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VOLUNTARY LABOR ARBITRATION TRIBUNAL

DEC 27 2001
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GRIEVANCE COORDINATOR

In the Matter of Arbitration *
Between *
OHIO CIVIL SERVICE *
EMPLOYEES ASSOCIATION *
LOCAL 11, AFSCME, AFL/CIO *
and *
OHIO DEPARTMENT OF *
REHABILITATION AND *
CORRECTION *

OPINION AND AWARD
Anna DuVal Smith, Arbitrator
d/
Case No. 27-01-010321-194-06-~~10~~
Maudie Williams, Grievant
Suspension

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Lynn Belcher, Staff Representative
Patty Howell, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Rehabilitation and Correction:

David Burrus, Labor Relations Officer
Teri Decker, Chief, Bureau of Labor Relations
Ohio Department of Rehabilitation and Correction

Neni Valentine, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:25 a.m. on October 18, 2001, at the offices of the Ohio Civil Service Employees Association in Worthington, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation and Correction (the "State") were Elizabeth Murch, Chief, Bureau of Equal Employment Opportunity, and Ray Mussio, Chief of Audit and Investigation, Division of Parole and Community Services. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") was the Grievant, Maudie Williams. Also in attendance were Eleanora A. Brown, Chapter Vice President and Angela Lapsley, Chief Steward. A number of documents were entered into evidence: Joint Exhibits 1-4, State Exhibits 1-2 and Union Exhibit 1. The oral hearing was concluded following oral summations on October 18, 2001, whereupon the record was closed. This opinion and award are based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Grievant is an EEO Investigator employed in the Bureau of Equal Employment Opportunity of the Ohio Department of Rehabilitation and Correction since December 31, 1997. She is also president of her chapter of the Union. This case concerns a five-day suspension issued on March 9, 2001, for removing investigative reports from co-workers' offices, altering them, and then submitting them as if they were her own work product. The Grievant admits these actions but claims she did so to investigate whether she was being treated differently than her co-workers. In order to understand this contention it is necessary to review the Grievant's history with the Department.

The Grievant's performance was first evaluated on February 6, 1998, and again on July 1, 1998. She met or exceeded her employer's expectations on every dimension, and became a nonprobationary employee. Some time after this, her supervisor became Brian Eastman. The Grievant testified her problems began when the Union formed a privatization committee of which she was a member. Eastman would not let her use personal leave or vacation to picket the private prisons even though she had no delinquent cases and other employees were released. The Union filed a ULP charging disparate treatment. She further testified a hostile work environment was created when she was asked to take action to get her classification made exempt. When she refused to cooperate, she said, Eastman told the other examiners it was her fault their status remained nonexempt. The resented her for it, she said, and would not speak to her. When she filed a charge with the Ohio Civil Rights Commission, Eastman quit looking at and signing off on her investigative reports and just let them pile up. Eastman was succeeded by Vanessa Gregory, who also did not check her reports. Meanwhile, other investigators' reports were being processed. Neither Eastman nor Gregory formally evaluated the Grievant's job performance, so it was not until December 18, 2000, when Elizabeth Murch had become Chief, that she underwent a nonprobationary performance appraisal. Murch rated her performance as below expectations in five of seven areas: quantity of work, quality of work, timeliness, communicating and planning/scheduling. Murch testified some of her specific concerns were the large backlog of incomplete reports and poor writing. She developed a performance improvement plan for the Grievant, which included having nonsupervisory employees (Administrative Assistant Phyllis Dempsey and Linda Bond) review her reports and assist her with writing and report completeness, and having her take courses in grammar and writing skills. The Grievant appealed this performance evaluation, but it was upheld. On January 12, 2001, Murch also imposed a deadline of January 31 for completion of a number of reports. Murch testified the Grievant was cooperative in that she attended the classes and took her reports to Dempsey for editing, even though she thought she did not need this kind of help. The Grievant, however, believed she was

being unfairly singled out in retaliation for her union activity and EEO charge. She feared the multiple revisions to her reports requested by Dempsey were geared toward making her miss her deadline in order to set her up for termination. She therefore decided to find out whether reports completed by other investigators would pass muster if they were submitted as authored by herself. To perform her test she removed two completed reports from the offices of co-workers, copied them and their accompanying documents and made a few alterations to them, then submitted them to Dempsey. On January 19, 2001, inconsistencies in the reports aroused Dempsey's suspicion. She reported her concern to Murch, then filed an incident report. Murch discovered from a database that the cases had been assigned to other investigators and reports had already been completed. Concerned about the Grievant's ethics and their impact on her ability to perform her job, Murch requested an investigation for possible discipline. Ray Mussio, Coordinator of Audits and Investigations in the Division of Parole and Community Services, was assigned. He interviewed Dempsey, Murch, the two authors of the investigative reports that had been submitted by the Grievant to Dempsey, and the Grievant. He also compared the two altered reports with the originals. The Grievant admitted she had altered the reports and turned them in to Dempsey to see if they would be marked up like her own reports had been. Mussio concluded there was substantial evidence to believe there was violation of the Department's Standards of Employee Conduct and recommended disciplinary action.

Meanwhile, the Grievant was issued a written reprimand for not meeting her January 31 deadline. The Grievant testified she almost made the deadline but that Dempsey was off for a few days and requested minor changes when she came back. Still, she was written up for it. When her predisciplinary conference was held on February 21, this written reprimand was the only discipline in her file. On March 6, the hearing officer issued his report, concurring with the investigator that there was substantial evidence of rule violations. Thus, in a letter signed by the Director on March 12, the Grievant was issued a five-day suspension for violation of Rule 22, Falsifying, altering or removing any official document, and Rule 38, Actions that could

compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee. This action was grieved on March 21, alleging no just cause because the Grievant was trying to prove discrimination and retaliation by the Department for filing complaints and grievances. On April 6, the Grievant's performance was again formally evaluated. This time she met expectations on all dimensions. Murch was pleased with her receptiveness to suggestions and with her improvement. However, she also testified that since the incident leading to the suspension she felt she needed to be exacting in her review of the Grievant's work product to assure herself as much as possible that the reports were true. The Grievant, on the other hand, says her reports are now scrutinized less than before the incident. She attributes the fewer requested revisions to her supervisor doing her job. She also does not believe her reports are better than formerly because she never saw a problem in the first place. In her view, when Dempsey was proofreading her work her findings were changed and her reports were made to read as if there were gaps.

III. ISSUE

Was the five (5) day suspension for just cause?
If not, what shall the remedy be?

IV. ARGUMENTS OF THE PARTIES

Argument of the State

The State argues this case is not about a backlog of cases or discriminatory treatment. It is about an employee who freely admits she went into someone else's office and took something without permission. Then she made nonsubstantive alterations to those documents to pass them off as her own. The Grievant's motive is irrelevant. It does not justify what she did, which was to falsify documents in violation of Rule 22. The State submits that it does not matter what the status of those documents was, whether draft or final. Any work product document from the Department is "official" and discoverable. The State goes on to say that it is not the Union's place to say what the intent of Rule 22 is for the rules are Management's, not the Union's.

Regarding Rule 38, the State points to the supervisor's testimony that she now has to check the veracity of the Grievant's reports because she no longer trusts her. Damage done to the work relationship between supervisor and subordinate compromises their ability to perform their duties. EEO Investigators must be held to strict standards of honesty and integrity. The credibility of a report by an investigator who falsifies documents can be challenged wherever it goes. The Department simply cannot have that.

Turning to the Union's claim that the Grievant was treated badly by her supervisor, the State submits the record does not show this to be true. What it does show is a supervisor who recognized an employee in need of improvement and who took nondisciplinary, positive and supportive actions to bring it about. The Department did treat her differently from other employees. It had to because her work product quality was different from theirs. It is management's right and duty to set the standard and not to accept shoddy work.

In conclusion, the State points out that the Grievant knows how to properly handle complaints about management. But she did not do that here. Instead, she purposefully set out to entrap management. What she did can be likened to plagiarism, but is worse because her intent was to set up management to further her own interest. The State asks that the grievance be denied in its entirety.

Argument of the Union

The Union contends that the State's trust in the Grievant's investigations is unimpaired as a result of the incident. First, the supervisor testified she was unimpaired in her ability to supervise the Grievant. What is more, the April 2001 evaluation makes no mention of credibility issues. All the distrust and scrutiny were before the incident and a product of Union activity. The Union submits that the backlog was manufactured by management and represents managerial neglect. In fact, the Grievant was the one who felt set up. Trust was an issue for her as well as for management.

The Union argues that the Grievant's conduct does not meet the intent of Rule 22. She was not the official investigator in the subject cases and she did not intend to change the outcome of them. She was afraid of being terminated if she did not meet her deadline so just tried to determine if the proofreader was treating her work fairly.

Finally, the Union argues a five-day suspension is not progressive. The incident giving rise to the written reprimand occurred after the incident resulting in the suspension. Moreover, the written reprimand was not justified because the Grievant did meet her deadline. Therefore, the written reprimand should not be a factor in determining the appropriate level of discipline.

The Union asks that the grievance be sustained, the suspension removed from the Grievant's record, and that she be paid five days back wages.

V. OPINION OF THE ARBITRATOR

There being no question that the Grievant took the actions she did, there are really only two questions to be answered: (1) Did her conduct violate departmental rules? (2) Were there mitigating circumstances?

The Union urges a narrow interpretation of the rules, saying "official documents" were not involved because the Grievant was not the official investigator of the subject cases and did not intend to alter their outcome. Moreover, her job performance was not impaired and, in fact, improved as evidenced by her post-incident annual evaluation and supervisor's testimony. This misses the point. The Grievant did not make a simple, honest mistake. She deliberately falsified copies of other people's work product for her own ends. This means that her own reports can no longer be presumed to be truthful. Like a witness caught in one lie or covering up one part of the truth and whose entire testimony becomes suspect as a consequence, the Grievant's investigative reports (which are official documents even when not in final form because they are created in the performance of the duties of the public office) were thereafter subject to greater scrutiny than when she was presumed to be wholly truthful. This is what the supervisor had to do, not review the Grievant's use of English, but scrutinize for integrity. She needs to do this until she learns to

trust the integrity of the Grievant's reports again, something that can occur only with time and experience. The significance of the Grievant's error is that she is an investigator. The value of her work product depends critically on her integrity. When her integrity is open to question, so are her investigations and reports thereof. Thus, it is not that the quantity of her work suffered but that her actions compromised the integrity of her investigatory reports and ultimately could affect the integrity of the Bureau. It is similar to an arbitrator accepting a case involving a close, personal friend. The personal connection undermines the ability of the arbitrator to effectively fulfill his function, not because the arbitrator necessarily decides the case on the basis of the friendship, but because the tribunal just does not look fair and impartial under such circumstances.

I am not unsympathetic to the Grievant's situation. Nor am I saying that her fears were unreasonable given the lack of effective supervision from former chiefs and the demands of the current one. The Grievant also deserves respect for her responsiveness to her improvement plan and for the ratings and positive comments she earned on her 2001 performance evaluation. However, as understandable as it is that the Grievant would be looking for a way to protect herself, she erred in the method of self-protection she chose. Her mistake was not that she challenged the fairness of Dempsey's reviews, but that she chose to challenge in a way damaging to her office and to the Bureau, rather than using benign or constructive methods such as filing a grievance. While it is true that she did not attempt to alter the outcome of a case or intend that the falsified documents would ever leave the Bureau, she was not disciplined as if she had. The five-day suspension she received was within the guidelines for a first offense of these rules, even at the low end of the range. It was thus progressive even without counting the written reprimand imposed after the incident for another offense. I am therefore unable to find that the State abused its discretion or lacked just cause in any other regard in this case.

VI. AWARD

The five (5) day suspension was for just cause. The grievance is denied in its entirety.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
December 21, 2001