

**IN THE MATTER OF ARBITRATION
BETWEEN**

Prospect Foundry,

Employer

**FMCS Case No. 080320-53080-3
Blahe Termination Grievance**

and

**Opinion and Award
A. Ray McCoy
Arbitrator**

GMP, Local 63B,

Union

June 12, 2008

Appearances

For the Employer

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JURISDICTION

The collective bargaining agreement (hereinafter “Agreement” or “Contract”) between Prospect Foundry, Inc. (hereinafter “Employer”) and Glass, Molders, Pottery, Plastics and Allied Workers International Union, Local 63B (hereinafter GMP Local 63B or “Union”) was effective December 19, 2003 and expired on May 31, 2008. The Agreement was effective during all times relevant to this grievance/arbitration. The instant grievance was processed pursuant to the terms of Article 16 of the Agreement and is properly before the arbitrator. The Agreement gives the arbitrator authority to resolve this matter and sets forth limitations on that authority. The arbitrator is not permitted to “render an award which has the effect of adding to, subtracting from or in any other way changing the provisions of this agreement.” (Employer Exhibit 1, p. 18, hereinafter “Er. Ex. ___”) The Agreement also calls for the arbitrator to “set forth fully the basis on which the decision is made, together with the specific provisions of the Agreement relied upon, within thirty (30) calendar days . . .” from the time the record is closed or the final submissions are received from the parties. (Id. at p.18)

The undersigned arbitrator was notified of his selection by the Federal Mediation and Conciliation Services on March 28, 2008. The parties selected Wednesday, May 14, 2008 for the hearing of this matter. The hearing took place as scheduled at the offices of the Employers Association Inc. in Plymouth, Minnesota. Both sides had a full and fair opportunity to present their cases. The Employer called three witnesses in support of its case as follows: Ms. Allison Adam, human resources manager, Mr. David Garrick, melt supervisor and Mr. Scott Comer, general night shift supervisor. In addition, the Employer introduced five exhibits. The Union

called two witnesses, the Grievant, Mr. Jonathan L. Blaha and Mr. Mark Williams, union steward. Mr. Greg Sticha, GMP Local 39B, financial secretary attended but did not testify. The Union introduced one exhibit as well. Finally both sides presented written opening statements. At the conclusion of the hearing the parties agreed to oral closing arguments and the arbitrator closed the record at that time.

ISSUE

The issue to be decided is whether the Employer had just cause to terminate the Grievant and if not, what is the appropriate remedy.

RELEVANT ARTICLES IN THE AGREEMENT

Article 6 **Shop Rules**

Employees covered by this Agreement will observe such rules and regulations as may be established by the Management and the Shop Committee for the promotion of health and safety and the welfare of the Employer and employees, providing such rules and regulations do not conflict with or supersede any of the terms and provisions of this Agreement. Such rules and regulations shall be posted on the Shop Bulletin Board. New shop rules or changes to existing shop rules shall be communicated to the Shop Committee prior to implementation, with the Shop Committee's input taken into consideration.

Article 13. **Discharge**

The Employer shall not discharge any employee without just cause. Any claim of unjust discharge must be presented to the Employer in writing by the employee or Union within seven (7) working days of such discharge and shall be settled immediately in accordance with Article 16 of this Agreement. The Union Chairperson or his/her designee will be notified in writing within two working days when an employee has been discharged. An employee being suspended or discharged may request the presence of his committeeman or his designee (or in their absence another employee).

RELEVANT WORK RULES

Prospect Foundry Employee Handbook

Inattention to Duties

Loitering, sleeping on the job, or inefficient performance will not be tolerated and will be subject to disciplinary action, up to and including termination of employment.

POSITIONS OF THE PARTIES

Employer's Position

1. The Grievant was terminated for sleeping on the job.
2. The shop rules referenced in Article 6 of the Agreement are synonymous with the "Work Rules" in the Employee Handbook. Notice of the work rules were provided to the union in advance of implementation.
3. The Company notified its employees of the work rules one of which prohibits employees from sleeping on the job.
4. Twelve regular employees and four temporary employees have been terminated for sleeping on the job. All but one of these employees was terminated for their first offense of sleeping on the job. The one exception was due to proof of a medical condition caused by work.
5. There is virtually a zero tolerance for acts or lack of actions which can jeopardize the health and safety of him or her or co-workers.
6. Inattention to duties in a dangerous environment cannot be excused because the amount of time the inattention lasted is brief. The Employer views inattention to duties for a brief period of time, given the nature of Foundry work, as it does theft where the value of the thing stolen is less important than the fact that the employee consciously engaged in theft of company property.
7. While some types of inattention to duties may be less serious and therefore warrant lesser discipline, sleeping on the job is considered to be among the most serious examples of inattention to duties.
8. In cases of determining the appropriate level of discipline, an employer may consider the motivation of an employee in deciding to steal company property. However, when it comes to sleeping on the job it doesn't matter whether the employee was "nesting" or

simply dozed off at the work station. Sleeping is negligence which can jeopardize the health and safety of employees.

9. When sleeping on the job occurs it must be dealt with swiftly and severely so as not to send an inappropriate message to employees who work in an exceedingly dangerous environment.
10. The arbitrator should apply a preponderance of the evidence standard to this grievance. Since the Grievant admitted sleeping on the job to his supervisor and there are no mitigating circumstances the grievance should be upheld.
11. The Employer's decision to terminate satisfies the just cause standard. There was proof of the work rule infraction, notice of the work rule and knowledge on the part of the Grievant of the rule, there was a fair investigation conducted prior to discipline and the Grievant was treated in the same manner as other employees found to have violated the rule against sleeping on the job. The Employer's decision satisfies the test of reasonableness and should be upheld.

Union's Position

1. The Grievant was discharged for dozing off a couple of minutes while watching a machine move unused sand molds into a shaker where the sand is recycled. The Grievant's job was to sit and watch the machine in order to shut it down in the event of a malfunction. The job is described as a very boring job because you have to sit and watch and are only required to do something in the event the machine malfunctions.
2. The discharge was not for just cause. If discipline is warranted, it should be less than discharge.
3. The Employer has not met a key element of just cause which has to do with fair, equal and consistent enforcement of rules. Other employees have been caught sleeping on the job and were not terminated.
4. The punishment doesn't fit the crime. Other employees have been caught sleeping during boring circumstances and were not fired. Employees are required to view safety films and often fall asleep during the presentation.
5. Discipline should be reasonable. The Grievant is a valued employee as evidenced by his

promotion to lead man status. He did not build a nest or attempt to hide for the purpose of sleeping. The Grievant did not act intentionally but inadvertently dozed off. His was a minor, inadvertent, unintentional infraction.

FINDINGS OF FACT

Prospect Foundry is a gray and ductile foundry located in Minneapolis, Minnesota. It is owned by TMB Industries and has approximately 125 employees. The employees are represented by Local 63B. The Union filed the grievance at issue here on September 13, 2007. The Union filed the grievance to challenge the Employer's decision to terminate Mr. Jonathan Blaha. The Employer hired Mr. Blaha (hereinafter "Grievant") on August 9, 2004. The Employer promoted the Grievant to the lead position. The lead fills in for absent employees and therefore must be able to work the full range of stations. The lead is required to provide work direction to other employees from time to time. The Grievant earned a good work record during the three years that he worked for the Employer.

On September 10, 2007, the Employer assigned the Grievant to dump unused molds. The term "dumping" is misleading. The Employer has a machine which actually dumps or moves unused sand molds into a shaker where the sand is recycled. The employee assigned to "dump" molds must actually watch the machine perform the task. The Employer requires someone to observe the machine as it dumps the molds to make sure someone is available if the machine malfunctions. The employee would be required to shut the machine down in the event of a malfunction in order to prevent damage to the equipment or danger to himself and co-workers. Employees performing the task of dumping molds normally sit and watch the machine perform the tasks. The machine takes approximately one hour to complete the dumping process.

The Grievant was assigned the task on his first day back to work following a brief illness.

The Grievant testified that he did not feel ready to return to work but could not afford to take another day off. The Grievant took up a seated position to observe the machine. He dozed off for a brief period of time. An employee passing by the area observed the Grievant sleeping and went to inform the supervisor. The supervisor testified that as soon as he was notified he immediately asked the general night supervisor to accompany him to the area in order to observe the Grievant sleeping. By the time they arrived the Grievant was already awake. According to various witnesses, the amount of time the Grievant was asleep ranged from 4-15 minutes. The supervisor notified the human resources manager of the incident and a meeting was held the following day. During the meeting, the Grievant admitted to the human resources director that he had indeed been asleep while assigned to dump molds. The Employer determined that discharge was the most appropriate remedy based on its review of how it treated other employees found to have violated the rule against sleeping on the job.

Between 1988 and the present, the Employer terminated twelve (12) employees, including the Grievant, for sleeping on the job. The twelve terminations can be broken up into distinct groups according to similarities in fact patterns. One category of cases involves what has been termed “nesting.” Nesting is hiding within the workplace where the employee cannot be seen and taking steps to prepare a place for sleeping on the job such as putting cardboard down. For example, one employee found a place in the back of the maintenance crib area and covered himself up for the purpose of sleeping and not being detected. Another employee had gone underneath various machines and fallen asleep there. The area underneath the machines is called the pits and is known to be dark and full of sand. The shift supervisor searched for twenty (20) minutes before finding the employee. The supervisor also discovered that the employee was

sleeping on cardboard down in the pits. Among the twelve (12) employees terminated for sleeping on the job, some slept through their break time and therefore did not return from their breaks on time. These employees were sleeping on the job but not at their assigned work stations. Finally, there were others among the twelve (12) terminated for sleeping on the job who were actually asleep at their assigned stations. For example, one employee was asleep in the cab of the vehicle used to run iron up and down the rails as needed. He was found in the cab of the vehicle asleep.

The evidence does show that the Employer made an exception to its practice of terminating employees for either intentional or unintentional sleeping on the job following a first offense. The exception was made for an employee who was able to demonstrate that he was on medication for a work-related injury. The employee claimed the medication made him fall asleep. The Employer also made an exception for employees who fall asleep during safety meetings. Testimony revealed that some supervisors have witnessed employees falling asleep in safety meetings. Apparently, falling asleep in the meetings happened often when safety films were being shown. Even though the supervisor in charge of the meeting was well aware that one or more employees were sleeping and had to wake an employee up during one meeting, no disciplinary action was taken against the offending employees. Otherwise, the Employer's practice has been to terminate employees on the first offense of sleeping on the job.

OPINION AND AWARD

The parties' Agreement imposes a standard of just cause upon the Employer when it comes to decisions to terminate a member of the bargaining unit. Just cause means that the

Employer's reason for discharging an employee is a reasonable one. Of course, just cause includes proof that the employee engaged in the prohibited conduct and notice that doing so could lead to discharge. Just cause also implies fairness in the application of discipline given the specific rule violated and the facts of each case. Here, the Employer has identified conduct that cannot be tolerated because it interferes with the effective management of the enterprise.

As the Employer demonstrated, the shop rules referenced in Article 6 of the Agreement are synonymous with the work rules in the Employee Handbook. There is no question that the Agreement clearly tells employees that they will be subject to a set of work rules and references a process by which the Union will be notified of the Employer's intent to add to, modify or otherwise alter existing work rules prior to doing so. There is also sufficient proof that the Employer established a practice of handing out those work rules to each and every employee at the time of hire in order to make certain that they could familiarize themselves with work rule expectations. These are excellent practices that help everyone involved understand roles, expectations and responsibilities.

Here the Employer clearly informed the Grievant that inattention to duties is a violation of the work rules. More specifically, the Employer notified the Grievant at the time of hire that sleeping on the job ". . . will not be tolerated and will be subject to disciplinary action, up to and including termination of employment." (Er. Ex. 2 at p. 14)

It is important to note that the Employer does not say that the first offense of these examples of inattention to duties will lead to discharge. The Employer intentionally states that these acts will be subject to discipline up to and including termination. This language clearly implies that consideration will be given to whether discharge or some lesser form of discipline

will follow the rule infraction given the circumstances of each case. Therefore, it makes sense that employees would not know that a first offense of sleeping on the job and an unintentional instance of sleeping on the job, in particular, would automatically lead to discharge. It is important to note that the arbitrator finds the Employer has chosen the language of the work rules very carefully. For example, violation of the drug and alcohol prohibition will result in discharge. “Possession or use of alcohol or illegal drugs on Company premises is strictly forbidden. ***Violation of this rule will result in termination of employment.***” (Er. Ex. 2 at p. 13, Emphasis added.) Likewise, refusal to follow the reasonable instructions of the supervisor is considered insubordination and may result in “termination of employment.” (Id at p. 14) Even more clear is the Employer’s prohibition against fighting.

“Fighting on Company premises is strictly prohibited. Employees who engage in fighting are ***subject to termination of employment.*** Prospect Foundry, Inc. has a “***zero tolerance***” policy regarding violence and physical or verbal threats.” (Id at p. 16, Emphasis added.)

Likewise, theft of property whether the Employer’s, co-workers, suppliers or customers will lead to discharge. (Id at 15) Obviously, when the Employer intended to send a message that conduct would lead to discharge on the first offense it made that fact clear in the handbook. Otherwise, it left open the type of discipline that might be imposed and implied that discharge was not automatic. The Employer states that violating other work rules such as abuse of company property, dishonesty, gambling, horseplay, ***inattention to duties***, harassment and even possession of or brandishing weapons in the workplace employees “are subject to discipline up to and including termination.” (Id at pages 13-16)

The arbitrator is mindful that the Employer’s intent, as its disclaimer in the Employee

Handbook states, is to approach the work rules a guide and with the full understanding that they may be changed, terminated or otherwise altered and are not considered to be all-inclusive or final. However, in order for the work rules to provide the kind of notice that the Employer's definition of just cause requires, it is important to view the current handbook in effect at all times relevant to this grievance, as an important guide in resolving the issue in this case. The work rules, incorporated into the Agreement by reference, represent notice to employees and serve as a guide to prohibited conduct. They also set expectations of how management will respond when the work rules are broken.

The significance of this guide, in this case, is that it represents the Employer's pronouncement that it will, given the particular work rule the Grievant violates, give due consideration to the facts of the infraction and make a determination as to the appropriate level of discipline rather than move immediately to discharge. The Employer, contrary to its stated position argued that sleeping on the job is similar to theft and that it has "virtually a zero tolerance" for acts or omissions which jeopardize safety.

The Employer's testimony on this point cannot be upheld. Here, the handbook clearly states that theft will be cause for termination. It does not say "up to an including termination." Therefore, the Employer's policies demonstrate zero tolerance for theft and something less than that for sleeping on the job. If this were not true, the Employer should not have granted an exception to the employee who was sleeping on the job due to the medication he was taking for a work related injury. The Employer, in that case, gave consideration to mitigating factors and decided not to discharge the employee. In fact, it appears that the Employer did not impose any discipline in that case. Contrary, therefore, to the Employer's assertion of zero tolerance and the

need to send an appropriate signal regarding safety to the rest of the workforce, its practice is something less than that. The fact that the Employer granted an exception under any circumstance defeats its position that sleeping on the job is punishable by discharge regardless of the employee's intent. Obviously, the Employer considered it significant that the employee could demonstrate that he fell asleep, in part, due to prescription medication taken to aid with the effects of an illness or injury arising out of the work environment.

Such an exception is consistent with the language in the Employee Handbook which states that inattention to duties "will be subject to disciplinary action up to and including termination of employment." (Er. Ex. 2 at. p. 14) The arbitrator finds it significant that the prohibition against sleeping on the job is lumped in with loitering and inefficient performance. Loitering is clearly not the kind of act that would lead to discharge on the first offense. Similarly, Employers are expected to give employees an opportunity to improve their performance rather than simply discharging them. The act of lumping these work rules together suggests that violating them will result in a progressive disciplinary approach characterized by something short of discharge.

The Employer argued that sleeping on the job had to be dealt with severely because of the safety implications associated with the infraction. If that were true, the Employer should have used the stronger language as it did in describing the discipline that would follow a violation of the work rules prohibiting drug and alcohol use, insubordination, theft and fighting. In those work rules the Employer makes clear that a violation will lead to termination. The Employer should have also separated that rule out as it did with fighting and used the "zero tolerance" language that appears in the section on fighting in the workplace. Having failed to take those

steps, the arbitrator finds that the Employer's argument is out of line with its practice and is unreasonable as applied to the Grievant.

The Employer signaled a willingness to consider a lesser penalty than discharge in its policies and practice as discussed above. However, in an effort to defend its decision, maintains, contrary to the Agreement, that discharge can be the only result for sleeping on the job. Just cause also implies that the discharged employee did not live up to his responsibilities. In this case, it is far too harsh to force the Grievant into the job hunting process with a discharge on his record. The discharge signals to potential employers that the Grievant was irresponsible. However, the Grievant's work record suggests otherwise. The Grievant was very responsible and so much so that he was willing to show up while not fully recovered from an illness. Those employees who were found to be "nesting" should have their discharge follow them because their behavior was irresponsible and intentionally so. Just cause cannot possibly mean that the Grievant should be painted as no different from a "nester."

In this case, the Grievant testified that he had missed the last work day prior to September 10, the day he fell asleep on the job, due to illness. He also testified that he did not feel fully ready to return to work but could not afford to miss another day of work. The Employer did not dispute the Grievant's testimony but simply established that the Grievant had not revealed that information during the meeting held to investigate the charge. The arbitrator finds that the just cause standard in the Agreement requires the Employer to consider such factors as it did with a prior employee in determining the appropriate level of discipline.

Here, the Grievant said that while he was not on medication that he was not feeling completely recovered from his illness. It was the combination of not having fully recovered from

the illness and the task of simply watching the machine perform its functions that caused the Grievant to fall asleep. The Grievant did not lie about falling asleep but acknowledged that he did and apologized. Fortunately, the machine did not malfunction and the Employer suffered nothing but the loss of between four (4) and fifteen (15) minutes of observation time. When the Grievant's actions are compared to those of employees who intentionally hid themselves from view and prepared a place to sleep, it is not possible to say that the Employer's treatment of the Grievant amounts to just cause.

The Grievant was not engaged in "nesting." The Grievant did not try to hide out in a secret spot in the workplace in order to avoid detection and create a comfortable place to sleep while getting paid. It is inconsistent with reasonableness to say that the Grievant should be considered no different than a "nester" or one who intentionally engages in what amounts to theft of wages by intentionally hiding out to sleep and still get paid.

An employee engaged in nesting plans to absent himself from his assigned responsibilities for a significant amount of time and leave his co-workers and supervisors without explanation to handle whatever duties he has abandoned. That is not the Grievant's situation. Here the Grievant enjoyed an excellent work record, received a promotion to lead and consistently performed in that role. Due to an illness and a boring task assigned to him after eating lunch, the Grievant fell asleep at his station for a few minutes. It was an unintentional infraction of a work rule under circumstances similar to the employee who unintentionally fell asleep due to the prescribed medication he was taking while working.

There is no distinction of significance between the two employees and they both should have received the same response from the Employer. The employee who fell asleep due to the

medication was not disciplined and given the facts of this case, the Grievant should not be disciplined either. To maintain that discharge is the only appropriate remedy to be applied for the infraction of the rule against sleeping on the job begs the question why the Employer would care that an employee was on medication and therefore should be given another chance. One could argue that knowing the importance of the safety issue and the possible consequences of falling asleep, given the nature of foundry work, that an employee is behaving irresponsibly when he takes medication that could lead to drowsiness. This is especially true since most medications come with instructions that spell out whether operating machinery, driving or similar activities should be avoided while taking the medication. Here, the Employer simply provided that employee another opportunity.

The Employer's emphasis on the significance of the safety issue was also undermined by testimony that employees regularly fell asleep in safety training meetings and particularly while watching safety training films. These employees fell asleep in front of supervisors who apparently commented but took no steps to discipline them. This conduct took place in the workplace during a mandatory activity for which the employees were paid and during a workshop on safety no less.

Finally, the Employer did not entertain any mitigating circumstances or other factors that might lead to a reduction of the discipline to be applied. As stated above, the Grievant was a good worker as evidenced by his unblemished work record and promotion to lead as well as his honesty. These are the kind of factors that are worthy of consideration in an effort to arrive at a just and reasonable level of discipline. The Employer's failure to consider mitigating factors is contrary to the policy language of its employee handbook and therefore Article 6 of the

Agreement which references the rules.

AWARD

Based on the foregoing and the record as a whole, the grievance is sustained. The Employer will rescind the discharge and make the Grievant whole. In this case, the make whole remedy provides back pay minus any unemployment compensation received by the Grievant. It also restores the Grievant's seniority rights and returns him to the lead position that he held at the time of discharge. Moreover, the Employer is required to remove any reference to this discipline from the Grievant's personnel file.

Respectfully submitted,

Date: June 12, 2008

A. Ray McCoy
Arbitrator