

VanDagens #3

**FEDERAL MEDIATION & CONCILIATION SERVICE
VOLUNTARY LABOR ARBITRATION TRIBUNAL**

In the Matter of the Arbitration

between

Employer,

Issue: Gina Green Termination

-and-

Union

_____ /

SUBJECT

Discharge for sleeping allegedly while on duty.

ISSUE

Did the Employer have just cause to terminate the employment of Grievant, Gina Green?
If not, what shall the remedy be?

CHRONOLOGY

Discharge: February 20, 2002
Grievance Filed: February 22, 2002
Arbitration Hearing: November 19, 2002
Briefs Received: December 26, 2002
Award Issued: February 25, 2003

SUMMARY OF FINDINGS

The grievance is DENIED. The evidence shows that the Grievant was asleep while on duty, in an administrator's private office, and that she was aware that such conduct was inappropriate. Further, the Employer was justified in discharging Grievant because her work record would reasonably lead the Employer to believe that her misconduct would continue. In a short term of employment, Grievant showed a continued disregard for the Employer's legitimate interest in having its employees perform the work they are being paid to perform.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 EMPLOYEE RIGHTS

(3.1) No seniority employee shall be disciplined, which shall include, written reprimands, suspensions, demotions, and discharges, without just cause. The specific grounds forming the basis for disciplinary action will be made available to the employee involved.

BACKGROUND

Grievant, Gina Green, was initially employed by Employer (hereinafter “Employer” or “Employer”) on December 1, 2000. During her entire term of regular employment, she worked full-time as a custodian at the high school on the third shift, from 9:30 p.m. to 6 a.m. Prior to her hire as a full-time custodian, Grievant worked as a substitute custodian for the Employer. At the time of her hire as a full-time custodian, Grievant became a member of the bargaining unit represented by the International Union of Operating Engineers, Local 547 (hereinafter “Union”). The Employer and the Union are parties to a collective bargaining agreement, effective July 1, 2001 through June 30, 2003.

On January 31, 2001, during her probationary period, Grievant was disciplined for leaving her assigned building before the end of her shift and for falsifying her time card, by indicating she had worked the entire shift. Grievant completed her probationary period 60 days after her date of hire.

On the third shift at the high school, Grievant was responsible for cleaning the “front” part of the high school, including the main administrative office area. A second custodian, less senior to Grievant, cleaned the remainder of the building. No supervisor was assigned to the third shift.

On the morning of February 6, 2002, at approximately 7:05 a.m., then High School principal, Stanley Lavender, entered his private office in the administrative office suite and found Grievant sleeping in his chair, her feet on his desk, with the television on and the lights off. Lavender’s secretary, Pearl Blue, testified that she had unlocked Lavender’s door between 6:45 and 7:00 a.m., as is her practice every morning, that she noticed the light from the television, but had not seen Grievant. The placement of Lavender’s desk and chair in his office made it impossible to view them from the administrative office area even through the window to Lavender’s office. Lavender tried to wake up Grievant by calling her name, and was successful on his second attempt. Grievant said she was not feeling well, and then Blue left the room. Later, Lavender said to Blue, “Wow, she was really sleeping.”

Grievant’s supervisor, Barry Brown, the Director of Facilities, was out of town at a conference on February 6. Brown returned to a message from Lavender informing him of what happened that morning. Brown talked to the Human Resources Director, Macy Aquamarine, and then began an investigation of the incident. Brown met with Grievant and her union representative on February 15. He spoke with Lavender and the other high school third shift custodian. When Brown completed his investigation, he met with Aquamarine and the school superintendent and recommended that Grievant be discharged. Aquamarine and the superintendent concurred in Brown’s recommendation. On February 20, Aquamarine and Brown met with Grievant and her union representatives and told her that her employment was being terminated for “inappropriate conduct.” Grievant filed the instant grievance two days later.

The matter was processed through the steps of the grievance procedure and a demand for arbitration was made. The parties selected the undersigned through the Federal Mediation and Conciliation Service. A full evidentiary hearing was held on November 19, 2002 in City, Michigan. Both parties had full opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses and both parties elected to file post hearing briefs.

EMPLOYER'S POSITION

The Employer contends that it had just cause to discharge Grievant, because it has established that Grievant is guilty of the misconduct for which she was discharged, and because the penalty imposed is reasonable when viewed in the totality of the circumstances.

The Employer contends that prohibiting employees from sleeping while on the job is a reasonable rule, and one which it may reasonably expect its employees to obey. The Employer contends that Grievant was aware that she should not have been sleeping while on duty, despite the fact that there is no specific work rule prohibiting sleeping on the job. The Employer contends that sleeping while on duty is "so clearly wrong" that any employee using common sense would understand that it would be misconduct. The Employer contends that Grievant's claim that she was not feeling well, and that she had taken medication which made her sleepy, does not excuse her misconduct, because it should reasonably expect that its employees are doing the job they are being paid to do.

The Employer contends that it conducted a full and fair investigation before disciplining Grievant. Further, the Employer contends, its investigation yielded substantial evidence of Grievant's misconduct. Barry Brown testified for the Employer that, according to his notes, Grievant told him that she had entered Lavender's office at about 5:45 a.m., had turned on the television, sat down in the chair, and fallen asleep. In addition, Brown's notes reflect that Grievant stated that she had been told the last 15 minutes of her shift were to "clean up." Finally, when Brown asked Grievant if she knew the seriousness of the offense, Grievant responded, "yes" and that she thought she would get a couple of days off. Brown's notes reflect that he told her he considered the incident much more serious than that.

The Employer further contends that this version of events is corroborated by Tyler Fuchsia, the other third shift custodian. Fuchsia testified for the Employer that near the end of a work shift, Grievant and he would seek each other out to see if the other needed help finishing any work. Fuchsia said that on the morning of February 6, he looked for Grievant around 5:30 a.m., but could not find her. He said that around 5:40 a.m., he saw through the principal's office window that the television was on. Fuchsia unlocked the door and turned on the lights. Grievant looked up at him and Fuchsia said she looked "tired" as if she might have been sleeping. Fuchsia said he asked Grievant if she was feeling okay and she replied, "yes" then told him to turn out the lights and shut the door. Fuchsia did as she asked. Thereafter, Fuchsia went outside to warm up his car, came back inside to finish his work and then at 6 a.m., left the building.

The Employer contends that the serious nature of this offense, coupled with Grievant's prior discipline for time-card fraud and her relatively short term of employment, justifies the penalty imposed in this matter. The Employer contends that because Grievant unlocked an administrator's private office, turned on his television, sat in his chair, put her feet up on his desk and fell asleep, she engaged in misconduct serious enough to warrant her discharge. Further, the

Employer contends that Grievant's version of events related at the arbitration hearing should not be credited as it contradicts the sworn testimony of other eye witnesses, and the version she told during the investigation is corroborated by Brown's testimony and notes, and by Aquamarine's testimony. Finally, the Employer contends that Grievant's version of events is self-serving, and therefore, should not be given weight.

UNION'S POSITION

The Union contends that there was not just cause to terminate Grievant's employment, because the specific reason for her discharge, "inappropriate conduct" was not provided until five days after her termination. With respect to the three "areas of difficulty" identified by Brown, none can serve as the basis of her discharge. First, the Union contends that Grievant was never placed on notice that there were designated areas in which she was only allowed during certain times. The union contends that employees frequently used the break room adjacent to the principal's office to eat or watch television.

Second, the Union contends that the Employer has not proven that Grievant was sleeping during her shift. At the hearing, Grievant testified that on the morning of February 6, both she and Fuchsia had finished their work a little early, and they both entered Lavender's office and turned on the television. She said that Fuchsia left her at 6 a.m. and that she was still awake when he left. Grievant testified that after Fuchsia left, she fell asleep until Lavender woke her shortly after 7 a.m. The Union contends that this testimony indicates that Grievant's shift may have been completed before she turned on the television, sat down and fell asleep.

Third, the Union contends that Grievant's failure to inform Brown that she had been found by Lavender sleeping in his office cannot be a reason to justify her discharge, as no work rule requires employees to incriminate themselves.

Additionally, the Union contends that the Employer did not have a work rule forbidding sleeping at work, and that, the Employer did not consider the infraction serious enough to bar Grievant from working while the investigation was ongoing. The Union contends that the Employer failed to use progressive discipline in this matter and that Grievant's conduct was labeled "dishonesty and fraud" in order to justify a more severe penalty than was warranted. The Union contends that Grievant's prior discipline should not be considered, as she was a probationary employee at the time, and once she completed her probationary period, the infraction became "moot."

The Union contends that Grievant was discriminated against on the basis of her gender, because similarly situated male employees were not written up or disciplined despite engaging in misconduct for which female employees have been disciplined.

In sum, the Union contends that the Employer failed to prove that Grievant was sleeping while she was on duty, because no one established the time she fell asleep. The Union asks that the discharge be set aside, and Grievant be made whole.

DISCUSSION AND FINDINGS

As noted by both parties, in a discipline matter, the Employer bears the burden of proving that the Grievant has engaged in the misconduct for which she was disciplined. In this matter, Grievant was discharged for being asleep in the principal's private office while she should have been working. The Employer classifies this behavior as akin to "dishonesty" as it considers Grievant to have "stolen" the time for which she was paid, but was asleep. Further, the

Employer is particularly troubled by the place Grievant chose to sleep: an administrator's private office, behind a locked door, with the lights out.

In this matter, Grievant was caught "red-handed" so to speak, as she was discovered sitting in administrator's chair with her feet on his desk, sound asleep. There is no dispute that she was sleeping in his office. However, the Grievant was discovered a full hour after the end of her shift, and she testified at the hearing that she did not fall asleep until after the end of her shift. While it would be discomfiting for a supervisor to find an employee asleep at his desk in his private, usually locked office, the Employer has charged that Grievant "stole" time by sleeping while she should have been working.

After carefully considering all the evidence, I do not find Grievant's assertion that she fell asleep after the end of her shift credible. As the Employer pointed out, her testimony contradicts that of the other third shift custodian¹, who had nothing to gain by distorting the truth. Even more significant, however, is that Grievant's testimony contradicts the statements she made during the investigation on February 15, where she readily admitted sleeping "for the last fifteen minutes" of her shift, conduct for which she thought she might get a "couple of days off." Brown's notes reveal that on February 20 he passed around his notes of the earlier meeting, containing these statements by Grievant, and that no "corrections, additions or deletions" were proposed to the notes. There is no reason Grievant would have made these incriminating statements during the investigation if she was sure that she had been awake until the end of her shift. Accordingly, I find that the Employer has proved that the Grievant did sleep in the principal's office for some period while she was still on the clock.

Having reached that conclusion, the next question is whether, given the totality of the circumstances, discharge was the appropriate penalty for the misconduct proved. The Employer asserts that this Arbitrator may not alter the penalty imposed once the misconduct has been proved, unless management's decision is "arbitrary, capricious, discriminatory or imposed by bad faith."² However, nothing in the collective bargaining agreement limits my authority to modify a penalty, should I consider it to be improper. In such circumstances, "most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed inherent in the arbitrator's power to discipline and in [the arbitrator's] authority and to finally settle and adjust the dispute...."³ The Union has raised several arguments regarding mitigating circumstances which it asserts make the penalty of discharge too severe. Each will be examined separately.

Whereas the Union argues that the Employer had no rule prohibiting sleeping while on duty, the Grievant herself acknowledged that such conduct was inappropriate, even going so far as to acknowledge she might get a couple of days off. Further, common sense would tell an employee that sleeping during her shift is not consistent with her obligation to her employer who is paying her to work. There is no evidence that the Employer published a comprehensive list of prohibited conduct, so the absence of a rule prohibiting sleeping could not reasonably lead an employee to believe such behavior would be tolerated. An employer can reasonably expect that

¹ Although Fuchsia did not see Grievant sleeping, she certainly was not working when he discovered her in the administrator's office, at best she was "loafing" when he discovered her.

² The District cites Arbitrator McCoy in Stockham Pipe Fittings Co., 1 Lab. Arb. Reports 160, 162 (1945), for this proposition.

³ Platt, Harry H., "The Arbitration Process in the Settlement of Labor Disputes," 31 J. Am. Jud. Soc'y 54, 58 (1947), quoted in Elkouri & Elkouri, How Arbitration Works, 5th ed. (1997) at p. 913.

its employees are performing the work they are being paid to perform, even without a specific directive to that effect.⁴

The place where Grievant chose to sleep, a locked private office, not visible to anyone outside the office, confirms that she intended to sleep in a place where detection would be unlikely. She deliberately sought an out of the way spot, where she would not be disturbed, turned off the lights, locked the door, sat down and turned on the television set. This is not an employee who inadvertently fell asleep while performing work. She deliberately set out to sleep, despite the fact that her shift had not yet ended.⁵

Similarly, “common sense” would inform an employee that unlocking the private office of the school’s principal and sitting in his chair with her feet up on his desk would be perceived as an invasion of the administrator’s private space. The Grievant should understand the difference between an implied permission to enter the office for the purpose of cleaning it and entering the office to put it to her own private use. Whereas the first serves a legitimate purpose—performing the job she is paid to perform—the second has no legitimate purpose. The fact that employees frequently used the break room next to the principal’s office for breaks, lunches and staff parties does not imply that the private office was also available for relaxing in. Grievant was or should have been on notice that this conduct was inappropriate despite the lack of a specific written rule prohibiting it.

The other “notice” deficiency raised by the Union—that Grievant was not told of the reason for her termination until five days after her discharge—is not supported by the evidence. While Aquamarine’s letter, dated February 25, 2002, states that Grievant was discharged for “inappropriate conduct,” there can be no dispute that Grievant was well aware, even during the investigation, of the nature of the charges against her. Aquamarine’s characterization of the events as “inappropriate conduct” was not a new charge, but a summary description of the events previously discussed. In fact, on February 22, 2002, Grievant filed a grievance, stating, in part, that the parties held a meeting on February 15 regarding the Grievant “sleeping in Stanley Lavender’s office.” Grievant clearly understood the nature of the conduct being investigated and for which she was discharged.

The Union’s point is well-taken that Grievant should be not discharged for failing to take it upon herself to inform her supervisor that she had been awakened from sleeping by Lavender. An employer may not discipline an employee solely for failure to “self-report.” Having said that, however, had Grievant “owned up” to the misconduct and “turned herself in,” an employer might reasonably consider that to be a mitigating factor when assessing a penalty. Whereas the Employer could not have discharged Grievant simply for failing to inform her supervisor of what occurred, it can reasonably take into account her lack of forthrightness when determining an appropriate penalty.

The Union argues that the Employer failed to abide by its progressive discipline policy in this case, and discharged Grievant despite the fact that this was first offense as a non-probationary employee. However, Grievant’s past record is not one that should encourage leniency. At the time of her discharge, she had been employed for just less than fifteen months. She had already been disciplined for a related offense—leaving the work place early while

⁴ Accord, Packaging Corp. of America, 76 Lab. Arb. Reports 643, 648 (High, 1981).

⁵ Cf., Columbian Chemicals, Inc., 115 Lab. Arb. Reports 1033 (Barons, 2001).

indicating on her time card that she worked a full shift.⁶ Both incidents reveal a troubling disregard for her employer's interests. Grievant worked on the third shift, with no supervisors present. As a result of these two incidents, the Employer was reasonably concerned that Grievant lacked of a sense of obligation toward meeting her employer's needs. Further, the Grievant's cavalier attitude toward being caught sleeping in the principal's office demonstrated that she did not believe she had engaged in any serious misconduct.

It is generally accepted that an employer must impose lesser discipline before more severe penalties, in order to give an employee an opportunity to correct errant behavior. However, it also clear that some transgressions are so serious as to justify immediate discharge. One authority states, "In particular, discharge may be imposed only when less severe penalties will not protect legitimate management interests, for one of the following reasons: (1) the employee's past record shows that the unsatisfactory conduct will continue, (2) the most stringent form of discipline is needed to protect the system of work rules, or (3) continued employment would inevitably interfere with the successful operation of the business."⁷

Here, the Employer persuasively quotes Arbitrator Cohen who writes, "[S]leeping on the job has long been a dischargeable first time offense in a broad range of industries and employment situations. Any employer has the right to expect that employees are awake while at work and performing the job for which they are paid."⁸ In this case, not only was Grievant asleep while she was being paid to work, she was deliberately sleeping in an administrator's private, locked office. Further, Grievant's past conduct, coupled with her cavalier attitude toward being caught, would reasonably lead the Employer to believe that Grievant's unsatisfactory conduct would continue, especially as she worked essentially without supervision on the third shift.

Finally, the Union argues that the Grievant was discriminated against because she was a woman. However, there is no evidence that any other employee of the Employer had been caught sleeping while on duty, so there is no similarly situated male who Grievant can show was treated differently without good reason. Therefore, I find her claim that she was discriminated against to be meritless based on this record.

AWARD

The grievance is DENIED.

February 25, 2003

Date

Kathryn A. VanDagens, Arbitrator

⁶ Although the Union argues that this discipline became "moot" when Grievant completed her probationary period, it has not demonstrated that the parties' collective bargaining agreement requires that probationary employee's record be "wiped clean" when she completes the probationary period. In the absence of such a provision, the employer may take recent prior discipline into account when addressing later, similar misconduct. Of course, the weight to be given to such prior discipline varies depending upon how much time has passed since its issuance.

⁷ Abrams, Roger I. & Nolan, Dennis R., *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 85 Duke L.J. 594 (1985).

⁸ Manley Brothers of Indiana, Inc., 106 Lab. Arb. Reports 442, 445 (1996).