

In the Matter of the Grievance Arbitration Between

AFSCME Council 65, Union,
Sarah Miles, grievant,

and

Minnesota Judicial Branch, Third Judicial District,
Employer

Before:

Arbitrator Harley M. Ogata

BMS Case No. 14-PA-0808

Date and Place of Hearing:

April 27, 2015
Third Judicial District Administration Office
Rochester, Minnesota

Date Briefs submitted:

May 15, 2105

Advocates:

For the Union:

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AFSCME Council 65

For the Employer:

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Director of Legal Counsel
Minnesota Judicial Branch

Introduction

This is a grievance arbitration involving the discharge from employment of the grievant, Sarah Miles. The parties made attempts to resolve this grievance short of arbitration, but failed to successfully reach a resolution. The parties agree that the matter is properly before the arbitrator for resolution.

Issue

The parties did not reach a stipulation of the issue in this matter, but there is little contention other than the wording of the issue. Therefore the arbitrator has determined the issue to be: Whether the employer violated the collective bargaining agreement between the parties under Article 17 when it discharged the grievant from employment. If so, what is the appropriate remedy?

Factual Background

The grievant, Sarah Miles, began her employment as a court clerk in Rice County in 1998. Over the years, she advanced to the level of Senior Clerk. She was fired from that position in November of 2013 after a lengthy investigation into alleged inappropriate use of the Minnesota Driver and Vehicle Services (DVS) database.

The employer audits use and misuse of the database systems used by its employees on a complaint-based basis. Jamie Majerus is the internal audit manager for the Judicial Branch of the Minnesota state government. In response

to complaints and a lawsuit, Majerus undertook an examination of several judicial districts and their use of the DVS system. This examination included the Third Judicial District, where the grievant worked.

Relevant to this arbitration, Majerus' investigation concluded that the grievant had used the DVS to "look up" over 9,000 members of the public and that over 6,000 of those lookups were questionable as to whether they were made for legitimate business purposes. Included in these questionable lookups were a number of celebrities and local officials.

On March 1, 2013, Jeff Sorba, State Court Administrator, sent out an email to all employees of the Judicial Branch clarifying the Branch's policy on appropriate use of the various data systems that Branch employees have access to, including the DVS system. The email clearly states that employees may "access, use and share data and records only for work related duties and responsibilities." That email states that violations of the policy can result in termination.

After that date, the grievant accessed the system only one more time, on March 4, 2013, to look up data regarding her husband's DWI. Finally, the grievant signed a form (given to all employees of the district) on March 13, 2013 which states very clearly that she understands that she must use publicly available means to access personal, non-work related data and that she is subject to discharge for failure to comply with this directive.

The administration of the 3rd Judicial District took the information provided it by Majerus and conducted a further investigation for the purpose of determining whether to administer any discipline.

Angie Armon, Human Resources Manager and Assistant District Administrator, headed up the investigation. Her investigation included interviews of the 26 employees who had questionable lookups on the DVS system and a review of the first third of the 6,000 lookups that Majerus had determined were questionable or potentially inappropriate. Armon determined that this representative sample of the total included 470 inappropriate lookups. She then multiplied that number by three to conclude that the grievant made 1,410 inappropriate lookups. This determination is approximate because of Armon's reliance on the representative sample of one-third of the questionable lookups.

Based on the results determined to that point, Armon didn't feel she needed to determine an exact number. For purposes of this decision, the arbitrator finds no fault in that determination. Of all the employees investigated, the grievant had the largest number of lookups that Armon determined to be inappropriate. The results of the investigation also showed that all but two of the employees investigated made numerous inappropriate lookups. These employees included both lead workers in Rice County, which is where the grievant worked.

The employer ultimately disciplined 8 of the 26 employees. Three were discharged, one received a 5-day suspension, 3 received a written reprimand and one received an oral warning. Only two were determined to have no inappropriate lookups. The remainder of the employees investigated received no discipline, even though they had varying numbers of inappropriate lookups. One of the terminated employees grieved the discipline to arbitration and successfully overturned the discipline. Arbitrator Charlotte Neigh instead imposed a ten-day suspension.

Relevant CBA and policy language

Article 17, Discipline, Discharge and Resignation, reads in relevant part as follows:

Section 1 Purpose

Disciplinary action may be imposed upon an employee who has attained permanent status only for just cause.

Section 3 Disciplinary Procedure

Discipline is intended to be corrective; not punitive. This process is intended to ensure employees understand the Employer's expectations, standards, and rules, and are aware of the consequences of unimproved conduct or performance.

Disciplinary action shall include only the following forms and depending upon the seriousness of the offense shall normally be administered progressively in the following order:

- 1) Oral reprimand
- 2) Written reprimand
- 3) Suspension

4) Demotion

5) Discharge

A written reprimand shall not be referenced or relied upon for further disciplinary action provided that no disciplinary action of a similar nature has been administered for two (2) years following the date of the written reprimand. Nothing in the above listing of types of discipline shall preclude the Employer from exacting stringent forms of discipline where the egregiousness of the offense so warrants. If the Employer or its designee has reason to discipline an employee, it shall not be done in the presence of other employees or the public. Oral reprimands shall be identified as such.

The Code of Ethics for employees of the judicial branch states in relevant part:

Article I. Abuse of Position and Conflict of Interest

- A. Employees shall not use or attempt to use their official positions to secure unwarranted privileges or exemptions for that employee or any other person...

- C. Employees shall act so that they are not unduly affected or appear to be affected by kinship, position, or influence of any party or person.
...

- E. Employees shall use the resources, property, and funds under their control judiciously and solely in accordance with prescribed legal procedures.

- F. Employees shall avoid conflicts of interest, or the appearance of conflicts, in the performance of their official duties. Examples include but are not limited to: processing cases involving family, friends, and self; using one's position with the courts to manipulate case processing; or influencing the outcome of a case whether positively or negatively for any persons, including yourself.....

Article V. Performance of Duties

...

E. Employees shall promote ethical conduct as prescribed by this code.

I. Employees shall avoid any activity that would reflect adversely on their position or court.

Discussion

Virtually all of the facts in this matter are undisputed. The sole distinction concerns how many lookups the grievant had during the four-year time period involved. The employer repeatedly used the figure of over 6,000 lookups as the correct amount. This figure is based on the preliminary study done by Majerus, the Branch's internal auditor. Majerus determined that the grievant made over 6,000 potentially unaccounted for lookups in the DVS system.

On behalf of the 3rd Judicial District, Armon conducted a further review of the data and facts and utilized a different system to analyze the number and types of lookups, make decisions about discipline, and compare the nature and type of lookups in which each of its employees had engaged. Therefore, the arbitrator will use that figure in the discussion about whether the employer had just cause to discharge the grievant because it allows for a fair comparison of the violations between and among the employees of this district.

Armon is the Human Resources Manager and Assistant District Administrator for the District. Armon took the lead in investigating and interviewing the 26 employees of the district that had suspicious lookups. She

developed the criteria that resulted in the comparative data the employer used in its determinations.

Under that criteria, Armon determined the grievant made 470 potential nonbusiness-related lookups, after applying the Judicial District's criteria to one-third of the potential violations received from Majerus. At that point, Armon multiplied that figure by 3 and determined the grievant made about 1,410 questionable lookups. The next nearest number of potential violations was 945. The employer terminated the three people with the highest number of alleged violations.

Summary of Decision

The employer proved that the lookups in question violated the governing policies in question, but the evidence shows that this activity was commonplace in the workplace and the employees were not generally aware that they could be disciplined for this behavior. There is no substantial allegation here that the grievant used the data obtained from the lookups in a surreptitious manner or otherwise tried to influence outcomes in any way. The employer disciplined her for the actual act of looking up people for nonbusiness-related reasons. The level of discipline administered to the grievant is not necessary to correct the aberrant behavior, is disproportionate to the level of discipline given to other employees engaged in the same behavior, and the arbitrator is convinced that the lookups will cease in the future. Although the arbitrator agrees that the

volume of lookups is relevant in disciplinary decisions, under these facts, the mere volume of lookups does not support a termination.

The grievant's actions are not so egregious that they warrant skipping lesser forms of discipline

Article 17, Section 3 of the collective bargaining agreement states that:

Discipline is intended to be corrective; not punitive. This process is intended to ensure employees understand the Employer's expectations, standards, and rules, and are aware of the consequences of unimproved conduct or performance.

Disciplinary action shall include only the following forms and depending upon the seriousness of the offense shall normally be administered progressively in the following order:

- 6) Oral reprimand
- 7) Written reprimand
- 8) Suspension
- 9) Demotion
- 10) Discharge

A written reprimand shall not be referenced or relied upon for further disciplinary action provided that no disciplinary action of a similar nature has been administered for two (2) years following the date of the written reprimand. Nothing in the above listing of types of discipline shall preclude the Employer from exacting stringent forms of discipline where the egregiousness of the offense so warrants.

For purposes of this matter, the arbitrator reads this language to require that discipline be administered to employees to correct aberrant behavior and not to punish employees, where possible. Further, the language is intended to

establish a disciplinary process that ensures that all employees comply with reasonable work rules that are communicated to them and that they also understand the consequences of failure to comply.

The language further requires that discipline be administered progressively, provided that the failure to comply is so egregious that the employer is justified in skipping some, or all, of the disciplinary steps. Whether the employer was so justified is the central issue in this matter.

Management has the right to expect that employees will comply with its expectations, rules and standards. When employees fail to adhere to those rules, management is justified in administering discipline in an effort to obtain compliance and as a means of clearly communicating the possible consequences of future failures to comply. If the conduct is so outside the norm that reasonable people would understand that the conduct is such an egregious violation of management's expectations, a discharge is warranted.

An inherently implicit component in such a disciplinary system is that management needs to clearly communicate its rules and expectations to its employees and to forewarn the employees about the disciplinary consequences of failure to comply. The only exception to this is where the conduct or activity is so egregious that a reasonably prudent person would understand that the activity in question is so outside the norm that they should not have to be told that engaging in that activity could result in discipline or discharge.

It was common for the employees of the 3rd Judicial District to look up people on the DVS for nonbusiness-related reasons.

The evidence in this matter clearly shows that many of the employees of the district looked up people on the DVS system for nonbusiness-related reasons. Of the 26 people interviewed by the employer regarding this issue, only two had no problems with inappropriate lookups.

The employer's witnesses (especially Armon and Marie Cramer, the immediate supervisor in the workplace) testified emphatically that all employees were aware of the conflict of interest policy and the use of data policy and that they were provided adequate training to understand the egregious nature of the alleged lookups. If that were true, the arbitrator believes the practice would not be so widespread among its employees. This is not a case of having one bad apple in a workplace that acts outside the scope of the norm.

The employer cited a number of ways that it trained its employees on this issue. Most prominently, it cited initial training on the system given to employees on hire, having the employees sign a statement that s/he had read the various policies relevant to this matter on numerous occasions (which were available to them online), and the fact that there was a warning about inappropriate use on the DVS sign in page each time they entered the system.

None of these attempts at training appear to have had any effect on a large percentage of the employees, since the practice of looking people up

appears to be so commonplace. Further, there is no evidence that employees were given examples of inappropriate use and appear to be left to their own to make those judgments. In this regard, it appears that a large number of employees determined that it was okay to undertake the practice in question here.

This is the central thing that distinguishes this matter from the arbitration cited by the employer in its brief. In that case, arbitrator Laura Cooper upheld the termination of an employee of the state for inappropriately looking up somebody on a state data base. The employer showed that it had indeed provided training that included examples that directly applied to the type of circumstance at issue in that case. It further specifically warned that employees could face disciplinary action for violations. Here, no such specific training was evidenced by the employer and the employees that testified stated that they had received none. Based on the testimony, the arbitrator finds that the employees received some training on the Use of Data Policy and the Conflict of Interest Policy, but received no guidance as to the actual application of these policies to the workplace.

Indeed, both lead workers in the county had about 100 nonbusiness-related look ups each. The employer disciplined only one of them. That employee received a written reprimand, which cited the level of discipline being justified, in part, because she was a lead worker. The other lead worker received no discipline and testified at the hearing that no specific training had ever been

given during her tenure on the proper use of the DVS such as that in question here.

Finally, once the employer issued a clear directive about the use of the DVS system, the evidence indicates most of the inappropriate uses ceased. With regard to the grievant, she looked up one more personal site (concerning her husband's DWI) 5 days after the directive and then ceased looking up anyone completely after that date.

The grievant did not use the data obtained for personal gain or for surreptitious purposes.

This is not a case where the grievant obtained private data on an individual and then used that data for some other purpose, either to further interests or to negatively affect matters. It is true that she obtained data about her family that is not otherwise available to the public at large, but it is also true that those family members could have obtained that same data on their own, since they are the subject of the data.

The central issue in question here is that the mere act of looking up people is a nonbusiness related activity in and of itself. This is the core reason that the grievant was disciplined. The grievant admitted that she knew it was nonbusiness activity and that it was wrong. Her position is that she didn't do anything so disproportionately bad relative to her coworkers that she deserved to be fired for it and that she will never do it again. The arbitrator is persuaded that

if the grievant goes back to work, she, along with her colleagues, know fully the consequences of continuing these activities and that in the case of the grievant, it will not happen anymore.

First, the grievant's demeanor at the hearing lends credence to this conclusion. She appeared compliant, not defiant. Second, the record shows that once the March 1, 2013 memo came out, her activities ceased, save for one final lookup for her husband regarding his DWI a few days later. This is in contrast to one woman in the district who only received a written reprimand and yet had 13 lookups deemed inappropriate after March 1, 2013. Another woman who received a 5-day suspension had 18 inappropriate lookups after that date. The employer's notes to that discipline indicate that it felt a suspension was warranted because she was put on a performance improvement plan in 2012 for issues it believed were similar to the DVS issue.

It's true that neither one of these employees had the volume of lookups that are alleged against the grievant, but for purposes of attempting to determine the grievant's ability to remediate, their disciplines are helpful for comparison purposes.

What is the appropriate remedy?

From the evidence and testimony entered at the hearing, the arbitrator concludes that the employer terminated the grievant solely for the large volume of lookups alleged here. While the grievant made some attempt to talk about

how some of the lookups could have been legitimate, she fully agreed that she engaged in this activity and did so frequently. Her explanation was that she was filling out her free time by looking up people, mainly to see what they looked like. When asked why so many, her reply was that she had time on her hands and used much of it this way.

The arbitrator is persuaded that based on these facts, a termination is too strong a penalty here. While everyone who testified admitted that they knew they shouldn't be doing the look ups, apparently a very large percentage of them still did, based on the employer's own investigation. It's clear that they did not understand the employer's position on the consequence of engaging in this activity. The employees did this openly, but only with each other. They followed the rule that what happens in the office stays in the office.

As stated earlier, the arbitrator is also persuaded the conduct in question will not recur and that the employee can and will be a productive employee in the future. She has a long, unblemished record with the employer, save for the issue at hand.

In awarding a lesser form of discipline, the arbitrator does not favor reinstating the grievant with no back pay, which is a practice used by some arbitrators. It is the arbitrator's belief that the length of time of the suspension that is imposed under such a system is more related to the conduct of the parties in setting up the arbitration and other matters outside the control of the grievant

and does not reflect disciplinary action commensurate with a judgment based on the merits of the case.

In this regard, the arbitrator is influenced by a previous arbitration decision regarding one of the three employees originally terminated by the employer in the 3rd district. In that case, arbitrator Charlotte Neigh overturned the termination of Linda Head and substituted a ten day suspension. The facts and circumstances in that matter are not substantively different from those in this case except for the fact that Head had only 478 deemed inappropriate lookups but 9 after the date of the March 1, 2013 memo.

In the interest of providing some form of equal treatment in this judicial district, the arbitrator feels compelled to grant some deference to the amount of discipline imposed under that case. On the other hand, the arbitrator agrees with the employer that volume, by itself, does matter. At minimum, it increases the odds of the employer's potential liabilities.

The arbitrator is troubled by the disparities in punishments in this matter. 26 employees were found to have engaged in this DVS lookup activity. Only 8 were disciplined at all. The employer's tenor and posture in this matter essentially amounts to a zero tolerance policy on lookups. It posits that it adequately forewarned all employees that these activities were not proper and that they could be disciplined if they engaged in the activities. Further, they argued that employees knew that such activities could subject them and the

employer to violations of state and federal law and civil liability. Those arguments would be true whether an employee had only one lookup or a thousand. Under the employer's posture, it would appear that each such employee should have received some warning from the employer in the form of mild discipline.

As a result, it is difficult for this arbitrator to establish a fair level of discipline based on internal comparison data. All but 3 of the 26 employees who were determined to have violated the policies in question received minor disciplines. Only one employee was suspended but the employer cites progressive discipline in that decision. One of the employees who received a written reprimand had over 300 determined violations. It is very difficult to understand the jump to termination of the grievant based on this record.

The employee in the Neigh decision received a reduction to a ten-day suspension. That employee had fewer lookups, but did have 9 lookups after the date of the direct memo on this issue dated March 1, 2013. The grievant only had the one lookup, on March 4, 2013 concerning her husband's DWI. To the extent that the employees did not fully understand what was expected of them in terms of the DVS system, it was very clear once the memo came out on March 1, 2013. In the arbitrator's mind, the employer's position that the number of lookups matters, while not dispositive in and of itself, has some reasonable relationship to the level of discipline.

With respect to the grievant, this is offset by her lack of activities after the employer issued the memo and her signing of the clear acknowledgement form. Accordingly, it is the arbitrator's belief that a 15-day suspension is a fair and comparable level of discipline under these circumstances.

Decision

The grievance is sustained in part. Based on the foregoing discussion, the termination decision is hereby overturned and in its place a 15-day suspension will be imposed on the grievant. She is to be returned to work with full back pay and benefits, save the aforementioned 15-day suspension. The arbitrator will retain jurisdiction for 90 days from the date of this decision.

Dated: June 1, 2015

A handwritten signature in black ink, appearing to read "H. Ogata", with a stylized flourish extending to the right.

Harley M. Ogata

Arbitrator