
In the Matter of:

TEAMSTERS LOCAL UNION NO. 117

Union,

vs,

**STATE OF WASHINGTON.
DEPARTMENT OF CORRECTIONS**

Employer,

**ARBITRATION
FMCS Case No: 07114-51256-5**

**Grievant: Ron Mickelson
Issue: Termination**

ARBITRATION DECISION

OF

DONALD E. OLSON, JR.

Appearances:

**For the Union.....Mr. Spencer Nathan Thal
General Counsel**

**For the Employer.....Ms. Rachelle Wills
Asst. Attorney General
Mr. Shane Esquibel
Asst. Attorney General**

OPINION OF THE ARBITRATOR

PROCEDURAL MATTERS

A hearing was held before the undersigned in accordance with the provisions set forth in Article 9 of the parties' July 1, 2005, through June 30, 2007, collective bargaining agreement. The hearing was held on March 29, 2007, in the Attorney General's Office located at 1115 W. Riverside Avenue, Spokane, Washington. The hearing commenced at 9:00 a.m. and concluded at 4:45 p.m. The arbitrator was selected from a list supplied by the Federal Mediation and Conciliation Service. The case number assigned by the FMCS was: **07114-51256-5**.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to make opening statements, to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties. There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that this case had properly been submitted to arbitration. The parties authorized the arbitrator to retain jurisdiction in the matter for sixty (60) calendar days after issuance of his opinion and

award. The arbitrator agreed to retain jurisdiction. The parties submitted the matter on the basis of evidence presented at the hearing and through argument set forth in their respective post-hearing briefs. Further, the parties stipulated the issue(s) to be determined by this arbitrator.

Mr. Shane Esquibel, Assistant Attorney General and Ms. Rachelle Wills, Assistant Attorney General, represented the State of Washington, hereinafter referred to as "the Employer." Mr. Spencer Nathal Thal, General Counsel, represented Teamsters Local Union, No. 117, hereinafter referred to as "the Union". and Mr. Ron Mickelson, hereinafter referred to as "the Grievant." At the beginning of the hearing the Union objected to an Employer witness participating. After hearing from both sides the arbitrator ruled that the Employer's witness would not be allowed to give testimony regarding this dispute. The parties introduced one (1) joint exhibit, which was received and made a part of the record. The Union introduced a package of exhibits, numbered one (1) through twelve (12), which were received and made a part of the record. The Union later withdrew Exhibit No. 3, after the Employer objected. The Employer introduced a booklet of exhibits, numbered from one (1) through fifteen (15), all of which were eventually received and made a part of the record. The parties requested an opportunity to file

post-hearing briefs. The arbitrator received the Union's post-hearing brief on May 21, 2007, and the Employer's brief on May 31, 2007, at which time the hearing record was closed. The arbitrator promised to render a written opinion and award no later than fourteen (14) calendar days after the record was closed. However, the arbitrator injured his left hand thereafter, and requested an extension to file his decision. The parties agreed to the extension request. This written opinion and award will serve as this arbitrator's final and binding decision regarding this grievance.

ISSUE(S)

The stipulated issue(s) to be determined are:

Was the Grievant discharged for just cause?
If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

**ARTICLE 3
MANAGEMENT RIGHTS**

3.1 Management Rights

It is understood and agreed that the Employer possesses the sole right and authority to operate the institution/offices and to direct all employees, subject to the provisions of this agreement and federal and state law. These rights include, but are not limited to the right to:

- A. Determine the Employer's mission, strategic plan, policies, and procedures;
- C. Plan, direct, control, and determine the operations or services to be conducted by

employees;

- D. Determine the size, composition, and direct the work force;
- E. Hire, assign, reassign, evaluate, transfer, promote, or retain employees;
- F. Discipline or discharge for just cause;
- G. Make, publish, and enforce reasonable rules and regulations;
- J. Determine reasonable performance requirements including quality and quantity of work;
- N. Schedule days and hours of work and overtime as necessary;
- O. Determine the method, technological means, number of resources and types of personnel by which work is performed by the Department; and

The Employer's non-exercise of any right, prerogative or function will not be deemed a waiver of such right or establishment of a practice.

ARTICLE 8 DISCIPLINE

8.1 Just Cause

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

8.2 Forms of Discipline

Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions and discharges.

8.3 Investigation Process

All agency policies regarding investigatory

procedures related to alleged staff misconduct are superseded. The employee conduct report (ECR) process will no longer be utilized. The Employer has the authority to determine the method of conducting investigations, subject to the just cause standard. Investigations will be completed in a timely manner.

8.6 Notification of Charges

Prior to imposing discipline, except oral or written reprimands, the Employer will inform the employee of the reasons for the contemplated discipline and an explanation of the evidence. Upon request, an employee may also have a union representative at a pre-disciplinary meeting, if held. The employee will be provided an opportunity to respond either at a meeting scheduled by the Employer, or in writing if the employee prefers.

BACKGROUND

The Grievant began his employment career with the Employer on July 28, 1980. At the time the instant grievance arose the Grievant was a member of the Union's collective bargaining unit, and was employed as a Fiscal Analyst Three in the Employer's Eastern Regional Business office in Spokane, Washington. On August 16, 2006, the Employer dismissed the Grievant for allegedly playing a game on his computer.

Sometime in May 2006 the Employer's business office was transferring all payroll responsibilities for the eastern region of the state to the business office in Walla Walla, Washington. As such, the Grievant's job duties would be changing from payroll to accounts payable, and he was

scheduled to begin his new duties in account payable on May 22, 2006. On or about May 19, 2006, Ms. Patrice LaFrance, the Employer's Regional Business Manager walked into the Grievant's office and observed the game Sudoku on his computer screen. Thereafter, the Grievant informed Ms. LaFrance that the game was called Sudoku and explained how it was played. Ms. LaFrance allegedly informed the Grievant at this time that Sudoku was a game and he was not supposed to be using his computer for this type of activity. Earlier, on May 16, 2006, and again on May 19, 2006, a co-worker of the Grievant observed him allegedly playing Sudoku on his computer, and subsequently reported these observations to management. On Monday, May 22, 2006, Ms. LaFrance delivered a letter to the Grievant assigning him to home, while the Employer investigated the facts surrounding the alleged game playing incident.

The Employer then began an investigation of the circumstances surrounding the alleged claim that the Grievant was playing a game on his computer during lunch break. The Employer's investigator met with the Grievant on June 28, 2006. During this interview the Grievant apprised the investigator that he was using the Sudoku game as a test environment for problems with cell protection, cell verification, and disabling keystrokes. The Employer's

investigator eventually received the password to the Grievant's computer and was able to access four of his protected files: *Excel Files for Ron, Problems, Puzzle, and Scribble*. Later, on July 24, 2006, the Employer's Comptroller met with the Grievant for a pre-disciplinary meeting. During this meeting the Grievant allegedly informed the Comptroller he was using the Sudoku game to design a use tax spreadsheet.

While the investigation was underway it was discovered that the Grievant had been discipline three separate times during the three years preceding his eventual dismissal. On January 13, 2003, the Grievant received a letter of reprimand from Ms. LaFrance for alleged inappropriate computer use. Furthermore, approximately one year later, on January 8, 2004, the Grievant received a reduction in pay for inappropriate computer use. Once again, July 16, 2004, the Grievant was demoted from Fiscal Analyst 3 to a Fiscal Analyst 2 for using profanity towards his immediate supervisor. After his return to work from his demotion, the Grievant requested and was provided a letter of expectations. Eventually, on September 1, 2005, the Grievant was elevated back to a Fiscal Analyst 3 position.

After the investigation had been completed on July 10, 2006, and the Employer's Comptroller had an opportunity to review same, the Comptroller terminated the Grievant's

employment by letter dated August 16, 2006. The Comptroller found that the Grievant's actions on May 19, 2006, violated the Employer's Ethics and Acceptable Use of Technology policies, since she had allegedly determined the Grievant was playing Sudoku on his computer for personal entertainment.

Shortly thereafter, the grievance as filed on the Grievant's behalf. The grievance was processed through the grievance procedure outline in the parties' collective bargaining agreement without resolution. Ultimately, the instant grievance was elevated to arbitration on March 29, 2007.

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

The Employer contends it had just cause to terminate the Grievant. Moreover, the Employer claims it satisfied its burden of proof by a preponderance of the evidence standard that there was just cause to terminate the Grievant. Further, the Employer alleged the Grievant's dismissal satisfied the Article 8.1 requirement of "just cause" for discipline under labor arbitration precedents. Finally, the Employer argued that for the reasons outline in its post-hearing brief the Employer's dismissal of the Grievant by letter dated August 16, 2006, should be upheld and the grievance should be denied.

POSITION OF THE UNION

First, the Union contended the Grievant was not terminated for "just cause." Second, the Union claimed the Employer has the burden to prove by clear and convincing evidence that there was just cause to terminate the Grievant. Third, the Union argued that the Employer has not proven that the Grievant violated the Employer's policies regarding appropriate use of technology. In support of that claim the Union alleges the policy as written does not prohibit the use of the Employer computers to engage in personal activity on non-work time. Further, the Grievant was not playing a game on his computer, and therefore did not violate the policy. Moreover, the Union maintained it was proper for the Grievant to work on problems with Excel XP using the Sudoku game as a format without prior approval, and in any event such activity does not warrant termination. In addition, the Union asserted that even if the arbitrator finds that the Grievant engaged in misconduct, termination is far too severe given the Grievant's tenure and extensive contributions to the Employer. In support of that position the Union asserted the nature of the offense is not severe, and the Grievant's 26 years of employment is a strong factor supporting the conclusion that termination is too severe. Likewise, the Union maintained the Grievant's significant contributions towards improving the

Employer's payroll system by developing spreadsheets on his own initiative is a special factor that mitigates against termination. Additionally, the Union asserted strongly that the appropriate remedy in this case is reinstatement along with an award of full back pay, benefits, interest and no loss of seniority.

DISCUSSION

This arbitrator has carefully reviewed the entire evidentiary record, pertinent testimony, and the parties' post-hearing briefs, as well as cited cases in support of their respective positions.

Initially, this arbitrator will discuss the appropriate standard of proof that the Employer must obtain in order to prevail in this case. Obviously, the Employer contends that it must shoulder a burden of proof by preponderance of evidence standard, while the Union maintains the quantum of proof the Employer must meet is by clear and convincing evidence.

Frankly, this arbitrator is of the opinion that the Employer must provide proof that it had just cause to discharge the Grievant by clear and convincing evidence, that is, proof by evidence that is clear, explicit, and unequivocal. Clearly, this burden of proof applies both with respect to proving the Grievant's alleged misconduct and with

respect to demonstrating the appropriateness of the penalty meted out, as the Union appropriately brought to the attention of this arbitrator.

Furthermore, as the Employer has correctly pointed out the basic elements of the term "just cause" have been reduced to four tests: notice, proof, investigation, and discipline. This arbitrator agrees. Article 8, Section 8.1 of the parties' collective bargaining agreement mandates that the Employer will not discipline any permanent employee without just cause. Moreover, Article 8, Section 2 defines "discharge" as a form of discipline. However, in this case the Employer has failed to prove it had "just cause" to terminate the Grievant.

Needless to say, the evidentiary record of this case supports a conclusion by this arbitrator that the Grievant had been put on notice that using his state-owned computer to play games could provide grounds for a claim of misconduct, and that disciplinary action against him could be taken. Clearly, the Grievant had received two prior disciplinary actions for alleged similar misconduct. Namely, a letter of reprimand and a reduction in pay. This arbitrator notes that both disciplinary actions taken against the Grievant squarely put him on notice that future similar incidents of misconduct

could result in disciplinary action up to and including dismissal.

Nevertheless, the Employer's case to establish its contractual obligation to prove it had just cause to terminate the Grievant after having established it had provided "notice" to the Grievant that alleged similar incidents of misconduct could lead to further discipline or the ultimate penalty of discharge, its case thereafter regarding the other three tests to establish just cause eroded.

Did the Employer establish by clear and convincing evidence that it had proof there was just cause to terminate a 26 year employee for allegedly violating the Employer's policies regarding improper use of its resources? Without a doubt, in the opinion of this arbitrator, the answer to that question is "NO". First, one of two policies the Grievant was charged with violating, that is, the "Acceptable Use of Technology Policy" which has been designated as policy 280.100, at best, is vague and ambiguous. The relevant provision of that policy which the Employer claims was violated by the Grievant provides that:

The Internet, email, cellular and all other Information Technology resources will be used only for official business purposes.

Yet, this arbitrator notes the phrase "Information Technology resources" which is specifically defined on page 2 of that

policy includes the Internet, electronic mail (email), cellular phones, portable computing devices, etc, but as the Union correctly points out in its brief this policy definition does not make any reference to desktop computers or computer workstations. On the other hand, the Employer argues that the absence of any reference to the desktop computer in that policy is a technical oversight or unnecessary because it is well-understood that desktop computers should only be used for official business purposes. Viewed broadly, that assertion by the Employer may be true, however, when the Employer is attempting to terminate an employee with 26 years service, in part, for violation of this policy, then the policy should be clear and unambiguous. As stated earlier, this arbitrator is of the opinion this policy is not only vague, but clearly ambiguous as it pertains to the use of Employer computers or workstations by employees during normal work hours or during unpaid lunch periods. Moreover, the Employer's policy number 250.100 expressly states:

Anyone who uses the Department's Internet, email, cellular phones, and portable computing device technology resources in a manner not in compliance with this policy may have his/her access immediately terminated and may be subject to corrective/discipline up to and including dismissal.

In fact, the general rule regarding "just cause" standard requires an Employer to inform its employees of rule

infractions of which may result in suspension or discharge, as well as the range of penalties that may be imposed for a violation of same. This arbitrator takes cognizance of the fact that the Employer's policy relied upon to terminate the Grievant contains absolutely no specific reference to the range of penalties that may be imposed for an alleged violation, except general references subjecting a violator to corrective/disciplinary action up to and including termination.

Additionally, this arbitrator concludes the Employer's investigation of the Grievant's alleged misconduct flawed. Indeed, this arbitrator is of the opinion that the Employer did not conduct a full, fair, or objective investigation of the Grievant's alleged misconduct prior to making a decision to terminate the Grievant. A faulty and inadequate investigation of the facts surrounding this matter can and did result in establishing inadequate proof the Grievant was playing the game of Sudoku during his lunch break on the Employer's computer. Initially, it appears the Employer representative(s) jumped to a conclusion suggesting that the Grievant was playing a game on the Employer's computer, without getting all of the pertinent information. The evidence adduced at the hearing supports inference that Ms. LaFrance may have already made up her mind before she

walked into the Grievant's office. After hearing the Grievant's explanation, Ms. LaFrance made no attempt to understand it, let alone confirm or disprove it. In fact, the official transcript at page 132 reflects the following interchange between the Union's attorney and Ms. LaFrance:

Q. Now, you testified that if he had told you that he was using it to test macros, you would have at the time asked him to demonstrate that and explain what he meant by cell protection, cell verification, and so forth, correct?

A. Right.

Q. And then on—it's your testimony that on Monday, he did mention that that was his purpose, correct?

A. He told me on Monday that he was using it to try to develop a macro that would allow him to use keystrokes rather than the mouse because using the mouse caused him wrist pain.

Q. And did you at that time ask him to show you and demonstrate what he was talking about?

A. No, I didn't.

To say the least, this arbitrator finds that type of interchange between management official and an employee suspected of playing a game on his computer, without making further pertinent inquiries surrounding management's suspicions, or failing to have the Grievant demonstrate how he might develop a macro that would allow him to use keystrokes rather than the mouse by using the Sudoku puzzle spreadsheet, to be mystifying. Clearly, it reinforces a conclusion that

management had already made up its mind. Namely, that the Grievant was playing a game on his assigned computer. This belief by management could have easily been sustained or refuted by asking the Grievant to demonstrate or show what he was doing and talking about. Furthermore, it is clear that during this interchange Ms. LaFrance did not ask the Grievant if he was playing the Sudoku game.

Equally important, even during the official investigation conducted by the investigator Todd Wiggs, he admitted that he did not take any steps to understand or ask for an explanation from the Grievant involving his claimed attempt to use the Sudoku game to test macros. This is clearly evident from Mr. Wiggs testimony, which is pertinent in part, reads as follows:

Q. And so you'd agree with me, wouldn't you, that from that initial point of contact where he's (the Grievant) getting challenged on the use of the game Sudoku, he's saying, I'm using the game to test macros, and he reiterated that with you, correct, in the investigation?

A. He did reiterate that to me in the investigation, that he was using it to test his macros, to use it to disable keystrokes, to do, do verification, and using it as, to solve problems that he was having with the whole cell protection issues, and that sort of thing.

Q. Did you understand what he was talking about?

A. Not really.

Q. And yet, you didn't ask for any follow up on that in terms of a demonstration or further explanation: right?

A. I, I possibly would have if-after I interviewed Mr. Mickelson, and he provided me with that information, I went back and interviewed Mr. Potesky-

Q. And so you didn't actually go back to Mickelson and say, hey, explain this to me, because I don't get it? There was not further follow up with Mr. Mickelson to ask for an explanation about all that?

A. Correct.

By all means, this arbitrator must conclude the actual investigation surrounding why the Grievant had a Sudoku spread sheet on his computer screen was never completed. In short, the investigation was not fair or objective, since the Employer's agents relied upon this investigative report to determine some how that the Grievant was playing a game while he was on lunch break.

Yet, the reviewing management official and the actual individual who terminated the Grievant, that is, the Comptroller relied upon the investigative report to conclude the Grievant was actually playing a game of Sudoku, even after the Grievant personally informed the Comptroller he was not playing the Sudoku game. This was a critical error. It is essential for some higher, detached management official to assume and conscientiously perform the role similar to that of an arbitrator, that is, to fairly and objectively review the evidence presented. Of course, this higher level management official has an affirmative duty to make sure that as much

available evidence as possible is collected, and that such evidence receives a careful look from the perspective of a disinterested third party. Equally important, this reviewing official must assure the investigative report is complete prior to making a decision to discharge a given employee. Of course, in this case that did not happen. The Comptroller claimed in her August 16, 2006, letter addressed to the Grievant that "a fair and thorough investigation was conducted on July 10, 2006, which describes these charges in detail, . . .". Additionally, the Comptroller in that same letter asserted the following:

"Specifically, on May 19, 2006, while on duty during your work shift, you were playing a game (Sudoku) using your state-issued computer...."

Without question, the Comptroller in the opinion of this arbitrator did not fulfill her obligation to see that the investigative report had been given careful review, prior to issuing a letter of termination to the Grievant on August 16, 2006. Clearly, if she had, in all likelihood the Grievant would not have been terminated. The Comptroller testified that she would not have terminated the Grievant if she was convinced the Grievant was attempting to sharpen his skills during lunch time, rather than goofing off playing a game on May 19, 2006. Nevertheless, the Comptroller did not ask the

Grievant to demonstrate or even explain in detail what he was doing while he had the Sudoku spread sheet on his computer screen. Accordingly, this arbitrator is not prepared to accept the Employer's assumption that the Grievant was playing a game based on the weak and circumstantial evidence presented in this case.

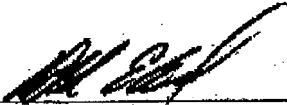
Hence, based upon the record and for the reasons set forth above, this arbitrator concludes the Employer did not have just cause to terminate the Grievant.

AWARD

The grievance is sustained. The Grievant shall be reinstated to his former position as a Fiscal Analyst 3, with no loss of seniority, and made whole, including back pay and benefits from the date of his termination until the date the Grievant is actually reinstated, less any earnings received from outside employment from the date of his termination to the date of reinstatement. The Grievant shall be reinstated to his former position no later than July 9, 2007. The Employer is also directed to pay interest on the back pay award. The interest rate to be applied will be the average interest rate paid to individual savings account holders at three (3) credit unions located in the City of Spokane. The Employer and Union will jointly determine the three (3) credit unions to be used to determine the average interest rate that

shall apply. Moreover, the Employer is ordered to remove any and all documentation regarding the Grievant's termination from his official personnel file, as well as any other files that management may possess that have copies of such documentation. Finally the arbitrator shall retain jurisdiction of this dispute for an additional sixty (60) calendar days after the issuance of this opinion and award.

Dated this 19th day of June 2007.
Tacoma Washington



Donald E. Olson, Jr., Arbitrator