

IN RE ARBITRATION BETWEEN:

COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 7, LOCAL 7212

and

CONSOLIDATED TELEPHONE COMPANY

DECISION AND AWARD OF ARBITRATOR

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April 28, 2008

IN RE ARBITRATION BETWEEN:

CWA, District 7, Local 7212,

and

DECISION AND AWARD OF ARBITRATOR
Roxanne Grimsley Grievance matter

Consolidated Telephone Co.

APPEARANCES:

FOR THE UNION:

Mary Taylor, CWA Staff Representative
Roxanne Grimsley, grievant
Angela Olson, CSSR
Sarah Larson, CSSR
Mona Milloch

FOR THE EMPLOYER:

Michael Landrum, Landrum & Dobbins
Mary Dobbins, Landrum & Dobbins
Steve Holmwig, Network Operations Mgr.
Kris Nelson, former Human Resources Dir.
Paulette Thoennes, Customer Sales and Service Supervisor
Andrew Isackson, Marketing Communication Specialist

PRELIMINARY STATEMENT

The hearing in the matter was held on February 29, 2008 at 9:00 a.m. at the Red Roof Inn in Brainerd, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on April 23, 2008 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated April 1, 2006 through March 31, 2009. The grievance procedure is contained at Article 4, section 2. The arbitrator was selected from a list provided by the American Arbitration Association.

ISSUE

Did the Employer have just cause to terminate the grievant on August 8, 2007? If not what shall the remedy be?

EMPLOYER'S POSITION

The Employer took the position that the grievant's termination was justified due to her actions at a meeting on August 1, 2007 and to her long record of issues related to her attitude and history of unprofessional behavior as set forth in the termination letter dated August 8, 2007. In support of this position the Employer made the following contentions:

1. The grievant was hired on July 1, 2002 as a Customer Service and Sales Representative, CSSR. She has a long history of disruptive behavior in the workplace. In June 2006 the Employer issued a written warning and a 1-day suspension for sending out several e-mails in which she used very offensive and obscene messages regarding a co-worker. Employer Tab 9. This was not grieved and the grievant acknowledged fault and indicated she would not do it again.

2. The grievant also received a prior warning that was given to the entire CSSR group not to discuss confidential information. The grievant was also given a warning for her conduct in April of 2006 regarding her interactions with customers, See Employer Tab 13. Once again the grievant demonstrated unprofessional behavior and an inability to follow clear directions.

3. In 2005 a co-worker complained that the grievant began complaining loudly about a customer in an office while other customers were around. The Employer asserted that this was a serious breach of confidentiality. The grievant was counseled about this and the grievant again acknowledged her guilt in this and indicated she would be more careful. The Employer argued though that later incidents showed that she was unable or unwilling to do so.

4. In April 2004 the grievant was issued a verbal warning for the grievant's failure to perform work in a timely fashion and for her attitude in demeaning her co-workers. Co-workers complained about the grievant's unprofessional behavior at meetings and in general in the workplace. The warning notice of April 5, 2004, Employer Tab 17, set forth a number of expectations regarding her workplace demeanor and behavior. The grievant agreed that her "mouth would get her into trouble" but agreed to adhere to the goals set forth in the memorandum of the verbal warning.

5. Her evaluations have also referenced her problems in this regard. See Employer Tab 25c, Evaluation from 6-05 to 12-31-05. See also, Employer Exhibit 25e, specifically where the grievant acknowledged that “her attitude can be bad.”

6. After all of these the grievant claimed that she would conform her behavior to the Employer’s expectations but each time there was another incident that the Employer asserted showed that the grievant was simply unwilling or unable to do so. The Employer introduced testimony and documents it alleged showed a continuing pattern of unprofessional and inappropriate workplace behavior as manifested by the grievant’s comments about co-workers, the company and even customers, all of which were inappropriate in the Employer’s eyes. The Employer argued that it is against this backdrop of ongoing problems and recidivism that the incident of August 1, 2007 must be viewed. The Employer further argued that even though the August 1, 2007 incident may seem minor when viewed in context; discharge is the only option here.

7. The incident giving rise to the termination, the straw that broke the camel’s back so to speak, occurred on August 1, 2007. At the meeting on that date with other staff including other Customer Sales and Service Representatives, CSSR’s, the grievant was loud, abusive, very disruptive and hostile toward her co-workers.

8. She created a hostile working environment, demonstrated a very unprofessional demeanor and attitude that created an atmosphere whereby the grievant’s co-workers did not feel even comfortable attending and participating in CSSR meetings.

9. The Employer argued that the grievant was very confrontational at the August 1st meeting and that she verbally attacked her co-workers. It was obvious that her co-workers were quite uncomfortable at this meeting and were very unwilling to tolerate the grievant’s aggressive and inappropriate comments and behavior.

10. The Employer pointed to Policy G-15 and noted that it clearly states that there is no contractual right to progressive discipline being applied prior to termination. It further clearly states that some situations require immediate dismissal.

11. The grievant's behavior was eroding team morale and undermining the efficiency of the entire operation and that problems in this regard go back almost to the first day of her employment with the Employer. The Employer argued simply that enough is enough and that despite repeated warnings and other communications to her in which she specifically agreed that her conduct was inappropriate and promised to improve she has not.

12. Accordingly, the Employer determined that the grievant's ongoing behavioral problems and failure to adhere to clear expectations of professional communications and behavior could not be tolerated. The Employer gave thorough thought to other disciplinary penalties but decided that termination was the only appropriate result here.

The Company seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION:

The Union took the position that there was not just cause for discharge, that the grievant was simply voicing her opinions and violated no specific rule or policy justifying such harsh discipline. In support of this the Union made the following contentions:

1. The grievant is by all accounts an excellent and dedicated employee whose job skills and performance has met or exceeded expectations.

2. Her prior work record, while not perfect shows only 3 other formal instances of discipline. See Employer Tabs # 11, 17 and 20. Further, in the latter the discipline was not even enforced. Further that matter is now several years old, i.e. 2003, and is stale.

3. Regarding the badge incident in August 2007, the grievant explained that she normally wears her badge but that on the day in question she was not wearing a shirt on which the badge could be attached. She left her lanyard at home and placed the badge on her desk where everyone could see it. Even after her supervisor came back and could see all of this, no one directed her to put it on; largely because she couldn't.

4. With regard to the pager incident, referenced at Employer Tab 7, the grievant did not believe she was loud or unprofessional. She felt that it was made in jest and that further, no one told the grievant that this incident was a warning of any sort or disciplinary

5. The allegations contained at Tab 8, the Union contends that these allegations were never discussed with the grievant. The first time she ever saw it was in the course of this grievance process when she got her personnel file.

6. Regarding the June 28, 2006 discipline, the Union acknowledged that she was disciplined but asserted that the grievant "got the message" and has not done anything like this again.

7. Regarding the allegations contained at Tab 13, the grievant alleged that she was complimented and that the customer was not on the line when she made the comments.

8. Regarding the allegations contained at Tab 14, the grievant explained why she did not sign up for the trade show. The grievant wanted to be with her daughter that weekend and was not informed that this was a mandatory meeting. The e-mails she sent were simply to inform the HR representative why she had not signed up for the show. There was no formal discipline about this.

9. Regarding the allegations contained in Tab 15, this was a discussion with the group. There was no discipline meted out to the grievant and the grievant was not even certain she was here since the whole group got the same message.

10. Regarding the allegations contained in Tab 16, the grievant indicated that the customer was on credit hold and went to talk to Jesse and Ryan (co-workers) about that and to inform them that the company should not be doing business with that customer without prepayment. She claimed that she did not realize that a customer was in the office when she told them this and later apologized for it.

11. Regarding the allegations contained in Tab 17, which is the disciplinary notice of April 5, 2004, the grievant explained that there were issues about other employees not helping customers and the grievant brought this concern to her supervisor.

12. The Union also focused on the meeting of August 1, 2007 and argued that she was not aggressive toward her supervisor nor anyone else at the meeting. The Union further introduced testimony from those who were there who indicated that the grievant was not disruptive nor did she create a hostile environment there or act in an aggressive way. The grievant and the Union asserted that the grievant gets along well with her co-workers and that none of her comments placed a chilling effect on that otherwise good relationship.

13. Further, the Union asserted that none of these witnesses who were actually at the meeting of August 1, 2007 saw the grievant point her finger at anyone nor did she act in any way inappropriately. While she raised her voice somewhat, everyone was speaking loudly at the meeting and trying to get their input heard.

14. Moreover, the Union asserted that there was a disconnect in what Mr. Holmwig said he was told by the individuals who were there and what those individuals said they told Mr. Holmwig. The Union argued that the people who spoke to Mr. Holmwig after the August 1, 2007 meeting expressed frustration at the lack of a clear agenda and with supervisory personnel telling the employees what the agenda was rather than eliciting input from employees. These individuals contended that they did not indicate that the source of their frustration was the grievant or her conduct. The Union argued that the employees tend to believe that the meetings are not productive and that this, not the grievant's conduct was the source of frustration.

15. These witnesses asserted that the grievant made a statement relative to logging onto the phone to enable people to get their work done faster and better. The witnesses in fact agreed with this statement and were not upset at all by it. The Union asserted that the very purpose of this meeting was to get that feedback. The fact that the grievant made statements in response to a request by the Employer to do so does not give the Employer the right to discipline someone simply because her ideas differed from what management wanted to hear.

16. The Union asserted that the grievant has not and did not create a hostile work environment at any time including the meeting of August 1, 2007. Further, the Union asserted that the Employer's conclusions about this were unsupported by the facts and witness testimony.

17. The essence of the Union's case is that the grievant is a dedicated and loyal employee who works very hard. Her comments on August 1, 2007 were designed simply to respond to the Employer's request for feedback and were not intended to nor did they create a hostile environment. The Union asserted most strenuously that the Employer simply did not provide sufficient factual basis to establish any work rule violation nor any inappropriate conduct by the grievant on August 1, 2007.

The Union seeks an award reinstating the grievant with full back pay and accrued contractual benefits.

MEMORANDUM AND DISCUSSION

The grievant is a CSSR and has been with the Employer since 2002. The Employer showed that she has had some problems with her workplace conduct and attitude in the past. As noted above, the grievant was disciplined formally on at least two occasions in the past for inappropriate use of workplace e-mails and making disparaging remarks on the e-mails she apparently sent to co-workers. The grievant claimed this was not directed at co-workers but at someone else. She further acknowledged that these were inappropriate and no repeat of this conduct has occurred. In addition, the grievant was given a formal discipline in April 2004 for various reasons including making inappropriate comments in the workplace and for other lapses in work performance issues.

The Employer also introduced a number of instances where formal discipline was not meted out but which the Employer contended were clear notice to the grievant of the need to conform her behavior to the standards set by the Company. There were comments made in her evaluation over time that further supported this. In all, the evidence showed that the grievant's conduct has not been exemplary and that while her work performance remains quite good, she occasionally shows poor judgment in making comments around the workplace. The Employer argued that this evidence shows that her conduct on August 1, 2007 was inappropriate and that when viewed in context, the evidence shows that her conduct simply cannot be condoned or tolerated.

The question is not whether her prior record was good or bad, but rather whether there exists just cause to impose discipline for her conduct on August 1, 2007. That will be the focus of considerable discussion later, but the point is that prior discipline may never be used in a just cause inquiry to determine whether the grievant is guilty of the conduct for which discipline is being currently imposed. While a grievant's prior record may be used to determine the appropriateness of discipline once it has been established that the grievant did something wrong now, it cannot be used to determine guilt or innocence of the offense charged. The case must therefore focus on the events of August 1, 2007 and whether the actions and statements made by the grievant at that meeting support a discharge for just cause.

The evidence showed that the meeting of August 1, 2007 was called for the purpose of providing feedback from the CSSR's and to find out why there were errors being made in the billing system. See, Tr. at page 20. The meeting was "free flowing" in the words of Mr. Holmwig, Tr. At page 20, and there was no set agenda. At some point in the meeting the grievant, having been asked for her input by the Company's representative about errors, did just as she was asked to do: she gave it. She indicated that errors were made because people were logging off the phones. Tr. At page 21-22, 51, 147-48, 155-56 & 163. On that point there was general agreement by the witnesses and the parties.

It was clear that several people actually agreed with the grievant when she made this statement and that this led to a spirited discussion. The preponderance of the evidence showed that everyone was trying to get a word in edgewise during the meeting and that voices became somewhat elevated as a result. The evidence showed that the grievant's voice became elevated but that she was not out of control nor was she shouting in such a way as to be inappropriate. There was further no evidence whatsoever of any inappropriate comments made during the meeting nor did the grievant conduct herself in an inappropriate or unprofessional way.

Mr. Holmwig noticed the change in "tone" in the room and the evidence showed amply that the tone did change. He perceived that several employees were nervous and upset during this part of the discussion. He testified that Ms. Olson, who was sitting very near him, was visibly upset and that others showed signs of intense nervousness and that the meeting essentially fell apart as the result. There was no evidence that he was fabricating any of this but, as will be discussed below, one person's impression about things may well prove to be very different from another's on such subjective matters.

In stark contrast to Mr. Holmwig's testimony about what Ms. Olson felt during the meeting was the testimony of Ms. Olson herself. Her story was frankly in stark contrast to that provided by the Employer. She indicated that she was not upset by the grievant's comments or her demeanor during the meeting. Tr. at page 146-48. She also testified credibly that she did not later tell Mr. Holmwig that she was upset by the comments the grievant made at the meeting. She indicated that she told him the meeting was less than fruitful, a "waste of time," to use her words. See Tr. at 149. She did not support his version of their subsequent conversation wherein he indicated that Ms. Olson had told him she was upset by the grievant's comments and actions during the August 1, 2007 meeting. She simply did not support that statement but it was clear that they did have a conversation about the meeting and about the meetings in general and that Ms. Olson indicated that the meetings were wasteful and not very productive due to the way they were conducted.

How then could these two tell such divergent stories? The answer was not that either was “lying” as suggested by the Employer at the hearing but rather one of perception. The evidence thus showed that Ms. Olson was not in fact upset by the grievant during the meeting and that she did not indicate to Mr. Holmwig she was. What she may well have told him was that she was upset at the tone of the meeting and the wasteful nature of them and that he assumed that it was due to the grievant’s comments since she was the one who spoke up first in response to his question.

The conclusion that the grievant’s comments were not as the Employer characterized them was further supported by the testimony of the other people who were there and who testified about it. Ms. Larson testified credibly that she was also at the meeting and never felt a hostile working environment was created nor did she feel that the grievant was inappropriate or overly aggressive. See, Tr. at page 154-55. She further testified that the group gets along well and that the grievant is a team player and has not created any sort of hostile work environment. Moreover, she did nothing at the meeting that was aggressive or inappropriate. Further, despite attempt to impeach her testimony, she further testified she had no personal motive for her testimony and it was accepted fully as credible.

The testimony of Ms. Milloch was similar in nature and also credible and relevant. She also indicated that the grievant was not inappropriate at the meeting and did nothing to create a hostile work environment. She testified that the meetings are frustrating for various reasons, none of which had to do with the grievant or her conduct. This too was accepted as credible and persuasive testimony.

Ms. Thoennes testified that she attended the meeting as well. She verified that the grievant spoke up when Mr. Holmwig asked specifically for why there were such a high number of errors. In fact she testified not only that the grievant was simply responding to a question asked by the manager but that others agreed with her when she brought it up. See Tr. at page 51-52. She testified that the grievant pointed her finger at Mr. Holmwig but this was not verified by any other witness, including Mr. Holmwig, who did not indicate that the grievant did that. On balance there was insufficient proof that the grievant threatened or acted inappropriately toward anyone at the meeting.

It should be noted that on this record, even if she had that would not be enough to sustain discipline here. The evidence showed abundantly clearly that the meeting did in fact get loud and somewhat more boisterous after Mr. Holmwig asked the question about errors and then asked the room in general if anybody else agreed with the statements the grievant made. It was clear that the room did get out of control at that point but the failure of a manager to keep control of a meeting after asking a question virtually designed to get that response is hardly the stuff on which discipline can be based.

Ms. Thoennes also indicated that Ms. Olson was visibly upset, a fact Ms. Olson flatly denied. How can these stories be reconciled? What was obvious was that the question about errors and the subsequent discussion about it did upset people, not because of what the grievant was saying but rather because people were upset by the actions of others whom they felt were not pulling their weight. That may well have been upsetting to people and that could well have led to the reaction by Ms. Olson even though she did not feel the same way about the statements as did Mr. Holmwig and Ms. Thoennes.

This latter fact needs to be examined as well. The Employer argued that the grievant was in effect accusing another worker of logging off the phones and creating more work for other employees. This was something of an obtuse reference. Mr. Holmwig testified that he was not aware of what was going on in the room when the comment about logging off the phones was made and that he only became aware of it later during the conversation with Ms. Olson. Significantly, the other employee who was supposedly the brunt of these comments was not called to testify. Having her there would have been helpful in fleshing out whether this allegation was really true but since she was not, there was simply insufficient evidence to show that the grievant's comments were in fact a mean spirited swipe at co-employee as the Employer alleged. On this record no such conclusion can be reached.

The facts and evidence thus showed that the grievant's actions were not only not inappropriate but in fact were responding to precisely the question asked of her. Further, there was no evidence of anything inappropriate she did at that meeting that could sustain discipline of any kind.

The Employer argued that it gets to establish workplace standards, not the Union or the grievant. This is absolutely true. In the world of labor relations, the Company does generally get to set the standards for appropriate workplace conduct. The question is whether they did that here and whether the grievant violated those standards. In both cases the answer is no.

First, there was no clear delineation of what was expected at this meeting. There are certainly some types of misconduct for which no rule need be posted on the wall so to speak. Example of these types of rules might include theft, insubordination, assaults or intentional damage to property. Here however the type of conduct complained of does not even approach that type of conduct. If the Employer wanted to have the grievant state her opinions in some other way it should have either made it clear to her before or even during the meeting. No such conversation occurred. Just cause inquiry requires more than some general notion that people have to “play nice” during a meeting to discuss problems in the workplace. Meetings like that can get uncomfortable, especially when the topic is about problems and other matters that are not going well. The meeting was after all called for that purpose. The question might well be asked of the Employer, what did you expect?

Certainly there was tension in the room, especially after the errors were brought up. The Employer apparently never considered that the tension and the perception of being upset was caused by that and not the grievant's comments themselves. This could also quite plausibly explain the different testimony between Mr. Holmwig and the three Union witnesses all of whom were at the same meeting. Where there are equally plausible conclusions to be drawn from the same testimony the party with the burden of proof faces a serious problem. Here such was the case with regard to the differences in testimony.

There was further no evidence of a “rule” in place requiring people need to sit quietly and say only what management wants to hear in a manner everyone is comfortable with; the “Minnesota nice” rule for lack of a better term. On this record that point is moot since there was no evidence of anything inappropriate done by the grievant at the meeting under any circumstances. She voiced her opinion and spoke up when others may not have and that led to a follow up question by the manager running the meeting. At that point others weighed in as well and the meeting got somewhat out of hand. The grievant was in no way responsible for that.

Second and more importantly, there was no evidence of any actions by the grievant that arose to the level of disciplinable misconduct. The Employer argued that this was “the straw that broke the camel’s back.” There was no straw here. She was asked for her opinion and she gave it. That apparently struck a chord within the group and it was apparent that others not only were thinking of the same thing but agreed with the grievant's comments. Being a bit strident does not result in discharge under these facts.

Based on this record, there was insufficient evidence to establish just cause for discipline. Accordingly the grievance must be sustained and the grievant reinstated to her former position as a CSSR with the Employer. In addition, the grievant is awarded full back pay, less any unemployment compensation benefits, wages or salary she earned or received in the time between her discharge and her reinstatement pursuant to this Award, along with any and all accrued contractual benefits.

AWARD

The Grievance is SUSTAINED. The grievant is to be reinstated to her former position within five (5) business days of this Award with full back pay, less any unemployment compensation benefits, salary or wages she earned or received between the time of her termination and her reinstatement herein, along with any and all accrued contractual benefits.