Arbitration Decisions

Labor Arbitration Decision, SpecPro Professional Services, 2022 BL 254454, 2022 BNA LA 203

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LABOR ARBITRATION PROCEEDING

In the Matter of:

SpecPro Professional Services,

Employer,

and

Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166,

Union

Arbitrator Lee Hornberger

DECISION AND AWARD

June 17, 2022

Hide Summary

BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Discharge - Absenteeism - Tardiness - Discrimination ►118.6362 ►118.6367 ►118.67 ►93.07 [Show Topic Path]
Arbitrator Lee Hornberger held that SpecPro Professional Services had just cause to discharge a laborer for a pattern of excessive absenteeism and tardiness, as he had been placed on a PIP for this problem and failed to improve his attendance, including incurring five unexcused absences or tardy violations within his last two weeks. The grievant was either unwilling or unable to improve his attendance even though he knew—at least after the PIP—that this could lead to discharge. The union failed to prove that the company discriminated against the grievant, as it failed to establish that its two comparators were similarly situated since it offered no evidence on the comparators' tenure with the company, their disciplinary record, or any mitigating information such as the number of excused or legally protected absences such as FMLA leave they had. Hornberger earlier determined that the grievance was arbitrable, since the employer failed to tell the union at a meeting one day before the filing deadline that it considered the grievance procedurally defective.

APPEARANCES

For the Employer.

S. Leigh Jeter
Nathan A. Shine
Michael Best & Friedrich LLP
444 West Lake Street, Suite 3200
Chicago, IL 60606

For the Union.

Ilissa B. Gold
Reich, Adell & Cvitan
3550 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90010-2421

INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between SpecPro Professional Services (Employer) and Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166 (Union). The Union contends that the Grievance was appropriately filed and that the Employer violated the CBA when it discharged Grievant. The Employer maintains that the Grievance was not appropriately filed and that it did not violate the CBA when it discharged Grievant.

Pursuant to the CBA, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on April 12, 2022, in San Bernardino County, California, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The hearing was transcribed. The transcript was received by me on April 21, 2022. The dispute was deemed submitted on June 8, 2022, when the post-hearing submissions were received by me.

Subject to a procedural arbitrability issue, the parties stipulated that the Grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

Both advocates did an excellent job in representing their clients. All involved in the arbitration were courteous and professional.

ISSUES

The Employer framed the issues as follows.

1. Whether the Union's Grievance is not arbitrable because the Union failed to comply with the grievance process set forth in CBA, Art. 26.
2. If the grievance is arbitrable, whether Grievant was discharged from the Employer for just cause and, if not, what is the appropriate remedy?

The Union framed the issues as follows.

1. Is the Union's Grievance arbitrable and compliant with CBA, Art. 26?
2. Did the Employer terminate Grievant for just cause pursuant to the CBA, and if not, what is the appropriate remedy?

I frame the issues as follows.

1. Is the Grievance arbitrable?
2. Was there just cause for the discharge, and if not, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE

In the first half of 2021, the parties negotiated a new CBA, with effective dates from April 22, 2021, to June 31, 2022. The CBA was signed and implemented on or about June 4, 2021.

ARTICLE 01.00.00

Intent and Purpose

Section 01.03.00

It is recognized by the Agreement to be the duty of the Company, the Union, and the employees to cooperate fully, both individually and collectively, for the advancement of said conditions; and to provide a fair and prompt grievance procedure for the peaceful settlement of employee[*2] grievances, and to provide that there shall[*2] be no interruption and impeding of operations during the term of this Agreement.

Section 01.04.00

All predecessor contractor past practices are hereby null and void, and shall not constitute a precedent in the future enforcement of the terms and conditions herein.

ARTICLE 02.00.00

Management Rights

Section 02.01.00

It is agreed that the Employer hereby retains and reserves unto itself, without limitation, all the powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitutions of the State of California and the United States, including, and without limiting the generality of the foregoing, the rights to:

Section 02.01.05

Establish, eliminate, continue or revise any personnel and employment policies and/or work rules and regulations;

Section 02.01.06

Dismiss and/or discipline employees for just cause;

ARTICLE 06.00.00

Shop Stewards/Visitation

Section 06.01.00

The Company agrees to recognize the Stewards and Chief Steward duly authorized by the Union to represent those employees covered by the terms of this Agreement. It is agreed this objective can be achieved with a minimum of one (1) Steward per branch per shift unless modified by mutual agreement of the Company and the Union.

Section 06.02.00

For the purpose outlined above, the Union agrees to supply the Company in writing, and shall maintain with the Company on a current basis, a complete list of all Union Stewards and the Chief Steward. The Company will provide this information to each first level supervisor having authority over employees covered by this Agreement. A current list of Shop Stewards shall be issued to new hires within ten (10) days.

Section 06.03.00

Subject to other provisions of this Article, reasonable and necessary time off during work hours shall be authorized without loss of pay or benefits to permit Stewards to carry out their responsibilities to the Employees in the Unit by meeting with management and attending meetings and discussions with management on behalf of employees.

Section 06.09.00

The Shop Steward shall be an employee of the Company, selected from among those employees whom he represents. The area of jurisdiction shall be determined by mutual agreement of the Company and the Union.

Section 06.09.01

The Union may appoint a steward to act as an alternate chief steward to represent employees in areas not represented by a steward at any given time, and to assist other stewards.

ARTICLE 16.00.00

Vacations

Section 16.06.00

When an employee puts in his vacation request, the Company will respond to the request within seven (7) calendar days. The vacation period referred to in this Article shall be requested in writing at least seven (7) calendar days in advance by the employee. If the original requested date cannot be agreed to, the Company and employee shall immediately agree to a mutually acceptable[*3] alternate day/week to be taken within thirty (30) calendar days following receipt by the Company of said[*3] employee request. Once the employee and the Company agree to a time mutually convenient, the time selected for the vacation period shall not be changed unless the employee and the Company agree to do so.

ARTICLE 18.00.00

Paid Personal Leave

Section 18.02.00

All personal leave hours shall be credited to the employee's account. Personal leave may be utilized for sickness, medical appointment, or personal reasons.

Section 18.03.00

The employees and the Union recognize their obligation to prevent unnecessary absence or any other abuse of this personal leave provision. The Company and the Union recognize the existence of bona fide family emergencies and employees shall be able to utilize personal leave for such purposes.

Section 18.04.00

An employee who is prevented from reporting for work by reason of sickness or injury shall promptly notify his immediate supervisor of his inability to report for work, giving the reason for the absence. When an employee desires to utilize personal leave for reasons other than illness or injury such time off must be requested in advance if possible and taken at a time mutually convenient to the employee and the Company.

ARTICLE 25.00.00

Discharge and Discipline/Absence From Work

Section 25.01.00

It is understood and agreed that the Company may discipline or discharge employees covered hereby for just cause. …

ARTICLE 26.00.00

Grievances

Section 26.01.00

It is the intent of the parties to this Agreement that the procedure provided herein for the settlement of grievances shall serve as a means for peaceful settlement of all disputes that may arise between them as to the application or interpretation of the provisions of this Agreement.

Section 26.03.00

Grievances are to be presented and considered in accordance with the terms of this Agreement.

Section 26.04.00

There shall be no responsibility of the Company to make an adjustment on any grievance unless it is filed within fourteen (14) calendar days from the date of the event, otherwise it shall be waived.

Section 26.05.00

It is understood that the time limits specified herein may be extended by mutual agreement of the parties hereto.

Section 26.06.00

Issues not specifically covered by the terms and provisions of this Agreement shall be subject to the grievance procedure up to but not including arbitration. If the Company and the Union are unable to reach agreement in 26.11.00, the decision given in 26.11.00 by the Company shall be final and binding on both parties to this Agreement.

Section 26.07.00

Any matters of contention between employees or the Union, and the Company, shall be initially discussed between the employee involved, if any, his Steward and the appropriate Company official. Nothing herein will preclude an employee from discussing any matter with any level of management.**[*4]** If such is not resolved at this informal step, the aggrieved party(s) shall proceed as provided below.

Section 26.08.00

Any employee having a grievance shall file a**[*4]** grievance form through the Chief Shop Steward to his Division Manager within fourteen (14) calendar days after the date of the event. The grievance form shall set forth a statement of the grievance including the date and approximate time the event occurred which gave rise to the grievance, the details of the event and a summary of the Articles of the Agreement allegedly violated, and the specific remedy or relief requested and shall be signed by the employee. The Division Manager and the Chief Shop Steward shall meet within five (5) calendar days to endeavor to arrive at a satisfactory adjustment of the grievance. The Division Manager shall then render a written decision within seven (7) calendar days after discussion with the Chief Shop Steward.

Section 26.09.00

If the written decision of the Division Manager is not satisfactory, the Union Business Representative shall file a formal grievance, which shall contain a detailed statement of the grievance, the facts upon which it is based, the specific Article or Articles of the Agreement allegedly violated and the specific remedy requested to the Labor Relations Manager provided such formal grievance is filed no later than fourteen (14) calendar days after receipt by Chief Shop Steward of the Division Manager's written decision. If such formal grievance is not filed within the time limits specified herein the Division Manager's decision shall be final and there shall be no further recourse.

Section 26.09.01

Termination grievances may be filed by the Chief Steward to the Labor Relations Manager, subject to review by the Business Representative for the purpose of filing a formal grievance as set forth in 26.09.00 not more than fourteen (14) calendar days from the date of termination.

Section 26.10.00

Under formal appeal as outlined above, the Labor Relations Manager shall attempt to meet with the Business Representative within fifteen (15) calendar days to endeavor to arrive at a satisfactory adjustment of the grievance. Upon the grievant(s) request, he shall be included in this meeting. The Labor Relations Manager shall render his written decision within seven (7) calendar days of the meeting with the Union Business Representative. If such meeting does not take place within fifteen (15) days or the meeting does not take place at all, the moving party must consider no

response as a negative response and move to the next step of the procedure unless time limit extensions have been agreed to. The grievance is still considered active and either party may still request said meeting or agree to proceed to the next step (4th Step) for a 2610 panel hearing.

Section 26.12.00

All of the steps herein established may be waived and the parties may proceed directly to arbitration provided that there is mutual agreement between the parties[*5] to proceed directly to arbitration.

Section 26.16.00

The signing[*5] of any grievance by any employee or representative either of the Company or of the Union shall not be construed by either party as a concession or agreement that the grievance constitutes an arbitral issue or is properly subject to the grievance machinery under the terms of this Article.

ARTICLE 27.00.00

Arbitration

Section 27.01.00

There shall be no grievances presented to arbitration until all steps of the grievance procedure have been utilized. All such grievances shall be considered finally settled and not subject to arbitration unless either party (the Union or the Company) first serves written notice of intention to arbitrate upon the other party during the first ten (10) working days after the final step of the grievance procedure.

Section 27.10.00

The Arbitrator shall not have the power to add to, subtract from, modify, alter or change any of the terms of this Agreement or any other terms made supplemental hereto, or to arbitrate any matter not specifically provided for in this Agreement or arbitrate any new provision into this Agreement. The Arbitrators authority is to interpret and apply provisions of the Agreement. The Arbitrator shall be bound entirely by the records presented to it in the form of evidence and argument.

ARTICLE 32.01.00

General

Section 32.02.00

The Company and the Union acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the Parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Parties, for the life of this Agreement, waive the right, and each agrees that the others shall not be obligated, except as otherwise provided in this Agreement, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement unless mutually agreed to do so between the Parties. Further, the Parties, for the life of this Agreement, waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of any of the Parties at the time this Agreement was negotiated or signed unless mutually agreed to do so between the Parties. The Parties agree that all negotiations which were conducted in reaching this Agreement were conducted at "arm's length" and in good faith as required by laws and regulations.

Section 32.04.00

Employees covered by this Agreement shall be governed by all site rules, regulations and orders, which are not in conflict with the terms and conditions of this Agreement.

FACTUAL OUTLINE

Participants

Grievant was employed as a Laborer by the Employer[*6] from August 12, 2018,[*6] to October 15, 2021.

Steve Alexander, Ph.D., is the General Manager and reports to the CEO.

Jacinda Mainord, Ph.D., is the Program Manager and Labor Relations Manager. Dr. Mainord reports to General Manager Dr. Alexander.

Jason Wray is the Program Manager.

Tim Brogdon is the Program Manager and reports to Mr. Wray.

Eric Hug has been the Union Business Representative (B. R. Hug) since 2018.

July 30, 2021, PIP/Written Counseling

According to Program Manager Wray, in late July 2021 he was noticing an attendance-tardiness pattern with Grievant. Mr. Wray and others asked Grievant if there was anything they could do to help him. There was no point system in effect concerning attendance. Mr. Wray and others worked on the PIP. The Employer gave the PIP to Grievant. Union Steward Grimes was there. After the PIP, Grievant's attendance did not improve. During September and October 2021, Grievant again had an attendance-tardiness pattern. These attendance-tardiness issues were creating a problem with other employees' morale. Grievant did not take any FMLA/ADA or COVID related leaves. Mr. Wray treats all his employees equally. LWOP is of a greater concern then other absences. They have already been maxed out. LWOP decreases morale of other employees more than other absences.

The July 30, 2021, PIP/Written Counseling stated,

> Excessive tardiness on dates 20, 21, 26, 27, and 28 leading to unauthorized absences and LWOP.
>
> Work hours are from 7-4 Monday thru Friday. Please arrive before your scheduled time to work ready for the day.
>
> If unauthorized absences and tardiness isn't resolved disciplinary action may occur up to termination. Ex. 11.

October 15, 2021, discharge

According to Grievant, he is presently employed in general labor with another employer. He was employed by the Employer from July 2018 to October 2021. He filed a Grievance concerning the discharge. He felt he was unfairly terminated. He was aware that his attendance was a problem. He agreed that being on time is important. He knew that the attendance-tardiness issues could lead to discharge. He was told that if he had a reason for the absence or tardy it would be OK. He had family related issues and court issues. He did not seek FMLA leave.

He received the July 30, 2021, PIP. He was not providing a reason for the absence. Using LWOP means an employee has exhausted sick leave and personal leave. There were "personal issues."

According to Dr. Mainord, Grievant was discharged on October 15, 2021. Dr. Mainord was part of the discussion with Dr. Alexander concerning the discharge decision. Dr. Alexander made the final discharge decision. Employee use of LWOP puts the Employer at risk. This is because they "don't have as many eyes." There is no earning of LWOP.

According to Program Manager Wray, Grievant reported to Mr. Brogdon. Mr. Brogdon came to Mr. Wray concerning Grievant's excessive absences and tardies. On multiple occasions, Mr. Wray spoke with Grievant concerning the attendance[*7] situation. Mr. Wray told Grievant that Grievant[*7] knew what to do to correct the attendance situation. This conversation occurred numerous times

According to Dr. Alexander, Grievant had attendance issues. Dr. Alexander made the final discharge decision. Dr. Mainord went to Dr. Alexander concerning Grievant. There was a Zoom meeting. The attendance-tardiness issues were discussed. There had been "27 times since the PIP." "Things had not improved. We cannot be understaffed." Waste management is

important. This is the largest training ground in United States. "All the trash came back to us." One has to make sure that no unexploded ordnance is in the trash and make sure staff is not hurt. There are not a lot of extra employees.

According to Program Manager Brogdon, there are 7:00 a.m. safety meetings. The goal is to "make sure all employees go home the same way that they came." The 7:00 a.m. meeting is very important. In June-July, 2021, he began to recognize a pattern concerning attendance with Grievant. This included Grievant being late to work. Mr. Brogdon reached out to Grievant's chain of command. On July 30, 2021, there was the PIP. Mr. Brogdon reached out to the Shop Steward to talk with Grievant to come to work on time. Mr. Brogdon also talked with one of Grievant's close friends to try to solve the attendance situation. The July 30, 2021, PIP did not solve the problem. In October 2021, the excessive pattern started again. Mr. Brogdon had no involvement in the discharge decision. According to Mr. Brogdon, the Employer had just cause for the discharge, reinstatement is not appropriate, and there was an ongoing pattern.

The October 15, 2021, termination document said,

> On July 30, 2021, you were given a Written Counseling regarding excessive tardiness and poor attendance. After counseling, management team have talked to you on numerous occasions regarding this topic and to keep management informed in a timely manner regarding tardiness and attendance and to provide an acceptable excuse for your actions. …[I]n the past two week you have continued to display a pattern of excessive tardiness and poor attendance, please refer to the dates and times below:
>
> # September 27, 2021 — 1hr 20mins late with no explanation.
> # September 30, 2021 — 1hr 15mins late with no explanation.
> # October 01, 2021 — Called in with no explanation and with no time accrual.
> # October 04, 2021 — 4hr 20min late no explanation until you were asked by management.
> # October 05, 2021 — 1hr 35min late, with an explanation that you left your wallet at your mother's home.
>
> Your employment with [Employer] will end effective October 15, 2021 due to your failure to meet performance expectations. Ex. 12.

October 20, 2021, Grievance

According to Union Business Representative Hug, Hug filed the Grievance on October 20, 2021, with an email to Mr. Wray. This was after Grievant was terminated on October 15, 2021. B.R. Hug asked for second step meeting. The meeting was set for and[*8] held on October 28, 2021. B. R. Hug requested information from the Employer. B. R. Hug[*8] later did an additional information request. Hug received records from the Employer.

According to Dr. Mainord, the October 20, 2021, Grievance was forwarded to her by Mr. Wray. Ex. 2. The Grievance had been filed by B. R. Hug with Mr. Wray. B. R. Hug was not the correct person to file the Grievance.

October 28, 2021, meeting

According to B. R. Hug, there was a third step meeting at 6:00 p.m., October 28, 2021. Ex. 3.

According to Dr. Mainord, the Employer met with the Union on October 28, 2021. The Employer was represented by Mr. Wray, Dr. Mainord, and Director Amy Shirlberg. The Union was represented by B. R. Hug. Dr. Mainord is not sure if Grievant was at that meeting. At this meeting, other employee names were raised including A___. The Employer did not agree to waive the CBA grievance filing procedures. According to Dr. Mainord, reinstatement is not appropriate. The attendance-tardiness issue would not improve.

According to Dr. Mainord, there were no comparables during the period of June to October 2021. Grievant had 35 instances of which 27 were no reason. A___ had 29 instances of which 8 was no reason. A___ had a tendency to provide a reason. Grievant did not.

According to Program Manager Wray, there were no similar employees. There was no uneven application. There was no prior PIP for A___. Thereafter A___ definitely improved. Mr. Wray did not tell Grievant it was okay to be late if Grievant told Wray the reason for being late. After July 30, 2021, Grievant did not provide reasons for being absent. Wray gave Grievant multiple chances to improve.

B. R. Hug agrees that the relevant time period is June 2021 to December 2021.

CONTENTIONS OF THE PARTIES

a. For the Employer

According to the Employer, SPS was a contractor for the U.S. Department of Army at Fort Irwin in California. At Fort Irwin, SPS provided recycling and waste handling operations. The Union represents the refuse vehicle drivers and the recycling employees at that location. Although the size of the bargaining unit may vary slightly from time to time there are less than 10 bargaining unit members.

The procedural issue is whether the Union complied with the CBA grievance process. The Union did not properly follow that process. The Grievance is not properly before the Arbitrator. Although a grievance was filed a few days after Grievant's discharge the Union did not use the correct process. Under the CBA, termination grievances have to be filed in one of two ways. It could either be through the Shop Steward to the Division Manager or through the Shop Steward directly to a Labor Relations Manager. Neither of those steps occurred. Since that was not done, the Grievance is not arbitrable.

If the Grievance is arbitrable, the Employer had just cause to discharge Grievant. Grievant was repeatedly counseled about his violations of the Employer's attendance policy which included a repeated pattern[*9] of excessive tardiness and absences. On July 30, 2021, the Employer issued a PIP and a verbal/written warning to[*9] Grievant due to excessive tardiness on five occasions within a 10-day period or less than a 10-day period. He was advised that he had to arrive at work at a scheduled time which was 7:00 a.m. ready for the day. He was also advised that additional unauthorized absences and tardiness would result in termination of his employment. Grievant was either unable or unwilling to make the necessary improvement to keep his employment. Between July 30, 2021, the date of the PIP, and October 15, 2021, the date of his discharge, Grievant was verbally counseled on a number of occasions about the pattern of violations. On October 15, 2021, he was discharged after he failed to improve and had an additional pattern of tardiness and attendance violations within less than a two-week period. The Employer concluded that despite giving Grievant's multiple opportunities to improve his attendance issues he was either unwilling or unable to do so. The only option was to separate his employment.

To the extent that the arbitration is properly before the me, the Employer submits that just cause existed for the discharge and requests that I deny the Grievance.

b. For the Union

According to the Union, Grievant was discharged on October 15, 2021. Three days later on October 18, 2021, Union Business Representative Hug filed the Grievance with the Employer regarding the discharge. The Employer argues that this was out of compliance with CBA Art. 26 on the basis that Art. 26 states that the Grievance shall be filed with the Chief Shop Steward as the first time for a Grievance filed by the Business Representative per Art. 26.09.00. The Employer denied the Grievance on that basis and then claimed it was time barred because it was not filed by the Chief Steward within the required time limit.

Art. 26.09.01, which is the provision that deals with discharge grievances, states that the termination grievance may be filed with the Chief Steward to a Labor Relations Manager, not "shall," "may." It may be done for the purpose of a formal grievance not more than 14 days from the date of termination. This is a key difference in language, that it says in that provision "may" as opposed to "shall." The Union contends that to require a discharge grievance be filed by the Chief Steward before the B. R. to file a formal grievance is reading language into Art. 26.09.01 that it does not contain. It does not require that first step of the Chief Steward filing the Grievance and therefore B. R. Hug was in the right to file the formal Grievance on Grievant's behalf.

The Employer engaged with B. R. Hug when he first filed the Grievance and when he filed an initial request for information on that Grievance the Employer[*10] did respond and

provide him the initial information. The Employer only raised that procedural issue two weeks later after multiple contacts[*10] with B. R. Hug. The Employer waived the procedural issue by failing to raise it during the initial process. The Grievance filed on October 18, 2021, was three days after Grievant's discharge. The Grievance was timely, procedures were followed, and this matter is properly before the Arbitrator.

Concerning the just cause issue, the Employer did not evenly apply its policy regarding tardies and employees taking LWOP. At least two other employees had more tardies and more LWOPs than Grievant over the last year but were not subject to the same form of discipline. Grievant's discharge was not for just cause.

The Union requests that I sustain the Grievance and order the Employer to make Grievant whole including, but not limited to, returning Grievant to his former position with the Employer, with full back pay, seniority, and benefits, from October 15, 2021, to the date of his reinstatement by the Employer.

DISCUSSION AND DECISION

Introduction

The CBA provides that an employee cannot be disciplined without just cause. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. "Just cause" is a term of art in CBAs. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that the Grievance is arbitrable and that the Employer had just cause to discharge Grievant.

Procedural Arbitrability

CBA, Art. 26 is entitled "Grievances." Art. 26.08.00 states,

> Any employee having a grievance shall file a grievance form **through the Chief Shop Steward to his Division Manager within fourteen (14) calendar days after the date of the event**. … The Division manager and the Chief Shop Steward shall meet within five (5) calendar days to endeavor to arrive at a satisfactory adjustment of the grievance. The Division Manager shall then render a written decision within seven (7) calendar days after discussion with the Chief Shop Steward. Ex. 1, p. 46. Emphasis added.

Art. 26.09.01 discusses termination grievances and says,

> Termination[*11] grievances may be filed by the **Chief Steward to the Labor Relations Manager, subject to review by the Business Representative** for the purpose of filing a formal[*11] grievance as set forth in 26.09.00 not more than fourteen (14) calendar days from the date of termination. *Id.* Emphasis added.

On October 15, 2021, the Employer notified Grievant that his employment with Employer would be terminated.

On October 18, 2021, B. R. Hug filed a Grievance with Program Manager/Division Manager Wray regarding Grievant's termination. On October 20, Hug contacted Mr. Wray to schedule a meeting to discuss the Grievance. B. R. Hug and Grievant met with Wray, Senior Program Manager/Labor Relations Manager Dr. Mainord, and Director Amy Shirlberg on October 28, 2021. B. R. Hug testified that he told the Employer's representatives that he considered the meeting to be a step in the Grievance process.

On November 2, 2021, Mr. Wray emailed B. R. Hug and explained that the Employer viewed its termination decision regarding Grievant as "final" and "not subject to further recourse" through the CBA grievance process. Mr. Wray explained that the Union had failed to file a grievance in accordance with the CBA procedures, as the Union Steward had not filed a

grievance with either the Division Manager or the Labor Relations Manager. Mr. Wray further explained that because the 14-day time limit for doing so had passed, the Employer's decision to terminate Grievant was final and not subject to arbitration.

B. R. Hug responded with an email to Mr. Wray questioning how Grievant could have had access to the Steward (Grimes) to discuss a grievance because Grievant no longer had access to the military base. B. R. Hug questioned why the Employer had not raised its concerns regarding the Union's compliance with the grievance process during the October 28, 2021, meeting. Hug stated that he would request an arbitration panel unless he received a response from Dr. Mainord explaining why the Grievance was denied. He also asked which Employer representative was considered to be the Labor Relations Manager.

Dr. Mainord replied to Hug. Dr. Mainord confirmed that she is the Labor Relations Manager. In terms of Grievant's ability to meet with Union Shop Steward Grimes, Dr. Mainord stated that after being advised about the termination decision on October 15, 2021, Grievant had met with Grimes for over an hour. Dr. Mainord noted that the Employer had granted Grimes' request for a personal paid leave on October 18, 2021, so that Grimes could meet with Grievant. Dr. Mainord stated that Grievant's lack of access to the base after his discharge did not preclude Grimes and Grievant from communicating at other locations or times. Dr. Mainord said that because the Union had failed to file a grievance in accordance with the CBA's procedures within 14 days, the time limit for doing so had passed, the Employer's decision to terminate Grievant was final, and the discharge decision was not subject to arbitration.

According to the Union, the Employer[*12] engaged at length with B. R. Hug on the Grievance. B. R. Hug and Grievant met with several representatives from the Employer[*12] on October 28, 2021. B. R. Hug made it clear in that meeting that the Union considered the meeting to constitute the third step in the grievance process pursuant to Art. 26.10.00. Dr. Mainord's testimony further corroborated this point, that the Employer by this meeting acknowledged the Grievance. If the Employer had not intended to acknowledge the Grievance and go through the termination grievance process, then there would not have been any reason for them to agree to meet with B. R. Hug to discuss the Grievance. The fact that the Employer engaged with Hug prior to making up a new interpretation of the termination grievance provision estops the Employer from later claiming that the Grievance was somehow improperly filed. On the basis of the plain language of the CBA, and the fact that the Employer only raised the issue of the lack of a filing from the Chief Shop Steward after the Employer had already agreed to proceed to the next step of the grievance process, the Union properly followed the grievance provisions of the CBA and the matter is arbitrable.

According to the Employer, the Grievance is not procedurally arbitrable. Following the Employer's discharge of Grievant, the Union purported to file a Grievance contesting that discharge. However, the Union failed to do so in conformity with the language set forth in CBA, Art. 26. Pursuant to Art. 26, termination grievances can be filed only in one of two ways: (1) "through the Chief Shop Steward to the Division Manager," or (2) "by the Chief Steward to the Labor Relations Manager" within 14 calendar days. Art. 26.08.00 and 26.09.00. It is undisputed that the Union failed to use either of these options to grieve Grievant's discharge. The Employer properly determined that the Union had failed to file a grievance in accordance with the CBA's procedures and notified the Union that, because the 14-day time limit for doing so had passed, the Employer's decision to terminate Grievant was final and not subject to arbitration. As a result of the Union's failure to follow the mandatory negotiated terms of the CBA's grievance process, the purported Grievance is not arbitrable. According to the Employer, the Union failed to present any evidence showing it had good cause to deviate from the requirements set forth in the CBA regarding the proper filing of grievances. The Union did not present any special, extenuating circumstances to serve as acceptable[*13] reasons to modify the plain terms of the CBA. The Employer did not waive compliance with the CBA's terms. The fact that the Employer met with the Union at its request in an effort to maintain positive labor relations with the Union falls far short of being sufficient to constitute a waiver of the CBA's provisions. The Employer has[*13] repeatedly asserted that the instant grievance is not arbitrable due to the Union's failure to comply with the parties' negotiated grievance process and, in fact, provided a written response to the Union regarding its position shortly after meeting with B. R. Hug.

Discussion and decision concerning procedural arbitrability issue

Procedural arbitrability questions are to be decided by the arbitrator because they typically present questions of contract interpretation. *John Wiley & Son v. Livingston*, **376 U.S. 543** (1964).

> A general presumption exists that favors arbitration over dismissal of grievances on technical grounds. … [W]here the parties' [CBA]s contain specific language and requirements regarding the filing of grievances, arbitrators will deny a grievance where the procedure is not followed, at least in the absence of mitigating

circumstances. … [R]egardless of the procedure followed during the steps leading to arbitration, if a party does not timely object to the arbitrability of the grievance, but instead waits until the hearing or shortly before the hearing to object, some arbitrators hold that the party waives the objection. Elkouri and Elkouri, pp. 5-10 to 11.

The discharge was on October 15, 2021. The Grievance had to be filed "within" or "not more than" 14 days. This means the Grievance had to be filed on or before October 29, 2021, by the Chief Steward with the Division Manager or the Labor Relations Manager. Elkouri & Elkouri, pp. 5-35 to 39. **Fed. R. Civ. P. 6(a)(i)** . The Union Business Representative filed the Grievance on October 18, 2021, with the Employer's "Division Manager (Program Manager Wray)." Employer Post-Hearing Brief, p. 25. Division Manager Wray forwarded a copy of the Grievance to Labor Relations Manager Dr. Mainord on October 20, 2021. *Id.* On October 20, 2021, B. R. Hug asked for a meeting with the Employer. This meeting was held on October 28, 2021. October 28, 2021, was one day before the due date of the Grievance. At the October 28, 2021, meeting for the Union was the Union Business Representative (B. R.) and Grievant, and for the Employer, Dr. Mainord, Mr. Wray, and Director Amy Shirlberg. Based on what was said at the October 28, 2021, it was clear that the Union believed that it had filed a timely Grievance. The Employer at the October 28, 2021, did not articulate anything to disabuse the Union of that belief. This was even though there was at least one day left during which the Union could have had the Chief Union Steward sign the Grievance.

Dr. Mainord testified,

Q. So the Company did not raise the issue that they did not believe it was timely filed until November 2nd?

A. Correct. Tr.**[*14]** 93-94.

The CBA says,

It is recognized by the Agreement to be **the duty of the Company, the Union, and the employees to cooperate fully, both individually and collectively, for the advancement of said conditions; and to provide a fair and prompt grievance procedure for the peaceful settlement of employee grievances**, … . CBA, p. 4. Emphasis added.

The Employer's silence at the October 28, 2021,**[*14]** meeting concerning the procedural arbitrability issue was inconsistent with "the duty of the Company, the Union, and the employees to cooperate fully, both individually and collectively" requirement of the CBA.

AAA Lexis 696, p. 8 (Knott, 2012) states that once the arbitrator finds the Union failed to adhere to the CBA's requirements for arbitrability, the burden shifts to the Union to convince the arbitrator there are ambiguous or special circumstances that may permit relaxation of strict requirements and thus consider arbitration of the grievance on its merits. The Employer's silence when coupled with the "cooperation" language of the CBA is a "special circumstance."

The Grievance is arbitrable.

The crucial points on the procedural arbitrability issue in this case include:

1. The Employer has the burden of proof;
2. "[T]he duty of the Company, the Union, and the employees to cooperate fully, both individually and collectively" requirement in the CBA;
3. The Employer meeting with the Union on October 28, 2021, and not mentioning the Grievance filer identity issue;
4. The due date of the Grievance was October 29, 2021;
5. The totality of the circumstances; and
6. The CBA.

Union Steward not being called as a witness

According to the Employer, Union Steward Grimes was not called to testify by the Union, though Grimes is still apparently a Union Steward. No reason was proffered by the Union for not calling Mr. Grimes. The failure to call as a witness a person who is available and should be able to provide important testimony may permit an arbitrator to form an inference that the testimony would have been adverse to the party that did not call such person as a witness. Elkouri & Elkouri, *How Arbitration Works* (8th ed), pp. 8-50 to 8-52.

It has been indicated that:

If the missing witness appears to the arbitrator to have played a critical role in the events raised in the grievance, the neutral will draw a negative inference that the missing witness would not have testified in support of the claim. Abrams, p. 147.

It could be stated that Mr. Grimes did not play any role in the events in the Grievance. There is no evidence that Grimes has information concerning the attendance of Grievant or the alleged comparables A___ and B___.

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

Grievant knew of the attendance policy

The Employer's policies and expectations regarding Grievant's and other bargaining unit members' attendance are set forth in various provisions in the Employer's Employee Manual, as well as in the CBA. Grievant was aware of the Employer's attendance policies. On[*15] August 17, 2018, Grievant reviewed a copy of the Employer's Employee Manual and acknowledged that he understood the guidelines and requirements set forth therein. Ex. 6. Grievant was aware, at least after July 30, 2021, that if he failed to resolve his pattern of unauthorized absences and tardiness, he could be terminated.

Mr. Wray testified,

> On multiple occasions I spoke with [Grievant] in[*15] regard to his attendance. I told [Grievant],
>
> > "You know, sir, you're going to really need to figure this out."
>
> His response to me was, "I don't think I can, man." I said, "Well, sir, you're going to have to — you're not really giving me any options here. I've given you as many free passes and chances as I possibly can."
>
> You know, he looked at me and he said,
>
> > "I'm going to lose my job. I know I'm going to lose my job, I'm going to lose my apartment."
>
> And I said, "Well, sir, you know what you need to do to fix this, so please do so" and unfortunately the attendance issues continued. Tr. 118.

Mr. Brogdon testified,

> I would pull [Grievant] aside and just pretty much ask him like, "Hey, is there — can you make whatever adjustments that you can to where that you are reporting to work on time at 7 AM?
>
> And I also reached out to Mr. Gary Grimes seeing that he was the shop steward, I reached out to him as well to see if he can also have a talk with [Grievant] about, you know, doing whatever adjustments were needed to be made for him to be at work on time.
>
> And I also went as far as reaching out to one of his really close friends B___ and ask him as well, "Can you please just try to either talk to [Grievant] or just at least make sure that he is reporting to work on time". Tr. 135.

The policy was a reasonable work rule

Management has the right to establish reasonable work place rules not inconsistent with the CBA. Elkouri & Elkouri, pp. 13-144 to 13-145. Assuming there is a proven violation and the other requirements of just cause, the Employer's attendance policy is reasonable. Abrams, p. 261.

The rule was applied evenly and without discrimination

The Union has the burden of proof concerning the similarly situated issue. "Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving that the employer improperly discriminated against an employee." Elkouri & Elkouri, p. 15-84.

> A recognition that not every employee is treated exactly the same does not justify a charge of invidious discrimination against any employee or any other intentional discrimination. To show disparate treatment strong enough to overcome management's decision requires the Union to show by clear and convincing evidence purposeful discrimination.

Ohio Department of Rehabilitation and Corrections, *93 LA 1186* (1990) (denying grievance and explaining that each employee's total work record, longevity, and past discipline are important considerations, particularly where there is no indication that the employer was out "to get" the employee). *City of Alton*, *121 LA 1288* (Pratte, 2005) (denying grievance and rejecting instances of alleged disparate treatment lacking evidentiary**[*16]** support and without evidence regarding the prior disciplinary records of others).

Dr. Mainord testified,

> So from June to October, 2021 [Grievant] was absent or tardy 35 different instances, had provided no reason per the CBA requirements for 27 of those instances and had almost 26 hours of leave without pay that was not excused.
>
> A___ had 29 total absences. Out of those 29 only eight of those instances were no reason provided and he had**[*16]** zero hours of unexcused leave without pay. Tr. 86.
>
> Q … Did Mr. A___ have a tendency to provide a reason when he [Redacted text] going to was be absent?
>
> A. Yes, he did.
>
> Q. Did [Grievant] based on your review of the documents?
>
> A. [Grievant] did not. Tr. 88.

Mr. A___ and Mr. B___ were not "similarly situated" to Grievant. There is no evidence whether any of the absences incurred by these employees were excused or unexcused. There is no evidence regarding these two employees' tenure with the Employer, their disciplinary record, or any mitigating information (such as whether either employee was absent or tardy pursuant to job-protected leave such as FMLA or COVID-19 leave). Ohio Department of Rehabilitation and Corrections, 93 LA1186 (1990). The Employer disciplined Mr. A___ in a similar manner after he was absent on multiple occasions within a short period of time and had to use LWOP for some of those absences. Tr. 223-225; Ex. 13.

There is a preponderance of proof that there was a violation

An arbitrator may require a high degree of proof in one discharge case and at the same time recognize that a lesser degree may be required in others. Similarly, where the burden of proof was not strong enough to justify a discharge, some arbitrators have found it strong enough to justify a lesser penalty. Elkouri & Elkouri, pp. 15-28 to 15-29.

> The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run. Abrams, p. 202.

During the relevant period for considering discipline, Grievant repeatedly violated the attendance-tardiness policies. Ex. 3 and 11. Prior to his termination on October 15, 2021, Grievant had been verbally counseled, warned, disciplined, and placed on a July 30, 2021, PIP regarding the policy violations that led to his discharge.

After being placed on the July 30, 2021 PIP, Grievant did not improve his attendance and tardiness, as reflected by a similar pattern of excessive attendance violations that began less than two months later. Ex. 3, 7, 8, and 11. Within the two-week period leading up to Grievant's discharge, Grievant was either absent or tardy on September 27, September 28, October 1, October 4, and October 5, 2021. Ex. 3. In each case of tardiness, Grievant was late to work by more than one hour. Notwithstanding Grievant's July 30, 2021 discipline and PIP, as well as the verbal, informal warnings and counseling he received before and after that date, between September 27 and October 5, 2021, Grievant had the following pattern of "excessive and egregious" tardiness and poor attendance:

• September[*17] 27: 1 hour, 20 minutes late (no explanation)
• September 30: 1 hour, 15 minutes late (no explanation)
• October 1: absent (called in with no explanation and no paid leave time available for part of the day)
• October 4: 4 hours, 20 minutes late (no explanation until asked)
• October 5: 1 hour, 35 minutes late (ultimately provided reason that he left his wallet at his mother's home). Ex. 3, 7, 8; Tr. 70-74, 83, 148.

This pattern of excessive[*17] attendance violations was nearly the same as the attendance violations that had caused the Employer to issue discipline and a PIP to Grievant approximately two months earlier in July 2021. This pattern of attendance violations was decreasing morale among other employees because those employees were required to take on more work to assume Grievant's duties at unexpected times, even though their workload was already higher than usual due to other employees being on leave for excused absences related to FMLA leave and COVID-19 leave.

None of Grievant's absences were excused or related to legally-protected reasons, such as those under the FMLA, ADA, or California's COVID-19 leave provisions.

Grievant does not dispute that he was absent or tardy on any day listed in his July 30, 2021, discipline and PIP document or in the October 15, 2021, termination notice. Tr. 148, 159.

Penalty

It has been indicated that the remedy to be fashioned will be fact-specific. An arbitrator can consider mitigating circumstances. Arbitrators may reduce the penalty if, given the facts of the case, it is clearly out of line with generally accepted industrial standards of discipline. Elkouri & Elkouri, pp. 18-46 to 18-49. "Absent a specific provision establishing that violation of a provision [of the CBA] results in [a certain level of discipline], the arbitrator has broad leeway to determine whether the discipline imposed fits the charge of misconduct." Farrell, "Due Process/Just Cause Issues," *References For Labor Arbitrators* (American Arbitration Association, 2005), p. 32.

Based on Grievant's attendance violations between September 27 and October 5, 2021, and his history of being disciplined and placed on a PIP for the same type of attendance violations, the Employer properly discharged Grievant on October 15, 2021. The Employer's decision was consistent with the CBA, the Employer's policies regarding attendance, tardiness, and personal leave.

The Employer had just cause to discharge Grievant.

Conclusion

The crucial points on the just cause issue include:

1. The Employer has the burden of proof;
2. Grievant was on notice of the attendance policy;
3. Grievant received progressive discipline, including the PIP;
4. There were no comparable employees who were treated differently during the time period in question;
5. The totality of the circumstances; and
6. The CBA.

This decision neither addresses nor decides issues not raised by the parties.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the Grievance.

Dated: June 17, 2022

LEE HORNBERGER
Arbitrator
Traverse City, Michigan