

In the Matter of the Grievance Arbitration Between

St. Louis County Employees Association,

Mark Staniger, grievant

and

BMS Case #12 PA 0866

St. Louis County

Before: Arbitrator Harley M. Ogata

Date and Place of Hearing: April 30, 2012
St. Louis County Office Building
Duluth, MN

Date of submission of Briefs: May 18, 2012

Advocates:

For the Employer:

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For the Union:

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This is a grievance arbitration between the above named parties in accordance with procedures outlined in the collective bargaining agreement. The grievance involves the discharge from employment of Mark Staniger, a supervisory employee of the County Auditor's office with the County of St. Louis.

ISSUE

The St. Louis County Employees Association (union) conceded at the outset of the hearing that St. Louis County (employer) had just cause to discipline the grievant, Mark Staniger (grievant). The union contested the imposition of discharge as the appropriate remedy in this case and argued that the discharge should be reduced to a suspension of a length to be determined by the arbitrator.

FACTUAL BACKGROUND

The County hired the grievant as a supervisor in the County Auditor's office in February of 2008, which is a division of St. Louis County. He supervised 12 employees in the Service Center, which provides driver's licenses and vehicle registrations among other services.

As a result of budget reductions, the State of Minnesota quit printing the driver's manuals that the public used to study for license exams. As with most changes, this created some turmoil with the public. The manuals were, however, made available electronically on the State's website. In April of 2011 the grievant

approached his supervisor, Chief Deputy Auditor Nancy Nilsen with a plan that would involve the County printing and selling the manuals at a profit.

This plan would serve two purposes. First, it would satisfy a public need. Second, it would provide a revenue stream for the County. The grievant testified that he felt under pressure to raise revenue for the Service Center, because he was under a directive to ensure that the Center was self supporting. In the previous year, the Center had a net deficit of \$1,300.

Nilsen rejected the plan and stated that the public would have to get used to finding the materials online and that the Auditor's office was not a print shop.

The grievant next approached the Minnesota Deputy Registrar's Association (MDRA) with the idea of having that group print the manuals at a profit. The MDRA is a statewide organization consisting of the heads of the various motor vehicle service centers in the state. The grievant is a member of the MDRA. The MDRA rejected the idea because it was not allowed to make a profit under the laws applicable to nonprofit organizations.

The grievant then determined that he would investigate the possibility of printing the manuals himself as a for profit business that he would establish outside the confines of his employment with the County. He testified that he received some encouragement for this venture from MDRA members. The grievant had owned a private printing business for twelve (12) years prior to coming to work for the County.

The grievant enlisted the help of a friend who was in the printing business. It is unclear from the record whether the grievant was the sole owner or whether he owned the business in equal partnership with the friend. In any event, at minimum, the grievant was at least a co-owner of the newly formed venture, which was named mydriversmanuals.com.

On September 15 and 16, 2011, the grievant attended the annual meeting of the MDRA. On the 15th, the grievant and his business partner made a presentation to the MDRA board about the venture during time when he was not on the County's clock. He made another presentation on the next day to the full group while on company time. This presentation was apparently unscheduled and the grievant testified that his business partner was not available. He testified that the presentation was short and that he handed out business cards with the private enterprise's name and address.

On September 22, 2011, the grievant discussed the possibility of the County buying the manuals from his company with the County Auditor and indicated that the County could make a profit on the transaction. The grievant failed to mention that he owned the company. The grievant's supervisor reports to the County Auditor. The grievant's supervisor was not informed of this meeting.

The County Auditor asked the grievant to check with the County Attorney's office to determine if the plan had any legal issues. The grievant did not inform

the County Attorney's office that he was the owner of the venture. The County Attorney's office opined that he saw no impediments to proceed with the plan.

On September 28, 2011, after obtaining the clearance from the County Attorney's office, the County Auditor asked the grievant to come up with an analysis of entering into the plan including pricing, projected sales and profits for the remainder of the year and the next. The grievant's supervisor was copied on this email. This was the first time she had heard of plan and what was going on relative to it.

The grievant recruited an accountant and two of his subordinates to assist him in fulfilling the County Auditor's request. The projections and analysis were forwarded to the County Auditor and the grievant's supervisor in a series of emails. Finally, on October 5, 2011 at about 1:15 in the afternoon, the grievant sent the County Auditor an email indicating that the grievant would be out of the office beginning the next day in the afternoon for the rest of the week. He stated further that there was an offer for a 10% discount that could be applied if they ordered manuals by the next day and told him that he would need to place the order before he left at noon the next day.

The grievant had yet to disclose that he was the owner of the company.

Meanwhile, the grievant's supervisor, Nilsen, was investigating the grievant for what she perceived to be other infractions related to the implementation of the plan.

During the course of the grievant's employment with the County, Nilsen had indicated to the grievant that he had difficulty in the area of accepting supervision from her. This was reflected in all three performance evaluations forms received by the grievant during his employment. As recently as May of 2011, Nilsen had reminded the grievant that he needed to accept direction from her.

When the County Auditor copied Nilsen with his emails dated September 28 and 29, 2011, Nilsen believed that the grievant had once again failed to take direction from her, referencing the conversation she had with him earlier directing him to not print the manuals through St. Louis County.

Nilsen contacted Human Resources Advisor Jennifer Turner to assist in the investigation. The two of them met with the grievant and his representatives on October 13, 2011. At this time, it was first revealed by the grievant that he was the owner of the company. Nilsen and Turner were unprepared for this development, so the meeting was continued to a future date.

The second meeting was held on November 14, 2011. During the intervening time, the grievant's email account was reviewed. There is a dispute about the grievant's demeanor at this meeting. There is also some dispute as to the factual basis behind some of the grounds for the grievant's discharge. These disputes and the significance of each will be discussed more fully below.

On December 15, 2012, the grievant was discharged, based on the results of the investigation.

DISCUSSION

As stated at the outset, the union has conceded that the uncontested facts of this case provide for just cause to discipline the grievant. In its brief, it requests the imposition of a suspension as an appropriate alternative discipline.

The St. Louis County Conflict of Interest policy states:

“Use of County time, property and information: Officials/employees of the County shall not use County time, supplies, property or equipment for anything other than official County business, except as provided by County resolution.”

The Auditor’s Behavior Policy includes the St. Louis County Auditor’s Department Electronic Mail Policy (ER 6, p. 13) which states:

“The system is not to be used for employee personal gain or to support or advocate for non-county related business or purposes.” (p. 13)

* * *

“Use of the County e-mail system for personal business (profit or non-profit organizations of any kind) is prohibited.” (p. 15)

The Auditor’s Office Employee Behavior Policy, Outside Employment Policy Statement (ER 6, p. 24) provides:

In accordance with the county board established conflict of interest policy and well established legal principles all employees holding outside employment with any organization doing business with the county must not involve themselves in any processing or in any decisions relating to such other employer when performing duties as a public employee.

* * *

Employees are expected to report to the Auditor the nature and extent of any outside employment that could result in a conflict of interest situation arising or that could give the appearance of a potential conflict of interest

to a reasonable person. Strict adherence to this policy is expected by all employees. Violations may result in disciplinary action.”

The St. Louis County Principles of Conduct (ER 5), provides:

Use of Official Position. Employee/officials of St. Louis County should not use their official position to secure benefits, privileges, exemptions or advantages which are different from those available to the general public.

The St. Louis County Conflict of Interest Policy (ER 3) provides:

Outside Employment. Any outside employment may not conflict with an employee’s/official’s job duties. A conflict occurs when the employee/official has the opportunity to affect the outcome of County decisions which may directly or indirectly benefit them through their outside employment.

* * *

Administration of Conflict of Interest Policy. It is the responsibility of each official/employee to identify the potential for conflict of interest and to avoid such situations. The employee should be specifically aware of situations addressed in Minnesota Statutes § 382.18, . . . The official/employee shall bring the issue of a potential conflict of interest to the attention of the County Administrator, County Attorney, or the employee’s immediate supervisor upon identification of the conflict.

Minn. Stat. 382,18 states:

No county official, or deputy or clerk or employee of such official; . . . shall be directly or indirectly interested in any contract, work, labor, or business to which the county is a party or in which it is or may be interested or in the furnishing of any article to, or the purchase or sale of any property, real or personal, by, the county, or of which the consideration, price, or expense is payable from the county treasury.

A violation of the above statute is a gross misdemeanor.

The County listed four reasons for discharging the grievant.

1. You provided me information to affect my decision to purchase driver's manuals from mydriversmanuals.com, which would have resulted in a financial benefit to you as an owner of that business.
2. You withheld information regarding your ownership of the driver's manual business from me as well as other St. Louis County staff. You were also not upfront about your ownership with other individuals outside of St. Louis County.
3. You utilized St. Louis County time, staff, property and information to work on your private business.
4. You used your position with the St. Louis County Auditor's Office to gain an advantaged opportunity, beyond that available to the general public, to further your private business endeavor.

The union conceded paragraph one and the first sentence of paragraph two. The union conceded paragraph number three, but argued that the violation was *de minimus* and not enough to uphold a discharge. Finally, the union denies the allegations in paragraph four.

The union denies that the grievant was not up front about his ownership of the company to those outside St. Louis County. The county cites the MDRA meeting and the content of the emails received at the office as evidence supporting this contention. The evidence of the County's assertion on this point is not substantial. It is true that the grievant could have asked outsiders not to email him at work when he received unsolicited business related emails, but the emails give no indication that there was confusion on the part of the outsiders. Additionally, none of the emails indicated an assertion on the part of the grievant that would mislead the other party on the ownership issue. On this point, the

arbitrator rules that the County has failed in its burden of proving this allegation in support of its decision to discharge the grievant.

On the issue of the grievant using company time and resources to further his personal business, the arbitrator agrees with the union that the seven emails cited are a *de minimus* use of the County's resources and would, by itself, not support a discharge. It would have been better for the grievant to inform those communicators not to use the County email and to direct them to his business account.

The arbitrator disagrees with the union's contention that minimal personal use is permitted under the relevant policies to the extent that there is a difference between personal use and business use. A careful reading of the relevant policies differentiates between the two. Minimal personal use is permitted. Personal business use is prohibited. Even so, the business use proven here does not alone justify a discharge because the business use was somewhat minimal and the behavior could easily be changed by a lesser form of discipline with a stern prohibition.

The additional admitted use of County time making the presentation of the Friday of the MDRA conference would, in the arbitrator's opinion, not sustain a discharge here. The grievant admitted that making the presentation was a mistake. His version of the circumstances surrounding why he made the presentation differed greatly from the County's, but the mistake would still not justify a discharge, even in conjunction with the other proven transgressions.

The union next makes the argument that the other use of County time and resources came at the direction of the County Auditor. This includes the time of the County Attorney, a County accountant, two subordinates of the grievant, not to mention the County Auditor and Nilsen, along with the various equipment and emails that went along with the inquiry.

The union's argument here misses the main point of the reason the County is discharging the grievant. If the grievant had been up front about the ownership issue, none of the county's resources would have been wasted here because that would have ended the discussion. More to the point, if the grievant had not engaged in the series of actions wherein he hid the ownership issue while trying to entice the County into buying from his business, this arbitrator would not have sustained a discharge on the remaining issues alone.

Conflict of interest policies exist precisely for circumstances like the instant matter. They are designed to eliminate both the actual conflicts that can occur in the public sector as well as the clear appearance of conflicts that have historically plagued public employment.

If the County had engaged the grievant's business in buying the driver's manuals, the public would not look at this as an arm's length transaction. The grievant's explanation for how he avoided disclosure in order to ensure an objective decision misses this point entirely.

There is also little doubt that this transaction was prohibited no matter how objective the decision might have been made. The policies of the County, the

law and a common understanding of what constitutes a prohibited transaction due to a conflict of interest leads a reasonable person to understand that the actions undertaken here were outside the limits of acceptable behavior. This conclusion is exacerbated by the fact that the grievant is a supervisor who is responsible for overseeing these policies. Further, the grievant works in the County Auditor's office, which would naturally lead the public to expect a higher standard of behavior due to the nature of business of the office.

Here, the grievant admits that it was a mistake to not disclose the ownership issue and asks for reinstatement on the basis that he has learned this lesson and that it will not be repeated. At the hearing, the reason he gave for failing to disclose was that he hoped to have the venture's merits determined on their own terms rather than being tainted by the fact it was his idea. In its brief, the union asserted that he failed to disclose because he wanted to find out if the County was willing to buy manuals from any vendor.

With regard to the first assertion, the grievant's explanation is not credible. The grievant testified repeatedly that he was going to disclose the ownership issue once a decision was reached to go with the plan. However, the fact that the grievant pressed forward on trying to get the County Auditor to make a decision within less than a 24 hour period before the grievant left the office for a couple of days, indicates clearly that the issue of disclosure was not an important issue to him. It strains credulity to believe that the grievant would press for a

decision quickly and then have the intention of responding with the disclosure of the ownership issue within such a tight time frame.

As to the second assertion, the evidence indicates otherwise. All of the discussions the grievant had with the County Auditor concerned the grievant's business. All of the pricing models, discounts and other information concerned the grievant's business. Again, if the grievant wanted a generic decision on the issue, he would not have pressed so forthrightly on the urgency of making a decision quickly in order to obtain a discount from his business.

Most importantly, the assertion that he intended to disclose the ownership issue at some point in time shows that the grievant still misses the real issue in the conflict of interest analysis here. The fact that he had an ownership interest in the business automatically and immediately disqualified the transaction from taking place, so long as he was an employee of the County. The grievant should have disclosed the conflict, but he also should have understood the prohibition in the first place. Based on his testimony at the hearing, he still fails to understand this fundamental point. On this point, the grievant testified that this was a fine line issue and that he wasn't clear where that line was. To the contrary, the arbitrator finds that this is a bright line issue and that the grievant continues to fail to understand this.

In order for this arbitrator to overturn a discharge decision under facts like this, the grievant would have to acknowledge responsibility for the alleged errors, evidence a full understanding of what his errors were under the circumstances,

provide a reasonable basis to show that they will not recur and not have engaged in conduct that is so egregious that corrective action is not possible.

The grievant has failed to meet this threshold test.

CONCLUSION

For the foregoing reasons, the grievance is denied.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "H. Ogata", with a long horizontal stroke extending to the right.

Harley M. Ogata

Dated: May 31, 2012