

IN RE ARBITRATION BETWEEN:

**GLASS MOLDERS POTTERY PLASTICS AND ALLIED WORKERS INTERNATIONAL
UNION LOCAL 63B**

and

PROGRESS CASTINGS GROUP, INC.

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 08-50630

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April 21, 2008

IN RE ARBITRATION BETWEEN:

Glass Molders, Pottery, Plastics and Allied
Workers International Union Local 63B,

and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 08-50630
Billy Christon Grievance Matter

Progress Castings Group.

APPEARANCES:

FOR THE UNION:

Dale Jeter, Business Representative,
Billy Christon, grievant
Nick Hill, Union Steward
Greg Sticha, Local Union Secretary Treasurer
Roy Hanson, Union Steward
Al Anderson, Union Steward

FOR THE EMPLOYER:

Richard Ross, Esq., Frederickson and Byron
Linda DeRosa, Human Resources Manager
Kevin Durant, 2nd Shift Supervisor
Sue Marsolais, formerly with HR Department
(called by the Union)

PRELIMINARY STATEMENT

The hearing in the matter was held on February 5, 2008 at 9:30 a.m. at the Federal Mediation and Conciliation Service in Minneapolis, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on April 7, 2008 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated October 1, 2005 through September 30, 2008. The grievance procedure is contained at Article 6. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. There were no procedural arbitrability issues and the matter was properly before the arbitrator. The parties waived the 5-day requirement found in Article 6 Step 6 for the issuance of a decision in the matter.

ISSUES

Whether there was just cause to terminate the grievant, Billy Christon? If not what shall the remedy be?

EMPLOYER'S POSITION

The Employer took the position that there was just cause for the termination of the grievant. In support of this position the Employer made the following contentions:

1. The Employer asserted that the Employee Handbook, employer Exhibit 3, on the subject of Respectful Workplace at section 1.4 clearly prohibits disruptive behavior, disorderly conduct and insubordination. Further, the Employer asserted that it is certainly well known that any sort of physical assault on a supervisor or co-worker is strictly prohibited in the American work place and is generally severely punished, usually by discharge. Such behavior cannot be tolerated. Finally, it is again well known that the reasonable orders of a supervisor must be obeyed, even if the employee may disagree with it. As many commentators have said, the work place is not a debating society.

2. The Employer further argued that the grievant has a checkered history with the Company. He has received several SWAT (Safety, Work, Attendance and Team) notices advising him of unacceptable workplace behaviors since his hire in August 2000.

3. In addition, the grievant was suspended in June of 2007 for his attitude and refusal to perform a job as directed by his supervisor. The Employer asserted that the suspension was for very similar behavior to what he allegedly did in August 2007 and shows a continuing pattern of insubordinate and disruptive behavior. See, E-mail dated June 14, 2007 from JP Palmer to Linda DeRosa, wherein the supervisor found the grievant to be "insubordinate and belligerent."

4. The Employer noted that the grievant thus has a long history of poor attendance, poor attitude and unruly and even insubordinate behavior. In addition, he and his entire unit were given a specific notice regarding unacceptable workplace behavior in July 2007, see Employer exhibit 1, regarding the sexual harassment policy. Thus, while these incidents may or may not be considered for purposes of establishing his guilt for the incident in question, they are certainly relevant to the level of discipline which was eventually meted out, i.e. discharge, as opposed to some lesser form of discipline.

5. Further, the Employer asserted that the grievant has a history of being untruthful and cited the incident of July 2007 as an example. The grievant was disciplined for failure to come to work on time. His explanation was that he had punched in but then immediately left for a bathroom break that took 24 minutes. He claimed that he told his lead person about this. Later, he told the HR Director that he had to leave to use the bathroom for 21 minutes and, more significantly, that there was no one around to speak to about that. He was observed coming back from the restroom and the supervisor assumed he was coming late. The Employer cited this as an example of the grievant's lack of veracity.

6. The incident that gave rise to the discharge occurred on August 21, 2007. The grievant was approached by his supervisor regarding his time card for the day before. The time card was improperly filled out and the supervisor asked that the grievant fill it out correctly. Rather than complying, the Employer asserted that the grievant refused and said, "I already filled out a F**ing time card and I won't fill out another one," or words to that effect and further "F**K you" to his supervisor.

7. More importantly, during this heated exchange, the grievant physically pushed the supervisor with his chest. This act constituted grounds for immediate discharge, and the grievant acknowledged this at the hearing. The Employer noted that the grievant admitted that if he pushed or intentionally physically assaulted the supervisor, this would be grounds for termination.

8. Rather than continuing this argument out in the shop area, the supervisor directed the grievant to come to the Core Office to fill out the paperwork. This was only after the grievant initially refused to even do that, asking instead that the supervisor go and get the paperwork so he could fill it out at his machine.

9. When in the Core Office, the grievant essentially began "playing games" with the supervisor. When asked to fill out his name correctly the grievant said he did not have a pen. When given a pen he then said that he couldn't write. Frustrated, the supervisor then went and got a person from HR to attend this meeting along with a Union steward.

10. The Employer asserted most strenuously that the attempt by the Union to argue about the way the time card was completed is a red herring. The grievant did not fill his time card out properly but that is not why he was terminated. He was terminated for his conduct in shouting at, cursing out and physically assaulting his supervisor. It does not matter that others fill out their cards this way, what is important was that the supervisor told the grievant to do it the proper way and the grievant not only refused but became positively disruptive in doing so.

11. The Employer acknowledged that there were no witnesses to the physical assault other than the grievant and his supervisor and that no one witnessed the scene in the Core Office when the grievant refused to comply with the reasonable order to complete the time card correctly.

12. The Employer thus argued that the grievant's actions constituted clear insubordination, assaultive and disruptive behavior warranting termination. The request of the supervisor was reasonable and clearly directed the grievant to perform a reasonable task. Instead of simply complying with this order he became verbally abusive and physically assaultive.

13. While other lesser forms of discipline were considered, it was clear that based on his record, discharge was more than warranted and appropriate.

The Employer seeks an Award denying the grievance in its entirety and sustaining the discharge.

UNION'S POSITION:

The Union took the position that there was not just cause for the grievant's discharge. In support of this the Employer made the following contentions:

1. The Union pointed out that the grievant has a very good work record, contrary to the assertions by the Employer. He has received several very positive evaluations and even though he does have a few attendance related issues and some warnings regarding talking too much to co-workers, there is little on his record that constitutes true discipline.

2. The Union pointed out that SWAT notices are not disciplinary. While they can lead to discipline if enough of them are accumulated, the grievant never accumulated enough of them to warrant a disciplinary notice based on the SWAT notices alone. They are even labeled Counseling and Coaching Notices and are thus not disciplinary in nature

3. The Union raised what it saw as a very relevant and germane issue regarding the time cards. The Union asserted that the grievant virtually always fills his time cards out with the name "Billy C" and has never been told not to do that nor disciplined for doing it that way. Further, his employee ID number is on all the time cards so that the appropriate pay and billing can occur.

4. Moreover, the Union noted that many people do not fill out their time cards with their full names on them and introduced a representative sampling of time cards from the same approximate time frame as the incident in question to show that this was in fact the case. Moreover, there are two sets of cards at issue here. There are the time cards themselves, See Employer Exhibit 6. While some of the employees put "Leaning core" on the log sheets there was no evidence as to what they put on their time cards. It was the time card issue that was raised here.

5. The Union asserted that the supervisor was at fault for falsely accusing the grievant of improperly filling out his time cards regarding the date in question. The Union argued that the grievant spent the entire day on August 20, 2007 cleaning cores and performed no production work that day. Accordingly, there were no jobs he worked on and therefore no job numbers to fill out on the time sheet. Thus he filled it out the way he always had and submitted the card.

6. On August 21, 2007, the supervisor, "got in the grievant's ear" about this and immediately accused the grievant of incorrectly filling out his card. The grievant had just started setting up his machine for that day, as he was going to run production on August 21, 2007, and asked that the supervisor simply bring the paperwork out to him so he could both fill out the paperwork and do his job. The supervisor escalated things and began shouting and yelling at the grievant and refused to do that.

7. The grievant vehemently denied ever physically assaulting the supervisor and noted that the first time he even heard that was in the HR office sometime later and when he did he was shocked. So much so that he jumped up out of his chair and fell to the floor. The grievant was quite adamant that he never pushed or even physically touched the supervisor during any of the incident in question.

8. Further, the Union asserted that the supervisor was by far the more aggressive and introduced a memo from a management representative that indicated just that. Indeed, the Union argued, the supervisor has a well-known propensity for getting angry and aggressive and this was simply one example of that. His style is very confrontational and lends itself to conflict. The Union asserted that while both men were angry and upset, the supervisor was at least if not more so. It is well established that where a supervisor is also at fault for a verbal confrontation like this, discharge is not appropriate for the employee. The Union asserted that this is precisely what happened here.

9. The Union further noted that the grievant never refused to perform any of the tasks the supervisor asked him thus there was no insubordination. When the supervisor asked him to come to the Core Office he did. When the supervisor directed him to fill out the time card in a different way with his full name, he did. When the supervisor directed the grievant to go to the HR office to meet with his steward and a representative of the HR department he did. At no time was there ever a refusal to perform a reasonable tasks. The Union asserted that insubordination requires a clear order with a clear refusal. That latter element is missing here and there cannot be any insubordination here.

10. The essence of the Union's claim is that the grievant was never insubordinate and never refused a direct order. Moreover, while he became angry the supervisor was the aggressor and clearly also violated the very same work rule the grievant is accused of violating.

The Union seeks an award sustaining the grievance and awarding full back pay and accrued contractual benefits.

MEMORANDUM AND DISCUSSION

The grievant was hired in August 2000. His employment history has been marred with several disciplinary warnings and suspensions and several SWAT notices. These SWAT notices are not disciplinary in nature but are to advise the employee of work related issues they need to address.

The prior disciplines were for issues related to quality of work, excessive socializing and wasting time/taking excessive breaks, verbal harassment of co-workers, absenteeism, improperly climbing through a cage window, insubordination and various work performance issues. These were admitted over the Union's objection at the hearing and the question now is whether these are to be considered at all and, if so, for what purpose. The evidence showed that the SWAT notices are essentially irrelevant after one year. Some of the SWAT notices are from 2004 and 2005. Given that the incident under consideration occurred in August 2007 these were of very limited evidentiary value.

Some of the disciplinary warnings were also old and went back to 2001 and 2002. There was nothing in the labor agreement that calls for the removal of these notices nor was there any contractual provision that dealt with the evidentiary weight to be given such a notice after a certain period of time. Accordingly, while some of the older disciplinary actions were given less weight, it is clear that they can be considered as evidence in the matter for purposes of determining the remedy once just cause has been established for the case under consideration, i.e. the August 2007 incident between the grievant and his supervisor, Kevin Durant. It is axiomatic that prior discipline cannot be considered for the purpose of establishing guilt or innocence of the charge giving rise to the termination but that it can be considered as relevant and material evidence of the remedy to be imposed once that has been established.

Thus, while considerable time was spent at the hearing arguing over the admissibility of these prior warnings and much was made of them by both parties, they are not and cannot be considered to determine just cause here. The inquiry must first turn to what happened in August 2007.

The evidence showed that the grievant was at his workstation that day cleaning cores. There was also considerable discussion and argument about how the time cards were to be filled out while doing this. Customarily, the grievant would simply put his name on his card as “Billy C” and it was generally known who that was. If an employee is working on a particular job the employee fills out a Production Log indicating part number and the amount of time spent doing the operation. See Employer exhibit 8. There was evidence that most people put their full name on the logs for identification purposes but that many employees, including the grievant, do not. They put initials or their first name with a last initial or the like and the company is well aware of which employee that is. In addition, the employees are to place their “associate number” on the logs as well. The grievant was #824 and this was on each of the log forms introduced into evidence. It was apparent that this is simply a way of verifying who worked on what job. The Union argued that the grievant had been filling out his cards in this way for a long time and nobody ever told him this was a problem. Moreover, others did it as well and they were neither disciplined nor counseled otherwise.

The Employer argued that the time card issue was a red herring and that the issue here is not whether the grievant filled out his time card appropriately or not. Rather, the issue was his conduct once his supervisor told him to fill it out in a different way. The grievant is being discharged for his insubordinate and disruptive behavior, not for improperly filling out time cards. Indeed, the Employer’s argument in this vein is correct – the question is not the time cards or how they are to be filled out but rather whether the grievant was guilty of the misconduct and insubordination as alleged.

The evidence further showed that Mr. Durant had been the grievant’s supervisor for a short time prior to August 20, 2007. He approached the grievant about his time cards while the grievant was at his machine and an argument ensued very shortly thereafter. There were no other witnesses to this incident and the versions of how this unfolded were about as divergent as one could imagine. Both parties recognize that this incident comes down to the credibility of the two men who were there and reasonable conclusions to be reached based on the evidence.

The Employer alleged that the supervisor approached the grievant at the workstation and that he asked him to fill out the time card for the previous day with his full name and the part numbers on it correctly. The supervisor asserted that at that point the grievant became angry, swore at him and said that he had already filled out a F'ing time card and was not going to do another one. There were no witnesses to this and no one apparently heard it or could verify independently that this happened or what the context of this conversation was. The evidence did show that the supervisor asked the grievant to come back to the office to fill out the time card and that the grievant asked if he could do it at the machine rather than wasting time walking back to the core office. Eventually he did comply with this request and the two went to the core office.

The Employer also asserted that the grievant physically assaulted the supervisor by bumping into him with his chest. Again there were no other witnesses to this event. The Employer asserted that the grievant become coy in this meeting and asked that he be trained in the proper way to fill out the time card, that he refused to fill it out claiming he did not have a pen or pencil and that he even indicated at one point that he did not know how to write.

After the two got to the core office a Human Resources person was summoned to deal with this situation. The evidence showed that the two men were both quite agitated at this point and both were shouting and quite angry and at one point the supervisor threatened that either the grievant be fired or he would essentially quit; "either he goes or I go" was the testimony at the hearing. It was in the core office that the supervisor accused the grievant of pushing him at the workstation. The grievant became very agitated at this and literally fell out of his chair when that allegation was made.

As simple as it may seem, a case like this is often the most difficult sort of matter to decide. Here we are faced with a stark contrast in stories even though there are some things that are quite clear from the evidence. Also, there is the thorny decision about whether someone, or everyone, is lying or not or simply whether they recall things differently from what was certainly a heated conversation. This is not an exact science by any means.

What was clear is that the grievant was at his machine on the day in question. Whether he was running it or setting it up remains somewhat in doubt and the Employer made much of this minor discrepancy by arguing that it demonstrates the grievant's propensity for fabricating facts to his convenience. This did not rise to that level on this record however. "Running the machine" versus setting the machine up to be run is such a small discrepancy that it did little to undermine the grievant's credibility.

In any event, he was approached by Mr. Durant about the time card. It was more than likely that he was indeed asked to fill out the time card differently just as Mr. Durant testified. How this was done was again something of a dispute. The Union argued that Mr. Durant's supervisory style is confrontational and that he "gets in people's ear" about things and comes across in an accusatory fashion virtually designed to get an angry or defensive response.

The Employer asserted that the grievant became immediately defensive and used foul language towards Mr., Durant almost immediately. The Employer acknowledged that there were no witnesses to this but asserted that it is more likely than not that the grievant used foul language and initially balked at filling out the time card since he had a history of doing that very thing, one such instance occurring only two months prior to this incident.

Obviously, prior actions cannot be used to establish guilt or innocence but can be useful to try to make some sense of what happened here. The determination of what happened here must be based on the evidence on this record about this incident. What is clear is that both men "get in each others' ear" almost immediately after this conversation started and escalated this far beyond what was probably necessary.

What is also clear on this record is that no physical assault occurred as alleged by the Employer. The evidence showed that the argument at the machine became heated and that the two were physically quite close. It is entirely possible there could have been incidental contact between the two during this but it was entirely unclear who initiated this "Belly bumping" so to speak.

There was no evidence that there was an intentional assault or anything of the sort. The evidence showed that the first time this allegation was raised was well after it allegedly occurred and that when it was the grievant's reaction to it was palpable. The fact that the allegation of physical assault was not made until the conversation in the core office undercuts the credibility of this assertion. If a physical assault had occurred one would expect that it would have been grounds for immediate discharge at that moment. At the very least the allegation would have been raised immediately. Instead, the grievant was directed to go to the core office where the diatribe over the time card continued for some time without the allegation of a physical assault being made until well into that meeting. On this record this allegation at least cannot be sustained.

The question is then whether there was such disruptive or insubordinate behavior as to warrant discipline. It should be noted that this is an industrial shop where some course language and even profanity is used. It is also loud. The exchange between the two did not apparently arouse any special attention from anyone else on the area since no one came forward to testify or indicate that they saw this conversation at the grievant's machine or that there was such disruption that they even paid any attention to it. On this record it simply cannot be determined that the grievant's actions there caused disruption in violation of the Employer's policy.

Was there insubordination? Insubordination is generally regarded as the clear refusal of a clear order or directive of a supervisor. Here the grievant's action become far more suspect. The record showed that he was directed to fill out his time card by his supervisor. His response was fairly terse and was that he already had and was not going to do another one. Eventually though he apparently relented and asked if he could do it at the machine rather than wasting time shutting the machine down and going to the office. For whatever reason the supervisor directed him to shut the machine down, even though that would have delayed work for the day, and go with him to the core office to fill out the time card. The grievant balked at this but eventually complied and went to the core office. All the while the running argument and shouting between them continued into the core office.

There the grievant's actions bordered on then sophomoric. He asked for training and then a pen and then asserted he did not know how to write. While some of this can be attributed to the heat of the moment and possibly a reaction to the already hot exchange going on between them, it certainly does not show the sort of attitude one would expect from an employee who was being asked to comply with a directive of a supervisor.

While this did not constitute a clear refusal to comply, in this context the grievant's actions crossed the line and were certainly obstreperous enough to warrant some discipline. This will be discussed below.

There was the question of whether the grievant was so disruptive as to warrant discipline for violation of the Employer's workplace conduct policy. Certainly the grievant was angry and engaged in a shouting match with his supervisor. However on this record it was clear that this may well have been caused by the supervisor's actions as much as anything else. Ms. Marsolais indicated in a follow up memo that the supervisor seemed more agitated and angry than the grievant was at that meeting.

It was not clear why the supervisor would have escalated this to this level even though he had very little history with the grievant. The record showed that he had been the supervisor for only about one week. Elkouri notes that "where an employee is guilty of wrongdoing but management, (ordinarily the supervisor) is also at fault in some respect in connection with the employees conduct, the arbitrator may be persuaded to reduce or set aside the penalty assessed by management." Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. at page 938-939. Elkouri further notes in that same section that a physical assault by the employee may yet be sustained even where the supervisor was also at fault but no such physical assault was found to have occurred on this record.

Here the crux of the Employer's case is that the grievant was at his machine either running it or preparing to run it and was asked politely by the supervisor to re-fill out a time card and that he needed to do that in the core office and that the grievant simply flew off the handle, swore at the supervisor, threatened him, assaulted him and told him he would not comply.

The truth in a situation like this is always an elusive concept, the determination must be based on the hard evidence that does exist and must be based on the reasonable and rational conclusions to be drawn from that evidence. Here the Employer's argument that the grievant's venomous attack was done for no apparent reason is akin to an example of road rage where both sides claim to have been minding their own business when somebody else cut them off, cursed obscenities at them and eventually ended up out on the shoulder of the road pounding the hood of each other's car. That simply does not make sense. Something happened to touch the grievant off. There was enough evidence on this record to show that the supervisor's actions were nearly as inappropriate as the grievant's. It should be noted that this determination was based not so much on the grievant's testimony but from the evidence and testimony of the other witnesses in the matter.

The employer tried mightily to show that the grievant's version of the events in question cannot be trusted since he has a propensity for fabrication and outright lies. This allegation was based on prior incidents which were not entirely explored, nor should they have been. The question is whether there was evidence he was lying here about the events in this matter.

He testified credibly that he never assaulted anyone. This was supported by the fact that the allegation of assault was not brought up until well after the pair were in the core office. He further testified that he felt that he had filled the time card out correctly and that he did it that way frequently. Indeed, the time cards showed he had and that others do as well. He further testified that he was puzzled by the request since he had been cleaning cores and there were no part numbers to fill out and that accounting would have no trouble telling who he was by his name and ID number on the card. Indeed that turned out to be true as well. He testified that the supervisor was more out of control than he was; a fact verified by the former HR employee who testified at the hearing and her e-mail to the same effect. He never denied some of the inappropriate things he did do that day, such as the use of profanity, asking for a pen or training.

The Employer further asserted that the grievant testified that he “had no clue” why he was fired and yet made specific statements alleging why he was terminated in a separate EEOC action filed over this same action. This statement proved very little. The grievant was essentially asked why the Company made the decision to terminate him and required him to assume what someone else was thinking. The standards for determining just cause in this setting is very different from the standards for determining a federal or state statutory violation for discrimination.

There was also some evidence that he lied to Ms. DeRosa in July 2007 about another incident. This was not fully explored at the hearing since it was not under consideration. While there was insufficient evidence to establish that the grievant was a habitual liar this at least provides some explanation for why the Company did not believe him. That however does not end the inquiry. The question is whether the evidence showed that the grievant violated work rules and was insubordinate or disruptive enough to warrant discharge for this incident.

All in all, the grievant’s story, while containing some inconsistencies when compared to the testimony of other witnesses, was fairly consistent all along here. On this record it cannot be said that he is intentionally lying or fabricating his story about the events in question.

This is not to say at all that the grievant’s response was appropriate. There was some compelling evidence as noted herein that the grievant used course language, and initially at least refused to comply. This also was an inappropriate response. Finally, his actions once in the core office were also entirely uncalled for.

It is against this set of factual determinations that the question of whether there was just cause for his discharge must proceed. Certainly there was considerable evidence that the supervisor was a substantial contributing factor in the way this incident unfolded and while it is not for an arbitrator to dictate how a supervisor runs his area or does his job, it is up to the arbitrator to determine if a discharge can be assessed when one operates like this.

As Elkouri and countless arbitrators have noted, where the supervisor is also complicitous in or engages in the same behaviors complained of in an employee, the discipline will be mitigated or even set aside. Here there was simply insufficient cause to terminate the grievant on this record.

The inquiry now turns to the remedy. As noted above, the evidence did not establish sufficient cause to terminate the grievant but that the grievant was part of the problem here. Certainly his prior record, good and bad, must be taken into account. The Union alleged that the Employer focused only on the negative aspects of the grievant's prior record. There was some truth to that but there was insufficient showing of any discrimination toward the grievant. He does have a somewhat spotty prior disciplinary record and despite some good evaluation and work records, he must be aware of the responsibility to comply with the directives of a supervisor, whether he thinks he needs to or not.

His prior disciplinary record shows a series of verbal and written warnings going back to 2001. He also was suspended for what appears to be a day but even that was not entirely clear on this record. He acknowledged that he was suspended but the evidence was somewhat unclear as to whether he suffered any actual wage loss as the result. For this purpose it must be assumed that he was suspended for his actions in June 2007 when he allegedly refused to assist in the training of a new employee. Given his prior record and the seriousness of the actions he did undertake in this matter it is determined that a 30-day suspension be imposed.

Thus, the grievant is to be reinstated to his former position with the Employer within 5 business days of this Award. Further, the grievant shall be made whole for all back pay and accrued contractual benefits less a 30-day suspension for his actions herein. The Union argued that he should receive full back pay plus the other wages he has earned in the interim but this would result in a windfall to the grievant. Further, traditional mitigation of damages principles would apply to reduce any such back pay award. Accordingly, any back pay shall be reduced by any government unemployment benefits or other governmental benefits received and any wages or other salary he has earned since his termination up until the time of his reinstatement herein.

AWARD

The Grievance is SUSTAINED IN PART AND DENIED IN PART as set forth above. The grievant is to be reinstated to his former position with the Employer within 5 business days of this Award. Further, the grievant shall be made whole for all back pay and accrued contractual benefits less the 30-day suspension for his actions herein imposed above. Back pay shall be reduced by any government unemployment benefits or other governmental benefits received and any wages or other salary he has earned since his termination up until the time of his reinstatement herein.

Dated: April 21, 2008

Jeffrey W. Jacobs, arbitrator

GMP and Progress Castings Group - Christon