Labor Arbitration Awards: 1986 - Present, United Steelworkers Local 1191 and Holsum of Fort Wayne, Inc., 25-1 ARB ¶8570, (Nov. 18, 2024)

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25-1 ARB ¶8570. LEE HORNBERGER, Arbitrator. Selected by the parties. Case No. FMCS 240506-05904. Hearing held via Zoom on September 27, 2024, in La Porte, Indiana. Post-hearing submissions received on November 11, 2024. Award issued on November 18, 2024.

Headnote

Sexual harassment: Discharge from employment: Reinstatement.–
The union filed a grievance challenging the termination of the grievant, a box maker, for alleged violations of the employer's sexual harassment policy. The arbitrator sustained the grievance. The employer contended that the grievant engaged in inappropriate conduct, including unwanted physical contact and sexually suggestive remarks toward coworkers. However, the employer relied on statements from anonymous complainants who did not testify, and it failed to provide written, signed, or notarized statements. The arbitrator found that the employer's investigation lacked fairness, violated procedural due process, and did not establish a preponderance of evidence to justify termination. The employer was ordered to reinstate the grievant with full back pay.

Jake Fulcher, Esquire, for the Employer. Sondra Espinoza, for the Union.

[Text of Award]

DECISION AND AWARD

INTRODUCTION

HORNBERGER, Arbitrator: This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Holsum Bakery of Fort Wayne, Inc. (Employer) and the United Steelworkers 1191 (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. In addition, the Union contends that the Employer's Third Step response was untimely. The Employer contends that the Third Step response was not untimely.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on September 27, 2024, in [A], Indiana, 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 October 14, 2024. The dispute was deemed submitted on November 11, 2024, the date the post-hearing submissions were received.

Subject to the timeliness of the Employer's Step Three response, 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.

ISSUES

The Employer frames the issues as follows.

Whether special circumstances excuse the Employer's delayed response and allow the grievance to be heard on the merits?

Whether the Employer had just cause under the CBA and its Rules and Procedures to discharge Grievant for violating its sexual harassment policy.

The Union frames the issue as follows.

Did the Employer discharge Grievant for proper cause?

If not, what shall be the remedy?

I frame the issues as follows.

Did the Employer have just/proper cause to discharge Grievant? If not, what is the remedy?

Did the Employer violate the CBA with respect to the timing of the Employer's Step Three response? If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 5 – MANAGEMENT RIGHTS

A. The Company has the exclusive right to manage the business and the plant and to direct the working force. In the exercise of those rights, the Company shall have the right to hire, promote, reprimand, suspend, discharge or otherwise discipline employees for proper cause. Jx. 1, p. 005.

ARTICLE 27 - ADJUSTMENT OF GRIEVANCES

> B.In the event the Company fails to answer a grievance in any step of the procedure within the time limits, such grievance becomes automatically granted.

SEXUAL HARASSMENT POLICY

It is the policy of Lewis Bakeries, Inc. to provide all employees with a work environment free from any type of discrimination, including sexual harassment. All employees have an individual responsibility to refrain from behavior that might offend another person or violate his/her rights. Any employee found by the company to have sexually harassed another employee will be subject to appropriate disciplinary sanctions ranging from a warning in his or her file up to and including discharge. The Equal Employment Opportunity Commission (EEOC) defines sexual harassment as follows:

> “Unwelcome sexual advances or request for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or, (3) such conduct has the purpose of effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.”

This company does not condone nor will it tolerate sexual harassment under any circumstance. If you feel you have been subjected to this form of conduct, you should report it immediately to your supervisor or manager. If you prefer, you may contact the Director of Employment or the Vice President of Human Resources at the Evansville Office (1-800-365-2812) so that an investigation can be conducted and appropriate steps taken. Jx. 2, p. 044-045.

FACTUAL OUTLINE

List of participants

HR Administrative Assistant KH.

Senior Human Resources Manager AP.

Union Chair Griever WF.

Union International Staff Representative SE.

CPs are three "complaining employees" (CPs). The CPs did not testify at the arbitration hearing.

Grievant was employed by the Employer from February 12, 2020, to February 21, 2024, as a box maker. Grievant did not testify at the arbitration hearing.

Introduction

The Employer is a producer of freshly baked goods, with locations in [A] and Fort Wayne, Indiana. The Employer employs approximately 170 employees at its [A] facility that are members of the bargaining unit.

Testimony of HR Administrative Assistant KH

HR Administrative Assistant KH has been employed by the Employer for two years. KH is familiar with the *CBA. KH* does not deal much with Union and Employer relations at [A]. There are sexual harassment guidelines and an Employee Handbook. Refresher training is done via video including concerning sexual harassment. Grievant was hired in February 2020. He was a box maker.

On January 25, 2024. Three employees (CPs) separately contacted KH. KH typed notes as the CPs were talking. The CPs wanted to remain anonymous. There were one-on-one interviews. KH gave their statements to AP. Rx. 13, p. 93.

KH's notes of her January 25, 2024, conversation with the first CP states:

> … I feel that I've been sexually harassed by [Grievant].
>
> … He hugs me which makes me uncomfortable, and I said I was tired because I didn't get much sleep trying to get him away. He said Oh' you must have a second job and made some gestures (implying I'm a prostitute). …
>
> He said "You don't look like you ride dick. You look too submissive." Then he said I'll leave you alone now. …
>
> I talked to someone about it and then went back to him and I said "How you spoke to me earlier. That will never happen again. And don't fucking touch me. I don't want things to be weird now but that was not ok.
>
> He then said "I'll never talk to you again." And walked out. Jx. 10.

KH's notes of her January 25, 2024, conversation with the second CP state:

> … He does stuff like that to everyone.
>
> [Grievant] always comes up and hugs me and kisses my cheek and it makes me uncomfortable, but I just let it go. Jx. 11.

KH's notes of her January 25, 2024, conversation with the third CP state:

> Last Monday I was working, and I had the plyers in my back pocket and [Grievant] grabbed them and then touched my butt. I told him not to do that and he said I was asking for it because I was sticking my butt out. Jx. 12.

KH gave the statements to **Senior Human Resources Manager AP**. The Employer spoke with Grievant. The Employer suspended Grievant without pay pending investigation. The Union Representative was there. KH was not there. The Employer asked Grievant to provide a statement. He did not provide a statement at that time. On February 9, 2024, AP again asked Grievant for a statement. Grievant said he would but he did not do so at that time.

KH does not know when the redacted notes of the CP statements were provided to the Union. The CPs will not be testifying.

Testimony of Senior Human Resources Manager AP

Senior Human Resources Manager AP is stationed in Fort Wayne, Indiana. AP has been the Senior Human Resources Manager for two years. AP is familiar with the CBA. The policy book is given to employees at their orientation. The employees sign for it. There is an acknowledgement form. The penalty for sexual harassment is discharge if found to be proven. The Employer does an annual training video with sexual harassment training in it. On February 12, 2020, Grievant was given the policies.

Grievant was hired on February 12, 2020. He was a box maker. Prior to January 25, 2024, AP did not know of Grievant. AP was informed of the incident on January 25, 2024. This was the first sexual harassment matter that AP was involved with in [A].

AP received statements from KH. Once AP received these statements AP was alarmed. AP believed it was a sexual harassment issue. AP spoke with KH and the Plant Manager. The CPs wanted to remain anonymous. They were afraid of Grievant and did not want rumors to go through the facility.

The Employer suspended Grievant without pay pending investigation. Grievant was told that he was being investigated for sexual harassment. AP was told that Grievant contacted the victims. That concerned AP. Grievant did not provide a statement that day.

The Employer started an investigation. Rx.14. Grievant was told that he was suspended pending investigation for SH. Grievant was suspended without pay pending investigation for sexual harassment of the CPs. Grievant was not given the specific details. AP was not there for that meeting.

On February 9, 2024, AP reached out for a statement from Grievant. AP called Grievant on February 12, 2024, to again ask for a statement. The Union had told Grievant not to make a statement. Grievant ultimately provided a statement on February 13, 2024. Grievant's handwritten statement said:

> I [Grievant] writing this statement because I have been accused of sexual harassment. This is not in my character. And never will be. So whoever I offended, I apologize to you, I would never do something like that on purpose or intentionally. I would never intentionally treat anyone like that on purpose. On that note, since the company is not telling what was said, accept for someone accusing me of sexual harassment. I do not know what else to say or how to defend myself against these claims. All I can say there is no way on God's green earth I would purposely do this to anybody. It's not who I am as a person. Rx. 16.

There was a February 20, 2024, meeting. KH took notes during this meeting. The Employer provided the allegations to Grievant. AP read the redacted statements to Grievant and the Union. Grievant had been off work for four weeks. During the February 20, 2024, meeting, Grievant stated as follows.

> I never said none of that to her. The conversation we had was we were BS'ing, I walked up to her and said you look tired. She said well I've been up for 72 hours. She said you would be tired too in bed. I said “well you need to tell your boyfriend to leave you alone then.”
>
> I didn't do that. I tried to hug her and she shrugged away. It's not in my nature to make people uncomfortable. The ladies give me hugs all the time. They come up to me when they are leaving. 90% of the time I don't even ask for it. If they would have told me to stop I would have stopped. I don't even know some of who these are about? …
>
> The second one. I'm a very friendly person and I don't want to make anyone uncomfortable. Whoever that is, they haven't told me to stop. If they had, I would have stopped. …
>
> I said what did I do to make you feel this way? She said I'm not talking to you. You're going around telling everyone I'm the B word. I went to talk to her just to
>
> see if I said or did something to offend her and that's all it was. …
>
> I'm sorry for making them feel that way if I did. I didn't mean to. …
>
> I don't remember that. I did not say or do that. …
>
> I hope you guys take me serious? And work something out? I can work nights. I didn't do anything on purpose. I need my job. Rx. 17.

According to AP, Grievant violated the Employer's sexual harassment policy. This included verbal and physical harassment. AP believed Grievant should be discharged.

AP looked at Grievant's personnel file. Rx. 19 to 25. The personnel file for Grievant reflects the following disciplinary history.

In October 2021. Grievant was placed on a written warning for conduct issues. The written warning indicated: “Employee is to refrain from performing actions that causes a hostile work environment.” Rx. 19.

In October 2022, there was a “Written Warning for Conduct Issues” concerning a forklift. Rx. 20.

Grievant threatened to fight another employee. Rx. 21. Rx. 22, page 106, is a May 16, 2022, discharge of Grievant for “Threatening another employee.” Rx. 23. November 29, 2022, is a six month Last Chance Agreement with no back pay and attend anger management course.

Rx. 24, December 16, 2022, concerns Grievant attending anger management classes.

On September 14, 2023, there was a corrective action Verbal Warning for Conduct. Rx. 25.

AP saw a pattern of behavior that was not appropriate. AP believed the sexual harassment alone was sufficient cause for discharge.

The February 1, 2024, grievance says:

> Employee was wrongfully and unfairly suspended pending investigation. And, Company is not conducting a proper investigation. Jx. 4.

The February 9, 2024, Employer response to the February 1, 2024, grievance says:

> The company stands by the decision to suspend pending investigation [Grievant's] employment for violating [Employer] Rules & Policies, Sexual Harassment policy (page 7). Jx. 5.

The February 21, 2024, discharge notice says:

> This letter is in regards to your employment with [the Employer]. The company originally placed you on an unpaid suspension pending investigation of a complaint made against you involving an act of sexual harassment. After completion of our investigation, your employment has been terminated, effective immediately. Jx. 6.

The February 23, 2024, grievance says:

> Employee was unfairly and unjustly discharged without proper investigation performed by the Company. Jx. 7.

The Step 3 meeting was on March 4, 2024. Other grievances were also discussed. Under the CBA, the Employer has ten working days to respond to the Union. This does not include weekends.

AP called the Union to say that she was not receiving emails. She believed that she had ten working days. Rx. 26. AP believed the email had gone out. AP discovered it had not gone out. Jx. 9. This surprised AP. Then she looked into it. It surprised AP that her emails had not gone out. There was a technology issue. Jx. 8.

On May 1, 2024, the Union requested arbitration.

Testimony of Union Chair Griever WF

Union Chair Griever WF has been employed by the Employer for 12 years. Grievant was not given an opportunity to give a statement before he was suspended. WF asked for the statements of the CPs. The Employer told WF they would not be provided. WF later saw Grievant on Employer property. WF told Grievant he can give a statement before he knows what the accusations are. Grievant has given a statement

WF was at the February 2024 meeting. The Employer gave details of the SH allegations. WF then found out there were three CPs. Grievant and WF had previously believed there was only one CP. Grievant tried to figure out who the CPs were. Grievant denied the allegations. Grievant was discharged a couple days later via a February 21, 2024, discharge letter. The Grievance was filed on February 23, 2024.

The Union has not received the names of the CPs or the written statements of the CPs. In the past, the Union had received the statements even with sexual harassment claims.

Grievant told WF he had confronted the two women. WF told Grievant that was not a good idea.

On February 20, 2024, the Employer went through the allegations with Grievant line by line. As of February 20, 2024, the Grievant knew what the redacted statements said. Prior to the February 20, 2024, meeting, Grievant did not know the specifics of the allegations. Grievant's written statement was written before the February 20, 2024, meeting.

The Union did not ask to come in for interviews with the CPs.

WF went to CP One and told her she cannot tell another employee. WF relayed this to the Plant Manager.

Testimony of Union International Staff Representative SE

Union International Staff Representative SE attended the grievance Step Meeting. On several occasions SE was in contact with the Employer. Grievant had not received a copy of the CP statements.

SE sent a February 9, 2024, email to the Employer saying “Where are we at?” The termination was on February 21, 2024.

The Third Step meeting was on March 4, 2024. SE was there. Several grievances were discussed at that meeting. SE does not recall a discussion of email problems. The Employer's answer was due on March 18, 2024.

On March 26, 2024, the Union asked the Employer for a Step Three response. Sometimes the parties agree to extensions of the deadlines. The Employer and the Union had asked for extensions in the past in other cases. The Employer did not ask for an extension in this case.

The March 26, 2024, SE email to the Employer says:

> The Union did not receive a response to the above referenced grievances per the time limits in Article 27 in the [CBA].
>
> Therefore the grievance shall be resolved at the Union's remedy which would be for the employee to be made whole and be reinstated. Please advise [Grievant's] return date as soon as the Company can determine his schedule. Jx. 9.

On March 27, 2024, AP responded:

> Cory King is on vacation this week. Upon his return he will get with you to discuss details. *Id*.

AP was told it was sent but it was in her outbox.

AP never said an email. AP said CK would respond when he got back.

CONTENTIONS OF THE PARTIES

For the Employer

The Employer contends that its delayed response to the grievance can be excused as AP's issues with her emails constitute special mitigating circumstances. The Employer also acted within its power under the parties' CBA and its Rules and Policies and had just cause to terminate Grievant for violating its sexual harassment policy. Grievant was aware of the Employer's sexual harassment policy, which was a reasonable work rule and was applied evenly and without discrimination. Based on his earlier termination for threatening behavior towards his co-employees, Grievant also knew that confronting CP One and CP Two could result in discharge. The Employer also relied on numerous evidentiary sources in determining that Grievant violated its sexual harassment policy, including the testimony of three female victims, his egregious retaliatory actions towards Victim One and Victim Two, his prior history of threatening behavior in the workplace, Grievant's written statement and comments at the February 20, 2024, meeting, and indications that there were other victims who were harassed but did not come forward. Grievant's failure to testify at the arbitration hearing also creates an inference that his grievance lacks merit.

There is no procedural timeliness issue preventing this grievance from being heard on its merits. Special mitigating circumstances excuse the Employer's delayed response to the Union following the March 4, 2024 grievance meeting, as the delay was caused by an issue with AP's email that the Union was aware of and did not prejudice the Union in any way, as they were already aware of the Employer's position and did not immediately raise the timeliness issue.

The Employer had just cause to terminate Grievant based on a preponderance of evidence in the record. Grievant was also aware he could be terminated for violating the sexual harassment policy, and the sexual harassment policy was a reasonable work rule applied evenly and without discrimination. Grievant's failure to testify leaves the Employer's testimony and evidence regarding his violations of the sexual harassment policy

unrebutted and shows that his grievance lacks merit. For these reasons, the Employer requested that the grievance be denied.

For the Union

According to the Union, on January 25 ' 2024, the Employer received alleged harassment claims by three unnamed co-employees of Grievant. Grievant was called to the office on this same day and advised he had a complaint of sexual harassment and was being placed on suspension while the Employer was to investigate.

The employees alleging harassment came to the office on January 25 ' 2024, stating two of the three incidents occurred on that day, and the third the Friday before. The Employer provided notes from each meeting KH and the Plant Manager. The notes do not have any questions asked of the CPs during the note taking. Nor are there any additional notes of any other persons questioned or witnesses to collaborate the allegations or any documents to substantiate an investigation was completed. The Employer policy states that found allegations will receive appropriate disciplinary sanctions ranging from a warning in the employee's file up to and including discharge. Grievant was not given a proper investigation, simply the words of three individuals who went to the office and accused Grievant of sexual harassment and the Employer deemed it true.

Grievant was an almost four year employee with the Employer. Grievant was suspended and eventually terminated and has had a loss of an income starting January 25, 2024, through the current date, which is the sole income he depends on.

The Employer had a duty to complete a proper investigation and failed to do so. The Employer had a duty to provide information to the Union upon the Union's request for the Employer to conduct a proper and thorough investigation and failed to do so. The Union was unable to conduct a proper investigation due to the lack of information provided by the Employer. In the weeks Grievant was on suspension, there was no investigation completed nor was Grievant made aware of what he was being accused of doing or saying. Grievant was asked to provide his statement two days prior to being discharged on the harassment allegations which Grievant was not told what he was being accused of. Grievant provided a statement, that substantiates the fact he was unaware of what he did or say that offended any person. This statement was completed only after the Union inquired on the status of the Employer's investigation via email. Even if the Employer completed a proper investigation, the CBA is clear in Art. 27 (B), “In the event the Company fails to answer a grievance in any step of the procedure within the time limits, such grievance becomes automatically granted.”

The Union requests that Grievant be reinstated and made whole.

DISCUSSION AND DECISION

Introduction

The CBA provides that an employee cannot be disciplined without just/proper 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 violated the CBA when it discharged Grievant.

Procedural issue

CBA Art. 27 (B) says:

> In the event the Company fails to answer a grievance in any step of the procedure within the time limits, such grievance becomes automatically granted.

The Union argues that the Employer failed to provide the Employer response within the time limits of the CBA. According to the Employer, the email sent on March 26, 2024, from SE and the response from AP did not state email problems, it only said CK was on vacation and would get back with details. The Employer violated the CBA Art. 27 (B) time limits of providing an answer in ten working days after the Third Step meeting. The Employer made no request for an extension of time and made no argument when it initially emailed concerning the missed date.

The Employer argues that there are special mitigating circumstances present that excuse the Employer's delayed response and allow this grievance to be decided on its merits. According to the Employer, AP's email issues that caused the Employer's delayed response constitute special mitigating circumstances permitting relaxation of the CBA's grievance procedure and allowing arbitration of the grievance to move forward on its merits. At the March 4, 2024, grievance meeting, AP told the Union she was having issues with her email. Tr. 62/1-14. The Employer records of AP's Microsoft Outlook account used for sending emails show that AP had modified the Employer's response to the grievance and attached it to an email on March 11, 2024, which was well within the ten working days the Employer had to respond as set forth in the CBA. Rx. 26. AP testified that she understood she had attached this response to her email on March 11, 2024, and that this email was sent, but only later found out that it had not left the network. Tr. 63/13-21; and Tr. 64/1-5. The Employer knew how to request an extension in the event it needed one. Tr. 101/15-18. The Employer's failure to request an extension to respond following the grievance meeting suggests that its delayed response was unintentional and the result of a computer issue outside of the Employer's control, not a deliberate attempt to skirt the CBA's grievance procedure.

I conclude that the IT issue was a special mitigating circumstance which explained and justified the timing of the actual receipt of the Employer's Step Three response.

Senior Human Resources Manager AP testified:

> … [D]o you recall telling the Union in that meeting that you were having some e-mail trouble?
>
> A. Yes.
>
> Q. And what was going on with your e-mail?
>
> A. … I was not receiving e-mails in a timely manner. I would just — some of them I would not receive at all and some things that I was sending out — I — at that time, I didn't really know that it was just what I was sending — I didn't know it was what I was sending out as well. It was just what I was — I wasn't receiving everything I was supposed to and it — there was some kind of IT issue going on. Tr. 62.
>
> Q. But ultimately, did you then at that point discover it never left your network?
>
> A. Yes. And I found that that e-mail did not send along with many others did not go out as well. Tr. 65.

The discharge was on February 21, 2024. The Third Step Meeting was on March 4, 2024. The Art. 27 (B) ten working day response was due March 18, 2024. Not having received the ten day response, the Union raised the issue on March 26, 2024. The record shows that the delayed receipt of the response was caused by IT issues that were not known until later by the Employer.

The crucial points on the procedural issue include:

1. There were special mitigating circumstances that explained the delay in the response being delivered by the email system to the Union;

2. The totality of the circumstances; and

3. The CBA.

Discipline

Grievant was disciplined for allegedly violating the Employer's sexual harassment policy.

The Employer contends that Grievant violated the sexual harassment policy. The Union contends that Grievant did not violate the Employer's sexual harassment policy.

The CBA provides that the Employer can discharge an employee for proper cause.

The Employer's sexual harassment policy proscribes sexual harassment and provides that discharge is an available penalty for sexual harassment.

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 sexual harassment policy

There is no dispute that Grievant knew of the sexual harassment policy. Grievant knew or could reasonably be expected to know that he would be subject to discipline for violating the sexual harassment policy.

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/proper cause are met, the Employer's sexual harassment policy is reasonable. See generally, 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]arbitrators 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.

The Grievant was ultimately given a meaningful opportunity to tell Grievant's side of the story before discipline was imposed.

The rule was applied evenly and without discrimination

There is no evidence that other employees have violated the sexual harassment policy.

There not 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. See generally WD Mi Civ JI 2.07.

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.

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.

I find that that there is not a preponderance of the evidence that Grievant violated the sexual harassment policy.

The Union argues that that the exhibits, Rx. 11, 12, and 13, provided are only Employer notes and there are no written statements signed by the unnamed accusers. The Union further argues that the Union was not able to ask the CPs any questions.

In the case before me, the CPs did not testify. No signed or written statements from the CPs were provided. The Union has not been able to question the CPs.

Nolan, *Labor and Employment Arbitration* (1998), 230, states: "… [A]rbitrators tend to require the testimony of employee witnesses notwithstanding potential strife …." St. Antoine, *The Common Law of the Workplace* (2d ed.), says:

§1.39. PRACTICE AND PROCEDURE

Confrontation of Witnesses

Former rulings that employers could keep the identity of certain witnesses, such as undercover spotters or shoppers, confidential by withholding their appearance at a hearing have generally been superseded and it is now commonly required that all witnesses must testify and be subject to cross examination.

Comment:

In rare instances, good cause for concealing the identity of a witness from the grievant, such as by taking testimony from behind a screen, may be established to the satisfaction of the arbitrator, particularly when there is fear of physical retaliation. In such situations counsel should be entitled to be present. …

§1.58. Naked Hearsay Documents and Sworn Declarations

A distinction is drawn between the situations where there is at least a witness, who may be cross examined, giving the hearsay evidence and where there is a "naked hearsay" document that is not subject to cross-examination. The latter may be ruled inadmissible absent special exceptions. Unless allowed by agreement, statute, or applicable agency rule, sworn declarations or affidavits may not be considered competent evidence by many arbitrators, if the other party objects, since the declarant is not available for cross-examination.

Comment:

Naked hearsay documents include physicians' notes about employees, customers' written complaints, statements by nonappearing supervisors and employees and the like. Sworn declarations, under agency rules such as those of the AAA, are to be admitted into evidence "subject to weight," as discussed above. No guidance is provided by the AAA as to what "weight" is to be ascribed to such declarations. That requires the opposing party to challenge by its own evidence or counterdeclarations what that party perceives might be the "weight" ascribed to the initial declaration.

Some arbitrators, on their own, or on the basis of the parties' practice or acquiescence, will admit "subject to weight" such relatively routine items as doctors' statements concerning an employee's absence because of illness, whether sworn or not, or other documents such as police reports. Rules against admissibility do not apply to documents that are deemed intrinsically reliable, such as records kept in the normal course of business.

Arbitration awards may be vacated by courts for not providing the opportunity to cross-examine witnesses, and such documents-as opposed even to hearsay witnesses-cannot be cross-examined. *E.g.*, California Civil Procedure Code §§1282.2, 1286(b), (e).

§1.59. Hearsay as Only Evidence to Support Claim

Some arbitrators have held that unrebutted hearsay evidence alone is sufficient to establish a claim.

Comment:

Other arbitrators conclude that if hearsay is the only type of evidence presented,

> the evidence will not have enough weight to support a claim or affirmative defense. Emphasis in the original.

Elkouri & Elkouri indicates:

> … [D]isciplinary action based solely on the charge of an employee whose identity the employer was unwilling to reveal was set aside by an arbitrator who stated that no matter how meritorious the reasons for nondisclosure may be, it results in a lack of competent proof. *Id.*, p. 8-29.
>
> Even where an accuser's identity is known to the grievant, if the accuser does not appear at the hearing to testify and be subject to cross-examination, it is still likely that the accuser's statement will be given reduced weight or will not be admitted into evidence at all. *Id.*, p. 8-31.

The Employer argues that Grievant's failure to testify at the arbitration hearing creates an inference that the grievance lacks merit. This argument does not control. The CPs did not testify at the hearing. There were no written or signed statements from the CPs. This means there was no evidence of sexual harassment for Grievant to address. At the arbitration hearing, Union Chair Griever testified as follows:

> Q. To this day, based on your knowledge, has the Union received the names of the accusers?
>
> A. No, we have not. Tr. 81-82.
>
> Q. Has the Union received any written statements from any of the three females?
>
> A. No, we have not.
>
> Q. In all other grievances that you've been a part of as the unit chair for the last at least three years, have you received written statements in the past for all of the grievances?
>
> A. Yes, I have. And I have been through — and I'm privy to sexual harassment cases at the bakery as well, and each time, we were given the opportunity to understand — to be provided with who the person was or individual or individuals were bringing accusations against an employee. We understand that there's a — you know, you have the part that we have to have privacy. So we make sure that the names are not commonly spread broad that way. Tr. 81-82.

The Employer argues that arbitrators have previously upheld discharges where neither Grievant nor the victims of sexual harassment testified. Cincinnati Housing Authority, 119 LA 1389, 1393 (Heekin, 2004) (In denying reinstatement for grievant who was terminated for sexual harassment where both grievant and accusers did not testify, Arbitrator Heekin noted “in the face of a lot of evidence that serious wrongdoing did take place despite the failure of the two accusing employees to testify, it simply cannot be concluded that the Grievant would have faired favorably had he testified.”) This argument does not control. In the case before me, there is not a lot of evidence that serious wrong doing took place. There is no non-hearsay information that any wrongdoing took place. Arbitrator Heekin indicated “there is a strong basis for concluding that this fear would likely return were the Grievant to be reinstated, especially since there is no evidence that he no longer has the emotional problems he undisputedly was having at the time in question. Therefore, reinstatement is specifically denied.” It would appear that if it had not been for the fear of emotional problems returning, that Arbitrator Heekin might have reinstated the non-testifying grievant employee in the *Cincinnati Housing* case. Furthermore, there were notarized victim statements in *Cincinnati Housing*. Elkouri & Elkouri, p. 17-112, described *Cincinnati Housing* as standing for the proposition that:

> … the arbitrator refused to order his reinstatement because he had created a climate of fear in the workplace, and he had not resolved the emotional disturbances from which he suffered at the time. [Elkouri & Elkouri apparently incorrectly cites this case as 119 LA 1359 instead of 119 LA 1389].

The Employer argues "the law of Indiana … permits drawing an unfavorable inference from the failure of a party to call a witness presumably favorable to that party who has special information relevant to the case." *Rock-Tenn Services, Inc.*, 131 LA 1468, 1487 (Kossoff, 2013). This argument does not control. To the degree that *Rock-Tenn* is applicable to the case before me, the adverse inference would cut both ways. In the case before me, the Employer, which has the burden of proof, failed to call the CPs.

Elkouri & Elkouri, p. 8-48, indicates:

> … arbitrators sometimes have expressly stated that the failure of a grievant to testify creates no inference against him or her. Even so, an arbitrator may pointedly note that the grievant's failure to testify has left the employer's case unrefuted. The latter situation assumes, of course, that the company has adequately established its case by probative evidence.

Remedy

The wording of the issue authorizes me to provide a remedy. Elkouri & Elkouri, p. 18-5.

Nolan, p. 276, indicates:

> If an arbitrator finds that a discharge was not for just cause, the typical remedy is reinstatement with full seniority and back pay.

Abrams, p. 175, indicates:

> The default remedy in a wrongful discharge case is the reinstatement of the grievant … with full back pay, including benefits, and with no loss of seniority.

The remedy will be that Grievant shall be reinstated and made whole.

Conclusion

The crucial points in this case include:

1. The Employer has the burden of proof;
2. The CPs did not testify;
3. There are no written, signed, or notarized statements by the CPs;
4. There is not a preponderance of the evidence that there was just/proper cause for the discharge;
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 grant the Grievance. Grievant shall be reinstated and made whole.

I retain remedial jurisdiction over this matter for sixty days from the date of this Award for the sole purpose of resolving any questions that may arise over application or interpretation of a remedy. *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, Part 6, Section E. Elkouri & Elkouri, pp. 7-49 to 7-54. “It is widely accepted that an arbitrator may properly retain jurisdiction to resolve remedial problems that may arise in complying with the award.” St. Antoine, p. 63.

Dated: November 18, 2024

Lee Hornberger

LEE HORNBERGER

Arbitrator

Traverse City, Michigan