

CASE: Opperwall #3

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION

In the matter of the arbitration between:

AAA Case No. 54 390 00012 02

-and-

Union,

Local Reference No. IC-06

Log No. A6741-1585-02

Grievant:

Employer.

Issue: Discharge

Arbitrator: Kathleen R. Opperwall

ARBITRATION OPINION AND AWARD

An arbitration hearing was held on January 23, 2003, in _____, Michigan
with the following persons attending and/or testifying:

On behalf of the Union:

Staff Specialist

On behalf of the Employer:

Asst. Director Employee Relations

The record was closed on March 26, 2003 after receipts of the parties' post-hearing
briefs.

ISSUE

Did the Employer have just cause for terminating grievant's employment on August 3, 2001?

HEARING RECORD

The grievant was employed by _____ at its _____. The _____ is commonly referred to at the Clinic. Mr. _____ began his employment with _____ on June 26, 1984. He was terminated on August 3, 2001. At the time of his discharge, he was working in an Animal Caretaker III/Repair position at the Clinic. The basic functions and responsibilities of this position are summarized as follows in the job description:

"To care for experimental and clinical animals and operate, maintain, and make routine repairs to a hydro-manure removal system."

On July 26, 2001, the administrator at the _____ Clinic contacted the _____ Police Department concerning an allegation that Mr. _____ had taken three shelving units which belonged to the _____. Officer _____ was sent to investigate the complaint. She interviewed four individuals: _____, the administrator; _____, a co-worker who made the allegation; _____, the grievant; and _____, another co-worker. Officer _____'s incident report was admitted as an exhibit at the arbitration hearing.

Mr. _____ admitted that he had taken three shelves home. He told Officer _____, however, that he did not intend to keep the shelves. The incident report which Officer _____ filed included the following summary of her interview with Mr. _____:

"I made contact with SUBJECT _____ in room 198A of the _____ Clinic. _____ was called down to speak with me. I interviewed _____ in regards to the shelves. I asked if he could tell me where the shelves were. _____ advised me that they were doing some work in the garage where the shelves had previously been and that he was told that the shelves

needed to leave that room. then advised me that he took the shelves down to the manure pit and stored them up on some wood so that they would not get damaged. The shelves were there for approximately a week and noticed that they were kind of getting rusty and mildewed from the condensation in that room. then told me that he took the three shelves, loading them up in his truck and took the shelves home to store them. advised me that he did not take the shelves with the intention to keep the shelves. told me that he was just taking them home until they could place the shelves back into the garage when the construction was done.”

Mr. told Officer that he would return the shelves to the Clinic.

He testified at the arbitration hearing that he did return the shelves later that day.

The following week, on August 3, 2001, Mr. was told to report to a meeting. The Chief of Staff at the Clinic, , and the administrator, Ms. , were present, as well as Mr. 's union representative . Mr. was advised at this meeting that he was terminated. The termination notice gave the following reason:

“On 7/26/01 Employee admitted to DPPS that he took two shelving units home in early July 2001.”

The notice also gave the following explanation:

“Calf Manna was missing in 2000. Meeting held and supervisor asked for it to be returned, ‘no questions asked’. Several staff suggested had taken calf manna. Supervisor warned that he would be terminated if found that he had taken anything from the .”

The notice also stated the following under the heading for corrective action expected of the employee:

“None. Terminate so remaining staff know this will not be tolerated.”

The Union filed a grievance on August 10, 2001. The grievance cited Article 17, paragraph 77 of the parties' contract, and stated that the discipline was excessive and

without just cause. The grievance asked that Mr. _____ be made whole for any and all losses.

After the Step 3 grievance hearing was held, the Employer denied the grievance on October 8, 2001. The denial notice included the following statement:

“Discharge was an appropriate response to the Grievant’s actions in the instant matter.”

The grievance was thereafter appealed to arbitration on or about December 28, 2001.

At the arbitration hearing, the Chief of Staff at the _____ Clinic, _____, testified that in the summer of 2000, some feed supplement (“calf manna”) had turned up missing. A meeting was held with the staff concerning this, after which the feed supplement was returned. Dr. _____ then met with staff members, including Mr. _____. Dr. _____ testified that when he met with Mr. _____, he told him that if he was ever caught taking anything, he would have no choice but to fire him.

Mr. _____ testified that as he remembered the conversation, Dr. _____ told him that if he took any property from the _____, he would be disciplined, and discharge was one of the possibilities.

Mr. _____ admitted that he took the three shelving units home. He testified at the arbitration hearing that he first saw the shelves on an inside loading dock at the _____ Clinic when they were remodeling the _____ Clinic. He moved the shelves from the loading dock to the manure pit. He wanted to eventually move them into a garage at the _____ Clinic and use them for storing various things. However, the garage was too crowded at that time.

He testified that approximately eight months later, he and co-worker _____ needed to replace two pumps in the manure pit. Mr. _____ testified that the

shelves were basically in the way for getting in the equipment needed to replace those pumps. He agreed that co-worker may well have seen him loading the shelves onto a horse trailer on or about July 1, 2001. He testified that he took the shelves to the barn to try to store them there, but the barn was too full. So he took the shelves back to the manure pit. He testified that a few days later he took the shelves home on his own truck. He explained that he did this "to store them, for one, and to bring back equipment I needed to use in order to replace the pumps."

Mr. [REDACTED] testified that he and [REDACTED] replaced one of the pumps one day and then because of busyness with other jobs were not able to finish the other pump until several weeks later. They were finishing up the pump replacement job when he was called in to speak with the [REDACTED] police officer. He testified that it was not his intention to keep the shelves. He acknowledged that he did not tell any member of management that he was taking the shelves home. He testified that he had told his co-worker [REDACTED] that he was taking the shelves home.

The Employer called as an adverse witness testified that he did not think that Mr. ever told him he was taking the shelves home until the day he was interviewed by the police officer.

The report filed by the police officer gave the value of the shelves as \$45.00. No testimony was presented at the arbitration hearing concerning the value of the shelves.

The Employee Handbook was submitted as an exhibit at the arbitration hearing. The handbook includes the following under examples of conduct that is prohibited:

“6. Taking or attempting to take property from the _____, its students, employees, visitors or patrons.

* * *

16.g. Unauthorized use/possession of or other property, including, but not limited to, non-business of computers and peripheral equipment.”

The Handbook states that violations of the rules shall be regarded as “cause for disciplinary action, up to and including discharge.” The Handbook also states that:

“Discharge may result from an accumulation of minor infractions as well as for a single serious infraction.”

CONTRACT PROVISIONS

Both parties focused on Article 17, paragraph 77 of their collective bargaining agreement, which reads as follows:

“Appeal of Reprimand, Suspension or Discharge

-77 Should the reprimanded, 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.”

POSITIONS OF THE PARTIES

It was the Employer’s position that there was just cause for the termination of [REDACTED]’s employment. The Employer emphasized that Mr. [REDACTED] had been warned the previous year that he would be terminated if he took any University property. The Employer argued that it did not need to prove that Mr. [REDACTED] intended to keep the property, only that he took it. The Employer pointed to inconsistencies between what Mr. [REDACTED] told the [REDACTED] police officer and his testimony at the arbitration hearing. The

Employer argued that it has consistently terminated employees for a first offense of unauthorized removal of property.

It was the Union's position that the discipline given to Mr. [REDACTED] was excessive and without just cause. The Union emphasized that the Employer was not charging Mr. [REDACTED] with "theft," but was only charging him with unauthorized removal of property. The Union argued that this misconduct did not rise to the level of the most serious type of misconduct which would justify immediate termination. The Union emphasized that Mr. [REDACTED] was a long-term employee with a clean discipline record. It was the Union's position that the discipline should be reduced in line with the seriousness of the offense, and Mr. [REDACTED] should be reinstated.

DISCUSSION AND DECISION

The issue in this case is whether the Employer had just cause for terminating [REDACTED]'s employment. Discipline cases such as this one involve two basic questions: (1) Is the employee guilty of the misconduct charged; and (2) if so, is the level of discipline appropriate to the offense.

In this case, the first question is easily answered. Mr. [REDACTED] admitted to the police officer that he took three shelving units home. He also admitted this at the arbitration hearing. He admitted that he did not have authorization to take the shelves home. This was clearly a violation of the Rules of Conduct which prohibit unauthorized use or possession of University property.

The second question is whether termination of employment was excessive discipline for this violation.

The Employer emphasized that Mr. [REDACTED] had been explicitly warned one year earlier that if he ever took anything, he would be fired. This occurred during a meeting between Mr. [REDACTED] and his supervisor, Dr. [REDACTED]. This case therefore differs from the case decided by Arbitrator Tanzman, Log No. 8933-1585-90, which involved an employee in a laundry helper position who took some sheets and towels. The arbitrator concluded that the employee had not had notice that a first offense would result in discharge, and therefore had not had an opportunity to correct her behavior. The arbitrator reduced the discharge to a six-week suspension and reinstated the grievant.

The parties also submitted three other arbitration decisions involving this Employer and this Union. In Log No. A5121-1585-87, decided by Arbitrator Silver, the employee had taken some student property which had been left behind in a closet over the summer. The pertinent rule at that time prohibited "theft, or attempted theft, of property from the [REDACTED], its students, visitors, patrons, or employees." The arbitrator concluded that theft was a specific intent crime, and that intent had not been proven under the circumstances where the employee took what he believed was abandoned property.

The arbitration decision stated the following:

"Being guilty of employee misconduct in violation of the Employer's rules is a somewhat different matter than discharge for theft. . . . However, the conduct is serious and warrants serious discipline. The employee was well aware of the rules against removal of property and the employer properly considered this a serious breach of its rules."

The arbitrator reinstated the grievant but did not award any back pay.

In case No. DA-14, Arbitrator Howlett concluded that the [REDACTED] had not established that the grievant was guilty of theft. The employee in that case had been found with several items in his car, including a [REDACTED]-owned battery. The

arbitrator concluded that the evidence was not sufficient to show that the employee had intended to permanently deprive the _____ of the battery, and therefore the had not established that the employee was guilty of theft. The arbitrator reinstated the employee with back pay.

The fourth arbitration case was decided by Arbitrator Ott in Log No. A8934-1585-90. The employee worked in the laundry as a laundry control checker, which the arbitrator described as a leader position. The arbitrator concluded that the employee had taken several sheets and a pillow to her car and had been untruthful when questioned by her supervisor. The arbitrator affirmed the discharge despite the employee's eleven years of service. The arbitrator based his decision in part on his conclusion that the employee had not shown any remorse for her actions.

One difference between the four previous arbitration cases and this case, is that the Employer has amended the Rules of Conduct. Rule 6 no longer prohibits "theft, or attempted theft," but is worded instead to prohibit the following:

"Taking or attempting to take property from the _____, its students, employees, visitors or patrons."

The Employer did not charge Mr. _____ with theft. The incident report indicates that the police officer was told that the Employer did not want to prosecute Mr. _____. At the arbitration hearing and in its brief, the Employer noted that it had not used the terms "theft" or "stealing." The Employer argued that it was not required to prove the elements of theft, including intent to keep the property. Nonetheless, the Employer argued that the evidence showed that Mr. _____ had intended to keep the shelves.

The Union argued that this case is like the case decided by Arbitrator Silver, where the employee was found guilty of a serious breach of the rule against removal of property, but the arbitrator found that the conduct did not rise to the level of theft. In that case, the employee was charged with theft, but the arbitrator concluded that the elements of theft had not been proven. In this case, Mr. Siegel was not charged with theft.

The Union emphasized that Mr. had 17 years of employment with the Employer. He testified that he had a clean employment record with the Employer, with no previous discipline. The Employer did not dispute that.

The basic question is whether under the facts of this case the discipline imposed, termination, was excessive. After considering all the facts and circumstances, it is my conclusion that termination was not excessive. First, it is very significant that one year previously Mr. had been very specifically warned that he would be terminated if he ever took anything from the Clinic. The Clinic had had a problem with some feed supplement being missing. Dr. had spoken with all the employees concerning this. He had met with Mr. personally, and told him that there had been allegations by several co-workers that he had taken the feed supplement. Dr. was the Chief of Staff at the Clinic as well as Mr. 's supervisor. He told Mr. that if he were caught taking anything, he would have no choice but to fire him.

This was a very clear, explicit warning, based on past problems at the Clinic. Despite this very clear warning, Mr. took three shelving units home. He gave inconsistent explanations for why he took the shelves home. He told the police officer that the shelves had been in the manure pit for about a week, and he took them home to keep them from getting mildewed. In contrast, he testified at the arbitration

hearing that the shelves had been in the manure pit for about eight months, and he took them home because they were in the way for getting some equipment in to replace some pumps. It is difficult to believe this explanation. The Clinic is a large facility. There certainly would be other places to store three shelves on a temporary basis. Mr had the shelves at his home for about three weeks; it was not a matter of storing them for a few days and then promptly returning them. Mr. also testified that he had told his co-worker, , that he was taking the shelves home. However, Mr. testified that he was not advised of this until the day Mr. was questioned by the police officer.

Mr. 's misconduct in this case is more serious than the misconduct in the case before Arbitrator Silver. In that case, employees had been told in a general meeting that any property they found in student rooms needed to be tagged and placed in the property room, and could not be thrown away or removed. The employee in that case violated that rule, and removed some property which had been left in a student room. That case did not involve a personal meeting with the employee or a direct warning to the employee that he would be terminated if he took anything. Mr. 's conduct is certainly more serious because he took property home despite a personal meeting and despite a clear warning that he would be terminated if he took anything. The other arbitration cases which were submitted did not involve such a direct warning to the employee.

I have considered Mr. 's 17 years of employment with the Employer. It is not easy to uphold the termination of an employee with an otherwise good record over this long a period of time. Nonetheless, I cannot conclude that termination was excessive discipline under the facts of this case. I must question whether corrective discipline

would be effective when such a clear warning was not effective. Also, the employer's ability to trust Mr. [REDACTED] has been seriously undermined by the nature of the infraction and by the inconsistent explanations which Mr. [REDACTED] gave.

In summary, it is my conclusion that the Employer did have just cause for terminating [REDACTED]'s employment. The grievance is denied.

DATED: April 24, 2003

Kathleen R. Opperwall, Arbitrator