

IN THE MATTER OF ARBITRATION BETWEEN

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RON HOOK,)	
)	ARBITRATION
Individual Grievant,)	AWARD
)	
and)	
)	HOOK DISCHARGE
)	GRIEVANCE
)	
STATE OF MINNESOTA,)	
Department of Human Services,)	
)	BMS Case No. 10-VP-0948
Employer.)	
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Arbitrator: Stephen F. Befort

Hearing Dates: June 22, 2010

Post-hearing briefs received: July 16, 2010

Date of decision: August 19, 2010

APPEARANCES

For the Grievant: Cristina Parra Herrera

For the Employer: Rebecca Wodziak

INTRODUCTION

The Grievant, Ron Hook, brings this grievance pursuant to Chapter 11 of the Managerial Plan adopted by the State of Minnesota. The Grievant contends that the State of Minnesota, Department of Human Services (Employer), violated the Managerial Plan by discharging the Grievant without just cause. 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.

ISSUES

1. Did the Employer have just cause to discharge the grievant?
2. If not, what is the appropriate remedy?

GOVERNING PRINCIPLES

Chapter 11 – Managerial Plan

Administration of Discipline. An Appointing Authority shall make reasonable effort to discuss with the manager any performance problem which may lead to disciplinary action and to assist the manager in eliminating problem areas before disciplinary action becomes necessary. In the case of a permanent manager, disciplinary action may be taken only for just cause as provided in Minn. Stat. § 43A.33, subdivision 2 , which shall include failure to maintain any license required in the position.

Minn. Stat. § 43A.33, subd. 2

For purposes of this section, just cause includes, but is not limited to, consistent failure to perform assigned duties, substandard performance, insubordination, and serious violation of written policies and procedures, provided the policies and procedures are applied in a uniform, nondiscriminatory manner.

FACTUAL BACKGROUND

Ron Hook has worked for the Employer for the past 26 years. At the time of his discharge, Mr. Hook served as the Chief Administrative Officer for Health Care Administration. In that capacity, Mr. Hook served as a high-level manager, and his terms and conditions of employment were governed by the State's Managerial Plan. His duties included directing the daily operations of the Health Care Administration (HCA)

program, budgetary planning, communications, and the direct supervision of twelve employees.

Mr. Hook had a falling out with his supervisor, Assistant Commissioner Brian Osberg, in 2008. According to Mr. Hook, the dispute concerned his refusal to take certain actions that he thought were unethical. As a result of the incident, Mr. Osberg issued Mr. Hook a written reprimand for unprofessional and inappropriate behavior. Prior to this incident, Mr. Hook's performance evaluations were rated as "good" or "above expectations." Following the incident, Mr. Osberg essentially stopped interacting with Mr. Hook, and Mr. Hook claims that he was stripped of a number of work responsibilities for the purpose of "putting him out to pasture."

Billi Jo Zielinski replaced Mr. Osberg as Assistant Commissioner in July 2009. At the time, Ms. Zielinski was charged with temporarily performing two high-level managerial positions due to the retirement of the Director of Health Care Operations. She met with Mr. Hook in August 2009 to discuss his administrative duties. Mr. Hook provided Ms. Zielinski with a copy of a position description which listed Mr. Hook's official responsibilities and stated in an accompanying memorandum that it "is a fair representation of my current duties and responsibilities." Mr. Hook testified that he did not inform Ms. Zielinski that he had been relieved of some of the listed responsibilities since he assumed that Mr. Osberg had already informed Ms. Zielinski of that fact. Ms. Zielinski, in turn, testified that she was unaware that Mr. Hook was no longer performing some of the duties listed on his job description.

Ms. Zielinski testified that Mr. Hook failed to perform a number of assignments adequately during the summer and fall of 2009. According to her testimony, these shortcomings included:

- his failure to create a seating chart of HCA staff;
- his failure to adequately coordinate an office move;
- his failure to adequately prepare for bi-weekly meetings with the Assistant Commissioner;
- his failure to provide useful information in analyzing the department's use of electronic communication devices; and
- his failure to provide useful information in identifying strategies for dealing with a \$3.2 million budgetary shortfall.

Because of her concerns with Mr. Hook's performance, Assistant Commissioner Zielinski initiated an investigation of Mr. Hook in September 2009. Gary Johnson, a DHS forensic analyst, reviewed Mr. Hook's computer use activity for the period between July 28 and September 25, 2009. His report found an absence of any computer activity during 52 hours of Mr. Hook's scheduled work time during this period. A majority of this inactivity was found on Mondays when Mr. Hook telecommuted from his home. The grievant challenges these findings on two grounds. First, Mr. Johnson acknowledged that the Citrix records generated for Mr. Hook's telecommuting activities from home are not sufficiently reliable to establish remote log on or log off information. Second, the grievant argues that a lack of computer activity does not mean that Mr. Hook was not working in other ways, such as by reading work-related materials or engaging in face-to-face communications.

Mr. Johnson testified that his forensic examination also revealed that Mr. Hook opened a number of sexually explicit emails while using his work computer. Mr. Hook

did not deny that he viewed some sexually-related emails, but he testified that he mistakenly believed that such activity did not violate the Employer's computer use policy because the messages he accessed were stored on a personal email account.

Jodi Hebert, Personnel Director at the Office of Enterprise Technology, Department of Administration, conducted a follow-up investigation. She interviewed Mr. Hook who admitted that his workload was light, but indicated that there was not much for him to accomplish because he had been relieved of many of his duties. Among other findings, Ms. Hebert's report noted that the "sending, viewing or responding to sexually explicit email messages with the use of State hardware and Internet is prohibited by the Statewide Policy on the Appropriate Use of Electronic Communication and Technology."

Mr. Hook went out on approved FMLA leave from November 25 to December 31, 2009. Assistant Commissioner Zielinski terminated Mr. Hook on January 4, 2010, his first day back to work following the medical leave. The Employer based the termination on two grounds: 1) that Mr. Hook failed to perform sufficient work duties; and 2) that he violated the Employer's electronic use policy.

Mr. Hook initially appealed the discharge to Commissioner Cal Ludeman who sustained the discharge in a letter dated January 14, 2010. Pursuant to the provisions of the State's Managerial Plan, the grievant then appealed his dismissal to this arbitration proceeding.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to discharge Mr. Hook. The Employer claims that Mr. Hook was derelict in his duties, misled his supervisor about the extent of his work responsibilities, and accepted compensation for hours during which he performed little or no work. In addition, forensic evidence shows that Mr. Hook violated the Employer's electronic use policy by reviewing and sending sexually explicit emails during working time. The Employer maintains that this misconduct warrants Mr. Hook's discharge because he is a high-level manager responsible for enforcing the same work standards that he violated and that he can no longer be trusted to perform in such a capacity.

Union:

The grievant argues that the Employer did not have just cause to support its termination decision. The grievant contends that the Employer's forensic evidence is unreliable to show a lack of working time, and that Mr. Hook performed work-related duties by means that were not limited to computer use. The grievant also claims that any deficiency in work performance was due to his previous supervisor relieving him of work responsibilities. With respect to the electronic use policy, the grievant maintains that the Employer has shown the existence of only two offending emails and has not shown that other employees have been terminated for such conduct. Also relating to the appropriate sanction, the grievant asserts that the Employer has not complied with the Managerial Plan's mandate to discuss and assist the manager in eliminating problem areas before

resorting to disciplinary action. Finally, the grievant maintains that discharge is too severe of a penalty for a 26-year employee with a good work record.

DISCUSSION AND OPINION

In accordance with the terms of the State of Minnesota's Managerial Plan, 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* 948 (6th ed. 2003). Each of these steps is discussed below.

The Alleged Misconduct

The Employer alleges two basic grounds for discipline. First, the Employer contends that Mr. Hook failed to perform a sufficient amount of work duties. In support of this allegation, the Employer points to forensic evidence purporting to show a lack of computer work activity during 52 compensated hours over a two-month period. The Employer also relies on the testimony of Ms. Zielinski which depicts sub-par performance on a series of work assignments. Finally, the Employer claims that Mr. Hook misrepresented his work duties to Ms. Zielinski by not affirmatively revealing that he no longer was responsible for performing certain tasks.

I believe that the evidence supports some, but not all, of these allegations. On the plus side, Ms. Zielinski's testimony provides uncontroverted evidence of a series of inadequate work performances. Mr. Hook clearly did not meet reasonable work

expectations with respect to these assignments. On the other hand, Mr. Johnson's forensic report provides only modest support for the claim of non-work activity due to the unreliability of the evidence relating to time spent telecommuting and the fact that the report does not account for the possibility that Mr. Hook engaged in productive activities that did not involve computer usage. Additionally, the record does not support a finding that Mr. Hook intentionally misrepresented the extent of his assigned work responsibilities. While Mr. Hook should have revealed the fact that he was relieved of some duties by Mr. Osberg, it is understandable that Mr. Hook assumed that this rather embarrassing information already had been shared between the former and future assistant commissioners.

The second alleged ground for discipline relates to Mr. Hook's alleged violation of the Employer's computer use policy. Mr. Johnson's forensic report reveals that Mr. Hook retrieved sexually explicit emails from a private email account from his work computer during working time. Mr. Hook admits this activity, but testified that he thought it permissible since the emails were stored on a private account. As Mr. Hook acknowledged at the hearing, this activity, in fact, did violate the computer use policy.

Based on the foregoing, even though the Employer did not prove all of its allegations, it did establish that Mr. Hook engaged in significant misconduct warranting discipline. This conclusion, of course, leads to the issue of the appropriate remedy.

The Appropriate Remedy

The Employer focuses on Mr. Hook's status as a high-level manager in arguing that discharge is an appropriate remedy in this matter. The Employer maintains that an employee in such a position should be held closely accountable since he is responsible for

enforcing the work standards expected of other employees. The Employer also points to Assistant Commissioner Zielinski's testimony that she no longer trusts Mr. Hook to serve as her chief administrative officer.

While I agree that Mr. Hook's performance shortcomings are serious and support a significant sanction, discharge is too severe of a sanction under the circumstances of this case for the following reasons.

First, Mr. Hook has a long and exemplary record of employment. Such a record militates against a rush to termination.

Second, the Employer has introduced no evidence to show that it has discharged other similarly situated employees. For example, the Employer has not provided comparator information as to individuals who have been fired for performance deficiencies in the absence of progressive discipline or for accessing inappropriate emails from a private email account.

Finally, and most importantly, the State Managerial Plan contemplates that the Employer will not discharge covered managers without prior warning and remedial efforts. In this regard, the Managerial Plan states: "An Appointing Authority shall make reasonable effort to discuss with the manager any performance problem which may lead to disciplinary action and to assist the manager in eliminating problem areas before disciplinary action becomes necessary." This statement of policy comports with the widely-accepted principle that arbitrators generally require notice and progressive discipline before upholding a discharge decision based on performance concerns. *See DISCIPLINE AND DISCHARGE IN ARBITRATION* 65-66 (2nd ed., Brand & Biren eds. 2008). The purpose of progressive discipline is to correct inappropriate behavior. While an

immediate discharge is appropriate for serious misconduct such as theft or violence, this ultimate penalty is not appropriate if a less severe disciplinary step is likely to correct the grievant's behavior. DISCIPLINE AND DISCHARGE IN ARBITRATION 65-66 (2nd ed., Brand & Biren eds. 2008).

These principles do not support the Employer's discharge decision. The Employer gave Mr. Hook no warning that his work performance was deficient. He was not counseled or placed on a performance improvement plan. He was not subject to progressive discipline. While it is not certain that these steps would have led to an improvement in performance, a long-term employee with a good work record should have been afforded the opportunity to shape up rather than being fired immediately upon return from protected FMLA leave.

In conclusion, while Mr. Hook engaged in misconduct warranting discipline, discharge is too severe of a penalty. Under the circumstances, the sanction should be reduced to a 30-day suspension without pay.

AWARD

The Grievance is sustained in part and denied in part. The Employer had just cause to discipline the grievant, but the sanction is reduced to a suspension of thirty (30) days without pay. The Employer is directed to reinstate the grievant and to make him whole for any resulting loss in pay and benefits less any compensation earned in mitigation. The Employer also is directed to correct the grievant's personnel file to reflect this determination. Jurisdiction is retained for a period of sixty (60) days from the date of this award to determine any remedial issues as may be necessary.

Dated: August 19, 2010

Stephen F. Befort
Arbitrator