

Labor Arbitration Awards: 1986 - Present, County of Kent and Technical, Professional and Officeworkers Association of Michigan., 24-2 ARB ¶8482, (Jun. 13, 2024)

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24-2 ARB ¶8482. LEE HORNBERGER, Arbitrator. Selected by the parties. Hearing held in Grand Rapids, Michigan, on April 8, 2024. Post-hearing briefs filed by June 6, 2024. Award issued on June 13, 2024.

Headnote

Falsity: Termination: Official records.–

--A court clerk filed a grievance contesting her termination for altering court records without authority, most specifically, for altering criminal Judgments of Sentence. The arbitrator denied the grievance. The evidence revealed that the clerk used white-out to make changes on Judgments of Sentence. The employee argued that the changes were not substantive. The arbitrator rejected that argument, noting that some changes involved altering the count numbers from the complaint, which was a substantive change. She also made changes to Judgment of Sentence by “choosing whichever charges she desired.” If a change was necessary, a process existed for making those changes that did not encompass using white-out without supervision. As a result, the employer had just cause to terminate.

Leigh M. Schultz, Attorney, for the Employer. Gordana Misovski, Attorney, for the Union.

[Text of Award]**DECISION AND AWARD****INTRODUCTION**

HORNBERGER, Arbitrator: This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between the County of Kent (Employer) and the Technical, Professional and Officeworkers Association of Michigan (Union). The Union contends that the Employer violated the CBA when it discharged Grievant. The Employer maintains that it did not violate the CBA when it discharged Grievant.

I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on April 8, 2024, in Grand Rapids, Michigan. 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 22, 2024. The dispute was deemed submitted on June 6, 2024, the date the last post-hearing submission was received.

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. The post-hearing submissions were very helpful.

ISSUES

Was Grievant discharged for just cause? If not, what is the remedy?

FACTUAL OUTLINE

List of participants

Chief Deputy Court Clerk. The Office Administrator reported to the Chief Deputy Court Clerk.

Office Administrator. Grievant reported to the Office Administrator.

Senior Human Resources Specialist.

Union Business Agent. The Business Agent drafted the grievance.

Grievant. Grievant was a Senior Docket Clerk.

Testimony of the Chief Deputy Court Clerk

The Chief Deputy Court Clerk was hired in May 2007. She testified that:

The clerk of the Court is the keeper of the Court's record. We maintain the record. We make sure it is accurate. We process all of the paperwork that comes into the office, whether it be from the public or from the Court. Tr. 16.

The Chief Deputy Court Clerk works closely with the court, including the Chief Judge. There are 27 employees. Twenty-two of them are in the bargaining unit. Five of them are management. The Chief Deputy Court Clerk investigates allegations of misconduct. She makes discharge decisions concerning employees.

Grievant directly reported to the Office Administrator. The Office Administrator reported to the Chief Deputy Court Clerk. The Chief Deputy Court Clerk was not Grievant's direct supervisor.

In February 2020, Grievant started working in the clerk's office. At that time, she was a junior docket clerk. There is an active management system.

The CBA, p. 9, has a "Discipline and Discharge" provision.

The CBA, p. 43, has a "Rules and Regulations" provision.

The Union has not grieved any of the Rules of Conduct. There is web access to the Manuals. The Manual, Rx. 3, pp. 39 to 43, has a "Section 27: Employee Rules of Conduct" provision.

There is a Model Code of Conduct for Michigan Court Employees. Rx. 3, pp. 44-47. The Model Code proscribes:

(2) Failure to properly and satisfactorily perform the employee's job functions, including, but not limited to, failure to maintain work quality and/or productivity.

(3) Unprofessional behavior or failure to exercise proper professional judgment.

...

(31) Falsification of any official Court or County documents, reports or records, including, but not limited to, employment applications, time sheets, claims for benefits and expense reports, or any Court or County business records.

...

(49) Any behavior, conduct or action which discredits the Court or County, or which evidences a deliberate disregard for the best interest of the Court or county. Rx. 3, pp. 39-43.

Grievant prepared a list of her job duties. This list is in the June 26, 2022, e-mail. Rx. 4. This list of job duties indicates, in part: "In addition, I am responsible for: ... Corresponding with judge's clerks regarding any problems pertaining to pleas and judgments prior to posting."

Grievant was trained on her job duties. There was a two day training in Lansing, Michigan, in 2007. There was additional training in 2020.

The Chief Deputy Court Clerk's February 3, 2020, email, Rx. 5, concerns "Here are some valuable links/ Resources"

The Office Administrator's February 4, 2020, email, Rx. 6, concerns "Here is a list of resources you might find helpful Office Procedure Manual ... contains procedural information for many processes handled with our office"

The Office Administrator's February 6, 2024, email, Rx. 7, concerns "MJJ Court Support Staff Certification Training February 25-26 [, 2020]." This training contained four core modules. These modules were Purpose and Responsibilities of Courts; Professionalism and Ethics; Records, Policy, and Procedures; and Customer Service.

The training included "Professionalism & Ethics 2019" slides. Rx. 8. This training included Canon Nine of the SCAO Model Code of Conduct for Michigan Trial Court Employees. The slide for Canon Nine indicated, in part "Cannot inappropriately destroy, alter, falsify, mutilate, BACKDATE, or *fail to make required entries* on any court record." Emphasis in original.

Using slides, Grievant was trained on the "2019 Records Policy and Procedure." Rx. 10. This training includes MCR 1.109 and 8.119: "Court records are recorded information of any kind that has been created by the court or filed with the court in accordance with the Michigan Court Rules."

Using slides, Grievant was trained on "The Purposes and Responsibilities of Courts." Rx. 11. This training included "Trial Court Performance Standards and Public Trust and Confidence. ... As support staff, we enhance *Public Trust and Confidence* by consistently performing our duties up to the standards we embrace." Emphasis in original. This training further indicated "Michigan courts must continue to build public trust and confidence through accountability, performance standards and measurement, and communication."

The Chief Deputy Court Clerk's April 1, 2020, e-mail, "Daily Update #5," Rx. 12, assigned the watching of the "Making Ethical Decisions" video provided by the State Court Administrative Office.

The Chief Deputy Court Clerk's April 9, 2020, e-mail, "Daily Update #9," Rx. 13, concerned criminal case processing.

The Office Administrator's February 20, 2021, e-mail, Rx. 14, concerned "MJJ Criminal Case Processing Video and Powerpoint Slides."

The Office Administrator's July 12, 2022, email, Rx. 15, concerned "Criminal Orders." This email pointed out "the importance and need for accuracy of the record. ... Judicial staff should be contacted for an amendment regarding any substantive changes. The original incorrect version should be docketed, not returned."

The "Judgment of Sentence" procedure, Rx. 16, indicates, in part,

If the judgment is incorrect, reach out to the judge's office to get a correction before docketing (place in problem pile until we receive the amended order-do not sent [sic] original order back to the judge's office).

There was training to make sure the records Grievant inputted were accurate.

The Chief Deputy Court Clerk testified that:

Conflicting and/or missing dates might seem minimal/insignificant given the high volume of issues we see; however, they are not, and could result in severe ramifications concerning a person's criminal history. Tr. 41.

...

Q ... So employees in your office were not to make changes themselves. They were to return it to the judicial staff, is that right?

A Correct. Tr. 44.

...

Q Okay. So something other than a signature or a date is a substantive change?

A In our office, yes. Tr. 43.

...

A If the judgment is incorrect, reach out to the judge's office to get a correction before docketing. Place in problem pile until we receive the amended order. Do not send original order back to the judge's office.

Q Does it say anywhere in here that employees in the clerk's office are to make changes to incorrect judgments on their own?

A No. Tr. 45.

In March 2023, it came to the Chief Deputy Court Clerk's attention that Grievant may have altered a criminal record. On March 14, 2023, a Judgment of Sentence had been altered. The Chief Deputy Court Clerk heard this from the Office Administrator. The Office Administrator had heard it from the Account Clerk. The Chief Deputy Court Clerk started an investigation.

The Account Clerk's March 15, 2023, statement said:

I received the Judgment of Sentence on Case Number: _____44-FH and noticed that there were two different Disposition Codes for Ct. 1. I brought the Judgment of Sentence over to [Grievant]'s desk and informed her of the issue. I then said, "Shouldn't this be sent back to the Judge's Office?" [Grievant] took the Judgment of Sentence from me, looked up the case in Courtview then grabbed her "white out" and deleted the second code on Ct. 1. I don't recall the two-letter code that she deleted. [Grievant] handed the Judgment of Sentence back to me and I commented in a surprised tone, "Oh (I paused for a second) okay." There was no response to my comment, and I went back to my desk. Immediately afterward, the next Judgment of Sentence also had two Disposition Codes for Ct. 3. I brought this to [the Office Administrator]'s attention to get her input on what should be done because I thought it should be sent back up to the Judge's Office. I then informed [the Office Administrator] that [Grievant] had used "white out" and deleted one of the Disposition Codes on the previous Judgment of Sentence.

There have been a few other incidents where I have witnessed [Grievant] use her "white out" on a Judgment of Sentence and/or Motion for Nolle Pros. If the "Count Numbers" on the Judgment of Sentence and/or Motion for Nolle Pros did not coincide with Courtview, I have witnessed [Grievant] "white out" the Ct. number and hand write the correct one on the document. I recall this happening a few times with the most recent happening in the past 1-2 months. Rx. 17. Tr. 48-57.

On March 15, 2023, Grievant was put on suspension.

The Court Administrator and the Chief Judge were notified of the situation.

The Chief Deputy Court Clerk looked at the Judgment of Sentence document. Rx. 18. There was white out on the document. The Chief Deputy Court Clerk then looked at prior documents. She saw other documents that were altered. Rx. 18.

There was a *Loudermill* hearing on March 24, 2023. Tr. 67 - 68. There are typed notes of the "investigatory meeting" with Grievant. Exh. 20. Tr. 117.

The Chief Deputy Court Clerk testified that:

... we asked her if the changes that were on the orders or judgments were made by her. And she answered, yes, in the three examples that we have provided today.

Q So did she ultimately admit that she did, in fact, alter these judgments? A Yes.

Q You have, yes, she whited it out on the bottom right corner. A Yes.

Q She admitted that she whited it out?

A Yes. Tr. 73.

The relevant management individuals agreed that termination was appropriate. There had been an altering of a court order. This could jeopardize the liberty of the defendant in the criminal case. Prior copies of the Judgment had been sent on. Grievant knew what she should have done. Grievant did not refute that she altered the record. It was a repeat situation. The Chief Judge agreed. If there had been a single offense, the Chief Judge would have done less discipline. All of the evidence was reviewed. Alternative discipline was discussed. There had been no prior discipline.

The April 4, 2023, discharge letter said, in part:

On March 14, 2023 it was brought to your supervisor's attention that you were observed altering a Judgment of Sentence, which is an official court order signed by a Circuit Court Judge. During further investigation into the cases on your docket, it was found that three other signed court documents had been altered.

On March 24 2023 you and your TPOAM representative met with Clerk's Office administration to discuss the concern and additional documents that we found that may have been altered. During the meeting you admitted that you changed information on three cases: ... Judgment of Sentence (9/27/2022), ... Judgment of Sentence (9/30/2022), ..., Judgment of Sentence (3/1/2023). In addition, you confirmed your understanding of how the documents should have been processed and that you did not follow that procedure.

Your actions are a violation of 17th Circuit Court and Kent County Policy and Procedures Manual Section 27, Employee Rules of Conduct:

Item (2) Failure to properly and satisfactorily perform the employee's job functions, including, but not limited to, failure to maintain work quality and/or productivity.

Item (3) Unprofessional behavior or failure to exercise proper professional judgment.

Item (31) Falsification of any official Court or County documents, report or records, including, but not limited to, employment applications, time sheets, claims for benefits and expense reports, or any Court or County business records.

Item (49) Any behavior, conduct or action which discredits the Court or County, or which evidences a deliberate disregard for the best interest of the Court or County.

In addition, your actions are a violation of Canon One: Impropriety or the Appearance of Impropriety which states: I will avoid activities that could cause an adverse reflection on my position or the court.

At the March 24, 2023 meeting to discuss these facts, you offered no new information that would mitigate the seriousness of your actions. Therefore, your employment with Kent County Clerk's office is terminated effective immediately. Rx. 2.

Testimony of the Office Administrator

The Office Administrator has held that position for four years. The Office Administrator testified that Grievant reported directly to the Office Administrator. The Office Administrator had discussed sending back court orders with Grievant. There had been a number of ongoing talks.

The July 12, 2022, e-mail, Rx. 15, was sent to everyone for clarification purposes. The email "rehashed the whole topic." The Office Administrator was surprised and disappointed by the white out situation. Grievant asked can she not just fix it herself. The Office Administrator answered absolutely not. Tr. 108.

In March 2023, the Office Administrator heard that a Judgment of Sentence had been altered. Another employee saw the Judgment that had been processed. There were two inconsistent dispositions on one count. The Office Administrator was uncomfortable with what had happened. Grievant had taken white out and put it on the Judgment of Sentence. Tr. 111.

The Office Administrator then looked through Judgments looking for other examples.

The Office Administrator had no input on the level of discipline. She had no input on the discipline decision. Grievant had no prior disciplines.

Testimony of the Senior Human Resources Specialist

The Senior Human Resources Specialist testified that she has been employed for ten years with the Employer. She is familiar with Grievant. The Senior HR Specialist was involved in the investigation of the white out situation.

The first meeting was on March 24, 2023. Rx. 19 and 20. Tr. 120.

The Senior HR Specialist attended the second meeting which was on March 30, 2023. There was no additional information provided at that meeting.

A meeting was held on April 20, 2023, to discuss the grievance. The Employer maintained its position that there was no CBA violation, and the grievance was denied. Jx. 2, p. 4.

Testimony of the Union Business Agent

The Business Agent works with the Local Union. He testified that he gave some advice concerning the situation at the beginning. There was a *Loudermill* meeting. At the time it was thought that there might be a criminal allegation. If so, this meant there would be *Garrity* implications.

The Business Agent drafted the April 6, 2023, grievance. The grievance indicated, in part:

On 04/04/2023 [Grievant] was terminated by the Employer without just cause (...). The Employer action is excessive, without just cause and in violation of Section 7.1 subsection ©. "Discipline will be of a corrective/progressive nature ...)". The Employer has violated the just cause provision of

Section 3.1 (Rights of the County) and Section 7.1 (Discipline and Discharge) along with any/all other applicable sections of the current ... CBA Jx. 2.

At the beginning, there was no allegation of untruthfulness.

The Business Agent testified that:

My opinion is the discipline is excessive. It doesn't fit the violations or the alleged violations. And they did not follow progressive discipline in this case. Tr. 129.

A Well, the punishment is supposed to fit the crime. The idea is corrective action when employees make mistakes. And, of course, the Employer does have the caveat in the contract which permits them to accelerate it based on particular circumstances that would call for more discipline if — if warranted. Tr. 130.

Q In your experience, is something like what's before us today something that's warranted?

A No, I believe it's excessive. And it's — it could have easily been corrective action taken. She has been ... a good employee with no prior discipline, and there was no nefariousness involved here. It was simply correcting the order by the judge to facilitate the — and protect, I guess, in essence, to facilitate the accurate reporting of the record reported by the judge. Tr. 131.

Testimony of Grievant

Grievant testified that she started working in the Clerk's office in February 2020 as a regular Docket Clerk. Tr. 145 and 183. She was eventually promoted to Senior Docket Clerk. She handled documentation from five to seven judges. Inputting information from this documentation was 85% of her job. Tr. 146. The paper is put in a drawer. The paper is sorted and assigned to senior clerks who verify the information. The Judgment of Sentence is double checked, and information from the Judgment is entered.

There were three separate documents. Rx. 18. Tr. 147. Grievant testified that she was trying to be efficient and processed the Judgments of Sentence in question. Tr. 154.

Grievant testified that:

I was trying to be efficient and process the paperwork because it can take so long for a judgment to come down. And because you could follow the paper trail, I thought that it was fine. And you could see in the Court file exactly what happened and what the judge ordered. I didn't change anything. Tr. 153.

...

That one came down, and read Count I and II, initially. And I believe it had a mark. And I whited it out and rewrote what it had already said. Tr. 155.

...

Q Did you contact the clerk and let them know that this — that you were making this correction?

A No.

Q Is there a reason why you didn't let them know?

A Because I wasn't changing it. And I had verified. Tr. 159.

...

Q Were you ever explicitly told that you could not make any alterations, if you will, to a document?

A Yes.

Q But yet you did?

A I did not alter.

Q I'm sorry.

A It still says the same thing.

Q Were you ever told that you could not make any corrections, changes, writings to a document?

...

A Yeah. Tr. 172.

Q ... So whiting something out is not a change, it's an enhancement, right?

...

A Yes, because it still says the same thing. Tr.181.

A I did not change or alter anything. I don't think I made a substantive change. I feel that I enhanced to reflect what the judge ordered. Nothing changed from what the judge ordered or what was in — on the Court record. Tr. 189.

According to Grievant, the Office Administrator was aware of all the errors coming down from the judges' clerks. There were no directions on what substantive meant. Grievant testified that she "enhanced" the Judgment of Sentence. Grievant did "enhancements," not changes. She was frustrated.

CONTENTIONS OF THE PARTIES

a. For the Employer

The Employer contends that Grievant, a former Senior Docket Clerk in the County Clerk of the Court's Office, was appropriately discharged after the Employer discovered that she repeatedly and intentionally altered official court records, specifically criminal Judgments of Sentence, knowing that she did not have the authority to make such alterations and that doing so was strictly prohibited. Grievant's behavior not only called the integrity of the entire Court into question, but it could have had been hugely detrimental to the public whom the County and Court serves. Because the behavior was egregious, knowing, and repeated, the Chief Judge of the Court lost all trust and confidence in Grievant and there was no other choice but to terminate her employment. As the evidence at the hearing confirmed, there was clearly just cause to discharge Grievant and the grievance should be denied.

Discharge was appropriate due to (1) the egregious nature of the behavior, (2) the fact that it was repeated, (3) Grievant admitted to knowing the correct procedure and yet she did not follow it (i.e., she intentionally disregarded the instructions and requirements of her position); and (4) her conduct could have jeopardized defendants' liberties and called into serious question the integrity and trustworthiness of the Court and the Clerk. It was extremely concerning that copies of the original Judgments would have already been sent to the Department of Corrections, the Defendant's attorney, potentially to the victim, and to the prosecutor. Grievant then altered the Judgments so the criminal history record could have reflected something different than the Judgments in the possession of each of these individuals and entities. That was highly concerning. The potential impact on an individual defendant of having an error in their criminal history record "could be tremendous."

By her own admissions, Grievant knowingly, intentionally, and repeatedly violated the Employer's Rules of Conduct, including the Model Code of Conduct. She held a position of trust with great responsibility not only to the Employer but to the public. She disregarded the clear instructions she was given simply to cut corners and to save time because she was frustrated with how long it took to receive Amended Judgments back from the Court. She did not care then, and does not seem to care now, about the potential impact her behavior

could have had on criminal defendants and on the Court as a whole. She was flippant and dishonest and her testimony is not credible. There is no doubt that the Employer had just cause to discharge her employment due to her egregious behavior and no evidence was presented at the hearing that would justify a lesser penalty. The Employer requests that the grievance be denied.

b. For the Union

The Union contends that Grievant was a four-year employee of the Clerk's Office. She initially held the position of Docket Clerk and within nine months was promoted to Senior Docket Clerk, a position which, by the Employer's own admission, came with "a lot of responsibility" and was a lead position. She never received any discipline. She was an exceptional and well-liked employee.

Grievant was terminated after allegations that she altered or falsified Court records, engaged in behavior that discredited the Court, and failed to properly and satisfactorily perform her job functions or exercise professional judgement. These allegations arise out of three incidents where she corrected a physical paper Judgment to reflect the exact order of the ordering Judge.

The first Order was in Case No. _____23-FH. On this Judgment, upon receipt by Grievant, the Clerk had written in Counts 1 and 2 illegibly. Grievant simply whited it out and rewrote it exactly the same way, only legibly. She did not make any changes, fabrications, falsifications or alterations to the Judgment. She only made it legible.

The second order was in Case No. _____45-FH. On this Judgment, when it was received by Grievant, the Clerk had failed to add the Count numbers. Grievant simply added Count 1 and Count 2 because they were missing. She knew this to be the correct information because she compared it with the plea. The addition of the Counts on the document was consistent with all of the paperwork that came through on the case and throughout the court file. The information was not altered, nor fraudulent nor incorrect nor unethical, nor nefarious. It was consistent with exactly what the Judge ordered and consistent with the Court record.

In the third order, Case No. _____44-FH, the final disposition of the case is reflected exactly as shown in Ex. 18. When it arrived on Grievant's desk, the Judgment initially reflected that both Counts 1 and 2 were dismissed via "NP" (nolo pros). The Plea agreement, however, reflected that Defendant had Pled to Count 1 resulting in a conviction. Seeing this was an obvious error as the initial plea document did not match the Judgment and it is not possible for a defendant to both plea NC (nolo contendere) and have the same charge dismissed, Grievant testified that she requested the Judge's Clerk correct the error. When the Amended Judgment was returned to Grievant, the document reflected the Plea but did not withdraw the dismissal. As this was a simple error, Grievant used white out to clear the dismissal to reflect the Judge's true order and the true outcome of the case. She did not manipulate any record. She did not falsify any document. The only thing she did was correct the document that the Judge's Clerk executed incorrectly twice, jeopardizing not only the Defendant's record but the entirety of the judicial process, i.e., LEIN, the Department of Corrections, Probation, etc. If not for Grievant catching and correcting these mistakes, the mistakes made by the Judge's Clerk would have been the incorrect and permanent court record.

The policy of the Clerk's office is that instead of making the correction herself, Judicial staff should be contacted for an amendment regarding any substantive changes (to orders), Ex. 15, p. 2, and that, if the Judgment is incorrect, to reach out to the Judge's office to get a correction before docketing. Ex. 16. At some point the Employer was made aware that Grievant did not follow the policy when she found the errors on the Judgments, but instead made the small corrections herself.

Without determining the underlying rationale for her actions, the Employer terminated her employment. The punishment was far too harsh when considering the mitigating factors. The Union requests that I find that termination was too severe a penalty given Grievant's untarnished employment record and the severity of the discipline. According to the Union, I have the authority to determine that there was no just cause for the severe

punishment. The Union requests that I grant the grievance and rescind the termination, making Grievant whole with whatever back pay and benefits I deem appropriate.

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 Employer did not violate the CBA when it discharged Grievant.

Discipline

Grievant was discharged for allegedly violating the Employer's rules concerning altering/correcting Judgments of Sentence.

The Employer contends that Grievant violated the rules concerning altering/correcting Judgments. The Union contends that Grievant did not violate the Employer's rules concerning altering/correcting Judgments.

The CBA provides that:

Discipline will be of a corrective/progressive nature, (example: verbal, written, suspension, etc.) except nothing shall prevent the Employer from taking immediate and appropriate disciplinary action including discharge should it be required by the circumstances. Jx. 1, p. 9.

The Model Code of Conduct for Michigan Court Employees proscribes:

(2) Failure to properly and satisfactorily perform the employee's job functions, including, but not limited to, failure to maintain work quality and/or productivity.

(3) Unprofessional behavior or failure to exercise proper professional judgment.

...

(31) Falsification of any official Court or County documents, reports or records, including, but not limited to, employment applications, time sheets, claims for benefits and expense reports, or any Court or County business records.

...

(49) Any behavior, conduct or action which discredits the Court or County, or which evidences a deliberate disregard for the best interest of the Court or county. Rx. 3, pp. 39-43.

Grievant prepared a list of her job duties. Rx. 4. This list indicated, in part:

... I am responsible for: ... Corresponding with judge's clerks regarding any problems pertaining to pleas and judgments prior to posting.

The training slide for Canon Nine of the Model Code of Conduct indicated, in part:

Cannot inappropriately destroy, alter, falsify, mutilate, BACKDATE, or *fail to make required entries* on any court record. Emphasis in original. Rx. 8.

The "Judgment of Sentence" procedure, Rx. 16, indicates, in part,

If the judgment is incorrect, reach out to the judge's office to get a correction before docketing (place in problem pile until we receive the amended order-do not sent [sic] original order back to the judge's office).

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

Grievant knew of the policy

Grievant received extensive training concerning the Employer's rules concerning altering/correcting Judgments of Sentence. Grievant was aware of the Employer's rules. Grievant knew or could reasonably be expected to know that discipline could result from violating the Employer's rules concerning altering/correcting Judgments of Sentence.

The policy was a reasonable work rule

Management has the right to establish reasonable workplace 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 rules concerning altering/correcting Judgments of Sentence are reasonable. Abrams, p. 261.

There was a fair and objective investigation There was an appropriate investigation.

"Industrial due process ... requires management to conduct a reasonable inquiry or investigation before assessing punishment." Elkouri & Elkouri, p. 15-49. It is a fundamental principle of employment law that the issue of due process and following correct procedures can impact on the issue of just cause and the amount of discipline, if any, that should be approved or imposed. *Id.* at 15-47 to 15-50. *Federated Dep't Stores v. Food & Commercial Workers Local 1442*, 901 F.2d 1494 (9th Cir. 1990) (arbitrator appropriately determined due process to be component of good cause for discharge); *Teamsters Local 878 v. Coca-Cola Bottling Co.*, 613 F.2d 716, 718 (8th Cir.), cert. denied, 446 U.S. 988 (1980) (appropriate for arbitrator to interpret just cause as including requirement of procedural fairness).

Abrams, p. 211, states:

... [T]he concept of "due process" is inherent in the just cause provision.

... [a]rbitrators prefer seeing evidence that management ... offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by

an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation.

Arbitrators “often overturn otherwise valid discharges where the employer has denied the employee those [due process] protections.” Nolan, *Labor and Employment Arbitration* (1999), pp. 205 to 206.

Arbitrator Goldstein indicated at *State of Illinois*, 136 LA 122, 129-130 (2015), that:

[A]n employer's obligation to a predisciplinary investigation is determined by context. ... [T]he level of discipline involved is an important consideration ... in determining whether the underlying investigation by the employer was fair and reasonable.

Grievant was given a meaningful opportunity to tell her side of the story before discipline was imposed. There was an adequate check against the possibility of an incorrect decision.

The rule was applied evenly and without discrimination

There is no evidence that any other employees have violated the rules in question.

There is a preponderance of proof that there was a violation

Neither Employer nor Union witnesses should be given higher deference.

[S]upervisors should not necessarily be given greater credibility [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible Elkouri & Elkouri, p. 8-97.

I have considered all the circumstances of all the witnesses when assessing testimony. I have considered the totality of the circumstances. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98.

Furthermore:

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.

The violation is evidenced by Grievant making changes on Judgments of Sentence by applying white out to them and not complying with the rules concerning returning the document to the Judge for correction. “Judicial staff should be contacted for an amendment regarding any substantive changes.” Rx. 15, p. 3.

The Union has made serious arguments. I have considered all of them.

The Union argues the paramount issue is whether the corrections Grievant made to the Judgments were substantive. I agree with the Union that an important issue is whether the corrections were substantive. The corrections were substantive.

- _____ 23-FH. Tr. 155. Grievant says Count 1 and Count 2 were hard to read so she whited them out and rewrote the numbers. Tr. 179. This is a substantive change to what was originally put on the paper document. Having each Count legibly identified is of a practical and real concern.

- _____ 45-FH. Tr. 157. Grievant says that she added Count 1 and Count 2 because these numbers were missing. Tr. 180. She verified this with the plea. This is a substantive change to what was originally put on the paper document. Tr. 65-67. Knowing the Count numbers is of a practical and real concern.
- _____ 44-FH. Tr. 148. Grievant says she “White out” “NP” for Count 1. Tr. 174. This is the document that was seen by the Account Clerk. This is a substantive change to what was originally put on the paper document. Tr. 62, and 100-101. Knowing the correct disposition for each Count is of a practical and real concern.

The Union argues that there was an allegation made on the record by the Chief Deputy Court Clerk that Grievant randomly made changes to the Judgments by choosing whichever charges she desired. Tr. 102-104. This argument does not control. The Chief Deputy Court Clerk twice said “picked.” Tr. 103/19 and 104/5. She did not adopt the words “willy nilly chose.” Tr. 102-104 do not reflect that the Chief Deputy Court Clerk testified that Grievant “randomly made changes to the Judgments [by] choosing whichever charges she desired.” The Chief Deputy Court Clerk explained in her testimony that a substantive change is any change that could alter the criminal history record or that is of a larger impact than a signature or date. She further testified that Clerk of the Court’s Office employees were not to make any substantive changes themselves. They were required to return the record to the Court so that the judicial staff could make the appropriate changes. Tr. 44. This instruction is repeated on other documents that were provided to Grievant, including a set of instructions regarding “Judgment of Sentence.” Rx. 16. Those instructions state “[i]f the judgment is incorrect, reach out to the judge’s office to get a correction before docketing.” *Id.*

The Union argues the question is, was progressive discipline, or discipline less than discharge, appropriate in this matter. In the case at bar, the progressive discipline requirement is embedded in the CBA. CBA, p. 9. Elkouri & Elkouri, p. 9-36. The CBA provides that:

Discipline will be of a corrective/progressive nature, (example: verbal, written, suspension, etc.) *except nothing shall prevent the Employer from taking immediate and appropriate disciplinary action including discharge should it be required by the circumstances.* Jx. 1, p. 9. Emphasis added.

Grievant’s job was extremely important. She was given a lot of training for that job. By erasing information on the Judgment of Sentence and putting white out on Judgments, she was compromising the integrity of the Court’s record system and creating an inconsistency between the information contained in the Court’s records and the documents that the defendants and the defendants’ attorneys have. These were serious violations. It did not violate the CBA for the Employer to decide, after appropriate investigation and with no evidence of inconsistent treatment of other employees, that the Employer could “tak[e] immediate and appropriate disciplinary action including discharge ... [as] required by the circumstances.” *Id.* “Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning” Elkouri & Elkouri, p. 9-36. The Employer in its Post Hearing Brief argued that Grievant takes no responsibility for her actions or the potential consequences. This is a powerful argument. I very carefully watched and listened to Grievant’s testimony in-person. In addition, I have read Grievant’s testimony several times. There was no indication of remorse. There was little, if any, indication that Grievant would comply with the applicable rules in the future. Grievant did not promise that this would not happen again.

The Model Code of Conduct states, in pertinent part:

All employees in Michigan’s courts hold highly visible positions of public trust. ... Our actions at all times should uphold and increase the public trust and confidence in the judicial branch, reflect the highest degree of integrity, and demonstrate commitment to each principle embodied in this model

code. ... Improper behavior or the appearance of improper behavior may compromise the integrity of the court.

Grievant's rule violations were "not simple negligence; [they were] intentional and intolerable." Abrams, p. 212.

The Union argues Grievant had been a model employee for almost five years without being disciplined. The Union is correct. Job appraisals were alluded to but not put into the Record.

There was just cause for the discharge.

Conclusion

The crucial points in this case include:

1. the Employer has the burden of proof;
2. the CBA authorizes "the Employer [to] tak[e] immediate and appropriate disciplinary action including discharge should it be required by the circumstances," CBA, p. 9;
3. the discharge was an appropriate disciplinary action required by the circumstances;
4. the Employer's rules were reasonable;
5. Grievant received adequate notice and training concerning the Employer's rules;
6. there were serious violations of important rules;
7. there is no articulation of remorse by Grievant;
8. the totality of the circumstances; and
9. 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.

June 13, 2024

Lee Hornberger

LEE HORNBERGER

Arbitrator

Traverse City, Michigan