

IN THE MATTER OF ARBITRATION BETWEEN

State of Minnesota, Department of Revenue) Shoreview, MN
)
“Employer”) Issue: A. Blackburn Suspension
)
and) Hearing Date: January 24, 2006
)
Minnesota Association of Professional Employees) Record Closed: January 24, 2006
)
“Union”) Award Issued: March 11, 2006
)
) Mario F. Bognanno, Arbitrator

JURISDICTION

The hearing in this matter was held on January 24, 2006, in Shoreview, Minnesota. The parties appeared through their designated representatives and they waived the 30-day decisional period referenced in article 9, section 4 of the Collective Bargaining Agreement. (Joint Exhibit 1). Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into the record. The parties presented oral summations at the close of the evidentiary hearing. Thereafter, the matter was taken under advisement.

Mr. Anthony R. Orman was present at the hearing, working as an intern under the State of Minnesota, Bureau of Mediation Services’ arbitrator-internship program. In that capacity, Mr. Orman prepared the preliminary draft of this arbitration decision. Ultimately, however, all findings, conclusions, opinions and the final draft of this decision are solely the responsibility of the undersigned. Finally, the parties requested that the undersigned not make this decision public.

APPEARANCES

For the Employer:

Valerie Darling	Labor Relations Representative
Carolyn Travis	Assistant State Negotiator
Jerry McClure	Director, Income Tax Division, Department of Revenue
Dan Lee	Assistant Director, Income Tax Division, Department of Revenue
Tom Maier	Supervisor, Income Tax Division, Regional Audit North

For the Union:

Joseph McMahon	MAPE Business Agent
Alan Blackburn	Grievant and Revenue Tax Specialist-Intermediate (RTS-I)
Paul Becker	RTS, Senior
Daryl Piltz	RTS, Principal

I. FACTS AND BACKGROUND

The Employer is the State of Minnesota, Department of Revenue, Income Tax Division. The Income Tax Division is organized into several units. Jerry McClure is the Income Tax Division's Director. Dan Lee is the Division's Assistant Director and he supervises its four (4) regional operations, among other things. Tom Maier reports to Mr. Lee, the supervisor in the North Audit Region where Alan Blackburn, the Grievant, works as a RTS-I in the Brainerd Office along with two (2) other auditors. (Employer Exhibit 16).

In March 1994, the Grievant was hired as a Revenue Tax Auditor in the Employer's Sales Tax Division. In 1996, he was promoted to RTS-I and began working in the Withholding Tax Division. In July 2003, the Grievant was laid off from that

position and he exercised his right to bump into the Income Tax Division, assigned to the North Region Audit unit in Brainerd. Mr. Maier and Daryl Piltz, the Grievant's lead worker, work at the St. Paul and St. Cloud offices, respectively. As a general rule, the Grievant and his co-workers are supervised *via* electronic communications, written memoranda, and telephone conversations and in group meetings, as well as in face-to-face meetings.

Mr. Maier credibly testified that when he bumped into the Income Tax Division, the Grievant was treated like a beginning RTS even though he was classified as a RTS-I. In addition, he testified that the Grievant received RTS training, and was allocated an RTS-like caseload as spelled out in the Employer's Individual Income Tax Division RTS Performance Standards.¹ (Employer Exhibits 13 and 8, respectively).

The purpose of the Individual Income Tax Division RTS Performance Standards policy is to, "...provide for an objective review of productivity and fair, accurate comparisons of the accomplishments of those who perform similar work." In relevant part, this policy provides as follows:

Case completion based on expectations that a minimum of 70% of a field RTS time is spent on direct compliance activities. That means at least 1200 hours annually.

Four case classification levels:

Most Complex	60 hrs	$1200/60 = 20$ cases/year
Complex	30 hrs	$1200/30 = 40$ cases/year
Average	15 hrs	$1200/15 = 80$ cases/year
Minimal Contact	5 hrs	$1200/5 = 240$ cases/year

¹ For a period of time after his transfer, the Grievant also worked on Withholding Tax Division cases.

RTS should spend about 60% of their direct compliance time on appropriate level cases. Senior on Most Complex, Intermediates on Complex, and RTS's on Average level cases.

Senior Case Completion Std:

60% x 1200/60 = 12 Most Complex
30% x 1200/30 = 12 Complex
10% x 1200/15 or 5 = 8 – 24 Avg./Min. Contact
~ 32 – 48 cases

Intermediate Case Completion Std:

60% x 1200/30 = 24 Complex
20% - 30% x 1200/15 = 16 – 24 Average or
20% - 30% x 1200/5 = 24 – 48 Minimal Contact or
20% - 30% x 1200/60 = 2 – 4 Most Complex
~ 50 – 90 cases

RTS Case Completion Std:

60% x 1200/15 = 48 Average
20% x 1200/5 = 48 Minimal Contact
20% x 1200/30 = 8 Complex
~ 104 cases

(Employer Exhibit 8, with some changes in formatting.). This policy was distributed and became effective on March 1, 2002.

On December 15, 2003, Mr. Maier sent a memo to the Grievant about his recent short fall in case completions, reinforcing a theme they had discussed during several earlier conversations. Citing the Grievant's need to complete "at least eight to ten quality cases per month (more if less complex)", Mr. Maier indicates, "Alan, your performance to date has not met expectations." In addition, he notes specific resources that were available to help the Grievant meet expectations. The Grievant signed this memo and added his own postscript, acknowledging the Employer's concerns and that his case completion productivity would improve. (Employer Exhibit 9 and Union Exhibit 9). Also, during December 2003, the Grievant was directed to remove certain religious signs that he posted in his work area. Further, he was denied the opportunity to park on the Employer's property because of similar signage on his personal vehicle. In January 2004,

the Grievant filed a complaint against the Employer with the U.S. EEOC: a complaint that was later rejected for lack of jurisdiction.

On February 11, 2004, the Grievant was issued a one (1) day suspension letter for continued underperformance. In that letter, Messrs. Maier and Lee outlined the Grievant's deficiencies, and a corrective plan was set forth that includes, *inter alia*, specific productivity goals and weekly work plan reports. The letter also stated, "Failure to achieve these expectations may result in further disciplinary action." (Employer Exhibit 10 and Union Exhibit 8). The suspension took place on February 12, 2004, and while it was grieved by the Union, the grievance was later withdrawn.

In July 2004, the Grievant sued the Employer in federal court for infringing on his freedom of speech ("religious expression").

On July 20, 2004, Mr. Maier informed the Grievant by email that he would not be receiving a performance-based step increase because his productivity was "... short on virtually every standard we measure". A detailed narrative was attached to the Grievant's 07/03 – 7/4/04 performance review, describing his strengths and weaknesses. This performance review was not appealed. (Employer Exhibit 11 and Union Exhibit 12).

On September 3, 2004, Mr. Maier sent the Grievant an e-mail that compliments his recent successes, but also notes, "...we're looking for a higher completion rate." Mr. Maier offers the Grievant some Automatic Minimum Tax (AMT) cases designed to boost his case completion rate. The Grievant accepted and further explained steps he was taking to improve his productivity. (Union Exhibit 10).

In late August 2004, the parties reached an out-of-court settlement in the federal lawsuit. That settlement was executed on September 22, 2004, and in late October or

early November 2004, the Employer compensated the Grievant, as prescribed by its terms. (Union Exhibit 20).

On November 18, 2004, the Grievant received a five (5) day letter of suspension for "...continued failure to meet expectations for job performance". The suspension took place between November 22, 2004 and November 26, 2004 (Thanksgiving week). The letter outlines the Employer's ongoing attempts at progressive discipline and repeats the expectation that the Grievant must complete eight (8) to (10) quality cases per month, as opposed to four (4) per month, which the Grievant averaged during annual 2004-II and 2004-III quarters. The letter further states, "Failure to achieve these expectations may result in further disciplinary action or termination". (Employer Exhibit 2 and Union Exhibit 2).

On November 23, 2004, the Union grieved the suspension citing, article 4 (Non-Discrimination), article 8 (Discipline and Discharge) and other applicable articles in the Collective Bargaining Agreement. (Employer Exhibit 3 and Union Exhibit 3). The parties were unable to resolve the grievance and the matter was advanced to arbitration for a final determination.

II. THE ISSUE

The parties jointly stipulated to the following statement of the issue:

1. Did the Employer have just cause to give the Grievant, Alan Blackburn, a five (5) day suspension for failure to meet performance standards?
2. If not, what is an appropriate remedy?

(Employer Exhibit 1 and Union Exhibit 1).

III. RELEVANT CONTRACT PROVISIONS

ARTICLE 4 NON-DISCRIMINATION

Section 1. Pledge Against Discrimination. The provisions of this Agreement shall be applied equally to all employees in the bargaining unit without discrimination as to sex, marital status, sexual preference/orientation, race, color, creed, religion, disability, national origin, veterans status for all eligible veterans, current or former public assistance recipient status, political affiliation, age or as defined by statute. The Association shall share equally with the Appointing Authority the responsibility for applying this provision of the Agreement.

ARTICLE 8 DISCIPLINE AND DISCHARGE

Section 1. Purpose. Disciplinary action may be imposed on employees only for just cause and shall be corrective where appropriate.

Section 3. Disciplinary Action. Discipline includes only the following, but not necessarily in this order (emphasis added):

1. Oral reprimand (not arbitrable)
2. Written reprimand
3. Suspension, paid or unpaid: The Appointing Authority may, at its discretion, require the employee to utilize vacation hours from the employee's accumulated vacation balance in an amount equal to the length of the suspension. All suspensions must be served away from the worksite.
4. Demotion
5. Discharge

If the Appointing Authority has reason to reprimand an employee, it shall be done in such a manner that will not embarrass the employee before other employees, supervisors, or the public. Oral reprimands shall be identified as such to the employee.

When any disciplinary action more severe than an oral reprimand is intended, the Appointing Authority shall, before or at the time such action is taken, notify the employee and the Association in writing of the specific reason(s) for such action.

ARTICLE 28 WORK RULES

An Appointing Authority may establish and enforce reasonable work rules that are not in conflict with the provisions of this Agreement. Such rules shall be applied and enforced without discrimination. The Appointing Authority shall discuss new or amended work rules with the Association, explaining the need therefore, and shall allow the Association reasonable opportunity to express its views prior to placing them in effect. Work rules will be labeled as new or amended and shall be posted on appropriate bulletin boards at least ten (10) working days in advance of their effective date if practicable.

(Joint Exhibit 1).

IV. POSITION OF THE EMPLOYER

The Grievant was suspended for five (5) days, from November 22 through November 26, 2004, for failing to meet job performance expectations, which the Employer contends were based on reasonable and attainable, division-wide production standards. Further, the Employer argues, the Grievant knew the division's standards and he knew how they applied in his specific case.

In fact, the Employer points out that when the Grievant transferred into the Income Tax Division in July 2003, he was treated like a new RTS, even though he began working as an auditor at the Department of Revenue in 1994, and was classified as a RTS-I. Moreover, the Employer asserts that the Grievant received extensive (RTS like) training. In addition, like any new RTS, he was assigned to work less complex cases that are aligned with the RTS Case Completion Standard and *not* the Intermediate Case Completion Standard, as spelled in Employer Exhibit 8. The Employer observes that under the former standard, the Grievant was expected to complete between eight (8) and ten (10) cases per month, depending on case mix complexity.

Next, the Employer argues that its earlier attempts to boost the Grievant's case completion productivity through coaching and progressive discipline failed. Specifically, the Employer points to the following: (1) the December 2003 letter of expectations wherein its performance expectation mantra was repeated, but to no avail; (2) the February 2004 one (1) day of unpaid suspension for poor work productivity failed to affect the Grievant's work performance; (3) its requirement that the Grievant submit weekly progress reports failed as a tactic to motivate productivity; (4) the fact that the Grievant's July 2004 annual performance review indicates that he "does not meet

standards” and, thus, the denied annual step increase was another failed attempt to boost the Grievant’s case completion rate.

Further, the Employer alleges that for the six (6) month period April – September 2004, the Grievant completed only 24 cases, the vast majority of which were of “average” complexity; that the Grievant’s rate of case completion failed to meet the division’s standard; and that all other RTS and RTS-Is who worked this entire period under Mr. Maier’s supervision either met or exceeded their respective standard. (Employer Exhibit 17). In addition, the Employer avers that the Grievant underperformed relative to other’s in his division based on (a) the average number of hours spent/case by project-type (Employer Exhibit 18); (b) the percent of “closed” and “no change” cases (Employer Exhibit 19); and (c) the percent of “agree” cases (Employer Exhibit 19). Based on this record, in November 2004, the Grievant was suspended without pay for five (5) days, and the Employer urges that this level of discipline is warranted and just.

V. POSITION OF THE UNION

Initially the Union argues that the November 2004 five (5) days of unpaid suspension was premised on unreasonable expectations that were impossible to fulfill, and that were higher than prescribed by the applicable standard. That is, the Grievant’s production standard of eight (8) to ten (10) cases per month is higher than the posted RTS-I standard and that when other RTS-Is were allocated the less complex AMT cases, the Grievant was passed over, which is to say that he was set up to fail.² In this respect, the Union points out that the Employer’s letter of expectations, dated December 15, 2003,

² With reference to the RTS Performance Standards, the Union notes that the expected RTS-I case completion rate is 50 – 90 case/year. Whereas, the Grievant was expected to complete at least eight (8) to ten (10) cases per month or equivalently 96 – 120 cases/year.

failed to account for the Withholding Tax Division's cases on which the Grievant had been working since joining the division.

Next, the Union points out that during the April – September 2004 time period, Michelle Melby, a RTS-I, completed only 31 cases, well below the eight (8) to ten (10) cases per month production standard imposed on the Grievant. (Union Exhibit 17). Moreover, Ms. Melby, whose time-spent working in the Income Tax Division mirrored the Grievant's, was apparently not disciplined.

The Union also points out that the Grievant was never orally reprimanded or issued a letter of reprimand, rather he was suspended and, as if to add insult to injury, the Employer seldom communicated its displeasure with the Grievant on a face-to-face basis. Accordingly, the Union urges, that the Employer largely "ignored" the Grievant and that he was blindsided by his suspensions.

Finally, the Union alleges that the (a) December 2003 "letter of expectations", (b) February 2004 one (1) day suspension, (c) July 2004 denial of a pay step increase, and (d) November 2004 five (5) days suspension were retaliatory in nature. As argument, the Union points to the following sequence of correlated events: (a) in December 2003, the Grievant displayed signage that made the Employer "uncomfortable", so it demanded that he remove it, which he did; (b) but in January 2004 he also filed a federal EEOC charge against the Employer; (c) in early July 2004 the Grievant filed a widely publicized "speech" suit against the Employer; and (d) in October-November 2004, the Employer agreed to make a cash payment to the Grievant as part of the court case's settlement. In addition, the Union observes, the Employer delayed implementation of the five (5) day

suspension, imposed it during the Thanksgiving Holiday week thus depriving the Grievant pay for two (2) holidays.

Ultimately, the Union urges removal of the five (5) days suspension letter from the Grievant's personnel and that he be made whole for the unjustly deprived work opportunity.

VI. OPINION

This case presents a number of issues requiring careful analysis. First to be considered is the question "Was the Grievant's work assignment 'reasonable'?" The parties do not dispute the fact that the Employer has the contractual right to establish "reasonable rules". Article 28 in the Collective Bargaining Agreement expressly addresses that right, along with the limitations imposed thereon. (Joint Exhibit 1). Nothing in the record suggests that the Employer's promulgation of the Individual Income Tax Division RTS Performance Standards was and is somehow non-compliant with the terms of this article and, specifically, that the performance standards and expectations appearing therein are unreasonable. (Employer Exhibit 8). The Grievant and Messrs. Paul Becker and Daryl Piltz, RTS Senior and RTS Principle, respectively, variously testified that they knew the standards; that the standards have been discussed at North Audit Region staff meetings; but that they did not necessarily agree with the standards. Moreover, the testimonies of Messrs. Dan Lee and Jerry McClure, Director, Income Tax Division, make it clear that the standards were promulgated for business-related reasons; that time and case complexity criteria are rationally and realistically linked to the case completion standards; and that the standards are applied Division-wide.

Taken at face value, credible record evidence supports the conclusion that the promulgation and application of the RTS Performance Standards are reasonable.

Second, with respect to the reasonableness of the expressed standards, the fighting issue seems to be “Whether the Employer’s application of the standards was disparate?” The Union essentially argues that the Grievant was expected to complete at least eight (8) to ten (10) cases per month; whereas, other similarly classified RTS-Is were expected to complete four (4) to eight (8) case per month. Further, the Union suggests that the 24 cases the Grievant completed between April 1, 2004 and September 30, 2004, met the RTS-I case completion standard of 50 per year, and that the Grievant’s five (5) day suspension is the result of disparate treatment. (Employer Exhibits 8 and 17).

In response, the Employer contends that the Grievant’s case mix was akin to that of a new RTS, not that of a RTS-I. As a consequence, the Employer suggests that more, not less, completed cases per month were expected of the Grievant. This consequence, the Employer urges, derives from the fact that the Grievant’s case mix was largely made up of the simpler “average” or “minimal contact” cases. Whereas, the more difficult and time-consuming “complex” or “most complex” cases were assigned to RTS-Is. Nevertheless, the Employer continues, during the relevant time frame all of the North Audit Region’s RTS-Is completed more cases than did the Grievant, and that on a cases/month basis so did the relatively inexperienced and newly hired RTSs. (Employer Exhibits 8 and 17 and Union Exhibit 21).

The record evidence supports the Employer’s contentions regarding productivity expectations. The undersigned readily concludes that the Grievant was treated as if he was a new RTS, as Mr. Maier credibly testified. In addition, this treatment should have

given him a leg-up with respect to case completions *vis a vis* his newly hired RTS co-workers and it should have made it easier for him to achieve the RTS standard, particularly since his employment as an auditor with Department of Revenue dates back to 1994.³ This case does not involve disparate treatment. The Employer used the RTS eight (8) to ten (10) completed case/month standard in this case; the Employer correctly concluded that the Grievant significantly missed that productivity rate for the six (6) month period from April through September 2004; and the evidence proffered in support of disparate treatment in comparison to RTS-I Michelle Melby, who worked in the West Audit Region, and the other RTS-Is in the North Audit Region is not persuasive.

The Union also contends that the low productivity grounds for issuing the December 2003 “letter of expectation” and February 2004 one (1) day suspension were unfair, if not disparate, because the Employer did not account for the Withholding Tax Division cases on which the Grievant had worked for six (6) months following his transfer to the Income Tax Division. The record on this point is mixed, as suggested by Mr. Maier’s testimony. Ultimately, however, the undersigned considers this argument to be moot because the “letter of expectations” and one (1) day suspension were considered to be settled prior to the Employer’s issue of the November 2004 five (5) days suspension.

Third, the Grievant alleges that the Employer “ignored” him, suggesting that he was blindsided by the suspensions. The record, however, clearly shows that the Employer made a reasonable effort to advise the Grievant of its expectations and to communicate

³ The conclusion that the Grievant was treated like a new RTS is supported by his post-July 2003 record of training (Employer Exhibit 13); his case mix records as compared to those of co-workers in the region (Employer Exhibits 17, 18, and 22 through 32); and the record of personal correspondence he received from the Employer (Employer Exhibits 2, 9, 10, 11 and 12).

that his performance was lacking. These efforts took the following forms: twenty (20) one-on-one meetings, North Audit Region staff meetings and annual information technology conferences (Employer Exhibit 15); memoranda and email messages (Employer Exhibits 9, 10 and 11 and Union Exhibit 10); and performance appraisals (Employer Exhibits 11 and 12; also Union Exhibits 11 and 12). In addition, there is scant evidence that the Grievant objected to the Employer's claim of unmet productivity expectations between July 2003 and June 2004. Further, the Grievant dropped his grievance regarding the one (1) unpaid suspension he received in February 2004; and, by doing so, he implicitly waived any subsequent claim that he was not afforded proper progressive discipline. Moreover, he did not grieve the denied step increase in pay for (once again) poor productivity that was attached to his July 2004 performance evaluation. In addition, both the Grievant and Mr. Maier testified that they had several conversations about the Grievant's case completion rate, leading up to the November 2004 five (5) days suspension. Lastly, the undersigned notes that article 8 in the Collective Bargaining Agreement explicitly does not bind the Employer to strictly follow any prescribed sequence of elevating steps of discipline. (Joint Exhibit 1).

Finally, even if the Grievant's work productivity was impermissibly below standard, the Union alleges that the five (5) day suspension was unjust because it was issued in retaliation for the Grievant's EEOC claim and federal law suit: a violation of the "creed and religion" parts of article 4 in the Collective Bargaining Agreement. Support for this allegation is the temporal correlation between events surrounding the Grievant's administrative and legal actions and the Employer's meting out of counseling and disciplinary measures. (The correlated events were previously outlined and need not be

repeated here.) The Employer's witnesses denied this allegation, essentially claiming that the correlation of events were coincidental and spurious. After carefully considering the record on this matter, the undersigned ultimately concludes that the Union did not prove its claim. The record is lacking in direct evidence and, most critically, the Union failed to prove that the Grievant's productivity rate met the appropriate standard.

However, what the Union did show was that eighteen (18) days lapsed between the end of the Employer's six (6) month evaluation period and November 18, 2004, the date the five (5) days suspension letter was issued. (Employer Exhibit 2). Further, the Union showed that an additional four (4) days lapsed before the Grievant actually began serving his unpaid suspension: November 22, 2004 - November 26, 2004. Accordingly, the Union pointed out, the Grievant's suspension period was set to correspond with Thanksgiving week. Arguing retaliation, the Union further observes that this scheduling "cost" the Grievant two (2) days of holiday pay that he otherwise would have earned, namely, pay for Thanksgiving Thursday and the Friday after Thanksgiving Day. (Joint Exhibit 1; Article 11, Holidays). In response, the Employer observes that the time lapse was not excessive, nor was setting the Grievant's suspension period to correspond with Thanksgiving week an act of retaliation. Rather, the Employer suggests, Thanksgiving week was selected to help the Grievant avoid needless embarrassment.

After giving these opposing arguments due consideration, the undersigned concludes that the Employer did act in good faith in regard to the timing of the administration of the Grievant's suspension. But even if the Employer had been acting in bad faith, whether or not the five (5) day suspension occurred during a week with two (2) paid holidays is immaterial. Consider the following analysis. In this case, the Grievant's

five (5) day suspension took the form of three (3) workdays of suspension without pay, plus two (2) non-worked holidays without holiday pay. In the alternative, the Employer could have suspended the Grievant without pay during any five (5) day workweek. Either form results in the loss of five (5) days of pay, which is to say that the two (2) forms are equivalent. Indeed, it may be that the Union did not grieve this issue because either way the Grievant would lose the same amount of pay.

VII. AWARD

For the reasons set forth above, the grievance is denied. The Employer did have just cause for suspending the Grievant for five (5) days because of his continuing failure to meet performance standards.

Issued and ordered on this 11th day of March 2006 from Tucson, AZ.

Mario F. Bognanno, Arbitrator