

ARBITRATION DECISION NO.:

635

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Workers' Compensation

DATE OF ARBITRATION:

March 21, 1997

DATE OF DECISION:

May 13, 1997

GRIEVANT:

Osiris Malik Aziz Ali

OCB GRIEVANCE NO.:

43-51-(96-04-26)-0085-01-07

ARBITRATOR:

Nels E. Nelson

FOR THE UNION:

Steven W. Lieber

FOR THE EMPLOYER:

Kathleen S. Raparelli

KEY WORDS:

Failure of Good Behavior

Just Cause

Neglect of Duty

Progressive Discipline

Removal

ARTICLES:

Article 24 - Discipline

§24.01-Standard

§24.02-Progressive

Discipline

§24.04-Pre-Discipline

§24.05-Imposition

of Discipline

FACTS:

The grievant was employed as a Claims Assistant by the Bureau of Workers' Compensation at the Richmond Heights Local Customer Service Office when the alleged infractions occurred. The grievant allegedly answered his phone, but failed to speak, thus causing customers to hang up, supposedly this

occurred on seven occasions during the month of February, 1996. Grievant also allegedly left a customer on hold for twenty minutes, and failed to follow the action plan intended to improve his job performance.

The grievant was removed on April 15, 1996 for discourteous and/or rude treatment of customers and neglect of duty.

EMPLOYER'S POSITION:

The Employer argued that the grievant's actions justified his removal, given the Employer's primary focus on quality customer service.

The grievant had previously been demoted for his neglectful and irresponsible behavior toward customers. The grievant's removal was commensurate with his offenses and was progressive. The grievant's discipline in May of 1995 for discourteous treatment of a customer, had put the grievant "far beyond any sort of rehabilitation."

POSITION OF THE UNION:

The Union argued that the charges against the grievant were speculative and that the evidence offered was circumstantial. The Union contended that there were problems with the telephone system which may have contributed to the grievant's alleged problem. The Union also contended that the grievant had no forewarning or foreknowledge of the allegations or possible consequences of his alleged conduct. Further, the investigation of the grievant's conduct was tainted, and the procedure was not fair and objective. Finally, the state failed to use progressive discipline. The grievant had only been reprimanded once before, for an unrelated offense.

ARBITRATOR'S OPINION:

The Arbitrator stated that the charges of failure of good behavior and neglect of duty, were supported by the overwhelming evidence.

The Arbitrator further stated that despite the seriousness of the grievant's misconduct, his removal could not be upheld because the grievant did not receive progressive discipline.

AWARD:

The grievant is to be reinstated with full back pay and benefits, less a four-week suspension, any interim earnings or unemployment insurance benefits received will be offset against back wages due.

TEXT OF THE OPINION:

ARBITRATION DECISION

May 13, 1997

In the Matter of:

**State of Ohio, Bureau of Workers'
Compensation**

and

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

Case No.:

43-51-960426-085-01-07

Osiris Malik Aziz Ali, Grievant

APPEARANCES

For the State:

Kathleen S. Raparelli,
Labor Relations Officer
Kim Browne,
Labor Relations Officer
Sandy Blunt, Deputy
Administrator, BWC
Dorethea Mann,
CompLine Supervisor
Mellany Dane,
Team Leader
Mattie Conway,
Claims Specialist

For the Union:

Steven W. Lieber,
Staff Representative
Osiris M. A. Ali, Grievant
Lawrence McKissic,
Programmer Specialist II

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Osiris Malik Aziz Ali, was hired as a Clerk 2 by the Bureau of Workers' Compensation on October 22, 1990. He was promoted to Clerk 3 on September 20, 1992 and to Claims Representative 1 on February 6, 1994. On October 16, 1994 the grievant was promoted to Claims Representative 2 and was assigned to a customer service team at the Richmond Heights Local Customer Service Office. However, he did not successfully complete the probationary period for the position and on April 3, 1995 he was demoted to Claims Representative 1, which was renamed Claims Assistant, and assigned to the CompLine Department.

The CompLine Department is staffed by 17 Claims Assistants and Claims Specialists. Their main function is to take injured workers' Initial compensation claims over the telephone. They also answer inquiries from employers, employer representatives, medical providers, and others. The calls that come to the department are distributed among the workers by the Automated Call Distribution System.

When the grievant returned to the CompLine Department, Dorethea Mann was his supervisor. She testified that the grievant made too many personal calls, failed to verify information provided, and did not follow the script for opening and closing calls. These allegations led to the grievant and management agreeing on May 25, 1995 to an Action Plan directed at these concerns. On July 14, 1995 Mann sent a memorandum to the grievant indicating that he had shown steady improvement but that she wished to continue the Action Plan for another 30 days. However, no further meetings were held regarding the Action Plan.

On February 16, 1996 Mann sent the grievant a memorandum regarding disciplinary action. She charged that he had violated the Progressive Disciplinary Guidelines by engaging in discourteous and/or rude treatment of customers, neglect of duty, and failure to follow policies. The memorandum listed dates

between February 7, 1996 and February 13, 1996 when the grievant's calls were monitored and he was alleged to have picked up his telephone but did not speak causing customers to hang up, failed to properly identify himself, or neglected to verify information.

A pre-disciplinary meeting was held on March 6, 1996 and on April 15, 1996 the grievant was informed that he was being removed. The removal letter stated that on seven dates in February 1996 the grievant picked up the telephone but did not answer causing customers to hang up; that he left a customer on hold for 20 minutes while he talked with another employee; and that he failed to follow the Action Plan dated May 25, 1995. The letter indicated that the grievant was removed under the Progressive Disciplinary Guidelines for discourteous and/or rude treatment of customers and neglect of duty.

On April 26, 1996 the grievant filed a grievance. It charged that the Bureau violated the preamble and Sections 24.01, 24.02, 24.04, and 24.05 of Article 24 of the collective bargaining agreement. The grievance asked that the grievant be reinstated, promoted to Claims Specialist, and be made whole.

When the grievance was not resolved, it was appealed to arbitration. The hearing was held on March 21, 1997. Post-hearing briefs were received on April 9, 1997.

ISSUE

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

“Was the grievant removed for just cause? If not, what shall be the remedy?”

RELEVANT CONTRACT PROVISION

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 be commensurate with the offense.

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. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
- D. one or more day(s) suspension(s);
- E. termination.

* * *

24.05 - Imposition of Discipline

* * *

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

STATE POSITION

The state argues that there is a compelling case for the grievant's removal. It points out that Sandy Blunt, the deputy administrator, stressed that quality customer service is the Bureau's primary focus. The state notes that service is particularly important because in Ohio the Bureau is "the only game in town."

The state charges that the grievant handled calls in a discourteous, rude, and disrespectful manner. It indicates that Mann testified that she observed the grievant pick up the telephone and then remain silent until

the caller hung up. The state reports that Mellany Dane, a Team Leader, stated that when the grievant was on the Customer Service Team in the Operations Division, his neglectful and irresponsible behavior toward customers resulted in his demotion to his prior position in CompLine. It observes that Mattie Conway, a Claims Specialist and lead person in the CompLine Department, indicated that the grievant often greeted callers as "honey" or "babe."

The state contends that the grievant's removal was commensurate with his offense and progressive. It claims that the grievant's action resulted in irreparable harm to the Bureau and its mission. The state asserts that the grievant's discipline in May 1995 for discourteous treatment of a customer put the grievant "far beyond any sort of rehabilitation" and his behavior "defines an unrepentant and cynical heart." (State Closing Statement, page 12).

The state challenges the assertions made by the union in its opening statement. It points out that the claim that the grievant was unaware that his calls might be monitored is contradicted by the monitoring agreement signed by the grievant and his admission that he knew Mann and Conway were listening to his calls. The state notes that the assertion that management failed to discuss its concerns with the grievant is contrary to the grievant's own testimony. It rejects the claim that the grievant did not know the consequences of his actions since he acknowledged receiving the Progressive Disciplinary Guidelines which it maintains requires removal for a second occurrence of discourteous treatment of a customer.

The state rejects the union's attempt to imply that the telephone system was not working properly in February 1996. It points out that the e-mail message about telephone problems offered by the union is dated March 29, 1996 which is after the grievant's pre-disciplinary hearing. The state claims that testimony and documentary evidence from AT&T show that the telephone system was in perfect working order. It stresses that the union did not call Lawrence McKissic, a trouble-shooter for the computer system, to testify regarding the alleged problems with the telephone system.

The state disputes the union's contention that its investigation was improper. It claims that the union provided no evidence that the investigation was "tainted" or that management was "out to get" the grievant. The state asserts that the propriety of the lead person role played by Conway has no bearing on the grievant's case.

The state charges that the union went to arbitration with nothing to support its case except allegations. It points out that page 325 of the Fourth Edition of Elkouri and Elkouri's How Arbitration Works states:

"Too often a party goes to arbitration with nothing but allegations to support some of its contentions or even its basic position. But allegations or assertions are not proof, and mere allegations unsupported by evidence are ordinarily given no weight by arbitrators. Sometimes, too, a party will present no direct case at all, but will rely entirely upon cross examination of the other party's witnesses, or will simply contend that the other party has the burden of proof and has not proved its case."

The state notes that Elkouri and Elkouri cite in support of this view Bunny Bread Company, 74 LA 55, 57 (1980); Bonney Forge & Tool Division, 49 LA 415, 418 (1967); and John Deere Waterloo Tractor Works, 20 LA 583, 585 (1953).

The state relies on the decision of Arbitrator Jonathan Dworkin in State of Ohio, Ohio Bureau of Workers Compensation and Ohio Civil Service Employees Association, OCSEA/AFSCME Local 11; case no. 34-23-960320-0056-01-09; April 2, 1997. It reports that Arbitrator Dworkin upheld the removal of a Claims Specialist who responded to callers in a curt manner and who frequently hung up on callers. The state notes that Arbitrator Dworkin stated:

"Whenever a collective bargaining agreement controls employer-employee relations, Management is not at liberty to change employment conditions by taking some actions that are unreasonable, arbitrary, or purely whimsical. Discipline is subject to the same principle. The penalty imposed upon an employee for misconduct must be reasonable. That means it must be genuinely tied to legitimate employer needs and must be a rational reaction to the adverse impact the misconduct has on those needs. ... And, the aggrieved employee must have been adequately informed in advance that his/her offense could lead to terminal

discipline. In arbitration, the Employer has the burden of proving that the discipline at issue meets these standards. BWC fulfilled that burden. ... The Agency refuses to tolerate employees who give it a bad reputation. By distributing Guidelines, it notified Grievant and every other employee of this fact. It told them that impolite treatment of clients would be severely disciplined the first time it occurred and would be cause for removal the second time. ... There was nothing arbitrary, unreasonable or capricious in the Agency's expectations. Management's right to demand courtesy of its front-line employees was plainly rational and had a demonstrable relationship to the BWC mission."

The state asks the Arbitrator to deny the grievance in its entirety and to uphold the grievant's removal.

UNION POSITION

The union argues that management failed to obtain substantial evidence of the grievant's guilt. It claims that the charges against him are "sheer speculation." The union asserts that at best the evidence offered by the state is circumstantial.

The union contends that there were problems with the telephone system which may have accounted for the grievant's alleged telephone problems. It acknowledges that Mann testified that there were no equipment problems but claims that it introduced documentation to show otherwise.

The union challenges the testimony of the state's witnesses. It states that Conway's testimony that she did not perform supervisory duties was contradicted by her own supervisor's testimony. The union claims that Dane had an obvious dislike for the grievant as indicated by the fact that he was the only employee who was ever requested to take a typing test. It charges that it was Mann who engaged in poor customer service when she allowed the alleged problems to continue without discussing them with the grievant.

The union contends that the grievant never had "any forewarning or foreknowledge of the allegations or possible consequences of his alleged conduct." (Union Closing Statement, page 4). It points out that Mann's July 14, 1995 memorandum states that the grievant is showing steady improvement and meets department standards. The union notes that the grievant testified that Mann never spoke to him about any alleged problems after the July 14, 1995 memorandum or during February 1996 when his calls were being monitored.

The union charges that the investigation of the grievant's alleged misconduct was tainted. It claims that the procedure was not fair and objective. The union asserts that when such is the case, management "comes up short." It cites Ohio Civil Service Employees Association Local 11, AFSCME, AFL/CIO and Ohio Bureau of Workers' Compensation; case no. 34-18-951206-0235-01-09; November 14, 1996 in support of this contention.

The union maintains that the state failed to use progressive discipline. It points out that the grievant's only prior discipline was a written reprimand on May 25, 1995 for an unrelated offense. The union asserts that the lack of progressive discipline denied the grievant the opportunity to correct his behavior.

The union asks the Arbitrator to reinstate the grievant with full back pay and benefits.

ANALYSIS

The first issue is whether there is just cause to remove the grievant. He was removed for violating two provisions of the Progressive Discipline Guidelines. First, the grievant is charged with violating the section titled "Failure of Good Behavior," item a -- discourteous treatment of the public. Second, he is alleged to have violated the section of the Guidelines titled "Neglect of Duty "

The charges against the grievant involve several specific allegations. First, he is accused of failing to follow the scripted opening and closing for telephone calls and greeting callers as "Ali," "CompLine," or in other inappropriate ways. Second, the grievant is alleged to have addressed callers as "babe" or "honey" or similar words. Third, he is charged with failing to verify certain important information pertaining to claims. Fourth, the grievant is accused of holding up the telephone without responding causing callers to hang up.

The Arbitrator believes that the evidence in support of these charges is overwhelming. Mann, the grievant's supervisor, and Conway, a co-worker who serves as a lead person, testified that they observed

many instances of the behavior with which the grievant is charged. When the grievant's calls were monitored in February 1996, it confirmed that on a number of occasions the grievant held up the telephone without responding until the caller hung up. The grievant's claim that many of the hang-ups were caused by problems with the telephone system was unsubstantiated. The memorandum from Mann regarding telephone problems is dated March 29, 1996 -- long after the events leading to the grievant's removal.

The grievant's misconduct is very serious. The Bureau of Workers' Compensation has a monopoly in Ohio on providing insurance coverage for industrial injuries and illnesses. If the Bureau fails to provide satisfactory service, there is no competitive insurance provider available. Employees, employers, and providers are entitled to receive courteous and efficient service.

Despite the seriousness of the grievant's misconduct, the Arbitrator cannot uphold his removal. Mann testified that when the grievant ignored the script for opening and closing calls, spent too much time on personal calls, and failed to verify claims information, an Action Plan was adopted on May 25, 1995. Although her memorandum of July 14, 1995 indicates that as of that date he had made steady improvement and that he met department standards for being available for callers, she stated that in a "couple of weeks" he was "back to his old ways." Mann attempted to correct the grievant's behavior by "off-the-record discussions" with him and by speaking to the union steward about his problems. She testified that she did not discipline the grievant because she "thought [he] would understand."

While the Arbitrator appreciates Mann's efforts to help the grievant, it appears in retrospect that she should have applied progressive discipline as called for in the contract. Her discussions with the grievant had no impact and his serious misconduct continued for several months. The decision not to impose discipline may have led the grievant to believe that his actions would continue to be tolerated.

The Arbitrator recognizes that the grievant received a written reprimand on May 25, 1995. It was imposed when the grievant confronted a customer who had complained about his claiming that the computer system was down when she believed that it was not. Although the reprimand involved a problem with a customer, it related to a single offense of a different nature than the charges leading to the grievant's removal.

The state submitted the decision of Arbitrator Jonathan Dworkin in State of Ohio, Ohio Bureau of Workers Compensation and Ohio Civil Service Employees Association, OCSEA/AFSCME Local 11; case no. 34-23-960320-0056-01-09; April 2, 1997 in support of its position. In that case Arbitrator Dworkin upheld the discharge of a Claims Specialist for discourteous treatment of customers. The grievant in the case was charged with making rude comments to customers, hanging up on callers, and neglecting to return calls -- conduct similar to that of the grievant in the instant case.

However, in the case before Arbitrator Dworkin, the state clearly had satisfied the contractual requirement for progressive discipline. Arbitrator Dworkin indicates that the grievant had been counseled at least fifteen times, received a written reprimand, and was suspended for five days before he was removed.

The grievant in the instant case did not receive progressive discipline. He received a written reprimand on May 24, 1995 but for a different offense than those leading to his removal. Then, despite continuing poor performance the grievant received no further discipline until April 15, 1996 when he was removed. Perhaps the imposition of the contractually-mandated progressive discipline would have corrected his behavior.

The remaining issue is the proper remedy. The Arbitrator believes that a major suspension is in order. First, discourteous treatment of the Bureau's customers is a very serious offense which cannot be tolerated. Second, the grievant continued his misbehavior despite the efforts of Mann and Conway to help him. Anything less than a severe penalty appears unlikely to correct his conduct. Finally, converting the grievant's removal to a major suspension is not inconsistent with the Bureau's Progressive Disciplinary Guidelines which lists a major suspension as one of the penalties for the discourteous treatment of customers.

AWARD

The grievant is to be reinstated with full back pay and benefits less a four-week suspension and any interim earnings or unemployment insurance benefits.

Nels E. Nelson
Arbitrator

May 13, 1997
Russell Township
Geauga County, Ohio