have been fruitless for the grievant to deny his actions given the evidence that existed. Furthermore, the grievant's offer of restitution may have been motivated by a desire to avoid criminal prosecution or removal rather than any real remorse.

The Arbitrator also recognizes that Neubert told the Internal Security Committee investigators that he felt that the grievant should be demoted and suspended for 15 days. This, however, does not establish that removal is too harsh. Neubert is responsible for the operation of the Cleveland Service Center. He cannot be expected to have an agency-wide perspective. If each supervisor or manager were allowed to impose the penalty that he or she felt was appropriate, the result would be inconsistent discipline.

An employee's seniority and disciplinary record is normally taken into account in reviewing a penalty imposed by an employer. In the instant case the grievant had seven years of seniority and no discipline in his file. While the grievant's seven years of seniority and his good record might have been a factor in another instance, the grievant's misconduct in the instant case is too severe to be overcome by these factors.

Based upon the above analysis the Arbitrator must deny the grievance.

AWARD

The grievance is denied.

NELS E. NELSON, Arbitrator

December 6, 1993
Russell Township

Geauga County, Ohio