

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between:

UNION

and

**Re: Indecency on Job
Discharge**

UNIVERSITY

CASE: BROWN #5

The undersigned, Barry C. Brown, was mutually selected by the parties under the auspices of the American Arbitration Association to render an Opinion and Award in grievance number 54 00375 99/Gr #A2775-19-99. Hearing was held at the University on June 20, 2000. The employer submitted a post hearing brief on July 26, 2000, and thereafter, the record was closed.

APPEARANCES:

For the Employer:

-Human Resources Professional

, Employee Relations

Personnel Administrator

For the Union:

-Staff Specialist

-Local President

-Chief Steward

-Grievant

ISSUE:

Did the employer have just cause to terminate the employment of the grievant, B. CARR?

PERTINENT CONTRACT PROVISIONS:

Section 8. The Employer reserves and retains, solely and exclusively, all rights to manage and direct its work forces, except as expressly abridged by the provisions of this Agreement, including by way of illustration but not limitation, the determination of policies, operations, assignments, schedules, discipline, and layoff, for the orderly and efficient operation of the University.

ARTICLE 15 PRESENTING A GRIEVANCE

Section 61. Any employee having a problem in connection with his/her employment shall present it to the Employer as follows:

E. Step IV

Section 72. Grievances, within the meaning of the grievance procedure and of this arbitration clause, shall consist only of disputes about the interpretation or application of the clauses of this Agreement and about alleged violations of this Agreement. The arbitrator shall have no power to add to, or subtract from, or modify any of the terms of this Agreement, nor shall he/she substitute his/her discretion for that of the Employer or the Union where such discretion has been retained by the Employer or the Union, nor shall he/she exercise any responsibility or function of the Employer or the Union.

ARTICLE 17 REPRIMAND, SUSPENSION OR DISCHARGE

A. Notice of Reprimand, Suspension or Discharge

Section 76. In the event an employee is disciplined by written reprimand or written suspension or discharged by written notification, a copy of the discipline shall be given to the employee, a copy to the District Steward or Alternate Steward and a copy mailed to the local Union office at the time it is given to the employee. Such notice shall be specific and outline the reasons for the disciplinary action.

C. Appeal of Reprimand, Suspension or Discharge

Section 77. Should the reprimand, suspended or discharged employee or the Union consider the discipline to be excessive and without just cause, the Chief Steward or his/her designated representative shall, within seven (7) regularly scheduled working days after the Union office receives the written notification of the discipline, submit it as a grievance. A grievance over a written letter of reprimand or suspension shall

be submitted by the Chief Steward at Step II of the grievance procedure. A grievance over a discharge shall be submitted by the Chief Steward at Step III. Failure to submit a written grievance within the time limits shall constitute a waiver of all claims concerning such disciplinary action or discharge.

C. Use of Past Record

Section 78. In imposing any reprimand, suspension or discharge on a current charge, the Employer will not take into account any prior infractions of which the Employer had knowledge that occurred more than two (2) years previously. No derogatory inference will result and/or the material relating to disciplinary action be held against an employee in relation to his/her employment because of the need to retain records beyond the two (2) year period. Upon written request from a Local 19 Bargaining unit employee, the records' section will purge the employee's file of disciplinary actions over two (2) years old if there have been no intervening disciplinary actions.

Rules Governing Personal Conduct of Employees

Rules of personal conduct for employees are intended to promote the orderly and efficient operation of the University, as well as to protect the rights of all employees. Violations, therefore, shall be regarded as cause for disciplinary action, up to and including discharge. Discharge may result from an accumulation of minor infractions as well as for a single serious infraction. This statement of "Rules governing personal conduct of employees" does not preclude the establishment of additional rules for its employees by any University department that are necessary for the effective operation of that department.

Disciplinary action under these rules does not free an employee from possible criminal liabilities, nor preclude sanctions established for violations of UNIVERSITY Ordinances or state or federal laws.

The following are examples of conduct that is prohibited:

16. Other misconduct such as, but not limited to, the following:

e. Immoral conduct.

STATEMENT OF FACTS:

The grievant, B. CARR, was hired in 1982 by University to work as a custodian in the STUDENT Graduate Hall. He was a member of UNION Local 19, and he reported to R LEADER, his supervisor. The grievant's employment was terminated on December 11, 1998, based upon the charge of indecency.

The facts of this case are not in dispute. At 12:15 p.m. on December 9, 1998, Supervisor R. LEADER observed an area of spilled coffee near the reception desk of STUDENT Hall, and he looked for the grievant so that this area could be cleaned. The grievant's lunch period was over at noon, but he could not be immediately located so the supervisor looked in the "cot room." This is an area where roll-away cots are stored for the residents to use when they need them for overnight guests. The supervisor thought to look in this room, because a month earlier, he had found the grievant and a woman arguing in this room.

The supervisor entered the cot room by using his key, and there he observed the grievant and a woman both pulling their pants up. The grievant's penis was plainly in sight before he had gotten dressed. The supervisor had told the grievant that they would discuss this incident later, and he had then gone to the manager of STUDENT Hall and he reported what he had seen. Shortly after that, he ran into the grievant in the lunch room. The grievant apologized for his behavior, and the supervisor had told the grievant that his discipline for the incident would probably be a written reprimand.

The manager of STUDENT Hall met with the grievant and his union representative on that same day (12/9/98). The grievant was suspended pending investigation. On December 1, 1999, the grievant was again called in to answer the formal charge of indecency. There was no dispute about the facts reported by the grievant's supervisor. The grievant and the union representative explained that the grievant and the woman he was with had just gotten engaged. The manager decided that the

grievant should be dismissed because of his indecent behavior. He asserted that any resident could have walked in to find this couple partially dressed on a cot, and the grievant's penis exposed. He added that such on-duty conduct could not be tolerated at an UNIVERSITY residence hall.

THE UNION'S POSITION:

UNION Council 25 contended that the employer had not established just cause to discharge the grievant. The union asserted that the grievant had previously been in the same cot room with the same woman, and he was not disciplined, and so he had no forewarning that such conduct was forbidden. The union also argued that the grievant's misconduct on December 9, 1998, was not so serious that it warranted discharge for a first offense. The grievant's time in the cot room was near to his lunch period, the union maintained, and the grievant had not been charged with wasting time or for not being on the job. The union contended that the grievant's long work record and the fact that his misconduct took place in a locked room provide mitigation. For these reasons, the union asked that the grievance be granted, and the grievant be reinstated and made whole.

THE EMPLOYER'S POSITION:

University argued that it had fairly investigated this matter, and it had reasonably determined that the grievant should be dismissed because he had engaged in indecent behavior by being undressed with his girlfriend in a room which was regularly accessed by the student residents of the university. The employer asserted that such conduct is unbecoming a university employee, and it brings the employer into disrepute. The university maintained that the grievant's prior incident in the cot room was one in which he was arguing with a woman when he should have been working, and

it was treated as minor misconduct, and this surely did not condone sexual activity in that same room. The employer asserted that the cot room was regularly visited by residents, and an employee should reasonably expect that someone could walk in at any time. For all of these reasons, the employer asked that the grievance be denied.

DISCUSSION:

The union's arguments were directed entirely to the severity of the discipline assessed against the grievant. It has argued that the penalty of discharge is too severe under the circumstances. UNION has maintained that the grievant's actions were in a locked and windowless room where he expected no one to see him or to view his activities with his girlfriend. The union also said that his prior incident in the cot room with a woman, when discovered by his supervisor, had not resulted in discipline, and so he had not been forewarned. He had felt his presence in this room had been condoned. Finally, the union said that after the incident, the grievant's supervisor had told him that he would only receive a written reprimand.

The grievant's supervisor had no authority to suspend or to dismiss employees. His role was just a step above that of a working leader, and it was clear that others above him in authority would decide what punishment was warranted. Therefore, the supervisor's surmise that the grievant would only be written up was not an official decision or a final action by management. The grievant was called in and suspended a few minutes after the supervisor had offered his opinion, and so the grievant had not relied on the fact that he would only get a reprimand for his misconduct on December 9, 1998.

The fact that the grievant was in a locked room is of little consequence in this case. First, it

was established that residents often were given the key to the room to go to get a cot, and it takes only seconds to unlock the door and to see who is there and what is going on inside the room. Further, even if this were not true, the grievant must have the common sense to know that an employee cannot have a sexual encounter with a woman friend on the premises of his work place. The fact that the grievant and his girlfriend were hurriedly dressing while on a cot in a dark, closed room leaves little to the imagination. An employee in a college residence hall has a duty not to expose the student-residents to this kind of conduct. The parents of students in such a setting could become very concerned, and this could have serious negative ramifications for the university.

The grievant's first incident in the cot room came after loud voices were heard coming from the room. When the door was opened, the girlfriend was crying and there was no evidence that the room had been used for anything more than a private place for an argument. The supervisor gave the grievant a break, and he only told him to get back to work. However, nothing in all of this would lead the grievant to believe that he could now use the cot room as a trysting place.

In a somewhat similar case in 1982, Arbitrator Herman considered the discharge of a UNIVERSITY residence hall employee who had exhibited his penis to two women in a residence hall. This employee admitted his indecent exposure, and he was fired. The union objected that the penalty of discharge was too severe. Arbitrator Herman issued the following award:

"Arbitrators are prone, whenever they can find a reasonable justification therefore, to reduce the penalty of discharge because of the severe effect it has upon the employee and his family. In a case such as this, however, consideration must be given to the fact that there are youthful residents in the University dormitories who should not be exposed to the type of conduct which the Grievant admittedly performed. In such circumstances, and in light of the fact that the Employer reacted conscientiously and reasonably to the act complained of, an arbitrator should not substitute his judgment for that of the employer. I find I have no choice but to sustain the penalty."

This arbitrator concurs with this decision, and he sustains the discharge and denies the grievance.

AWARD

The grievance is

August 29, 2000

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Barry C 0 own, Arbitrator