

THE MATTER OF ARBITRATION BETWEEN

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MINNESOTA ASSOCIATION OF)	
PROFESSIONAL EMPLOYEES,)	
)	
Union,)	
)	
and)	RODRIGUEZ TERMINATION
)	GRIEVANCE
)	
STATE OF MINNESOTA,)	
DEPARTMENT OF EMPLOYMENT)	
AND ECONOMIC)	
DEVELOPMENT,)	
)	
Employer.)	
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Arbitrator: Stephen F. Befort

Hearing Date: March 30, 2015

Post-hearing briefs received: April 10, 2015

Date of Decision: April 27, 2015

APPEARANCES

For the Union: David Kamper

For the Employer: Laura J. Davis

INTRODUCTION

Minnesota Association of Professional Employees (Union), as exclusive representative, brings this grievance claiming that the Minnesota Department of Employment and Economic Development (Employer or DEED) violated the parties' collective bargaining agreement by discharging Santiago Rodriguez from his position as a Job Counselor without just cause. The Employer asserts that the discharge was warranted because the grievant violated published rules

forbidding the performance of private business during state employment time and while using state equipment. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the Employer have just cause to terminate the employment of Santiago Rodriguez?
If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article 8 Discipline and Discharge

Section 1. Purpose. Disciplinary Action may be imposed only for just cause and shall be corrective where appropriate.

FACTUAL BACKGROUND

The parties have entered into a stipulation that establishes many of the facts relevant to this grievance. The stipulation provides as follows:

1. The State of Minnesota and the Minnesota Association of Professional Employees (“MAPE”) are parties to a Collective Bargaining Agreement (“CBA”) which provides that disciplinary action may be imposed on employees only for just cause.
2. Santiago “Jimmy” Rodriguez (“Grievant”) is a member of MAPE.
3. Grievant worked full time for the Department of Employment and Economic Development (“DEED”) in Crookston, Minnesota from June 1, 1998, until his discharge on July 3, 2014.
4. The State Code of Ethics is set forth in Minnesota Statute §43A.38. Joint exhibit 9.
5. DEED has Code of Conduct and Code of Ethics Policies. Joint Exhibits 7, 8.
6. Grievant was a Workforce Development Representative and his principal duties

were to help DEED clients to obtain employment.

7. The majority of the DEED clients with whom Grievant worked were on public assistance as part of a “welfare to work” program.

8. Grievant is bi-lingual, fluent in both English and Spanish.

9. Effective March 12, 2014, Bonny Stechmann (“Stechmann”) became the Regional Field Operations Manager of the Northwest Region, and the Grievant’s supervisor.

10. While employed by DEED, Grievant also worked full time for the company, Eagles Wing.

11. When American Crystal Sugar needed Grievant’s translating services, he received to his State email address, a message with the text or document to be translated.

12. Grievant opened, read and replied to such email translation requests using his State computer.

13. The parties dispute whether Grievant performed that work on State time.

14. On March 17, 2014, Bonny Stechmann met with all Crookston employees including Grievant, and read the following statement from the policy concerning employee use of State property: “Employees may not use – or allow the use of – state time, supplies, or state-owned or leased property for their own private interests or any other use that is not in the state’s interest.”

15. Two days later, Stechmann sent a follow-up email to staff, including Grievant, summarizing that meeting. Employer’s Exhibit 4.

16. Before beginning in her new role, Stechmann contacted her manager about an allegation that Grievant was conducting outside business on State time, using State equipment.

17. As a result of that allegation, the Employer placed the grievant on investigative leave on April 7, 2014, and began an investigation. Joint Exhibit 1.

18. Investigator Nathan Shepard of the firm Ratwik, Roszak & Maloney conducted an investigation into the Grievant’s conduct culminating in an investigation report dated June 18, 2014. Joint Exhibit 5.

19. Forensic Investigator, John Israel (“Israel”), of State of Minnesota Mn.IT Enterprise Services, conducted a forensic investigation of Grievant’s email and two computer hard drives culminating in a Forensic Investigative Report Joint Exhibit 6 dated June 2, 2014.

20. When Israel obtained the hard drive from Grievant's desktop computer, it was non-functional and he could not obtain any information from it.

21. Grievant's email revealed that between 2012 and 2014, he exchanged email messages with American Crystal Sugar concerning translating documents from English to Spanish.

22. Bonny Stechmann provided to Grievant a discharge letter signed by Tom Norman, Director of Workforce Development for DEED.

23. The letter stated the reason for discharge was that Grievant used state time, property and resources in pursuing personal gain by providing translating services to another company violating Minnesota Statute §43A.38 (State Code of Ethics), the DEED Code of Conduct policy and the DEED Code of Ethics Policy.

24. Grievant's discharge was effective on July 3, 2014.

25. MAPE grieved that discharge in accordance with the parties' CBA and met all applicable timelines.

26. In the summer of 2014 after discharging Grievant, Mn.IT Services obtained new "NUIX" software, an email discovery tool to index and search email that made running forensic email searches more efficient.

27. Using the NUIX software after the Grievant had been discharged, the Employer discovered additional documents related to Grievant's use of State equipment for other outside employment and personal reasons. Employer's Exhibits 5 and 6.

28. An arbitration hearing was held on March 30, 2015 before Arbitrator Stephen Befort.

29. At the hearing, Grievant testified that he stored invoices to American Crystal Sugar on his State Computer hard drive.

Beyond the parties' stipulation, each party asserts the existence of additional facts. First of all, the Employer cites to Mr. Israel's Forensic Report. The report's summary of findings states as follows:

After a thorough review of the files contained in both the state mail and calendaring system and computer assigned to Santiago Rodriguez, I found indications that Mr. Rodriguez routinely used his DEED computer and State of Minnesota email account to accept and respond to requests for translation between English and Spanish. Most of this work involved ongoing work for American Crystal Sugar translating documents, signs, and occasional phrases. Rodriguez would receive

emails at this state account asking if he still did translation work, which he affirmatively answered, then submitting material or phrases to be translated and then return the completed work.

Some translations were short and were turned around quickly via email, while others took more time. This indicates that at least some of the work was performed during hours when Rodriguez was also being compensated by the State of Minnesota for his DEED work. Other work that took more time appears to be work conducted outside of DEED hours, but the use of state email and computers to transfer completed work does not preclude that at least some, if not all, was performed during working hours.

Rodriguez created and emailed invoices from his state computer and email account indicating that the payment for work performed was to be sent to his home address, further indicating that the work was performed for personal benefit and not as part of his DEED employment as a service the State performed and billed for.

The Employer claims that Mr. Rodriguez stated falsely during the investigation that he had not performed any translation work "for the last couple of years." The Forensic Investigation report indicates that Mr. Rodriguez communicated with American Crystal Sugar about translation work using employer-provided equipment during both 2013 and 2014.

The Employer also elicited testimony from State Ethics Officer Carolyn Trevis. Ms. Trevis testified to her belief that Mr. Rodriguez's conduct violated Minnesota's statutory code of ethics. She also identified a list of several former employees who the state similarly discharged for violating the ethics statute.

In support of the Union's case, Mr. Rodriguez testified that he did most of his translation work at home on his own time and only used his work email address to send these documents to American Crystal Sugar. He also testified that any private business conducted on state work premises was performed during lunch and break periods. Finally, Mr. Rodriguez testified that he had consulted with his former supervisor, Carolyn Toupin, about his consulting activities, and that Ms. Toupin gave her approval for these activities so long as the private work took place during break time and did not interfere with DEED work responsibilities. Mr. Shepard's

investigation report, in this regard, stated that "several of the interviewees made statements that tended to indicate that the subjects' former supervisor was aware of the [private] activities . . . [and these statements,] because of their volume and similarity, appear to be facially credible."

The Union also draws attention to three other pieces of evidence. First, Mr. Rodriguez consistently received positive performance evaluations of his state work and the only previous blemish on his disciplinary record was a written reprimand from 2006. Second, the Union points out that the record identifies a total of 23 emails sent by Mr. Rodriguez relating to private business over the June 2012 to April 2014 investigative period, with no message containing translations of more than a dozen words. Third, the Union submitted documentation from American Crystal sugar stating that it did not provide Mr. Rodriguez with any compensation for translation services during 2013 or 2014.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to discharge Mr. Rodriguez for conducting private business during state work time and on state-owned equipment. The Employer points to disseminated policies that prohibit the use of state time and property for private business pursuits. The Employer claims that the grievant violated these policies by performing paid translation work for American Crystal Sugar during state working time. A forensic investigation of Mr. Rodriguez's employer-provided laptop computer revealed email messages that Mr. Rodriguez sent to American Crystal Sugar relating to translation services, and investigator Shepard concluded that these messages constituted routine and not incidental violations of state policies. The Employer further claims that discharge is an appropriate remedy for this misconduct. The Employer asserts that this penalty is consistent with other similar ethics

violations and that the Union did not establish any mitigating circumstances warranting a lesser sanction.

Union:

The Union maintains that the Employer did not have just cause to support its discharge decision. The Union first argues that Mr. Rodriguez's use of state time and resources for translation work was de minimus in nature, constituting only a total of 23 short email messages over a 22 month period and resulting in no pay during 2013 and 2014. The Union further contends that Mr. Rodriguez performed most of his translation work at home and only used his work computer during break times to send these files to American Crystal Sugar. The Union additionally argues that the penalty of discharge is too harsh of a sanction in any event. In support of this contention, the Union claims that Mr. Rodriguez's former supervisor authorized his private activities so long as it did not interfere with his state work responsibilities. The Union also argues that Mr. Rodriguez has a good work record and that the Employer's termination decision is inconsistent with the notion of progressive discipline.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 15-23 (7th ed. 2012).

A. The Alleged Misconduct

The Employer contends that Mr. Rodriguez engaged in misconduct by violating state statutes and employer-promulgated policies that prohibit the use of state time and equipment for private business purposes. The Employer maintains that the investigations conducted by Mr. Israel and Mr. Shepard establish that Mr. Rodriguez violated these prohibitions by routinely performing private work for personal gain using DEED equipment and during state working time.

Minnesota Statutes section 43A.38, subd. 4(a) provides that employees may not use “state time, supplies or state-owned or leased property and equipment for the employee’s private interests or any other use not in the interests of the state.” DEED’s Appropriate Use of Electronic Communications Policy similarly forbids employees to use state-provided technology to engage in for-profit commercial activities. The DEED policy, however, does permit the “reasonable incidental use of these tools for occasional employee personal purposes that does not result in any additional costs or loss of time or resources.”

The two investigations commissioned by the Employer concluded that Mr. Rodriguez engaged in conduct that violated these laws and policies. Mr. Israel's Forensic Report found that "Mr. Rodriguez routinely used his DEED computer and State of Minnesota email account to accept and respond to requests for translation between English and Spanish. Most of this work involved ongoing work for American Crystal Sugar." He also suggests that "some, if not all [of this work], was performed during working hours." Mr. Shepard's report indicated that Mr. Rodriguez had spent more than incidental time performing translation services. That report also discredited Mr. Rodriguez's claim that he had not performed translation services for "the last couple of years" preceding the investigation. Mr. Shepard's report stated, "Mr. Rodriguez's direct statement that he had done translating work, but not for the last couple of years is

contradicted by computer records from Mn.IT showing that he performed that work just days before being placed on investigatory leave."

The Union acknowledges that Mr. Rodriguez sent 23 emails to American Crystal Sugar from June 2012 to April 2014 relating to translation services. The Union argues that former supervisor Toupin gave permission for this at-work activity and that the sum total of these emails is de minimus when considered over the span of almost two years. These arguments, however, do not excuse the apparent violation, but only suggest a potential basis for a lessened penalty. Accordingly, I conclude that the Employer has carried its burden of establishing the existence of the alleged misconduct.

B. The Appropriate Remedy

The Employer argues that discharge is an appropriate sanction under the circumstances. In support of this position, the Employer points to the clear violation of state law and employer policies and the fact that the Employer has discharged several other employees for similar violations.

Nonetheless, I believe that the Union has demonstrated adequately that discharge is too harsh of a remedy for several reasons. First, Mr. Rodriguez's private work was of a relatively minimal nature. The record reveals a total of 23 private emails over the course of 22 months, or roughly one per month. The vast majority of these emails consisted of only a few sentences or less. This evidence is consistent with Mr. Rodriguez's testimony that he performed more detailed translation work at home and that his sporadic contacts while at work did not interfere with DEED responsibilities.

Second, Mr. Rodriguez garnered little by way of financial gain through his private work. An email reply from American Crystal Sugar to a union representative indicated that Mr. Rodriguez did no paid work for American Crystal Sugar during either 2013 or 2014.

Third, Mr. Rodriguez claims that his former supervisor, Carol Toupin, explicitly gave him permission to perform translation work during state time so long as the private work took place during break times and did not interfere with DEED work responsibilities. Mr. Shepard's investigation report bolstered this claim by stating that "several of the interviewees made statements that tended to indicate that the subjects' former supervisor was aware of the [private] activities . . . [and these statements,] because of their volume and similarity, appear to be facially credible." While supervisor consent does not provide a blanket excuse for violating state law and policy prohibiting private work on state time, it does provide additional evidence that Mr. Rodriguez's private work did not impair his work performance as a DEED employee.

Finally, Mr. Rodriguez has a good work record. During his sixteen years of employment, he consistently received positive performance evaluations. In addition, the only discipline noted on his record is a written reprimand from 2006. This good work record further belies any claim that Mr. Rodriguez's occasional private work substantially undercut his performance as a DEED employee.

Based on the above considerations, I conclude that termination is too harsh of a sanction. Accordingly, the disciplinary sanction will be reduced to a ten-day suspension without pay.

AWARD

The grievance is sustained in part and denied in part. The discharge decision is reduced to a ten-day suspension without pay. Subject to that penalty, the Employer is directed to reinstate the grievant and to make him whole for any loss of pay or benefits. The Employer also

is directed to amend its personnel files to reflect this determination. The Arbitrator will retain jurisdiction for 60 days to address any remedial issues as may be necessary.

Dated: April 27, 2015.

Stephen F. Befort
Arbitrator