

In the Matter of Arbitration Between)
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)
WASHINGTON FEDERATION OF)
STATE EMPLOYEES,)
(Union),)
)
and)
)
STATE OF WASHINGTON,)
EMPLOYMENT SECURITY)
DEPARTMENT,)
(Employer or Department).)
)
)
_____)

OPINION AND AWARD

AAA Case No. 75 390 455 06
Carol Schley Grievance

BEFORE: David W. Stiteler, Arbitrator

HEARING LOCATION: Tacoma, Washington

HEARING DATE: February 15, 2007

APPEARANCES: *For the Union:*
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For the Employer:
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RECORD CLOSED: April 10, 2007

OPINION & AWARD ISSUED: May 9, 2007

OPINION

INTRODUCTION

The Employer discharged Carol Schley (Grievant) from her position in the Department's Lakewood WorkSource office. The Union grieved. The parties were unable to resolve the dispute and the Union advanced the grievance to arbitration. Through the procedures of the American Arbitration Association (AAA), David W. Stiteler was appointed as the arbitrator.

A hearing was held before the Arbitrator on February 15, 2007, in Tacoma. The parties agreed that the matter was properly before the Arbitrator for resolution. They had the full opportunity to examine and cross-examine witnesses, present documentary evidence, and argue their positions. They also agreed that the Arbitrator could retain jurisdiction to resolve remedial issues, if a remedy was awarded. At the conclusion of the hearing, they agreed to submit post-hearing briefs. The Arbitrator notified AAA on receipt of the briefs, and the record was closed.

ISSUE

The parties agreed to the following statement of the issue:

Did the Employer violate Article 27.1 in dismissing Grievant from the Employment Security Department?

RELEVANT CONTRACT LANGUAGE

ARTICLE 27

DISCIPLINE

27.1 The Employer will not discipline any permanent employee without just cause.

SUMMARY OF RELEVANT FACTS

At the time of her termination in March 2006, Grievant was an Office Assistant 3 for the Department. Though assigned to the Department's Lakewood WorkSource office, she was working in a Tacoma WorkSource office when she was

dismissed. She had worked for the Department for about two years. She went to work for the Department after she was laid off from a position with the Washington Department of Transportation. Overall, she worked for the State for over 20 years. She had no prior discipline with the Department or elsewhere during her career with the State.

When she started with the Department, she initially was assigned to a Tacoma WorkSource office. In August 2004, Grievant was asked to work temporarily at the Puyallup Job Fair. She expected to be doing data entry work, but when she got there, she was asked to take on counseling duties that are normally done by a higher paid position. When she questioned the assignment and requested differential, she had an exchange with Juanita Booker, a supervisor from the Lakewood office. Booker got upset and told her to just go back to her Tacoma office.

Grievant's position in Tacoma was eliminated in May 2005. She had the option of demoting to a position in Olympia or taking a lateral transfer to a position in Lakewood. She chose the latter.

Before she started in the Lakewood office in July, she had another encounter with Booker at a training class. Booker said something about preparing a list of job expectations "just for her." Booker asked whether Grievant really thought she could do the job. Booker also said that she expected Grievant would be late every day because she had to drive over the bridge. These comments led Grievant to believe she would be facing a hostile environment. She tried to change her assignment to an office other than Lakewood, but was told it was not possible.

Around this same time, Grievant was dealing with some difficult personal issues, which included caring for a terminally ill partner. Over the course of several months, she made a number of telephone calls at work relative to these issues. Many of the calls were long-distance and she used the State's SCAN system to make them.

Barbara Korst became the administrator in charge of the Lakewood office not long after Grievant started there. Sometime in July, Korst was reviewing the SCAN

bill and determined that Grievant had made personal calls using the SCAN system. Grievant indicated that her former supervisor in Tacoma, Lorenzo Quintana, was aware of the calls and had said it was okay provided she reimbursed the State. She eventually did so.

Quintana did not testify. According to Korst, he told her that he did not give Grievant permission to use the SCAN system for personal calls. Exhibit 6 is an email from Quintana to Frances Bailey in the Department's Human Resources (HR) office. In it, Quintana acknowledges that he discovered the calls and left a note asking Grievant for an explanation. He also asserts that he did not give her permission to use SCAN to make the calls.

On two consecutive days in August, Grievant was about 15 minutes late for work. On one of those days, she worked through her lunch hour to finish a project. Korst told Booker to talk to Grievant about being tardy and to direct Grievant to fill out leave slips for absences. Korst also told Booker to tell Grievant that it was not appropriate for her to work through her lunch hour.

On August 17, Booker went to Grievant's office to discuss these matters. During the course of their conversation, Grievant contended that she was being singled out, that other employees were late without consequence and were allowed to work through lunch. Booker denied Grievant's claims. Grievant was upset and the conversation got heated. Booker left to get Korst.

While she was gone, Grievant filled out the leave slip as directed. She also started filling out a second leave slip for the rest of that day because the confrontation with Booker had caused her to have chest pains.

Korst and Booker came into her office. There is some dispute about what happened next.

According to Grievant, Korst demanded to know what was going on. Grievant reiterated her claim that she was being singled out and was being blamed for things that were not her fault. After some additional exchanges, Grievant claims that Korst

moved quickly toward Grievant's position, leaned over Grievant's desk, and got in Grievant's face. Grievant also claims that Korst was very angry, her face was contorted, and through clenched teeth she ordered Grievant to go to her (Korst's) office. Grievant says that she asked Korst to move away, and told Korst that she was leaving for the day.

According to Korst, when she went into Grievant's office, Grievant was behind her desk, pacing and obviously agitated. Korst claims that Grievant was saying she hated it at the Lakewood office and was being harassed. Korst contends that she did not approach Grievant or get in her face, and that at all times she maintained a distance of at least four feet between them. She denies ordering Grievant to report to her office that day. (Booker did not testify, but was interviewed during the Department's investigation. Her statement supports Korst's account in most particulars.)

Sometime after she left the office, Grievant reported the confrontation to the Sheriff's office because she felt Korst's conduct bordered on assault. She also called the Commissioner of the Department about what occurred.

Korst reported the incident to HR. Grievant was directed by HR to report to work temporarily in the Tacoma office, beginning on August 19.

When Grievant reported to work in Tacoma, she met with Operations Manager Nadine Luster-Poe, who would be her immediate supervisor, and Area Director Anthony Wright. The meeting did not go well. Luster-Poe explained what would be expected of Grievant while she was working in the Tacoma office. Grievant was offended because she felt that she knew what was expected of her. She said that she knew what her duties were and that she did not need to be told. Grievant also claimed that Luster-Poe was only explaining these things so management could document any lapses. She was still upset from her interaction with Korst, and her tone and demeanor were curt and defensive at best.

Luster-Poe asked Grievant what had happened at Lakewood. (Wright had some knowledge of what had occurred; it was his decision to transfer Grievant temporarily to the Tacoma office.) After listening to Grievant's explanation, Wright said that Korst was just doing her job, that Grievant was probably exaggerating, and he suggested that Grievant's actions might have caused the incident. Grievant questioned whether Wright had EEO training.

Based on Grievant's attitude during the meeting, Wright later decided that it would be advisable to give Grievant written job duties and attendance expectations. A letter of expectations was prepared for Grievant's signature. On Friday, September 9, Wright sent Grievant an email scheduling a meeting between Luster-Poe and Grievant for September 14, a Wednesday. The purpose of the meeting was to discuss the letter of expectations. Grievant somehow deleted the email, and did not find out about the meeting until the day it was scheduled. The meeting did not occur.

Later that day, Wright rescheduled the meeting for Friday, September 16. In an email to Wright about the rescheduled meeting, Grievant said she had a previously scheduled doctor's appointment. Grievant also contended that Wright had only given her four hours notice of the initial meeting. She said his message was sent about 4 p.m. on a Friday to give her notice of a meeting set the following Monday at 11 a.m. (The original meeting actually was scheduled for Wednesday, not Monday.) In addition, Grievant also explained that she did not want to meet without Union representative Sean Dannon, and she was not sure about his availability for the rescheduled meeting on Friday. In the end, Grievant and Dannon showed up for the meeting but the parties ended up rescheduling it.

Sometime following this incident, the Department began a disciplinary review. In December, Grievant was notified that the Department was considering discipline, including possibly dismissal. The notice identified four charges: (1) that in May, June, and July, she inappropriately used State resources (SCAN) to make personal long distance telephone calls; (2) that Grievant had yelled at Booker and Korst when they

tried to talk to her about being tardy and working through her lunch hour; (3) that she was insubordinate with Luster-Poe when Luster-Poe talked to her about her job expectations; and (4) that in her email to Wright, she challenged his direction to meet with Luster-Poe to discuss job expectations.

Grievant was given the opportunity for a pre-discipline meeting to respond to the charges. She attended the meeting and presented some information.

In March 2006, Grievant was notified of her dismissal. The grounds were the same four charges listed in the pre-discipline notice. Assistant Commissioner Peggy Zimmerman stated that, in deciding on the level of discipline, she had considered the charges, Grievant's response, Grievant's employment history with the Department, and Grievant's work history, including her personnel file and training profile.

SUMMARY OF THE PARTIES' ARGUMENTS

Employer. There is no dispute that Grievant violated policy by using the State telephone system to make personal long distance calls. There is also no dispute that Grievant displayed inappropriate behavior to supervisors and managers over a several week period, also contrary to established policy. The Employer had just cause to discharge Grievant for these actions. The grievance should be denied.

The parties' agreement requires just cause for discipline. The term is not defined in the agreement, but the focus is generally on proof of misconduct, notice of consequences, and the reasonableness of the discipline.

Grievant admitted her misconduct regarding the telephone system to make personal calls. The violation is compounded because the number of calls she made meant she spent nearly five work hours on these calls.

Grievant's interactions with management beginning in August 2005 also amounted to misconduct. On at least three separate occasions, Grievant acted in a manner that was unprofessional and challenging to proper authority.

The Department has policies regarding both the telephone system and behavior. Both policies provide notice of the potential for discipline if the policies are

violated. Grievant acknowledged receipt of both policies, and thus had notice of the disciplinary consequences of her actions.

Dismissal was an appropriate sanction. Grievant's conduct established that she was incapable or unwilling to comply with policies and orders. The Department conducted a thorough investigation and review of her record and concluded that discharge was the only reasonable discipline.

Union. The Department did not have just cause to dismiss Grievant from her position. She was a long-term employee of the State with no prior discipline. The actions forming the asserted grounds for the discipline do not warrant discharge. The grievance should be sustained, and Grievant reinstated and made whole, including full back wages with interest.

The Department has the burden of proof. Because discharge is such a significant penalty, the quantum of proof should be clear and convincing evidence. The evidence produced by the Department does not meet that standard.

Regarding the personal long distance calls, the evidence is mixed. Grievant admits making the calls, but understood from her then-supervisor Quintana that it was okay as long as she reimbursed the Department. Korst said that Quintana had not given his approval. Quintana did not testify. In any event, Grievant paid for the calls. And after Korst told her it was not an acceptable practice, she did not make any more. The Department failed to prove that the calls were made during work time rather than on Grievant's breaks or lunch hour. More significantly, the Department discovered this issue in early July, yet took no steps to discipline Grievant until after subsequent unrelated issues arose in August.

Regarding the events of August 17, the Department did not prove that Grievant refused to follow any directive. Grievant admits questioning what she felt was arbitrary and unequal application of policies. Moreover, Korst's testimony undermined the Department's claim that Grievant yelled at her supervisors. On the other hand, Grievant consistently maintained that she felt physically threatened by

Korst's actions. And Grievant's later actions—reporting the interaction to the police and calling the Commissioner's office—establish how upset she was. In addition, though Korst denied under oath ever using profanity in the workplace, several witnesses testified about hearing Korst get upset and swear. This calls her credibility into question.

The events of August 19 must be examined through the prism of what occurred on August 17. Grievant was still upset when she reported to the Tacoma office, and she acknowledges that it was reflected in her attitude and tone. Nonetheless, there is no evidence that she refused to follow any directive she was given by Luster-Poe.

Finally, it is not precisely clear on what basis the Department contends Grievant's email to Wright supports discipline. Grievant acknowledges she insisted on having a particular Union representative present for a meeting. The Department did not show that Grievant's demand was unreasonable or that the meeting was unduly delayed. Regardless, it does not justify termination.

DISCUSSION AND ANALYSIS

In this discharge case, the Department bears the burden of establishing that it had just cause for dismissing Grievant. For the reasons explained below, I conclude that it has not met that burden for discharge. However, I also conclude that just cause exists for lesser discipline.

The parties do not define just cause in their agreement. It is, however, a commonly used term in labor relations. Simply put, it means that, all things considered, the discipline imposed must be reasonable. Key factors in determining just cause are whether the employer proved the charged misconduct, whether the employee was afforded the necessary due process, and whether the discipline imposed is proportionate to the misconduct.

The Department rests its decision to dismiss Grievant on four alleged acts of misconduct.¹ The first of these concerns Grievant's use of the SCAN system to make personal long-distance telephone calls at work.

There is no dispute that Grievant engaged in this misconduct; she admitted making the calls. The misconduct has two components: improper use of SCAN; and improper use of work time.

As to the first component, Grievant knew or should have known she could be disciplined for making personal calls on the SCAN system. She acknowledged receipt of a telecommunications policy that included a warning of potential discipline.

Regarding the second component, the Union argues that the Department failed to prove that the calls were not made during Grievant's break or lunch period. However, a review of the SCAN charges establishes that at least some of the calls were made during work time.

There are, however, troubling aspects to the Department's reliance on this misconduct as a basis for dismissal. There is no indication that discipline was being considered until the later alleged inappropriate behavior occurred. Timely investigation and imposition of discipline is a part of procedural due process. Unless there was a good reason for the failure to take action on this misconduct in a more timely fashion, its value as support for dismissal is diminished. No such reason was proffered.

Moreover, the policy merely states that personal use of the SCAN system is a violation of the policy and "*may* subject the employee to disciplinary action." (Emphasis added.) This sort of discretionary statement does not put an employee on notice that discipline *will* occur, and that dismissal is possible. Absent evidence of a well known and consistent practice of imposing significant discipline for improper

¹ In the pre-discipline notice, and in supporting information attached to the dismissal letter, there are other incidents discussed. Because those incidents are not specifically mentioned in the dismissal letter, and were not addressed at hearing or in the Department's brief, I have not considered them.

SCAN use, it would not be reasonable to discharge an employee for such misconduct, especially for a first offense.

The second charge against Grievant concerns the incident on August 17. Details of the incident are less than certain.

The specific charge is that Grievant "yelled" at Booker and Korst, a claim not supported by the evidence. Korst testified only that Grievant raised her voice, not that she was yelling. Booker did not testify. Grievant denied yelling, and in fact, claimed it was Korst who raised her voice.

Grievant and Korst each accused the other of acting in an angry, threatening manner; each also claimed that she behaved properly throughout. The reality probably falls somewhere in between their accounts. The most plausible interpretation of the evidence is that all three participants—Korst, Booker, and Grievant—were upset and lost their tempers. Grievant felt, correctly or not, that she was being treated unfairly and that office policies were not being applied equally to all employees. Korst and Booker saw Grievant's questions and demeanor as a challenge to their authority. Korst reported the interaction to HR. Grievant reported it to the police and the Commissioner's office.

The Department contends that Grievant's behavior was contrary to the employee conduct policy, which specifically warns employees of disciplinary consequences. Grievant received a copy of the policy, and should have been aware of the potential consequences of her behavior.

Though Grievant's conduct did not rise to the level of insubordination even if Korst's and Booker's accounts are accepted as accurate, she nonetheless was guilty of displaying a disrespectful attitude toward her supervisors. The policy aside, Grievant's conduct warranted discipline, regardless of provocation. Her conduct did not, however, warrant dismissal; it was her first offense of this type of misconduct.

The third charge concerns the incident of August 19. The facts are not much disputed. The Department charged Grievant with insubordination based on her

response to Luster-Poe. Grievant acknowledged that her tone and demeanor were inappropriate. The same policy relied on for the August 17 incident is implicated. The Union argues, however, that consideration should be given to the fact that Grievant was still upset from the August 17 incident.

In the usual case, insubordination refers to a refusal to follow a direct order. By that definition, Grievant was not insubordinate on August 19. The Department did not identify any order that Grievant refused to follow. What she did do was take offense to being told what was expected of her, and to express that offense in her response. Whether she was still upset by the August 17 incident, or whether Wright's comments about that incident upset her, Grievant's behavior was disrespectful and unacceptable. Her behavior warranted discipline, but under the circumstances, it did not justify dismissal.

The final charge concerns Grievant's responses to Wright's attempt to schedule a meeting between Grievant and Luster-Poe. Grievant is charged with "challenging" Wright's directive to meet with Luster-Poe.

As set out in both the pre-discipline and dismissal letters, the nature of the Department's complaint is not completely clear. Though the Department did not use the term "insubordination" in describing Grievant's behavior in this incident, it comes closer to fitting this situation than the previous two. Wright directed her to attend a meeting on September 14. Grievant did not comply with that directive; she claims she did not see it because she deleted the email. In addition, it was by no means clear that she would comply with Wright's second directive to meet, though in the end she did. Her response to the directive was uncertain. She said she had a previously scheduled appointment, which was not known to her supervisor. She said she was not sure if a particular union representative would be available. She blames Wright for not giving her enough advance notice of the meeting she missed.

The Department relies again on the "behavior" policy. Whether or not characterized as insubordination, Grievant's conduct in missing the original meeting

and in responding as she did to Wright was not appropriate. It was behavior that warranted discipline. Again, however, it was not so serious as to warrant discharge.

In sum, the Department established that Grievant was guilty of misconduct by using SCAN to make personal long distance calls, by acting disrespectfully to supervisors, and by failing to attend a meeting as directed. By virtue of Department policies, Grievant had at least some warning that her behavior could lead to discipline. The question is whether the discipline imposed was reasonable under the circumstances.

One concept embodied in the just cause standard is that discipline generally should be progressive in nature. That is, except for the most serious offenses, an employer should impose lesser forms of discipline to correct misconduct before resorting to dismissal. It is on this ground that the Department falls short.

Progressive discipline serves at least two important functions. It puts the employee on notice that related future misconduct will be addressed more severely. It also insures that the discipline imposed will be proportionate to the offense. The parties' contract here implicitly incorporates the progressive discipline concept in Section 27.2. That section lists various forms of discipline in order of increasing severity, beginning with oral reprimands and ending with discharge.

Independently, none of the four charges would support dismissal. Grievant's SCAN use by itself would not warrant even significant discipline, unless the Department has a consistently followed practice of serious discipline in like cases. No such evidence was presented. Grievant was told that her personal use of SCAN was inappropriate; she paid for the calls and did not do it again. She had no prior disciplinary history with the Department (and apparently, with the State either). For a first offense, this misconduct warranted no more than a reprimand.

The remaining three charges are interrelated, and completely separate from the SCAN use issue. The problems began in mid-August when Grievant and her Lakewood supervisors had a disagreement. They continued a few days later when

Grievant reacted inappropriately during her introduction to the Tacoma office. And they culminated when Grievant did not attend a meeting that had been scheduled to discuss her job expectations.

Viewed as discrete incidents, Grievant's behavior on these three occasions, while problematic, did not rise to the level of a capital offense warranting summary discharge. Nonetheless, each incident justified some level of discipline.

Viewed cumulatively, Grievant's behavior on these occasions is more troubling, because it could be seen as a pattern of disrespect for management. But even if these three incidents are treated as part of one whole, they still are not on par with offenses that justify discharge without progressive discipline.

Before these incidents, Grievant had not been disciplined for anything, let alone disrespectful or insubordinate behavior. Her job history does not establish that her misconduct is beyond correction. And she apparently had no such issues during her long tenure with another State agency. In addition, the Department did not show that dismissal was necessary to insure consistent application of disciplinary policies.

To impose the ultimate discipline for this collection of offenses was neither progressive nor proportionate. The Department did not have just cause to dismiss Grievant. In reaching this conclusion, I have considered all of the evidence in the record, as well as the parties' arguments, even if not specifically addressed above. The grievance will be sustained.

REMEDY

The Union requests the standard make-whole remedy for a discharge: reinstatement with full back pay, plus interest. That remedy would be inappropriate because it would relieve Grievant of responsibility for her proven and admitted misbehavior.

Under the circumstances described above, however, reinstatement is appropriate. The Department dismissed Grievant without first attempting to correct

her misconduct by some lesser form of discipline. The fitting redress for that is reinstatement.

As previously discussed, on this record the appropriate penalty for Grievant's inappropriate SCAN use would be a reprimand. If the Department chooses to impose a reprimand, the effective date for purposes of Section 27.10, Retention of Documents, will be March 25, 2006.

Determining an appropriate penalty for the other three charges is more complicated. Neither alone nor together do the incidents warrant discharge. Individually, the first two likely would warrant reprimands; the third, perhaps a pay reduction or short suspension. In the context in which the incidents occurred, however, they are more aptly viewed collectively or as part of a connected pattern of conduct. As such, more serious discipline is in order to make it clear to Grievant that her behavior was unacceptable and yet give her the opportunity to correct it. A suspension of 10 working days would be a reasonable penalty for these incidents.

The Union requests interest on the back pay. Given the nature of the charged offenses and the Department's failure to follow progressive discipline, it is appropriate here as part of a make-whole remedy. The back pay award shall include interest at the current Washington statutory rate.


In sum, to remedy the just cause violation, the Department will be ordered to make Grievant whole by reinstating her as an Office Assistant 3, with back pay to the date of her dismissal, less any interim earnings, and less the equivalent of a 10 working day suspension, plus interest. The Department also may issue Grievant a written reprimand for her improper SCAN use.

AWARD

Having fully considered the whole record in this matter, and for the reasons explained in the foregoing Opinion, I conclude:

1. The Department did not have just cause to dismiss Grievant. The grievance is sustained.
2. The Department did have just cause to issue Grievant a written reprimand for improper SCAN use. The Department also had just cause to suspend her for 10 working days for disrespectful and inappropriate behavior toward her supervisors.
3. The Department is directed to reinstate Grievant to her position as an Office Assistant 3, with back pay plus interest to the date of her dismissal. The back pay may be reduced by amount equivalent to a 10 working day suspension, and by interim earnings.
4. The Arbitrator will retain jurisdiction for 60 days from this date to resolve disputes concerning the remedy awarded.
5. Pursuant to Article 29, the Arbitrator's fees and expenses will be split equally between the parties.

Respectfully issued this day of May 9, 2007.


David W. Stiteler
Arbitrator