

AFSCME Council 5,
the Union,

-and-

Ramsey County,
the Employer.

ARBITRATION AWARD

Imholte Discharge

BMS Case No. 09-PA-0086

Arbitrator: Barbara C. Holmes
Hearing Date: November 6, 2008
Briefs Due: December 15, 2008
Date of Decision: January 7, 2009
Appearances:

For the Union: Tom Burke
AFSCME Council 5

For the Employer: Marcy Cordes
Labor Relations Manager
Ramsey County

INTRODUCTION

AFSCME Council 5 (herein the Union), as the exclusive representative, brings this grievance challenging the discharge of its member Gary Imholte (herein the Grievant). Ramsey County (herein the Employer) contends that it had just cause to discharge the Grievant. An arbitration hearing was held at which both parties had a full opportunity to present evidence through the testimony of witnesses, the introduction of exhibits, and the filing of written briefs containing their closing arguments.

ISSUE

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

FACTUAL BACKGROUND

The Employer operates the county government for Ramsey County and is located in the city of Saint Paul, Minnesota. The Grievant held the position of Maintenance Mechanic II for the Employer for three years. He is a licensed boiler operator and his duties included maintaining the HVAC systems, plowing snow and mowing grass at the six locations of the Employer's public libraries. The Employer provided the Grievant with a cell phone, laptop computer and a vehicle to perform his job duties.

In June of 2007 the Employer sold the site of the Maplewood Library to a private business named the Community Dental Clinic (herein the CDC). For several months after the sale the Employer directed the Grievant and his supervisor to provide ongoing support to the CDC regarding the operation of the mechanical systems in the former library building.

The new manager of the CDC testified that he felt intimidated by the size of the building. He stated that he talked to the Grievant's supervisor about whether he should hire a building manager or attempt to do the job himself. Although he testified that the Grievant's supervisor suggested that he hire the Grievant, the Grievant's supervisor denied making that suggestion. On July 17, 2007, the Grievant sent the CDC manager the following e-mail on the Grievant's private e-mail account:

As discussed I am willing to do a weekly walk-thru check of your bldg on Beam Ave. I will include a visual of operational equipment and a look on the automation system. I will keep [you] informed of any developments or needs. The building currently is in good mechanical shape. I will draft a recommended preventative maintenance list for your review. I propose this for a period of possibly one year or at least thru the construction phase. My fee is 35.00 per week for inspection and 35.00 per hour for any additional maintenance required. My cell phone is 651-253-2768. Home/summer residence is 651-439-7204. Try both because my cell service is weak at my Lake home.

On April 14, 2008, the Employer discharged the Grievant from employment for violating the Employer's procedures, policies and Article 9, Section 9.9 of the parties' collective bargaining agreement. The Employer asserted that the Grievant performed work for and received compensation from the CDC while on paid county time or paid

sick leave. It also asserted that the Grievant used the Employer's cell phone, computer, vehicle and tools to perform paid work for the CDC. The Grievant grieved his termination, the Employer denied his grievance, and the matter was appealed to arbitration.

RULES, PROCEDURES, CONTRACT PROVISIONS, STATUTES AT ISSUE

Ramsey County Personnel Rules, Rule 24 (in part): The following examples are declared to be just cause for disciplinary action, up to and including discharge; ... (e) the use of County-owned vehicles, equipment, materials or property for personal convenience or profit, except when such services are available to the public generally or are provided as County policy for the use of such public official or employee in the conduct of official business.

Ramsey County Code of Ethics (in part): In the execution of official duties, all Ramsey County Employees and Officials shall strive to: ...

- [s]eek no undue personal gain ...
- not use.. county owned vehicles, equipment, materials or property for personal convenience or profit ...
- [w]here a potential conflict of interest exists, employees shall provide prior written notification of acceptance of a secondary, paid position to their supervisor. Included in this notification should be the name of the secondary employer and the employee's intended duties. These secondary duties are to be administered during off work hours only.

Ramsey County Benefits Policy, Sec. 8.13: Engaging In Other Employment While on Sick Leave. An employee on sick leave with or without pay who engages in other employment without written approval of the appointing officer shall be subject to discharge in accordance with Section 383A.294 of the Act and Rule 24 (Cause for Disciplinary Action) of the Personnel Rules.

AFSCME Local 8 Contract, Article 9, Sec. 9.9: Employees on sick leave with or without pay may not engage in other employment without the written approval of the Employer.

Ramsey County Computer Use Policy (in part): Use of County computers for any activity unrelated to County work for which an employee is paid from an outside source is prohibited. If an employee has a question about whether an activity is related to County work, it is important to seek clarification from the employee's supervisor before using County computers.

POSITION OF THE PARTIES

Employer: The Employer alleges that the Grievant engaged in outside employment on employer-paid time and while using employer-paid sick leave. It also alleges that the Grievant used his employer-issued cell phone, computer and e-mail account to conduct his outside employment activities. Because these outside employment activities violated certain policies, procedures, and contract provisions, the Employer argues that it had just cause to discharge the Grievant.

To support its position the Employer provided detailed cell phone records, computer use records, time records and testimony from the Grievant's supervisor and other employees.

Union: The Union argues that the Grievant was scrupulous about performing work for the CDC outside of his normal work hours with the Employer. It argues that most of the Grievant's cell phone calls and computer use concerning the CDC occurred while he was advising the CDC about subcontractor bids. The Grievant testified that he was not compensated for that advice.

The Union also finds fault with the Employer's investigation of the Grievant. It believes that the investigation was "biased and grievously flawed" because the Employer drew negative inferences from incomplete or ambiguous information. The Union Steward representing the Grievant testified that the discussion at the Grievant's Loudermill hearing focused on an unrelated safety issue raised by the Grievant. He testified that the Employer stated that the investigation was complete thereby depriving the Grievant of an opportunity to tell his side of the story.

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

1. Engaging in Outside Employment Activities During Work Hours. The Employer argues that the Grievant had meetings concerning his outside employment while on employer-paid time on February 5th, 12th, and 15th of 2008. The Grievant does not deny that he had these meetings but claims that these meetings did not take place during employer-paid time. He argues that he used 1.5 hours of comp time for the 11:00 a.m. meeting on February 5th, conducted the meeting on February 12th at 4:00 p.m. after his work shift had ended, and conducted the 11:00 a.m. meeting on February 15th over his lunch hour at a restaurant located two blocks from the Employer's work site.

The Employer also offered evidence showing that a State Boiler Inspector met with the Grievant on February 12th to conduct an inspection at the CDC site. The Grievant attempted to refute this evidence by saying that the State Boiler Inspector must have put the incorrect location down because they actually met at the Employer's new library facility on that day.

I find that the Employer's payroll records support the Grievant's position regarding the February 5th meeting. I further find that a written statement submitted by an attendee at the February 12th meeting states that the meeting took place at 4:00 p.m., thus supporting the Grievant's position. Regarding the 11:00 a.m. meeting that took place on February 15th, the Grievant's position that it took place during his lunch hour is plausible and not refuted by any other evidence. However, after reviewing the details of the State Boiler Inspector's report, I find that the Grievant's refutation lacks credibility. I therefore conclude that the Grievant was engaging in his outside employment on February 12th while on employer-paid time in violation of the Employer's Code of Ethics.

The issue of whether the Grievant improperly used the Employer's computer or cell phone for his outside employment activities will be discussed below. For the purposes of this section the cell phone records of the Grievant's calls between December 29, 2007, and March 10, 2008, indicated that he made 33 calls totaling 285 minutes that are attributable to his outside employment with the CDC. Most of the calls were made by the Grievant during his normal work hours for the Employer. Similarly, the computer

records indicate that the Grievant sent e-mail messages regarding CDC business during work hours. I find that this evidence supports the Employer's position that the Grievant was conducting outside employment activities while on employer-paid time in violation of the Employer's Code of Ethics.

2. Engaging in Outside Employment Activities While on Paid Sick Leave. The Employer also alleges that the Grievant engaged in outside employment activities on February 6th and March 10th of 2008, while on employer-paid sick leave. Payroll records submitted by the Employer show that the Grievant took 8 hours of sick leave both days. The Employer also produced an e-mail sent by the Grievant from his employer-issued e-mail account to the State Boiler Inspector on February 6th. The e-mail set forth a question about the boilers located in the CDC building. Regarding the March 10th allegation, the Employer provided testimony from one of its employees that the Grievant was at the CDC building on March 10th asking questions related to the HVAC systems.

Because the Grievant did not deny that he sent the February 6th e-mail and was also unable to provide a credible explanation for his visit to the CDC on March 10th, I find that the Grievant was engaged in outside employment activities while on employer-paid sick time in violation of the Employer's Benefits Policy, Sec. 8.13, and the parties' collective bargaining contract, Article 9, Sec. 9.9.

3. Use of Employer-issued Computer for Outside Employment Activities. Another assertion of the Employer is that the Grievant used his employer-issued computer for activities related to his outside employment. To support its position the Employer offered copies of 16 e-mail messages that the Grievant either sent or received between January 23, 2008, and February 25, 2008, from his employer issued e-mail account. All of these messages related to his outside employment activities with the CDC. The Grievant provided no evidence or testimony to refute the existence or substance of these e-mail messages. In fact, the Grievant testified that he had a personal e-mail account that could have been used for outside employment activities. I find that the Grievant used his employer-issued computer and e-mail account for activities related to his outside employment thereby violating of the Employer's Computer Use Policy.

4. Use of Employer-issued Cell Phone for Outside Employment Activities. Finally, the Employer asserts that the Grievant used his employer-issued cell phone to

conduct his outside employment activities. As evidence the Employer provided cell phone records of the Grievant's calls between December 29, 2007, and March 10, 2008. During this period the Grievant made calls totaling 285 minutes that are attributable to his outside employment with the CDC and an additional 828 minutes of personal calls. The Grievant argues that it was permissible to use the employer-issued cell phone for non-county related calls as long as the Employer was reimbursed for the cost of the calls. He testified that typically his supervisor would provide him with a list of his non-county related cell phones calls and he would write a check to the Employer for the cost of these calls.

The Employer did not deny the fact that its employees are allowed to use employer-issued cell phones for personal use. Additionally, it allowed the Grievant to reimburse the Employer on a regular basis for these personal calls. For these reasons I do not find any misconduct regarding the Grievant's cell phone use. I make no ruling as to any costs that the Grievant may still owe the Employer for his personal use of the Employer's cell phone.

5. Summary. I find that the Employer has proven by a preponderance of the evidence that the Grievant has violated 1) the Employer's Code of Ethics, 2) the Employer's Benefits Policy, Sec. 8.13, 3) the parties' collective bargaining contract, Article 9, Sec. 9.9 and 4) the Employer's Computer Use Policy.

B. The Appropriate Sanction.

Because it has been found that the Grievant engaged in misconduct, the next step is to determine the appropriate sanction for his misconduct. In most cases of misconduct an employee's previous disciplinary record is considered. In this case, the Grievant has not received any prior discipline during his three years of employment with the Employer. Therefore the issue is whether or not the extreme penalty of discharge is warranted under these circumstances.

The Employer argues that the Grievant has intentionally falsified his time records because he was actually conducting outside employment activities during work hours. The Employer asserts that this falsification constitutes theft. It cites several cases where Minnesota arbitrators have upheld the discharge of an employee for such falsification.

The Union argues that the Grievant was merely trying to be helpful to the purchaser of the Employer's building. It argues that the Grievant's actions, at worst, constitute a lack of good judgment.

Arbitrators have consistently found that serious offenses such as theft often justify summary discharge. Additionally, the Ramsey County Benefits Policy, Sec. 8.13, states "an employee on sick leave with or without pay who engages in other employment without written approval of the appointing officer shall be subject to *discharge*." (emphasis added)

I have previously found that the Grievant was conducting outside employment activities during work hours. Had he sent just a few e-mails or made a few short cell phone calls during work hours to the CDC, the remedy of discharge would be too harsh. But the cell phone records show that Grievant spent large blocks of time during working hours talking about CDC business. The computer records show numerous messages sent and received by the Grievant concerning his outside employment. I agree with the Employer that the Grievant intentionally falsified his time records and that this constitutes theft. Furthermore, I have found that the Grievant was engaged in outside employment activities while on employer- paid sick leave.

An additional concern is the fact that the Grievant's position has little direct oversight on a day-to-day basis. The Employer must be able to trust that he is working during his entire shift. The Grievant actions have violated that trust. Because the Grievant was a relatively short-term employee of three years, his length of employment does not act as a mitigating factor with respect to the penalty.

I find that the penalty of discharge is appropriate under these circumstances.

AWARD

The grievance is denied.

DATED: January 7, 2009

Barbara C. Holmes, Arbitrator