

AFSCME, Minnesota Council 5, the Union,)	ARBITRATION AWARD
)	
-and-)	Traci Temple Grievance
)	
University of Minnesota, the Employer.)	BMS Case No. 07-PA-0380

Arbitrator: Barbara C. Holmes

Hearing Date: January 29, 2008

Post Hearing Briefs due: February 29, 2008

Date of Decision: March 24, 2008

Appearances:

For the Union: Kurt Errickson
Staff Representative
AFSCME Council 5, Local 3800

For the Employer: Brent P. Benrud
Associate General Counsel
University of Minnesota

INTRODUCTION

AFSCME, Minnesota Council 5 (herein the Union), as the exclusive representative, brings this grievance on behalf of its member Traci Temple (herein the Grievant). The Union contends that the University of Minnesota (herein the Employer) did not have just cause to discharge the Grievant from employment. An arbitration hearing was held and both parties had a full opportunity to present evidence through the testimony of witnesses, the introduction of exhibits, and the submission of post-hearing briefs.

ISSUE

Did the Employer have just cause to discharge the Grievant from her employment? If not, what should be the remedy?

FACTUAL BACKGROUND

The Employer is currently participating in a long-term research study through the Health Studies Department - Division of Health Sciences in its School of Public Health. This study, sponsored by the National Institutes of Health, is looking at the impact of cancer screening procedures on the rates of prostate, lung, colorectal, and ovarian cancers. The study has over 155,000 participants, with the Employer being the largest study site with approximately 30,000 participants. The overall cost of this study is estimated to be \$300 million.

Each year the Employer mails a blank Annual Study Update form to the participants of the study. Participants are asked to provide updated information regarding their address, the physician they are seeing, and the status of their health with regard to cancer. If a participant fails to return the completed form by a certain date a follow-up letter is sent requesting that the update form be completed and returned. If the participant again fails to return the requested update form, a Survey Interviewer telephones the participant to obtain the needed information.

The Grievant was employed as a Principal Survey Interviewer and made telephone calls to research study participants regarding various aspects of the study. Each day the Grievant was required to fill out a "Daily Phoning Tally Sheet" that detailed the time and nature of her phone conversations with participants. She testified that the number of conversations held per day could range from six to twenty. Prior to contacting a participant, a Survey Interviewer is required to access the Look-up History database to verify that the contact information on the Annual Study Form is the same as the contact information in the database. The Look-up History database is also accessed by Survey Interviewers for other aspects of the study.

On January 31, 2006, Participant A was mailed an Annual Study Update form. Because no reply was received, Participant A was mailed a follow-up letter on March 20, 2006, requesting that he complete and return the form. Again no reply was received. The Grievant was assigned the duty of telephoning Participant A to obtain the necessary information.

On the Grievant's "Daily Phoning Tally Sheet" for April 26, 2006, she recorded that 1) she placed a call to Participant A at 8:50 a.m., 2) the call lasted five minutes, 3) the subject of the call was the "ASU" (Annual Study Update), and the result of the call was "complete."

The Grievant gave the Annual Study Update form she had completed on Participant A's behalf to data entry personnel in the office. The information in this form noted that Participant A continued to be cancer free and was still seeing the same physician listed in the previous year's form.

On that same day, the Employer received a completed Annual Study Update in the mail completed by Participant A and dated April 23, 2006. Participant A noted that he had been diagnosed with colorectal cancer during the past year and had changed his physician. He also included a copy of the doctor's report detailing the diagnosis. This information was given to data entry personnel.

On May 15, 2006, the data entry supervisor reported the discrepancy between the form completed by the Grievant and the form that was received in the mail directly from Participant A to the Study Coordinator. On May 16, 2006, the Grievant's supervisor brought the discrepancy to the attention of the Grievant. A written memorandum created by the supervisor regarding this conversation states, in part, the following:

[The Grievant] responded that she wondered why the participant would say no ... [The Grievant] stated, "... I documented that I talked to him via phone, I wouldn't have done that if I hadn't talked to him."

On May 22, 2006, the Grievant's supervisor contacted Participant A. A written memorandum created by the supervisor regarding this conversation states, in part, the following:

[Participant A] stated he has discussed his colon cancer with many friends, family, and acquaintances, but did not specifically remember talking about his colon cancer with staff at the University of Minnesota. [Participant A] asked me if I received the information he sent to us from his doctor, Dr. Schwartz. I asked [Participant A] if he was still seeing Dr. Officer and he said no, he was seeing Dr. Schwartz and Dr. Schmidt.

The Employer was able to determine that the Grievant accessed the Look-up History database regarding Participant A's contact information at 8:06 a.m. on April 26, 2006. The Employer's telephone records indicate that the Grievant telephoned Participant A once on April 26, 2006, but that the call lasted only 4 seconds (8:42:04 to 8:42:08) instead of the five minutes listed by the Grievant on her "Daily Phoning Tally Sheet."

The Grievant was discharged effective June 2, 2006, for the following reasons:

[Y]ou have falsified study documents and lied to your supervisor. As stated in Article 22, Section 7 of the AFSCME contract, falsification of documents violates generally accepted standards of employee conduct and is grounds for discharge.

The Union grieved the termination of the Grievant on June 16, 2006. A Step 2 and Step 3 hearing were held where the grievance was denied. The grievance was appealed to arbitration on October 17, 2006.

POSITION OF THE PARTIES

Employer: After undertaking a thorough investigation, the Employer believes that the evidence compels the conclusion that the Grievant falsified the study data. The Employer asserts that acts of intentional falsification undermine the integrity of the study and could have a direct negative impact on the doctor who is the Principal Investigator for the study and on the Employer's reputation for scientific research.

The Employer does not believe that the evidence supports the Grievant's claim that she simply made an error in completing the study forms. It argues that the Grievant's mere assertion that she made a mistake is insufficient to overcome the

findings of the Employer's investigation. Furthermore, the Employer faults the Grievant for not being able to specifically explain how the mistake occurred.

The Employer also believes that the Grievant has been properly discharged under Article 22, Section 7C, for causing a "liability for the Employer by willful or careless violation of University procedures and policies." It argues that the Grievant failed to follow the protocols established by the study to ensure the integrity of data. It faults the Grievant for failing to properly use the Look-up History database to verify the identity of study participants prior to contacting them.

The Employer argues that the example offered by the Union to support a "disparate treatment" argument did not involve an employee of the University and is therefore not relevant. Furthermore, it believes the example offered represented a mistake, not a falsification of documents.

Union: The Union's position is that the Grievant made an unintentional error rather than a deliberate falsification. It points out that the Grievant telephoned Participant A at 8:41 and that the call lasted 4 seconds. The Grievant testified that the number was probably busy and in that case she would normally set the form aside and make the call again at a later time. The Union next points out that the Grievant went to a meeting and upon returning made a telephone call to Participant B. Although the telephone records indicate that the telephone call was made, the Union notes that the Grievant did not look up Participant B's contact information on the Look-up History database nor did she record talking to Participant B on her Daily Phone Tally Sheet. Because both of the last names of Participant A and B begin with the letters "Sch", the Union believes that Grievant confused the two individuals and recorded Participant B's information on Participant A's form.

The Union argues that there is no evidence of any motivation for the Grievant to falsify data. It also points out that the Grievant was a good employee for many years with no history of discipline. In terms of the impact of the Grievant's mistake, the Union argues that no harm resulted from her mistake, nor would any harm result if her unintentional error had not been discovered. The Union also notes that subsequent to the Grievant's discharge the Employer instituted new protocols for the completion of Annual Study Updates to ensure that similar types of errors would not occur in the future.

The Union offered into evidence an “error log” for another study. It asserts that over a thirteen-month period 46 minor errors, similar in nature to the Grievant’s mistake, were recorded. The Union argues that none of the staff committing these errors was disciplined.

DISCUSSION AND OPINION

The Employer must have just cause to discipline the Grievant. The analysis to determine whether or not just cause exists typically involves two distinct steps. The first step is to determine whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If the alleged misconduct is established by a preponderance of the evidence, the next step is to determine whether the level of discipline imposed is appropriate, taking into account all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS* 905 (5th ed. 1997).

A. The Alleged Misconduct

In addition to requiring the Employer to have “just cause” for a disciplinary action, the parties’ collective bargaining agreement sets forth circumstances that give the Employer the right to discharge an employee. Article 22, Section 7 states, in part, as follows:

The Employer shall have the right to discharge an employee who:

...

C. Causes a liability for the Employer by willful or careless violation of University procedures or policies;

D. Is judged by the Employer to be guilty of serious violations of generally accepted standards of employee conduct such as, but not limited to, theft, fraud, willful or careless destruction of Employer property, gross insubordination or falsifying of documents.

...

The Employer argues that the Grievant’s actions amount to a falsification of study documents or, in the alternative, cause a liability for the Employer by a willful or careless violation of University procedures and policies.

1. **Falsification.** A person accused of falsification must 1) know what the truth is,

2) but assert something different than the truth, and 3) have the purpose to mislead. The Employer argues that the Grievant completed Participant A's Annual Study Update form knowing that she had not spoken to Participant A and thereby falsified the study document. The Union contends that the Grievant unknowingly mixed up Participant A's and Participant B's paperwork and therefore did not intend to mislead anyone.

An accusation of falsification is a serious charge. It suggests that an employee has been dishonest and, under this collective bargaining agreement, is grounds for immediate termination. I find that the Employer has not met its burden of proving that the Grievant falsified study documents. Although the Grievant cannot explain precisely how her mistake occurred, that does not necessarily lead to a conclusion that she intentionally falsified the information. The burden of proving the intentional falsification is still on the Employer, and it failed to meet that burden.

The documentary evidence submitted by both parties was inconsistent and therefore confusing. Neither party addressed these inconsistencies; rather they each chose which exhibit supported their particular position. For example: The Grievant's Daily Phoning Tally Sheet does not match the two different types of telephone records submitted into evidence. The Daily Phoning Tally Sheet indicates that she called Participant A at 8:50 a.m. and talked for 5 minutes, but did not call Participant B. The exhibit that lists the Grievant's 20 outgoing calls indicates that she called Participant A at 8:00 a.m. with the call lasting only 4 seconds, and that she called Participant B at 9:37 a.m. with the call lasting 2 minutes and 54 seconds. Another exhibit that provides great detail on the specific call the Grievant made to Participant A indicates the call was made at 8:41:46 a.m. and lasted for 4 seconds. No exhibit was submitted that provided great detail on the specific call to Participant B. Neither party addressed why there is evidence that states 8:50 a.m., 8:00 a.m., and 8:41.46 a.m. as the beginning time for the one call to Participant A.

Another example of inconsistency arises from the exhibits that document the Grievant's use of the Look-up History database. She appears to have accessed Participant A's contact information at 8:06 a.m. on April 26, 2006 (Employer Exhibit #13 and Union Exhibit #15), and Participant B's contact information at 4:16 p.m. on April 27, 2006 (Employer Exhibit #13). The normal procedure was to first use the Look-up

History database to verify contact information and then contact the participant by telephone. Why would the Grievant telephone Participant B on April 26, 2006, but access the Look-up History database for him the following day?

I find that the telephone records are more reliable and I use the facts contained in those exhibits as the basis for my decision. The Grievant's Daily Phone Tally Sheet is inconsistent with the telephone records, but I do not find that this document was falsified. I believe its inconsistencies with other documents are the result of the Grievant making rough estimates as to her work activities and/or errors. Neither party provided testimony about the degree of accuracy required or actually used in completing the Daily Phoning Tally Sheet.

Based on the telephone records I find that the Grievant looked up Participant A in the Look-up History database at 8:06 on April 26, 2006, and telephoned him at 8:41 a.m. Because the telephone call lasted only 4 seconds, I find that the Grievant did not speak to Participant A and laid his paperwork on her desk intending to do a follow-up call. After returning to her desk after a 9:00 a.m. office meeting, I find that the Grievant called Participant B at 9:37 a.m. and talked to him for 2 minutes and 54 seconds but did not make an entry for this call on her Daily Phoning Tally Sheet or access Participant B's contact information on the Look-up History database. Because of the proximity of these two calls, because there is no entry on the Grievant's Daily Phoning Tally Sheet for her call to Participant B but is an entry for Participant A, because the Look-up History database was accessed for Participant A but not Participant B, and because the last names of Participant A and B begin with "Sch", I find that it is more plausible that she erroneously completed Participant A's Annual Study Update form as opposed to intentionally falsifying this information. It should also be noted that the backside of the Annual Study Update form that is completed by Survey Interviewers does not list the participant's name anywhere.

I am aware that my findings do not tie up all of the "loose ends" of the evidence. For example, the Employer argues that Participant B sent in his completed Annual Study Update form. The only task for the Grievant to perform was to verify that he had a change of address, not to find out whether or not he had cancer (he didn't) or a change in

physician (he didn't). Nevertheless, after weighing all of the evidence, I am not convinced that she falsified any study documents.

The Grievant's job involved a multitude of tasks – looking up contact information on a computerized database and comparing it to information on written documents, making and answering telephone calls, recording all of the information from telephone calls to various forms, entering data obtained from participants, etc. There were various studies for which the information was collected. There were also office meetings and interruptions by co-workers and supervisors that occurred throughout the workday. On April 26, 2006, the Grievant accessed the Look-up History database 42 times and made 20 outgoing phone calls. Given the variety of tasks and the repetitive nature of the work it is not surprising that errors occur. In this case, the Grievant's mistake occurred on April 26th but she was not asked about her error until May 16th. Her ability to precisely reconstruct a particular transaction that occurred three weeks earlier was undoubtedly hampered by the passage of time.

Additionally, although the Grievant's performance reviews indicate that she was an above-average employee for five years, she appears to have a tendency to make mistakes of the type involved in this grievance. The following are excerpts from her performance reviews:

- Documentation: need to give more details.
- Paying attention to detail is always a good thing.
- Should provide more details to ensure documentation is complete and substantial.
- Traci's documentation is adequate. Occasionally we see notations that appear to have been written in haste. Our expectation is that Traci will review her documentation before forwarding forms for processing to ensure that all notations are complete and substantial.
- The nature of the work is often repetitive, however, and Traci can become distracted. This is sometimes seen in hasty documentation and varying rates of calls completed.

My conclusion that the Grievant made a mistake is also supported by the fact that the Employer was unable to suggest any motivation whatsoever for the Grievant's actions. A person falsifies information because of the negative impact the truth will have on his or her interests. The most common example of falsification of documents in the workplace is when a job applicant makes false statements in a job application. The job

applicant 1) knows what the truth is, 2) but puts down something that isn't the truth, and 3) does so with the intent to mislead the employer so that he or she will get hired. But in the instant case there is no impending deadline to meet, no quota of calls required of the survey interviewers, nor any other conceivable reason for a survey interviewer to falsify information on one of the hundreds of forms that they work with each week.

Additionally, the Employer audited the Grievant's work after this incident occurred and found no further errors.

Finally, the Union provided an "error log" from a different study conducted by the Grievant's office. Many minor errors of a nature similar to the Grievant's error were made. The Employer did not discipline any employees for those errors. Nor did the Employer provide any evidence or argument to rebut this evidence offered by the Union.

2. Violation of University policies or procedures. The Employer also argues that the Grievant's termination is justified under Article 22, Sec. 7C, of the collective bargaining agreement. Specifically, the Employer claims that the Grievant's errors caused "a liability for the Employer by willful or careless violation of University procedures or policies." The Employer claims that the Grievant willfully and carelessly failed to follow the study protocols for completing the various forms. While I agree that she was clearly careless, I fail to see how her solitary error negatively affected the integrity of the study or caused any other liability for the Employer.

B. The Appropriate Sanction

The Study Coordinator testified that "mistakes happen" and that an appropriate sanction for a mistake would be a coaching session or a disciplinary action less than a termination. Given the entries in the Grievant's performance reviews quoted above, the Grievant was on notice of her error causing tendencies. The Grievant also admits that she made an error. I find that her careless work habits warrant a 3-day unpaid suspension.

CONCLUSION

There is no doubt that the falsification of study data is a serious offense with broad implications for the Employer and its other constituencies. But a charge of falsification resulting in termination also has severe implications for an employee. Although the Grievant was unable to explain precisely how her mistake occurred, that

does not necessarily lead to a conclusion that she intentionally falsified the information. The burden of proving the intentional falsification is on the Employer, and it failed to meet that burden.

AWARD

The discharge is reduced to a 3-day unpaid suspension. The Grievant is to be reinstated to her former position, with full back pay and benefits, less the 3-day unpaid suspension, and less any income earned since the time of her discharge.

I will retain jurisdiction of this matter for 30 days for the sole purpose of addressing any unresolved issues arising from the implementation of this award.

DATED: _____ 3/24/2008 _____

Barbara C. Holmes
Arbitrator