

ARBITRATION AWARD

In the Matter of the Arbitration)
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between)
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)
WASHINGTON FEDERATION OF)
STATE EMPLOYEES)
(Union))
)
And)
)
)
DEPARTMENT OF SOCIAL)
HEALTH SERVICES)
(Employer))
)

Robert Ethington
(Grievant)
AAA No. 75-390-00242 12
TAFL

BEFORE: Eduardo Escamilla, Arbitrator

APPEARANCES:

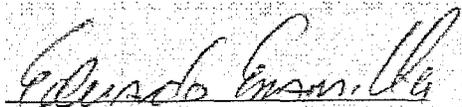
For the Employer:	Patricia Thompson, Attorney
For the Grievant:	Christopher Coker, Attorney

Date of Hearing: January 24 and February 8, 2013

Place of Hearing: Spokane, Washington

Date of Briefs: March 29, 2013

Date of Award: April 26, 2013


Eduardo Escamilla
Arbitrator

ISSUE

Did the Employer have just cause to suspend the Grievant, Robert Ethington? If not, what is the appropriate remedy?

STATEMENT OF FACTS

DEPARTMENT OF SOCIAL HEALTH SERVICES, State of Washington, (Employer) and WASHINGTON FEDERATION OF STATE EMPLOYEES (Union) share a collective bargaining agreement with the most recent contract effective dates of July 1, 2011, through June 30, 2013. The contract contains a grievance/arbitration procedure that requires the parties to resolve their contract disputes through this process.

Grievance process

On October 4, 2011, the Union filed a grievance in behalf of the Grievant alleging violations of Articles 27.1 of the Collective Bargaining Agreement. The grievance was filed after the Grievant received an eight day suspension. The Grievant alleges that the Employer violated the above-referenced article when they suspended him for eight days without pay from his employment as a Support Enforcement Officer 2, while employed at the Employer's Spokane Office of the Child Support Division. The Grievant requests that the discipline be removed and all related documentation be destroyed and that he be made whole.

Suspension Notice

By letter dated October 18, 2011, the Grievant was notified of his suspension. The basis for the suspension is the "result of your failure to follow written directives and to meet performance standards by your lack of demonstrating sound, independent judgment." The letter cited five different cases upon which the discipline was based. The cases were identified as Non-Cooperation Notice case; ADP case; Postmaster case; Utah case; and Nevada case.

With respect to the Non-Cooperation Notice case, the suspension letter noted that the Grievant was under a written directive that he was no longer authorized to issue Non-Cooperation Notices for custodial parents for failure to provide information unless it was essential to working the case. By sending out the Non-Cooperation letter on May 20, 2011, the Grievant failed to follow the written directives. Furthermore, the Employer concluded that the client had met their obligation of cooperation by calling him in response to his request for information.

With respect to the ADP case, the suspension letter stated that his conversations on May 23, 2011, with ADP representatives were "condescending, arrogant and abrupt." He was overheard telling ADP that they were "doing it wrong". The letter concluded it "wasn't his place" to question outside employers' procedures. In addition, the suspension letter also stated that these conversations were included in his case comments and that some of the phrasing was condescending and reflected his criticism which was extraneous information that was not relevant to the case.

With respect to the Postmaster case that occurred on April 20, 2011, the suspension notice concluded that his conversation with the postmaster regarding registered mail was "difficult and unprofessional by not listening and unwilling to change a preconceived notion." In addition, his case comments regarding this conversation included criticisms and unfavorable opinions of the U.S. Postal Service and postmaster.

The notice of suspension letter also identified the June 7, 2011, phone conversation with Utah Child Support Caseworkers regarding medical and daycare expenses. He was cited for raising his voice during a conversation and having an increasingly confrontational tone in his exchange. It concluded that he was acting in a "demeaning" manner by telling the Utah representative what she needed to do, and did not allow her to answer any questions. The letter also stated that when he spoke to the caseworker's supervisor his conversation and tone of voice began in a mild manner in which he described how rude the caseworker was. However, his tone changed and his voice rose again. The supervisor asked to speak the Grievant's supervisor at least on two occasions but he refused. In addition, his case comments included criticisms of the Utah Child Support staff.

The suspension letter also noted the June 10 and 14, 2011, conversations with a Nevada Child Support caseworker and supervisor regarding their policies on closing cases. The letter stated that his conversation started in a professional manner but changed when the caseworker was unwilling to do what he was asking. The Utah supervisor maintained the Grievant's phone call was frustrating because the Grievant kept insisting that Nevada could not continue to work the case, despite her explanation of Nevada's policies. His case comments on this matter reflected his argumentative tone and criticisms of the Nevada Child Support staff.

The suspension letter also noted that on January 12, 2011, his supervisor placed him on a Performance Improvement Plan (PIP) designed to assist him improve in several areas of concern related to the pattern of failing to demonstrate sound, independent judgment. A specific concern raised in the PIP involved the inclusion of information in his case comments that were not relevant. It instructed the Grievant to post only "concise comments documenting relevant information", citing specific handbook policy. The posting of non-relevant information to the case documents is in direct violation of the Employer's handbook and was further set out in his expectations during numerous performance improvement meetings.

The suspension notice also concluded that the Grievant failed to exercise good judgment when he posted extraneous and disrespectful comments. It concluded that the Grievant's communications with their external partners were found to be arrogant, demeaning, and condescending which clearly violated the handbook policy regarding communications.

The notice of suspension also cited the Grievant's April 9, 2009, prior disciplinary action wherein he was issued a written reprimand for failure to comply with directives of not working on cases while the cases were still in the hearings unit. Specifically, the Grievant issued a Non-Cooperation letter to a client for failing to provide information while the case was in the hearings unit.

On December 16, 2009, Grievant also received a two day suspension without pay for failing to follow the supervisor's directive not to post personal information case comments about individuals who are not parties to the case.

Performance Improvement Plan

January 12, 2011, the Grievant was placed on a PIP that specifically listed several items of concern. The first item dealt with Grievant's inappropriate use of case comments and his failure to make "clear and concise comments, documenting relevant information." The second item was entitled public disclosure. The PIP noted that the Grievant failed to use good judgment with respect to public disclosure by discussing cases with individuals who were not a party to the case. The third area of concern was entitled location actions which involve "excessive and unnecessary" use of forms to locate individuals, stating that the Grievant was "performing unnecessary, exhaustive location actions on the CP in order to provide a background foundation of the case." The fourth item was entitled case load management. It states that Grievant often took action without considering the cost of personnel and materials. It listed several examples of such actions. The fifth item was identified as "customer service, communications and public relations". It stated that there had been several complaints about his abrupt phone conversation and style and identified several cases as examples. The sixth item identified in the PIP dealt with reliability. The PIP stated that the Grievant could not be relied upon to follow established protocols and cited several examples. The PIP warned the Grievant that continued performance failures could result in disciplinary action up to and including dismissal.

On January 26, 2011, Lyn Rindy supervisor of Spokane Office of Child Support Division provided the Grievant with "Directives Regarding Work Expectations" describing 19 different areas. Relevant to the case at hand, a directive instructed the Grievant not to post personal information in the case comments section regarding individuals who were not parties to the case. It also reminded the Grievant to post only pertinent information needed to work the case. There was no need for him to post comments about relatives or friends to the case. Additionally, he was also instructed in the directives not to issue Non-Cooperation Notices for failure to provide information "unless it is essential to working the case". The directives were restated in a memo dated April 28, 2011.

Management met with the Grievant on four different occasions to discuss his Performance Improvement Plan. The Employer noted that there were some improvements in most of the categories. The first progress report was January 27, 2011, followed by March 3,

April 29, and May 18. The progress reports noted the Grievant's improvement in all areas including case comments, customer service, and communications and public relations.

Testimony

The Employer presented numerous witnesses to support its case that it had just caused to discipline the Grievant. One of the Employer's main witnesses is the Grievant's supervisor, Lyn Rindy. She supervises among others, Support Enforcement Officers, including the Grievant. She estimates that the SEOs in the Spokane offices have approximately 770 cases each. However many of the cases do not require any work and she estimates that SEOs will handle approximately 50% of those cases while the other cases do not need monitoring because of compliance.

SEOs act as a first line employee who collects monies owed in child support collection cases. They primarily make phone calls to different employers, agencies, and other individuals in an effort to collect money owed pursuant to court orders. On occasions, they will also deal directly with individuals. SEOs will examine cases at different stages of the collection process, which may require examining bank accounts, contacting Employers to ensure the appropriate deductions are made pursuant to court orders, and contacting other in-state and out of state agencies. SEOs also can recommend suspensions of bank account and driver's license for noncompliance. Each case must be examined as an individual case and actions are determined on a case-by-case.

Because of the SEOs' interaction with clients and other "stakeholders", their communication and personal relations are reviewed and monitored. The interaction cannot be measured but it is important to have good communication skills and good personal relationships with employers and other state agencies.

SEOs are trained on communication skills and are trained to deal with various reactions from customers in the collection process. The SEOs must act in a professional manner and also treat other agencies as professional individuals. It is common that SEO deal with many angry public individuals. SEOs are expected not to respond in kind if the customer is angry or uses

profanity. The SEOs have the ability to end a phone conversation if the callers begin using unacceptable language. When this occurs, the SEOs' interactions with parties are documented.

The SEOs documents these interactions or any actions taken on a case by entering them in the file's "case comments" section. This provides a history of the SEOs' interactions with other individuals and also the progress and status of the case collection process.

SEOs spent approximately their first five months in on-the-job training and handbook training. During this time they are trained to make entries to the Comment Case section of the file in a "clear and concise" manner, and report pertinent information that will help determine what, if any, further actions are needed.

Rindy supervises six collection teams (units). The Spokane office also has three lead SEOs who provide hands-on training to other SEOs. They are treated as technical experts and used as a resource for the remaining SEOs, and consequently have fewer cases assigned to them.

She describes the Grievant as hard-working, very committed, and dedicated to his work. However she finds that one of the challenges the Grievant faces is difficulty making judgment decisions concerning what further actions a case are needed. The Grievant's tendency is to send out the same forms in every case regardless of what the case actually needs.

Rindy became supervisor of the Spokane office in December 2009. She met with the outgoing supervisor and they discussed the employees in the office. The previous supervisor informed her of the Grievant's performance issues and she reviewed his past evaluations. The prior supervisor's file also documented meetings with the Grievant and his training by the lead SEO. She concluded that the files showed that Grievant did not following oral directions. The prior supervisor also informed her of a pending disciplinary action. Rindy did not take any part in the then pending disciplinary action.

Additionally Grievant has difficulty with public communications. In examining the Grievant's file, there have been complaints about him from the prosecuting office and public

assistance office as well as difficulty dealing with individuals. A major problem of the Grievant deals with interactions with employers. The Grievant treats small employers the same as large employers who do not have the same resources. Rindy expects the SEOs to help the small employers who have difficulty understanding the process. The Grievant does not distinguish this nuance.

In 2010, Rindy had an opportunity to observe the Grievant's performances. She felt that Grievant was working on too many cases and was being buried in his work. She felt that he was unnecessarily working on certain cases. The Grievant informed her that he was stressed and simply did not have enough time to do all the work that was required on cases. Although, the Grievant had high numbers in his work achievement goals, she discovered significant mistakes made in his cases.

She consulted with Grievant's lead SEO, Ron Walker, and they decided that the most helpful thing for the Grievant was to develop a Performance Improvement Plan. The plan listed the Grievant's consistent problems. They met on January 12, 2011, with the Grievant and the Union steward and inform them that the PIP was a result of their observations of the Grievant during the prior year. The intent of the PIP was to identify areas of improvement and to eliminate these concerns by following the PIP. They believed that if problems were eliminated his stress would be reduced because he would not be buried in his work.

Part of the PIP required the Grievant to provide Rindy and Walker all the cases he worked on a daily basis. She and Walker would then review a certain percentage of the cases and thereafter meet with the Grievant and give their feedback. She estimates that she and Walker each reviewed roughly 20% of the Grievant's daily cases. The cases that Rindy reviewed were cases where she discerned a sense of difficulty or concern with interactions with clients because of his entries in the case comments section of the file.

When she discovered several cases that showed unprofessional conduct dealing with others, she contacted human resource and management to inform them of her discovery. They agreed that she should conduct an investigation and obtain the caller's side of the story as well

as the Grievant's. On August 12, 2011, she wrote her investigation report identifying five cases that led to the instant disciplinary action.

The first case dealt with ADP, a large payroll company hired by various employers to process their payroll requirements. ADP consequently issues employees' checks, calculate withholding taxes, and deal with other pay related issues including issues involving the Employer's collection process. When she reviewed his case comments, she concluded that his comments indicated that he did not act in a professional manner. During the investigation of the case, the Grievant informed her that the problem was with ADP not withholding the correct amount. Rindy conclude that the Grievant acted in an unprofessional manner because he included in his comment "insisted that it (ADP) was correct". The word "insisted" was the triggering aspect of his notations that alerted her to a potential problem.

When she investigated this case, she was not able to talk to the people who dealt directly with the Grievant, as per ADP's policies. However, she was able to talk to other SEOs who overheard the Grievant's conversations with ADP. Two employees confirm that they overheard this conversation and informed her that the Grievant's conversation was demanding and rude. This occurred in June 2011.

The second case identified as problematic was the case which she identified as the Non-Cooperation Notice case. Oftentimes, clients are on public assistance. If the client refuses to cooperate, a Non-Cooperation Notice is transmitted to the agency providing the financial assistance. She discovered this issue while conducting the audit of Grievant's cases. The Grievant had requested information from the custodial parent by sending out the appropriate forms. The client or relative thereof called in response to the form. The relative was a noncustodial grandparent who was also on assistance. The individual informed the Grievant that she did not have any information but that she would try to get the information. After not receiving a call back from the grandparent, the Grievant issued a Non-Cooperation Notice. However prior to issuing a letter he spoke to a lead worker, James Kennedy, from whom the Grievant allegedly asked permission to issue this letter. The lead worker informed Rindy that it was his mistake because he had not reviewed the file and if he had reviewed the file, he would have concluded that the client had in fact responded verbally and the verbal response was sufficient. This case

was specifically troubling to Rindy because this interaction occurred shortly after his progress meeting on May 18, 2011.

The third case cited in the disciplinary action involved a U.S. Postal Service postmaster. Again in reviewing the Grievant's cases as part of the audit, she read the case comments that were posted on the case for April 20, 2011. The case comments indicated that the postmaster disagreed with the Grievant's assessment regarding registered mail indicating the postmaster had made a mistake. She asserts that Grievant's job does not include telling other agencies they are not doing their job correctly.

She subsequently contacted the postmaster who recalled the conversation. The postmaster tried to explain the Postal Service process to the Grievant, but the Grievant had a preconceived notion and did not want to hear about the postal service procedures. He however indicated Grievant did act in a professional manner.

The fourth case used as a basis for disciplinary action is referred to as the Utah case. She became aware of this case because an employee notified her that a Grievant's conversation on the phone was escalating. Rindy stood outside and out of sight of the Grievant's cubicle and overheard his conversation wherein the Grievant demanded in a raise tone of voice that they (Utah State staff) provide him with a copy of the Utah law which prevented them from complying with his request. Rindy conveys that the Grievant appeared to be angry, insisting that all states had to comply with this requirement because it was federal law. He demanded to speak with the person's supervisor. The Grievant told the supervisor that the employee had been rude and had refused to send him a copy of the law. The supervisor finally agreed to send him a copy of the law.

The final case cited in the disciplinary Notice was referred to as the Nevada case. She discovered this case as part of her audit. She read the case comments and was concerned that the comments indicated that the conversation with the Nevada employee had been difficult. His comments indicated that the Nevada employee had made a mistake, and elevated the conversation to the employee's supervisor. The supervisor later spoke with Rindy and told her

that the conversation with the Grievant was frustrating. However, the supervisor nevertheless stated that the Grievant acted in a professional manner.

The supervisor stated that he could not continue talking to the Grievant and just hung up. Rindy again concludes that it is not appropriate for the Grievant to tell another state agency how to administer their laws or how to do things. She is concerned that if there is a lack of cooperation between the different states, the states handling Washington States cases, who had challenging conversations her employees, may have a negative effect of not prioritizing Washington cases as they should be.

On August 2, 2011, Rindy interviewed the Grievant about these allegations. With respect to the ADP issue, the Grievant maintains he did not do anything wrong, but merely tried to convey in his case comments the attitude of the ADP personnel. Rindy took into consideration the Grievant's assertion that ADP was a difficult entity. He asserted that a lot of the SEOs have had difficulty with ADP. Rindy sent out an e-mail posing the inquiry whether any SEOs had difficulty with ADP. Only 2 out of 13 employees responded. Both employees' emails stated they did not have problems with ADP. Based on those two e-mails she assumed the ADP was not problematic.

With respect to the Non-Cooperation Notice case, the Grievant maintains that he sought and obtained permission from the lead SEO before issuing the letter. Rindy points out that the phone response is a sufficient response to the request for information. Additionally, the client's grandparent did not have an obligation to respond and the Grievant's actions affecting her assistance were unwarranted.

With respect to Postmaster case, Grievant felt that the postmaster's attitude about the failure to handle registered mail was terrible.

With respect to the Utah case, the Grievant asserted that she had only listened to one side of the case of the phone conversation. He maintained that the other person was not cooperative and was spoiling for an argument from the very start. He asked to speak to her supervisor. The supervisor later informed Rindy that the Grievant conducted himself in a

professional manner, even though Rindy categorized Grievant's tone as unprofessional and demanding. Rindy concluded it was unprofessional for the Grievant to post the attitudes of others because it was important for others who might deal with the case not to have a preconceived notion.

With respect to the Nevada case, the Grievant admitted that he documented his interactions with the Nevada employee because that person was not the sharpest pencil in the box. His comments were meant to just describe this individual's capability.

Ron Walker testified at the hearing. He sits in a cubicle next to the Grievant and can easily hear the Grievant on the phone. He can hear the Grievant because of his raised voice and on other times he admittedly eavesdrops. Other employees have complained that the Grievant speaks too loudly on the phone.

With respect to the Postmaster incident, the Grievant informed Walker about his conversation with the postmaster. He admits that the Postal Service is not exemplary in carrying out their duties with respect to registered mail. It is frustrating when dealing with the Postal Service because on occasions the Postal Service procedures forces SEOs to redo the work which leads to additional expenses. The Grievant told him that he informed the postmaster he was unhappy and wanted to know what went wrong and how to remedy it. This conversation occurred contemporaneously with the conversation the Grievant was having with the postmaster. Based on this conversation, Walker did not feel the Grievant's interactions were noteworthy.

James Kennedy is a lead SEO at the Spokane Office. He has been employed at the Spokane division for approximately 8 years. He recalls the incident concerning the issuance of the Non-Cooperation letter. The Grievant asked him whether it was effective to issue a Non-Cooperation letter to a non-custodial grandparent who was receiving public assistance. Based on the question and the manner in which was posed, he did not feel it was necessary to review the case file to provide a response to the Grievant. He informed the Grievant that if the grandparent was receiving assistance, a Non-Cooperation letter would be effective. He adamantly denies that he authorized the Grievant to issue a Non-Cooperation letter. Once he

obtained all the information, he asserts that he never would have approved the issuance of Non-Cooperation letter because a phone verbal response was all that was necessary to satisfy the cooperation requirement.

Mark Swanson is the District manager for the Spokane and Wenatchee Offices for the Division of Child Support of the State of Washington. The offices have approximately 120 employees. He is the authorizing agent who decided to issue the current disciplinary action. He was aware of the Grievant's prior disciplinary actions that included a letter reprimand, and a two-day suspension.

In a nutshell, he describes the key issue involving the Grievant is that "the ends do not justify the means". The Grievant is a high producer of cases and meets all his goals, but his method of performing his work is not acceptable, which is the crux of this disciplinary action. He readily admits that the SEO jobs are stressful and stress can be discerned from the case comments.

The Union presented several witnesses in behalf of all of their case. They generally confirm the testimony that the SEO job is a stressful job, dealing with angry or difficult clients. It is not unusual for employees to raise their voices during phone conversation working on their cases.

Robert Ethington testimony revealed that he has been employed for 11 years in the Child Support Division. He enjoys his job but considers it to be a very stressful job because it involves dealing with money and people who must pay it or people who want to receive it. The major part of this job is spent on the telephone.

With respect to the disciplinary actions, the Grievant confirms the general conversation with the grandparent in the Non-Cooperation Notice case. The grandmother contacted him in response to a form he sent and stated that she did not have that information but that she would try to get the information from her daughter and would call back. He stressed that she needed to call back. Time went by and she never called back and that is when he contacted James Kennedy the lead SEO. He acknowledged that he is restricted from sending Non-Cooperation

Notices unless he obtains permission from a lead SEO. He states that he in fact obtained permission from Kennedy, permitting him to send out the letter. Kennedy had the ability to look at the case but he refused or failed to do so. Kennedy was allegedly aware of his restrictions from issuing Non-Cooperation Notices.

He asserts that he was never informed prior to hearing that he misled Kennedy when discussing the case involving the Non-Cooperation Notice. The Notice of suspension does not indicate that he misled Kennedy in his conversation with him. He was never asked whether he misled Kennedy and the first time that he heard about this accusation was at the hearing.

However, contrary to his testimony, the Notice of intent to discipline included the allegation that he misled Kennedy in obtaining the noncooperation letter.

With respect to the ADP issue, he was unaware that he was not communicating with customers in an acceptable manner. No one had approached him about his conversations. He does admit that throughout his employment tenure, Walker would provide suggestions when conversations became contentious. He observed Walker dealing with contentious clients and he learned how to defuse the situation from him.

He believes it is an unfair to consider his conversations as being condescending because a person listening to only one side of the conversation simply does not know what the other persons are saying. As long as you do not have both sides of the conversation it is difficult to make any objective conclusion.

With respect to the postmaster case, he disagrees with Rindy's assessment that he acted unprofessionally. He was taken aback that Rindy was soliciting complaints from customers.

He explained that if an issue of registered mail arose, he would send out a form to the Postal Service to obtain the information of whether or not the person who signed for receipt of the mail was an authorized person. He contacted the postmaster about this particular case. The

postmaster was basically "blowing him off" by telling him that they had already submitted the response to the form and that was all that he could do. He denies being rude to the postmaster

The Grievant explains that he documents incidents in the case comments because he was trained that in contentious cases he should document as much as possible to make sure that the State and he, personally, would be protected against liability issues. It is now the instructions of the office to keep reducing the length of these case comments to only one field entry. Because of these directives, he feels that his comments or lack thereof are adding to his stress. It is always in the back of his mind when dealing with contentious callers of what will happen to him based on the lack of information in his comments. He does admit that he has been instructed not to include comments that are non-objective.

ANALYSIS

Employer's position

The Employer's arguments are straightforward as customary in most disciplinary cases where the issue of just cause arises. The Employer argues that the standard of burden of proof that falls on an employer in disciplinary cases is the "preponderance of the evidence" standard, meaning that the evidence must show "more likely than not the factual events are as it asserts". There are two main areas of analysis in just cause cases: whether the misconduct was proven and whether the punishment "fits the crime". It enumerates the seven criteria often and traditionally identified with the principles of just cause.

The evidence is clear that the Grievant had notice that his various work performance issues were not acceptable to the Employer; that the Employer conducted a thorough and fair investigation by contacting and interviewing all the available witnesses; the rules dealing with the allegations were clearly outlined in the Employer's various policies; and the evidence of each specific allegation was proven by the preponderance of the evidence.

The issue of consistency and degree of punishment should be examined by considering "the seriousness of the offense, the Grievant's past record, the Grievant's knowledge of the agency rules, and prior warnings administered by the Employer." In the instant case, the Employer properly considered the Grievant's prior disciplinary history and in accordance with progressive disciplinary principles, the eight day suspension was the appropriate level of discipline. The Employer further asserts that according to accepted practice, arbitrators "may not modify a penalty absent arbitrary, capricious, or discriminatory reasons". No such evidence of such improper imposition of penalty exists in this case.

Union's position

The Union submits that even though the allegations raised against the Grievant include five distinct allegations, there are in actuality three "concrete allegations of misconduct". These involve the allegation that the Grievant failed to follow written directives with respect to the Non-Cooperation Notice issue; failed to meet performance standards regarding his tone and demeanor during work phone conversations; and failed to adhere to Case Comments section guidelines.

The Union submits that in disciplinary cases, the Employer has the burden of proving misconduct by preponderance of the evidence. However, it believes that in certain situations the burden of proof should be raised to the standard of "clear and convincing" evidence because of the severity of the discipline.

Firstly, the Union argues that the Grievant did not violate any written directive issued to him concerning the Non-Cooperation Notice. It points out that the only directive addressing this issue directed the Grievant not to issue a Non-Cooperation Notice for failure to provide information unless "it was essential to working the case". The Grievant admits that he was instructed to seek permission from a lead worker prior to issuing a Non-Cooperation Notice, even under those circumstances. The evidence does not support a conclusion that the Grievant was completely prohibited from issuing such a Notice, but merely had some restrictions. The Grievant believed that the Notice was essential to working the case and he obtained permission

from a lead SEO prior to issuing the Notice. The evidence does not contradict this good faith belief of compliance.

The Union acknowledges that the Employer presented testimony disputing the Union's position that the Grievant did in fact obtain permission. However, the Employer's evidence amounts to an "allegation of intentional work misrepresentation", an allegation which was not specifically included in the disciplinary letter. There is insufficient evidence to show Grievant acted under the belief that issuing the Notice under these circumstances was in fact "essential to working the case".

With respect to the allegations of inappropriate telephone interactions, the Grievant denies these specific allegations. Even though the Grievant was under numerous directives, none of those involved any concern over his "telephone etiquette". The Union argues if those concerns existed, they should have been raised in the comprehensive directives issued to the Grievant. The Grievant was never placed on notice that his phone etiquette was an issue to his Employer.

With respect to the third area of dispute involving inappropriate Case Comments, the Union argues that this discipline resulted solely because of the Grievant's honesty of including such comments in his files. The Grievant was unfairly subjected to an unprecedented degree of work audits by his supervisors that revealed this issue.

Additionally, the Union argues that the Grievant did not violate the Employer's policy on the basis that his comments were not "clear and concise". There is insufficient evidence to clearly define what "clear and concise" is or that the Grievant had been provided training to meet the supervisor's expectations. The Grievant merely exercised his judgment to include case comments on cases in which he encountered difficulty with the phone participants in order to alert any other employee who might handle this case.

Conclusions

The parties agree that the central issue in this case is whether the Employer had just cause to discipline the Grievant. Inherent in determining this issue, several well-recognized axioms of legal principles involving the determination of just cause are adopted. In disciplinary matters, it is the burden of the Employer to prove by the preponderance of the evidence that it had just cause to discharge or discipline the employee. In order to establish just cause, many arbitrators have adopted well known and accepted analysis associated with this issue.

Firstly, employers are endowed with the right to establish rules and policies under the general management rights provisions of the contract. They are generally within their managerial rights to establish these rules for the purpose of achieving business goals or promote the health and welfare of the employees. These rules create expectations that employees must abide by in order for continued employment. Thus, the Employer must establish that the disciplined employee violated a well-known rule that was reasonably implemented to achieve the Employer's business goals and safety and welfare of employees.

Once establishing the employer has such a rule, it must be shown that the disciplined employee was aware of the rule and was also aware that adverse consequences would ensue if the rule was violated. Thus, the groundwork for employers to manage its workforce through disciplinary process of enforcing reasonable work must be established.

If an employer believes an employee violated a work rule, it is incumbent upon the employer to provide the employee with inherent due process rights that are incorporated in the just cause provisions of the contract. These due process rights include a fair and open investigation of the allegations against the employee; specificity of the allegations; and an opportunity for the employee to respond to the allegations. Additionally, many arbitrators also find that the timely investigation and disciplinary action by the employer is also a requirement for due process.

Upon completion of the investigation and deliberation by the employer of all the evidence, the employer then has wide latitude of deciding whether or not it has a reasonable basis to conclude that it had just cause to discipline an employee. Normally, the employer's discretion may not be usurped by arbitrators nor should an arbitrator's own judgment on the degree of punishment be substituted for that of the employer's.

However, other principles of due process and fair play apply in this latter analytical process. An employee's due process rights and the employer's obligation of fair play also takes into consideration whether or not the employer acted in a consistent manner in enforcing the rules and in arriving at the degree of discipline. If inconsistencies in either the enforcement of the rules, or the degree of discipline is established, then the Employer may be found to have violated this aspect of the just cause provision. Thus, arbitrators often will be asked to assess whether the punishment fits the nature of the offense in determining whether there was an abuse of managerial discretion in arriving at the degree of discipline.

Additionally, the just cause provision also has been found to include the principle of progressive discipline. Just cause requires an employer to mete out different disciplinary measures in an effort to rehabilitate an employee's unacceptable behavior or work performance in an attempt to correct this behavior through progressive disciplinary actions.

Thus, the primary preliminary focus in just cause analysis is whether or not the employer carried its burden of proof to show that the employee committed the alleged infraction. Most arbitrators place the quantum of burden of proof as preponderance of the evidence. Other arbitrators have used the quantum of proof as clear and convincing evidence standard when dealing with discharge cases. This arbitrator uses the preponderance of evidence standard. However, when dealing with discharge cases, closer scrutiny is appropriate when analyzing the

factors of fairness in deciding whether just cause was established. I note this is not a discharge case, but nevertheless closer scrutiny of the employee's due process rights will be undertaken.

After carefully considering the evidence and the parties' arguments, I agree with the Union that this disciplinary action deals with three main areas of concern for analysis purposes: Non-Cooperation Notice, Case Comments, and phone interactions. However, the Employer used five specific instances to base its disciplinary actions. The Employer is required to meet its burden of proof on each allegation.

Initially, I find that the Employer met its obligation of instituting rules that had a reasonable basis to effectuate the purposes of its mission. Rules regarding employee conduct, case file entries, and processing procedures have historically been recognized as covered by the management's right provision of the collective bargaining agreement. Additionally, I find that the Grievant was informed of these rules and that violations of the rules would lead to discipline. The PIP, prior disciplinary actions, and evaluations specifically set forth this notice and warning of disciplinary action for violating these rules.

I also find that the Employer conducted a thorough investigation of the allegations regarding the alleged phone misconduct. It provided an opportunity for the Grievant to respond to the actual facts after the Employer interviewed the other parties and witnesses. These allegations involved the question of whether or not the Grievant acted in a professional or unprofessional manner dealing with clients. There is no doubt in my mind that the Grievant is aware that he represents the State when dealing with clients. As such, there is a reasonable inference that the Grievant is aware of the expectations that he must conduct himself in a professional manner. This is a commonsense rule and no employee would be surprised to be discipline for engaging in "unprofessional" conduct towards clients. The determining issue however lies in deciding exactly what unprofessional conduct means.

In two of the phone misconduct allegations, the Employer is faced with the immediate challenge that during the interviews of the respective clients in the Postmaster case and Nevada case, management was specifically informed that the Grievant acted in a professional manner, despite his conversations with their staff. As everyone has acknowledged, the Grievant's duties involve issues that are often confrontational, stressful and not easily resolved. The question of whether an individual acted in a professional manner requires an objective standard rather than a subjective standard.

Applying an individual subjective standard would unnecessarily lead to inconsistent application of the collective bargaining agreement. Management is nevertheless not limited or prohibited from assessing the circumstances and arriving at an objective conclusion that an individual's actions are inappropriate. The manner in which this is resolved is through the quantum of evidence known to the Employer at the time of discipline. I find that the Employer acted in good faith in concluding that the Grievant did not act in a professional manner dealing with clients in the Postmaster and Nevada case.

However, the evidence available to the Employer at the time of discipline also included the statements from the parties that challenged this conclusion. Representatives of both clients clearly interjected their opinions during the investigation and stated that the Grievant acted in a professional manner. It is inconsistent for the Employer to conclude that the Grievant acted in an unprofessional manner when the alleged victims assert that the Grievant acted in a professional manner. This inconsistency shows that the supervisor's subjective standard was used rather than the objective standard.

Furthermore, with respect to the Postmaster case, I also find Grievant's immediate supervisor's actions are relevant to the issue of whether the Grievant acted in a professional or unprofessional manner. The facts clearly show that the Grievant's supervisor was contemporaneously aware of this issue when the Grievant was dealing with the postmaster. The supervisor did not find the phone interactions of sufficient concern to contact the postmaster to

determine whether the Grievant acted in an unprofessional manner. Thus, the issue of objective standard is furthered underscored.

With respect to the third case involving unprofessional conduct, the ADP case, I find that the Employer faces difficulties in proving this allegation especially because it was not able to interview the client's witnesses. The Employer relied solely on the testimony of two employees who overheard the Grievant's conversation. Reliance on the subjective opinions of individuals such as employees who are asked or who voluntarily offer to opine whether or not a person is acting in an unprofessional conduct clearly falls within the subjective standard of deciding this issue. If the supervisor cannot subjectively judge an individual with respect to disciplinary actions, I find that coworkers cannot interject their opinions and be the sole basis for a determination of unprofessional conduct. Those employees indeed have the right to voice their opinion. However, it is the Employer who establishes the standards of what professional conduct means rather than employees' opinions.

Accordingly, I find that in the ADP case the Employer's reliance on coworkers' opinions is an insufficient basis to conclude that the Grievant acted inappropriately with ADP representatives. This is further underscored by the fact that the Employer was unable to talk to the client's witnesses and thus relied solely on opinion testimony.

With respect to the Utah case, the Employer has presented direct evidence of the Grievant's conversation, because the supervisor actually listened to the conversation and later spoke with the other party. Even though the Union might find it distasteful that a supervisor eavesdropped on the conversation, it does not diminish the fact that the Employer has direct evidence of this conversation. Under these circumstances, I find that the Employer can rely on the facts obtained during the investigation and can conclude that the Grievant's conduct was unprofessional based on an objective standard. Based on the testimony of all the witnesses including the Grievant's, the Employer had a reasonable basis to conclude that the Grievant acted in an unprofessional manner interacting with the Utah representatives.

In summary, I find that the Employer failed to meet its burden of proof that the Grievant acted in an unprofessional manner involving the Postmaster case, the Nevada case, and the ADP case. However, I find that the Employer did in fact meet its burden of proof and established that the Grievant acted in an unprofessional manner when it dealt with the Utah representatives.

With respect to the Non-Cooperation Notice, I concur with the Union's assessment that there is no absolute restriction on the Grievant issuing Non-Cooperation Notice. However, the evidence is also abundantly clear that such notices can be issued only when it "is effective to the case". Additionally, the Grievant's own testimony acknowledges a further condition imposed upon him regarding such notices. He must obtain supervisory permission before issuing these notices.

As testimony on this issue evolved, its resolution eventually rested on credibility resolution of whether the Grievant did in fact obtain permission from his supervisor or whether no such specific permission was obtained. In order to reach this credibility resolution several other issues must first be addressed.

The Grievant asserts that he was unaware prior to hearing that that the Employer considered his version of the conversation as misleading the supervisor. If this assertion was proven, then indeed, the Grievant did not have an opportunity to respond to the specific allegations. However the evidence clearly shows that during the pre-disciplinary interview between the Grievant and Rindy, he was made aware of the underlying facts as reported by the supervisor that disputed his version of the conversation. Thus, I find that the Employer provided notice to the Grievant and an opportunity to respond to the allegations based on the supervisor's assertions made known to the Grievant during the disciplinary process.

The Employer's position creates the issue that the Grievant intentionally misled or withheld information from the supervisor. This issue, as the Union correctly points out, deals with an intentional action on the part of the Grievant. I find that the evidence dealing with this specific sub-issue is insufficient to show that the Grievant intentionally misled or withheld information from the supervisor. At best, the evidence shows there was miscommunication between the Grievant and supervisor. In the Grievant's mind he complied with the Employer's directives regarding issuance of the Non-Cooperation Notice. In his opinion the notice was effective to process the case and he obtained permission from his supervisor. The lack of evidence of intent does not justify finding the Grievant engaged in misconduct or violated any Non-Cooperation directives as asserted by the Employer.

With respect to the issue involving the Case Comments allegation, I initially find that the Grievant was specifically instructed to cease adding personal commentary about non-parties. Irrespective of the Grievant's concern that the lack of comments will somehow place liability on him, I find that the directives were abundantly clear.

The Employer clearly established that the Grievant failed to adhere to his instructions and to prior warnings regarding commentary about other individuals in the case comments entries. Accordingly, I find that the Employer had just cause to discipline the Grievant for failing to follow instructions over the subject matter.

The Employer took into consideration five specific instances to reach its determination of what the appropriate discipline should be. Reviewing the Grievant's disciplinary history and, if all of the allegations were proven, the Employer's level of discipline would arguably be in compliance with the Employer's obligation to issue discipline in a progressive manner. An arbitrator does not have the authority to second guess the Employer's decision regarding the degree of discipline. But in cases where some of the allegations of misconduct are proven and other allegations are not proven, arbitrators can reassess the level of discipline. The proven

allegations may be sufficient to warrant sustaining the Employer's level of discipline depending on the nature of the violation.

The parties did not submit evidence to substantiate the possible assertion that proving any of the allegations would be sufficient to uphold the level of discipline. Nor can I deduce from record that the Grievant would have been suspended for 8 days if any individual allegation was proven.

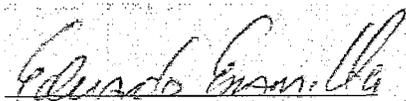
I find that the Grievant's disciplinary history is the determining factor on this issue. It is ultimately the Employer's obligation to meet the just cause standard, including substantiating the level of discipline for the proven allegation. By not proving by the preponderance of the evidence that several allegations occurred, I find that reduction of the Grievant's suspension is warranted.

Accordingly, I find that the Employer's level of discipline was based on three general areas, Non-Cooperation Notice, Case Comments, and phone interactions. The Employer met its burden of proof of showing just cause to discipline the Grievant on two of the allegations, Case Comments and phone interactions. Because this burden was not met on the third allegation, Non-Cooperation Notice, I shall reduce the suspension from 8 days to 4 days, taking into consideration that the last disciplinary action taken against the Grievant was a 2 day suspension.

AWARD

The grievance is sustained in part and denied in part. For the reasons set forth above, the Employer's is instructed to reduce the Grievant's suspension from eight (8) days to four (4) days and make whole the Grievant for any loss of pay and benefits. The Grievant's records shall be modified to reflect the reduction of suspension.

Dated this 26th day of April 2013


Eduardo Escamilla
Arbitrator