In the Matter of the Arbitration Between: **CASE: Frankland #1**

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University

-and-

UNION Re: Brian FISH - 10 Day Suspension

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The undersigned, Kenneth P. Frankland, was mutually selected by the parties to render an Opinion and Award in its case number A-308-9-98. Hearing was held at the University, on December 7, 1998. The parties presented witnesses and exhibits and orally presented closing arguments, and thereafter the record was closed.

A M M A N =

For the Employer:

Dir. of Employee Relations,
Maintenance Manager,
Skilled Trades Supervisor
Personnel Administrator
Human Resources Professional

F O R U N I O N:

Staff Specialist,
President
Brian FISH

ISSUE:

Did the University have just cause to issue a 10 day suspension to Grievant for violating the UNIVERSITY and-smoking policy while in a University vehicle?

PERTINENT CONTRACT PROVISIONS:

Article 2, 1 8
Article 19, 162
Article 20, 1 67, 68

STATFMENT OF FACTS MATERIAL PROCEEDINGS

The Grievant, Brian FISH, a Plumber I in the refrigeration maintenance division, was given a 10 day suspension by the employer on July 7, 1997, as "he was observed smoking in a University vehicle while drinking a cup of coffee at about 8:30 a.m." (12). The explanation on the disciplinary action form indicated six prior warnings (none of which are considered disciplined under the contract), and one suspension on September 14, 1996, for tardy for work. On July 9, 1997, a grievance was presented at Step III to Mr. HUNTER, stating "Physical Plant is in complete violation of the preface of this agreement and any and all other articles which may apply" (J3). The Union grievance stated this action was "continuing harassment and discrimination against member and is excessive and without just cause", and requested that the employee be made whole for all lost time. The University's response on July 16 from Mr. HUNTER indicated the Grievant had several warnings about not smoking in unauthorized locations, the last being October 9, 1996. Additionally, the parties entered into a letter agreement on March 23, 1997, in which the Grievant understood that he was required to satisfy his supervisor's reasonable performance and behavior expectations, and accordingly the University denied the grievance (J3).

The material facts in this case are really not in dispute, but it is the inference to be drawn from those facts which is essentially the heart of the arbitration. On July 7, 1997, Mr. Brian FISH reported for duty at about 8 a.m. and at about 8:30 he arrived at TREE Hall to start a project on his route for that day. Mr. David SKY was in the vehicle with him in the passenger seat. Mr. FISH pulled his vehicle into a parking space near the back loading dock at TREE Hall, and about the same time he was starting to exit the vehicle, his supervisor, Mr.

Michael MANN, was entering the parking area and observed *Mr.* FISH had a lit cigarette in his right hand and was starting to open the door with his left hand. He had a coffee mug with him inside the vehicle but not in his hands. Mr. FISH admitted that he had Just lit the cigarette, took at most one puff and when he saw Mr. MANN, he stated, "I guess I was gonna get busted." Mr. MANN testified that when he approached the vehicle, they saw each other and MANN said, "Couldn't you have just gotten out of the vehicle." According to Mr. MANN, Mr. FISH said he had a cigarette in his hand and had just screwed up. MANN said to get back to work and he would get with him later. MANN then discussed the matter with his supervisor, and later that day there was a meeting between Mr. CANN, Mr. FISH, Mr. MANN and a union representative. At that meeting, Mr. FISH was issued the suspension notice.

Mr. MANN further testified that he is a 30 year employee with the University and was the skilled trades supervisor. Mr. **FISH was one of the plumbers** that he supervised. Mr. MANN reviewed Mr. FISH's job performance and testified through Exhibits. E 1, 2, 3 5 & 6 that Mr. FISH had difficulty following the University's no smoking policy (see Exhibit J4). The policy adopted by the Board of Trustees on July 16, 1993, prohibited smoking in all UNIVERSITY facilities and vehicles. Mr. FISH was inside a UNIVERSITY **vehicle when the incident in question occurred.**

Exhibit E2 was a suggested history of smoking by grievant commencing on January 5, 1994, with incidents on February 14, 1994, July 11, 1994, and September, 1995, in **which Mr. MANN had discussed the smoking policy with Mr. FISH and continued to counsel** him regarding possible discipline in violation of the policy. In September of 1995, Mr. FISH

told MANN that he thought that Mr. TOPP said that it was okay to smoke in vehicles. Shortly thereafter, on September 14, 1995, Mr. TOPP circulated a memorandum (El) clarifying that the University's anti-smoking policy applied to all University vehicles. Although the memo was not specifically directed to Mr. FISH, and he was not personally aware of the document, he did testify that he was aware Mr. TOPP had clarified the policy. Exhibit 83 were notes of Mr. FISH regarding the July 7 incident, and included an observation at the 11:30 a.m. meeting that FISH allegedly said that he had screwed up and was smoking, and then a meeting later in the day when the discipline was issued.

Mr. MANN testified that he had issued a memorandum on October 9, 1996, to Mr. FISH entitled "Overall Performance." (86). Mr. FISH's total record had been reviewed for the frequency and severity of substandard conduct, and MANN viewed Grievant's overall performance as "borderline liability rather than asset' (86). Mr. FISH was advised that further misconduct or unsatisfactory performance would precipitate appropriate disciplinary action. He was also advised, "Your disciplinary track will generally be viewed as single entity, rather than several tracks involving tardiness and absenteeism, vehicle carelessness, smoking, etc." (B6).

This was preceded by a performance evaluation of April 15, 1997, acknowledged by Mr. FISH on May 15, 1997 (ES, in which the supervisor noted, "Brian's attendance and tardiness are unsatisfactory, needs improvement. Brian meets all other expectations". This evaluation was preceded by a disciplinary action, Exhibit J6A, of September 17, 1996, in which Mr. FISH was given a five day suspension for tardy for scheduled overtime; falsification of work records. Through letter agreement, Joint Exhibit 6B, the grievance with respect to the five

day suspension was withdrawn when the employer reduced the suspension to three days. Further, the employer could review Mr. FISH's ability to satisfy his supervisor's reasonable performance and behavior expectations one year from the date of suspension (September 17, 1996), and if satisfactory, the three day suspension would be expunged from the personnel file. Further, a grievance over Mr. FISH's evaluation on January 28, 1997, which was less than satisfactory, was withdrawn when the employer agreed to conduct a follow up evaluation within three months of the January 28, 1997, evaluation.

The employer offered Exhibit J5, which is a copy of the employee handbook that sets forth the rules governing personal conduct of employees. Proper behavior relating to attendance is one of the listed criteria.

On cross examination of Mr. MANN, the Union pointed out that there may have been violations in the *past,* but Mr. MANN did nothing about them, or at least there **was** no discipline specifically for smoking within the preceding two years, anything preceding two year being prohibited by contract as being part of this record. With respect to ES, that was a summary of MANN's notes. After leafing through materials, Mr. MANN could not locate the original notes from which ES was apparently prepared. MANN observed that he thought that there may have been a written reprimand for smoking before the TOPP memo, but thereafter, the memo cleared up potential confusion and he thought that he would simply go forward from that point on. Mr. MANN viewed the July 7 incident as a blatant violation of the smoking policy, but that it was a culmination of *all* other matters why he was given the ten day suspension.

Mr. FISH, during his testimony, was a candid, sincere and apparently honest

witness. He was not evasive and fairly conceded that he had lit up a cigarette, took at least one puff and was attempting to get out of the car when MANN saw him. He knew that he would get "busted", the phrase he used. The gist of his testimony was that the University was excessive in giving him ten days for simply taking one drag on a cigarette as he was exiting the car.

POSITION OF EMPLOYER

Because the parties want an expedited ruling, each of the parties presented their closing statements orally.

The University argued that there were two issues; one, whether an incident occurred which could be subject to discipline, and two, that the penalty imposed was not excessive. They argued that the facts speak for themselves and that clearly Mr. FISH violated the University's non-smoking policy on July 7, 1997. They argued that this smoking incident was the straw that broke the camel's back (Arbitrator's characterization). There had been a prior five day suspension, reduced to three days by agreement, there was a memorandum from the employer warning of further discipline given his overall unsatisfactory performance, and that the grievant knew of the warning memo that included among other things, smoking. Given prior notice and prior warnings, and his admission of violation, the University argued that the sanction was appropriate. The University also argued Article 18, I 62, reposes to management the right to discipline and the arbitrator would be foreclosed from substituting his judgment for the discretion of the management. They argue that the sanction was not unreasonable, was not clearly arbitrary nor capricious, and the employer used proper discretion. The arbitrator should

not review the discipline and should deny the grievance.

POSITION OF UNION

The Union concedes the facts were not necessarily in dispute and agreed that the Grievant had lit a cigarette in an UNIVERSITY vehicle, but disagreed as to what should happen as a result thereof. They argued that the Grievant was forthright, didn't deny his actions or try to mislead anyone, but that ten days was simply way too severe for simply lighting a cigarette in a vehicle. They argued that there was a slight discrepancy between the supervisor's version and the Grievant's version as to whether there was a cup of coffee between the legs or in his hands to discredit the credibility of the supervisor's testimony. They further argued that the evaluation (E8) showed that tardiness was a problem, but that in all other respects, Mr. FISH exceeded current expectations. Thereafter, he made one mistake and in view of the fact that there is only one prior discipline, the employer did not administer the discipline in a fair and equitable manner. They University was not justified in taking the action they did, and that ten days is excessive. The Union argued that the grievance should be granted in its entirety, or in the worst case scenario, the arbitrator should reduce the discipline to a reasonable sanction.

DISCUSSION

It is noted that the contract, Article 2, 1 8, reserves to the employer the right to manage and direct the work force, and to exercise discipline when necessary. Article 21, 167 states that if an employee is reprimanded, suspended or discharged, and the steward considers the discipline to be excessive without just cause, a grievance can be submitted. Article 19, 1 62 also states that the arbitrator has no power to add to or subtract from or modify any of the

terms of the agreement, nor substitute his discretion for that of the employer, whether such discretion has been retained by the employer or the union, nor shall he exercise any responsibility or function of the employer or the union. Thus, these contract provisions give the employer the right and responsibility to discipline where appropriate, but in all cases should do so with just cause. Just cause is not specifically identified or defined in the contract.

Arbitrators generally find that a provision for just cause requires two determinations: (1) whether a factual basis for discipline exists, and (2) whether the amount of discipline was proper under the circumstances. Stated another way, the tests for "just cause" require arbitrators to decide (1) has the commission of the misconduct, offense or dereliction of duty, upon which the discipline administered was grounded, been adequately established by the proofs; and (2) if proved or admitted, the reasonableness of the discipline imposed in light of the nature, character and gravity thereof,

Thus, the principle issue for the arbitrator is whether or not there is a violation of the contract University policy or work rules that would be subject to discipline, and then if there was, whether the discipline was appropriate.

With respect to the first kit, it is simply overwhelming that there is sufficient evidence to establish that in fact on July 7, 1997, the Grievant lit a cigarette and took a puff while still in the vehicle, which was University owned. This activity would violate the University's no-smoking policy. Licked, the Grievant admitted a violation and the Union did not attempt to defend this case on the premise that the violation never occurred.

The real issue is whether or not the employer had just cause for a ten day suspension, the employer arguing that he same was justified given the employee's past performance, and the Union arguing the penalty was excessive, arbitrary and unreasonable, and

not consistent with a relatively insignificant incident.

Reviewing the discipline, the arbitrator feels compelled and circumscribed by the contractual language in Article 19, 1 62. If the University has presented a reasonable rationale, then the arbitrator would be precluded from substituting his judgment for that of the University, even if the arbitrator were to believe that if he were imposing the discipline, something less than ten days might be appropriate. In other words, the arbitrator would have to find that the discipline clearly was arbitrary and unreasonable under all of the circumstances in order to find that in fact there was no just cause fix the sanction imposed. On the facts of this case, the arbitrator cannot say that the University's action was arbitrary, unreasonable and an abuse of discretion, and accordingly, the arbitrator will not modify the ten day suspension.

The evidence seems persuasive that Mr. FISH has had a checkered career with the University. He certainly is not an obnoxious or mean spirited gentlemen, at least from the tenor of his testimony, but seems lackadaisical or simply unwilling to follow the letter of the work rules and policies upon which employees are expected to perform their job. On September 14, 1996, there is a five day discipline for tardiness (falsification of work records) with the explanation at that time of earlier problems with tardiness. The grievance on that matter was not resolved until March of 1997, (16B) with the additional caveat that the supervisor could and should review Mr. FISH's performance no later than September 17, 1997, and if satisfactory, to remove die three day suspension from the personnel file.

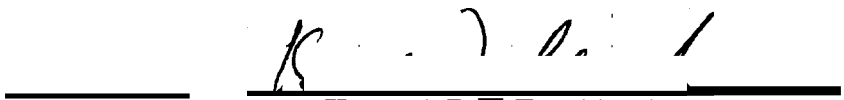
Unfortunately for Mr. FISH, on October 9, 1996, his overall performance was rated as unsatisfactory. He was given the written memo by Mr. MANN and told all prior problems of attendance, tardiness, vehicle carelessness and smoking could be rolled into one

track, and further misconduct would be dealt with accordingly (E6). Also, as of April or May of 1997, Mr. FISH was evaluated with his attendance and tardiness being unsatisfactory and needing improvement. Given these facts, plus the supervisor's testimony with respect to numerous counseling of Mr. FISH relative to smoking in violation of the University's no smoking policy, the arbitrator is left with an impression of an employee who has been given sufficient warnings,' and advised that the least infraction could trigger a more severe discipline than the five day discipline previously imposed (albeit reduced to three days by' subsequent agreement).

Giving this background of documentary evidence, when the supervisor observed the violation on July 7 two meetings were held later in the day, one at 11:30 and one at 3:30. At the 3:30 meeting, the discipline was presented to Mr. FISH. On this record, it has not been proven that the action of the University was precipitous, but rather measured, given the past record of the employee. Further, the record establishes the employee was forewarned that false steps could be grounds for significant action. The Grievant's own statement, "I knew I'd get busted," indeed evidences an employee who knew he ***was in*** rough waters.

Given the University's contractual ability to administer discipline, and given this evidentiary record, the arbitrator cannot say that the ten day suspension is totally unreasonable or an abuse of discretion. Whether the arbitrator would have "cut him some slack" is really irrelevant, given the arbitrator's views of the constraints of Article 19, 62. Accordingly, the grievance is denied.

The grievance is denied.



Kenneth P. Frankland,