

Attached find the arbitration decision in the case of Scott Z. The arbitrator in this case provided a “split decision in this case which was disappointing to both sides. This is one of the perils of going to arbitration. I would like to read this decision and determine:

Was there point in the case as you read it when Management of the hospital could have changed their approach and compromised and why? Where was this point and what would you have offered?

Putting on your union hat, you’ve just wasted a lot of member’s dues and got just half a loaf. Is there a point in this case where the Union could have pulled back and compromised? Where in the story could the Union have offered a compromise and avoided arbitration and why?

What is your opinion of the Arbitrator’s decision? If you had been the arbitrator and this were presented to you how would you have ruled and WHY. Please give me a detailed argument for your decision.

IN THE MATTER OF ARBITRATION BETWEEN

:

DECISION IN GRIEVANCE

:

LOCAL 550, RETAIL, WHOLESALE AND
DEPARTMENT STORE UNION, AFL-CIO

:

RE: GRIEVANCE OF SCOTT Z

AND

:

:

:

:

GRIEVANCE:

The grievance alleges that Mr. Z was terminated without just cause.

AWARD:

The grievance is sustained in part and denied in part as is set forth herein:

HEARING:

October 10, 1990, Fairmont

ARBITRATOR:

APPEARANCES

FOR THE UNION

FOR THE EMPLOYER

[REDACTED], Staff Representative

[REDACTED] Vice President
of Employee Relations

Procedural History

By letter dated July 3, 1990, the undersigned was notified of his selection by the Local 550 of the Retail, Wholesale Department Store Union, SSFL-CIO (Union) and _____ (Hospital or Employer) to hear and decide a matter then in dispute. Pursuant to due notice, a hearing was held on October 10, 1900 in Fairmont, West Virginia at which time both parties were afforded a full opportunity to present testimony, examine and cross-examine witnesses and introduce documentary evidence in support of their respective positions. The parties summed up their positions in briefs after the conclusion of the hearing. The matter is now ready for final disposition.

Background Facts

The Union and the Company are parties to a collective bargaining agreement effective March 2, 1989 and continuing until March 2, 1993. Article X of the agreement states that the hospital will provide clean uniforms to certain employees, including those in the Engineering Department. The Hospital has entered into a contract with Rental Uniform Service of Morgantown, Inc. ("RUS") by which it rents uniforms for its employees. Normally, RUS delivers clean uniforms for the Hospital's employees on Mondays prior to 7:00 a.m., and also then picks up the dirty uniforms from the prior week.

The Grievant, Scott Z____, was hired by the Hospital as a Skilled Mechanic in the Engineering Department on November 28, 1979. Pursuant to the Hospital's contract with RUS, he was furnished with eleven sets of uniforms, consisting of eleven pairs of pants and eleven shirts with his name on them.

On Monday, April 9, 1990, RUS did not make a morning delivery of clean uniforms. After reporting for work on the 7:00 a.m. to 3:00 p.m. shift, and becoming aware of the nondelivery, the

Grievant notified his supervisor, Assistant Plant Operations manager Dan J ____ that he did not have a clean uniform to wear. He also told Mr. J ____ that past practice was that if a clean uniform was not available to an employee; he/she was entitled to go home with a day's pay. Mr. J ____ reviewed the matter and at about 10:00 a.m., gave the grievant a clean housekeeping uniform to wear for the day. After initially protesting, the Grievant did put on the uniform and completed his shift in it. At about 2:00 p.m., RUS delivered six clean uniforms for the Grievant.

On April 10th and 11th, the Grievant worked without incident and wore one clean uniform each day. On April 12th, 13th, and 16th, he served a three day suspension for absenteeism, which the Union has grieved but has not yet arbitrated.

On Monday, April 16th, RUS delivered three clean uniforms for the Grievant. When only three uniforms were delivered, Supervisor J ____ felt that there was a discrepancy: five clean uniforms would have been delivered to bring the Grievant's total to the allotment of eleven.

On April 17, the Grievant reported for work on his 7:00 a.m. to 3:00 p.m. shift. After he had changed into a clean uniform, supervisor J ____ asked him to open his locker. After discussion, the Grievant complied and five clean uniforms were found in his locker. According to the Hospital's calculations, if the Grievant actually had no clean uniforms on April 9th when six were delivered to him, he should have had three clean uniforms in his locker on April 17th: the six uniforms would have been decreased by the ones he wore on April 10th and 11th and the one he was wearing on the 17th.

The Grievant was suspended and sent home on April 18th, he was terminated for filing a false report in violation of Section G of the "Disciplinary Action and Policy" provisions of the Employee Handbook which states: "Employees will be subject to immediate discharge for certain offenses including but not limited to: Falsifying records or reports." The false report was alleged to have occurred on April 9th, when he told Supervisor J ____ that he had no clean uniforms. The Hospital

dishonest
term

contended that he in fact had two clean uniforms on April 9th, as demonstrated by the five rather than the three uniforms in his locker on April 17th.

On April 23, 1990, the Union filed a grievance alleging that the Mr. Z____ had been discharged without just cause in violation of Article XV. The grievance was denied by the Hospital, remained unresolved in the grievance procedure and became ripe for arbitration.

Position of the Employer

The Hospital asserts that it terminated Mr. Z____ for the fundamental dishonesty of reporting a falsehood to his supervisor. The Employee Handbook states that employees will be subject to immediate discharge for certain offenses such as falsifying records or reports, or for dishonesty or theft on duty. On April 9th Mr. Z____ was made aware that the uniform company had failed to deliver clean uniforms. Mr. Z____ took advantage of this information by reporting to his supervisor that he had no clean uniforms so that he would be sent home with pay. When his locker was opened on April 17th, however, there were five clean uniforms in the locker, and he was wearing a clean uniform. A reasonably prudent person would have difficulty understanding why he should have so many uniforms in his possession if he actually had no uniforms in his locker on April 9th. It is a logical conclusion that he lied on April 9th.

The Hospital argues that the nature of Mr. Z____'s job necessitates that he be an honest and trustworthy employee. He is required to follow through on assignments without constant supervision and checking, and the Hospital must rely on his report of his activities. Failure to be honest or the act of filing a false report may indeed have the effect of placing employees or patients in mortal danger. For this reason, and because the Employee Handbook states that falsifying records or reports and

dishonesty and theft are to be remedied by immediate discharge, management acted with cause in terminating Mr. Z___'s employment. The grievance should therefore be denied.

Position of the Union

The Union asserts that the Hospital has the burden of proof, which it has failed to meet. RUS, the Hospital's uniform vendor, acknowledged that the Engineering Department's uniforms sometimes get mixed up with Penn Toyota's, and that the Grievant's uniforms could have been at Penn Toyota for as long as one week. One pair of Z___'s pants is missing, and is not at RUS, Penn Toyota or the Hospital. All told, the Hospital has proven nothing regarding whether Mr. Z))) had a clean uniform on April 9th.

Even if the Hospital had developed credible proof that Mr. Z))) had a clean uniform on April 9th, the discipline imposed is much too severe. After reporting that he lacked a clean uniform, he obeyed his supervisor's orders for the remainder of the day. The Hospital was unable to provide any evidence that he had ever lied about completing a task in the Hospital. Mr. Z___ has had no prior allegations lodged against him in his first ten years of service with the Hospital. It is also possible that clean uniforms could have been placed in his locker during his absence prior to April 17th, since his co-workers knew that Z___ kept his locker key on top of his locker. The Arbitrator should return Mr. Z___ to work with his original seniority date and full back pay including wages and fringe benefits.

Cited Portions of the Contract

ARTICLE X. UNIFORMS

The Hospital shall provide a complete uniform to the employees in Laboratory, Housekeeping, Nursing, Engineering, Dietary, and laundry. The Hospital shall provide long laboratory coats to the employees who desire them in Medical Records.

The color, design, and so forth shall be subject to approval by the Hospital. All employees shall be issued a sufficient number of uniforms to ensure that such employees shall have clean, properly fitting uniforms daily. The Hospital shall make available conductive shoe coverings of appropriate sizes for use in the operating room. The Hospital shall choose the number, type, and specifications of uniforms and frequency of laundering. Smocks will be made available to all uniformed department employees for wear on duty if desired.

ARTICLE XV. MANAGEMENT

The rights and duty of the Hospital to freely manage its operations shall not be diminished, except as expressly limited by this Agreement. The rights reserved to the Hospital include all those normal in business management, plus those necessitated by the unique nature of Hospital operations. They include, by way of illustration, but are no means limited to the following: the determination of the size, type, and method of operation of the Hospital and all its departments and the right to determine manning requirements, the qualifications of employees, and methods of operations. The right to hire employees; supervise; lay off for lack of work; schedule; assign; transfer; promote; demote for just cause, including lack of work; and determine job content and ability shall not be limited, except as expressly provided by this Agreement.

The Hospital shall have the right to establish reasonable rules and regulations, written and unwritten, and to discharge or otherwise discipline employees for just cause. The Union will be notified of any new or changed written rules and given copies of the.

Nothing in this Agreement shall limit the Hospital's right to use volunteers or other nonemployees in any manner and on any function it see fit, except as limited by Article IV.

Opinion

The issue presented is whether the Grievant, Scott Z____, was terminated for just cause and if not, what shall the remedy be. In order for the Hospital's decision to be sustained, it must first meet its burden of proving that he filed a false report on April 9, 1990, and then it must be found that the severity of the discipline imposed was appropriate. As stated in Elkouri and Elkouri, How Arbitration Works, Fourth Edition, at page 661:

"There are two areas of proof in the arbitration of discharge and discipline cases. The first involves proof of wrongdoing, the second, assuming that guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, concerns that question of whether the punishment assessed by management should be upheld or modified."

Once the party having the burden of persuasion presents sufficient evidence to justify a finding in its favor, the other party has the burden of producing evidence in rebuttal.

In determining just cause, the general rule is that the Employer has the right to develop and enforce regulations for its employees which are reasonably related to proper managerial objectives, but discipline or discharge for their violation can be imposed only for just or proper cause, with the determination of the reasonableness of the rules and the existence of just cause left to the arbitrator. A just cause determination involves a value judgment on the part of the arbitrator, who in general analyzes each case in terms of the following considerations: (1) was the alleged misconduct proved by the Company to the satisfaction of the arbitrator;; (2) if so, was it of such a nature as to warrant

disciplinary action:' (3) if the misconduct is proved, was it the result of provocation or other extenuating circumstances that might mitigate the guilt of the Grievant;; (4) is there evidence that discrimination motivated the disciplinary action:' and (5) if applicable, did the Company adhere to the principles of corrective or progressive discipline?

Corrective or progressive discipline is based on notions of fairness and on the assumption that, if suitably warned or punished by penalties of gradually increasing severity, employees will be motivated to improve their conduct or behavior, thereby preserving their own jobs and saving their employer the expense of hiring and training replacements. Progressive discipline is therefore a policy which is mutually beneficial to both employees and the employer.

In order to determine whether just cause existed to discipline the Grievant, it is first necessary to briefly review the evidence received at the hearing. After becoming aware that the uniform company ("RUS") had not delivered clean uniforms on the morning of April 9, 1990, Mr. Z reported to his supervisor (Mr. J____) that he did not have a clean uniform to wear that day. He further asserted that past practice was that if a clean uniform was not available, the employee was entitled to go home with a day's pay. Mr. J____ ascertained that no clean uniforms had been delivered that morning and subsequently provided the Grievant with a housekeeping department uniform to wear for the day. On the afternoon of April 9th, RUS delivered six uniforms for the Grievant. He used one uniform each day to work on April 10th and 11th, and then do not work again until April 17th. When he reported to work on that date, a review of the contents of his locker revealed five uniforms and he was also wearing a clean uniform.

Simply stated, if six uniforms were delivered on April 9th and he worked two days wearing a uniform (April 10th and 11th), he should not have still had six uniforms on April 17th. He should have had four uniforms, which leads to a strong inference that he had two uniforms on April 9th, when he claimed to have none. As he told his supervisor on April 9th that the practice was to allow an employee without a

uniform to go home with pay, the reasonable likelihood raised by the Hospital is that he was trying to get a day off with pay. As also noted by the Hospital, since the Grievant did not work on April 5th and 6th because of illness, he logically would have had the two uniforms in question in his locker for use on these two days. They would still have been there on April 9th. This would account for the discrepancy of two uniforms between the four that he should have had on April 17th, and the six uniforms he actually had.

The testimony produced by the Hospital also accounted for all of the eleven uniforms rented for the Grievant. He had the six uniforms previously noted, three were delivered to him on April 16th and as discussed later, two others were delivered on April 23rd.

All told, the Hospital produced clear and convincing circumstantial evidence that the Grievant had two uniforms on April 9th, when he claimed to have none. The burden of persuasion therefore appropriately shifts to him to explain how he still had six uniforms on April 17th, after he professed to have none when he began the day on April 9th.

The Union produced evidence that other employees had access to the key to the Grievant's locker, and theorizes that they could have placed the two uniforms in the locker without his knowledge. There was no evidence presented from any of the Grievant's co-workers, however, that they ever placed the Grievant's uniforms in his locker either in April, 1990 or at any other time.

There was also testimony that uniforms sometimes get mixed up, and on occasion, the Grievant has worn other employee's uniforms and they have worn his. Assuming this to be true, there was no evidence of a mix-up in April that would either cause the discrepancy of two uniforms or demonstrate that he had no uniforms on April 9th.

The Union also argues that the testimony of the representative of the uniform vendor, Doug C____, proved that the Grievant's uniforms could have been mixed up with the uniforms of Penn Toyota and that his uniforms could have been at the Toyota dealer for a week. The testimony of Mr.

C_____ revealed that one employee at Penn Toyota has a gray uniform similar to the Grievant's, and that his name ("Van") and "Toyota" would appear on the uniform. While it is always conceivable that uniforms might be mixed up, the error would be immediately noticeable between the Hospital and the Toyota uniforms and there was no confirmation that such a mistake was made in April, 1990.

The fact that the uniform company no longer had the route sheet for April 23rd, which would have shown the driver's delivery of two uniforms, is not defective to the Hospital's case. The sheets are destroyed as a matter of course after a month has passed and the testimony of Mr. C_____ in support of his written statement that two uniforms would then be delivered (Hospital Exhibit 8) credibly confirmed that it occurred. These two uniforms would have been the ones used by the Grievant on April 10th and 11th.

In addition, the Union argues that Mr. C_____ 's testimony showed that one pair of pants from the Grievant's uniform is missing and still unaccounted for. It asserts that this lends strength to its argument that the Hospital has not proved that the Grievant had a clean uniform on April 9th. A review of Mr. C_____ 's testimony reveals that when the Grievant's uniforms were returned on or about April 23rd, eleven shirts and ten pants were counted (Hospital Exhibit 10). Mr. C_____ did not know whether after this date, the missing pair of pants was ever returned. Even if it was not, the Hospital showed that as of April 23rd, the uniform company had supplied the Grievant with the full allotment of eleven uniforms: he had six in his possession on April 17th, three had been delivered on April 16th, and two were delivered on April 23rd. The fact that one pair of pants was somehow held back and not returned to the uniform company does not change the fact that the Grievant had two more uniforms on April 17th than he should have if he had no uniforms on April 9th.

The Grievant himself had no plausible explanation for why he had six uniforms delivered on April 9th and still had six uniforms after wearing two uniforms on April 10th and 11th.

The Grievant was disciplined for filing a false report in violation of Section G of the Disciplinary Policy set for in the Employee Handbook. This states that falsifying a record or report is grounds for immediate discharge. As all of the foregoing confirms that the Grievant falsified the oral report he made to his supervisor on April 9th, that he had no uniforms to wear that day, it is found that he did falsify a report within the meaning of Section G and disciplinary action by the Hospital was appropriate.

While just cause for discipline therefore exists, it still must be determined if the degree of discipline (termination) administered by the Hospital is reasonable related to the seriousness of the Grievant's offense, and his record with the Hospital. It is noted that there is no language in the parties' agreement that would prevent an arbitrator from reducing or eliminating the discipline, even considering that the Grievant did file a false report.

The Grievant works alone and is not directly supervised. As a preventative maintenance mechanic, he is responsible for repairing and maintaining the Hospital's machinery and mechanical equipment, and he signs a card stating that he has done a particular job. As his work is not checked and his word is taken that he has satisfactorily done a particular assignment, the Hospital argues that if he filed a false report concerning whether he had a uniform, his word cannot be trusted concerning whether he did the important responsibilities of his job which could impact on patient safety.

The Grievant has been employed by the Hospital for over ten years and this is the first allegation that he has falsified a report. There was no evidence that his work has been unsatisfactory or that left unchecked, he has not performed his assigned tasks. A review of his Employee Evaluations (Hospital Exhibit 5) showed that his quality of work (accuracy, thoroughness and neatness of work) has been rated either better than average or at least meeting the job requirements. His quantity of work has satisfied the requirements of his job. There was no indication this his work has actually had detrimental repercussions to the Hospital or its patients. While by analogy it could be argued that if he filed a false report on one matter (uniforms), he must be found to be inclined to file such reports on his usual job

responsibilities, a review of all the evidence presented one instance of misbehavior which cannot be extrapolated into an indictment of his past, present or future job performance.

Viewing the failure to accurately state how many uniforms he had on April 9th as an attempt to obtain a day off with pay, it is found that a five day suspension without pay or benefits will meet the requisites of corrective, progressive discipline. The termination will therefore be reduced to a five day suspension for April 17, 18, 19, 20 and 23, 1990 and the Grievant is to be reinstated as of April 24, 1990 and made whole for back pay and benefits. Back pay is to be computed at this hourly rate as of April 24, 1990. Whatever pay he received for April 17th may be deducted from the back pay liability. As there was testimony that Mr. Z____ had knee surgery after his termination, he is to be paid for each week that he was medically able to work after the suspension until he is actually back to work. If he had earned sick days in accordance with Article XXIV of the agreement, he is to receive sick leave pay for the amount of time he earned during the period that he was medically unable to work. His holidays are to be restored in accordance with Article XXII and he is to receive a floating holiday in place of Thanksgiving. The ten holidays are to be reduced by any floating holidays he used in 1990 prior to his termination. The Grievant's three weeks of paid vacation are to be restored in accordance with Article XXVIII, Section A, less any weeks of vacation for which he has been paid in 1990 prior to his termination. His insurance benefits under Article XXVIII are to be immediately restored. His pension benefits are to be restored retroactively, in accordance with the \$20 per week rate of Article XXIX, to commence again on April 24th. He is to be reimbursed for any out-of-pocket expenses related to obtaining health insurance during his period of termination, such as those set forth in Union Exhibit q, and for any out-of-pocket expenses related to his knee surgery. Any unemployment compensation paid to Mr. Z____ or other earning may be deducted from the back pay award. No interest is due.

The request of the Union to remove and destroy notice of this termination reduced to a suspension as well as Security Guard's Havey's report (Hospital Exhibit 7), from the Grievant's file is denied.

While this case might appear suitable for retention of jurisdiction because the make whole back pay and benefits remedy is complicated by the Grievant's surgery, absent agreement of both parties, an arbitrator's power ends when the Award is issued. As the parties have not acceded to the retention of jurisdiction, it is suggested that the parties mutually seek clarification of the Award if its implementation requires interpretation.

Award

The grievance is sustained in part and denied in part. The termination of Scott Z_____ is reduced to a five day suspension without pay and benefits. He is to be made whole for back pay and benefits as previously set forth.

Arbitrator

December 4, 1990
Pittsburgh, Pennsylvania