IN THE MATTER OF ARBITRATION BETWEEN

Association,

-and- **Case: Kanner #1**

Employer.

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APPEARANCES:

For the Association: C. S., Representative

For the Employer: R. R., Chief, Labor Relations

ISSUE:

Is the discharge of grievant based upon just cause. If not, what is the appropriate remedy?

AWARD:

The grievance is denied.

May 11, 1990 Richard L. Kanner, Arbitrator

Hearing on the captioned matter was held on February 13, 1990. Briefs were submitted on or about April 7, 1990, and the hearing declared closed.

IS THE DISCHARGE OF GRIEVANT BASED UPON JUST CAUSE. IF NOT, WHAT IS THE APPROPRIATE REMEDY?

STATEMENT OF THE CASE

Grievant, J.K. , an Environmental Analyst IV who is a probationary employee, was discharged on November 21, 1989 for "malicious burning of forest land at the Thompson Plains location on September 16, 1989." (Joint 7)

Grievance was filed claiming that said discharge was not based upon just cause, and requesting that grievant be reinstated and be made whole for all losses.

BACKGROUND

Grievant testified that on Saturday, September 16, 1989, while off duty, he and fellow employee G.S., an old friend, drove to state land at Thompson Plains intending to go hunting. G.S. asked him for aid in setting fire to a large 300 acre field which, according the G.S. , had been designated by the State as a future burn area. Grievant told G.S. that, since such designation was not official, such action was against the law and that they could be discharged. After lighting a number of incendiary devices, G.S. prevailed upon grievant to set them out in the field. Grievant did so out of friendship for G.S. .

The field burned requiring the services of the fire department to extinguish the fire, and resulted in $6,400.00 damage. Grievant was arrested and pled guilty to the charge of "willfully, maliciously, or wantonly set(ting) fire or cause(ing) or procur(ing) to be set on fire forest land, lands adjacent to forest land, or flammable material on such land, to wit: land in Thompson Township known as Thompson Plains, contrary to MCL 320.32(a); MSA 15.267(12), a felony charge carrying up to ten years, in State's prison or $10,000 or both." (Court Transcript - Employer 1)[1]

He agreed with the court and prosecutor to testify against G.S. who faced a similar charge.

APPLICABLE CONTRACT PROVISION

> ARTICLE 7 - DISCIPLINARY PROCEDURE AND PERSONNEL FILES A. The Employer reserves the right to reprimand in writing, suspend, discharge or take other appropriate disciplinary/corrective action against a unit member for just cause.

The association correctly points out that the employer carries the burden of proving the charge upon which grievant's discharge is based. But I do not agree that the burden of proof is beyond a reasonable doubt. In arbitration the

employer's usual burden is to measure to the lesser standard of preponderance of the evidence.

Initially, the association seeks to distinguish between the employer's charge against the grievant, and the criminal charge to which grievant pled guilty. In this connection the association emphasizes that the employer has charged the grievant with "willful and malicious burning of forest land." (emphasis supplied, Joint 7) According to the association the criminal court did not render a finding as to whether grievant did both willfully and maliciously set the fire. Therefore, it is left to conjecture whether grievant acted maliciously as well as willfully. Hence, the employer's charge against the grievant goes beyond the felony to which he pled guilty. According to the association, the employer, therefore, must prove both willfullness and malice.

At the outset, it is eminently clear by grievant's own testimony that he did willfully set the fire. Malicious is defined in Black's Law Dictionary:

> "Characterized by, or involving, malice; having, or done with, wicked or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse."

In my view whether grievant had a "wicked or malicious intent" is not controlling of a decision herein. While a "wicked" intent based, for example, on revenge against the employer for some perceived adverse action might arguably add justification for the employer's action of discharge, such embellishment is not necessary in this case. Accordingly, even absent any proof of malicious intent by grievant, the fact of his willful misconduct is sufficient to sustain the employer's burden of proof.

The association further points out that Arbitrator Carroll Daugherty in Enterprise Wire Company, 46 LA 359 (1966) attempted to define just cause as follows:

> "A 'no' answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such 'no' means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer..
>
> 1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
>
> 2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
>
> 3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the company's investigation conducted fairly and objectively?

5. At the investigation did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the company applied its rules, orders, and penalties even handedly and without discrimination to all employees?

7. was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?"

The association alleges the employer's violation of above items 2, 6 and 7 as hereinafter discussed.

DISPARITY OF TREATMENT (DAUGHERTY ITEM 6)

The association asserts that the employer is guilty of discrimination against the grievant in that it has treated other employees in a more lenient manner for similar offenses. Such defense is affirmative and, accordingly, the association bears the burden of proving disparity of treatment.

In this connection it is necessary for the association to prove: (a) similarity of seniority and discipline records of grievant and the other employees; and (b) similarity of the misconduct. As to the former, in none of the hereinafter discussed cases of alleged disparate treatment does the association prove that the other employees were on probation. I cannot agree with the association that length of service is not a factor in assessing and comparing discipline between employees. Unions, rightfully, are the first to argue that a long seniority employee is deserving of consideration in connection with the reasonableness of discipline or discharge. The converse also follows. Short seniority employees, and particularly those who are still on probation, are not entitled to the same consideration as those who are long-term employees. A fifteen year employee who is insubordinate in refusing a work order cannot be viewed in the same light as a short-term probationary employee. Probation is a testing period during which misconduct by the employee is to be viewed very seriously.

Likewise, an employee with an otherwise exemplary discipline record cannot be viewed in the same light as one who has a poor record.

As to similarity of the misconduct, employees number one and number two were convicted of criminal sexual conduct with a minor. The employer initially discharged these employees, but subsequently reinstated them after the employees undertook continuing psychiatric therapy.

Employee number three was convicted of killing her husband. The employer discharged her. But a mistrial was declared by the judge. She was thereafter found innocent at a subsequent trial, and was reinstated by the employer.

Aside from the fact that no evidence was adduced as to these employees' length of seniority and discipline records, I am of the view that there is no similarity with the subject misconduct of grievant. All of the above criminal acts were off-duty and non-job related. To the contrary, while grievant's misconduct also did occur off-duty, I find that it was job-related. (Daugherty Item #2)

It is elemental that a collective bargaining agreement cannot control an employee's conduct while away from work. It is the employer/employee work relationship that is controlled by a labor contract. But some types of off-duty conduct do relate to the work environment.

> "1) behavior harms company's reputation or product ... or
>
> 2) behavior renders employee unable to perform his duties or appear at work, in which case the discharge would be based upon inefficiency or excessive absenteeism ... or
>
> 3) behavior leads to refusal, reluctance or inability of other employees to work with him ... (Elkouri and Elkouri)

Here, grievant is an employee charged with the preservation, management, and protection of state lands. He intentionally destroyed same by burning a substantial area. By doing so, he "harmed the employer's product". Such action is analogous to an employee who burns his employee's building or product while off-duty. Whether such act is performed on or off duty, the result is the same, i.e., the employer's property has been harmed.

Therefore, I conclude that the employer is not guilty of disparate treatment.

THE REASONABLENESS OF THE DISCHARGE (DAUGHERTY ITEM ND. 7

A discharge is based on just cause unless, under the particular circumstances, the employer's action is so unreasonable as to be considered arbitrary.

Notwithstanding grievant's probationary status in his present job, he had 20 years of experience as a wild life biologist with the Department of Natural Resources. Accordingly, he was well aware of the aggravated nature of his action. In fact he knew such action was against the law, and would subject him to discharge.

Given grievant's willful action; the substantive harm which accrued; and the fact of grievant's probationary status; I am persuaded that the discharge is reasonable.

AWARD

The grievance is denied.

May 11, 1990

RICHARD L. KANNER, Arbitrator

[1] The entire underlying statute recites:

320.32. Willfully, maliciously, or wantonly setting or causing fire Section 12. A person shall not:

(a) Willfully, maliciously or wantonly set fire or cause or procure to be set on fire any forest land, lands adjacent thereto or flammable material on such land.

(b) Willfully, maliciously or wantonly set, throw or place any device, instrument, paraphernalia or substance, in or adjacent to any forest land with intent to set fire to the land or which in the natural course of events would result in fire being set to the forest land.