

IN THE MATTER OF THE ARBITRATION BETWEEN

INTERNATIONAL ASSOCIATION)	FEDERAL MEDIATION AND
OF MACHINISTS AND AEROSPACE)	CONCILIATION SERVICE
WORKERS, DISTRICT LODGE 77,)	CASE NO. 09-54336
)	
)	
Union,)	
)	
and)	
)	
)	
NILFISK-ADVANCE, INC.,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

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On July 15, 2009, in Plymouth, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, David M. Dibenedetto. Post-hearing briefs were received by the arbitrator on August 1, 2009.

FACTS

The Employer manufactures industrial floor cleaning equipment at several plants in the United States, including one at Plymouth, Minnesota. The Union is the collective bargaining representative of most of the non-supervisory employees of the Employer who work at its Plymouth plant.

The grievant was hired by the Employer on February 10, 1976. From then until January 6, 2009, the date of his discharge, he worked at the Plymouth plant as a Warehouse Worker. On that date, Mary B. Brobjerg, Human Resources Manager, gave him written notice of his discharge on the ground that he had violated General Work Rule 21, which provides that discharge is the penalty for the first occurrence of "theft or unauthorized possession of Company property or that of another employee." On January 7, 2009, the Union brought the grievance now before me; it alleges that the Employer did not have just cause to discharge the grievant.

Below, I summarize the evidence about the circumstances that led to the grievant's discharge, most of which is not in conflict. The grievant suffered a work-related back injury in October of 2007, for which he initiated a Workers' Compensation claim. He testified that the injury caused him to have severe pain that still persists. The physician treating his injury prescribed Percocet for pain relief, and the grievant began taking that medication soon after the injury. His physician has recommended a fusion of three lumbar vertebrae, but the grievant is uncertain whether he should undergo that procedure.

In July of 2008, the grievant obtained a leave of absence to accommodate his entry into chemical dependency treatment. As part of his treatment plan, he discontinued taking Percocet. The grievant testified that on about November 7, 2008, he was suffering extreme pain while at work and that he had no current physician's prescription for Percocet. He testified that he took "a few" pills from the supply of Percocet that Duane Hass, a co-employee, kept for relief of pain at Hass' work station on the shop floor. The grievant testified that no one saw him take the pills, that he dropped one of the pills on the floor and that he took the pills without permission from Hass. Two employees who learned that pills were missing from Hass' supply reported the taking to Paul Dyslin, a supervisor; Dyslin told Kenneth Page, Plant Manager, about the missing pills.

The grievant testified that, after taking the pills, he told his Alcoholics Anonymous counselor that he had taken them because he "felt bad" about having done so. On November 10, 2008, on the recommendation of his counselor, he told Hass that he had taken his pills, and he apologized. According to the grievant, Hass told him, "don't worry about it." A few days later, the grievant asked Hass if he would give him more of the Percocet.

Dyslin testified that "around Thanksgiving" he talked to Hass about the missing pills, that Hass told him someone had stolen his pain medication and that the loss would require him to cut back on the amount he took. Dyslin testified that at the end of November, he told Brobjorg about a theft of pills on the shop floor.

Brobjorg testified that she first heard of the missing pills on December 5, 2008, when her supervisor, David R. Tourville, Vice President for Human Resources, asked her about them. At that time, she was busy with the implementation of layoffs, including the layoff of Page, the Plant Manager of the Plymouth plant. During the week that began on Monday, December 8, 2008, she asked supervisors on the shop floor, including Dyslin, what they knew about the missing pills. Dyslin told her that he had talked to Hass about a theft of his medications after two employees had reported the incident to him. Tourville then directed Brobjorg to meet with Hass and Dyslin to find out more about the missing pills,

On December 16, 2008, Brobjorg and Dyslin met with Hass, who told them 1) that he had noticed at the beginning of November that a bottle of his pain medication, which had been about 75% full in the morning, was only about 25% full that afternoon, 2) that the bottle when full contained about 120 pills, 3) that he thought that about fifty pills were missing, and 4) that the grievant came to him a few days later, on about November 10, 2008, and apologized for taking the pills.

Brobjorg also testified that on about December 17, 2008, Hass informed her that the grievant had come back to him on about November 12, 2008, and asked him for more pills, but that he refused, telling the grievant that he would be short of pills for the rest of the month. Brobjorg testified that Hass was a good worker and that she had no reason to doubt his account. Also on December 17, 2008, Brobjorg informed Tourville about her

interview of Hass, and Tourville asked her to get a signed statement from Hass, incorporating the information obtained from her interviews with him.

On January 5, 2009, Brobjorg and Dyslin met with Hass again. She testified that when she told Hass she would like him to give a signed statement about the incident, he asked her to prepare it for his signature. She testified that she prepared a written summary of his account of the incident, and that, when she asked him if it was accurate, he agreed that it was and signed it. The Employer presented in evidence the signed statement that Brobjorg thus obtained from Hass, which I reproduce below:

The following is a recap of the conversation on December 16, 2008, between Duane Hass and myself, with Supervisor, Paul Dyslin present.

Due to hearing information from several sources about Dave Dibenedetto stealing prescription medication from Duane, I requested a meeting with Duane to investigate this further.

Duane confirmed that Dave stole prescription drugs from him during the first week of November 2008. Duane is legally prescribed both Oxycotin [sic] and Percocet for his injury, and keeps them in a container at his work station to take as needed. The Percocet had recently been filled for 120 pills and he estimated that the bottle was 3/4 full that morning. When Duane came back to his work station, he saw one [of] his pills on the floor, so he looked into his container where he keeps his Percocet and found that only 1/4 of the bottle remained. Duane estimates that 50+ pills were taken.

The next day, Dave kept looking over to where Duane keeps his medicine and Duane wondered if that was who took his medicine. Several days later, Dave came to Duane and admitted that he took the Percocet and apologized for his actions. A few days after Dave apologized for stealing the prescription, he approached Duane asking if he could have some of his Percocet. Duane responded that, no, you

wiped me out and I still have a week to go until my doctor appointment for a refill. Duane did report to his doctor what happened and that he had been on reduced medication as a result.

I have read and agree that the above stated information is true and accurate.

[Signature of Duane Hass] January 5, 2009

On January 6, 2009, at the direction of Tourville, Brobjorg met with the grievant, Dyslin and two shop stewards representing the Union. According to Brobjorg, at first the grievant denied that he had taken pills from Hass, but he then admitted doing so, though he said that he had taken fewer pills than Hass reported. The grievant told her that he had apologized to Hass. Brobjorg told the grievant that his employment was terminated. The stewards suggested less severe penalties, including a "last chance agreement," but Brobjorg refused.

The meeting of January 6, 2009, was the first time that Brobjorg or any management representative heard the grievant's account of the incident. Brobjorg testified that she would have discharged the grievant, even if he had denied the theft or even if he had said nothing. She had been directed to do so by Tourville.

The following is a summary of Tourville's testimony. It has been a requirement appearing in many successive labor agreements between the Union and the Employer, including the agreement in force at the time of the events leading to the grievant's discharge, that the Employer have "just cause" to discharge an employee. In addition, for many years, the Employer has had in place General Work Rule 21, which provides

that discharge is the penalty for the first occurrence of "theft or unauthorized possession of Company property or that of another employee." The Employer enforces that rule according to its content, discharging employees who steal. As an example, Tourville cited the discharge for the theft about two years ago of copper tubing from the Plymouth plant by a ten-year employee whom I refer to below by the fictitious name, John Doe; that discharge was not grieved by the Union.

Tourville heard about the missing pills from Brobjorg on about December 8, 2008, and he told her to investigate. On about December 17, 2008, Brobjorg reported to Tourville that she had interviewed Hass, who told her that about fifty Percocet pills had been taken from a bottle that had contained about 120 pills, and that the grievant had come to him and apologized for taking pills from him. In addition, Tourville testified that Brobjorg told him that, according to Hass, the grievant came back and asked for more pills.

Tourville also testified that in the spring of 2008 the grievant reported to the Employer's Workers' Compensation insurer that his home had been broken into, that pain medications had been stolen and that he had filed a police report. Later, the Workers' Compensation insurer informed the Employer that its investigation showed that the grievant's home had not been broken into and that he had not filed a police report.

Tourville testified that, after discussion with the Employer's General Manager on about December 18, 2008, they

agreed that the grievant should be discharged for theft. Tourville told Brobjorg that she should delay informing the grievant of the discharge until after the forthcoming holidays and that there was no immediate need to discharge him because the Plymouth plant would not be in operation during the annual shut down for the holidays.

Tourville testified that he intended the meeting of January 6, 2009, to be a meeting, not for the purpose of investigation, but rather for the purpose of notifying the grievant of his discharge. Tourville testified that, based upon the information he had obtained from Hass, discharge was appropriate because the grievant's conduct was serious misconduct -- the theft of a controlled substance. Tourville also testified that discharge was appropriate even without an investigatory interview of the grievant because the Employer knew the grievant had admitted the conduct when he told Hass that he had taken the pills.

Mark A. Gutzke, Chief Steward for the Union, testified that, when the grievant entered chemical dependency treatment in July of 2008, there was no requirement under the Employer's Drug and Alcohol Testing Policy that he sign a last chance agreement in order to receive a leave of absence for that purpose -- a condition the Employer's Nurse tried at first to impose, but that was not imposed because the Employer recognized that the Policy did not require a last chance agreement when the purpose of the leave was a voluntary entry into chemical dependency treatment.

Gutzke also testified that the Union did not grieve John Doe's discharge for theft, referred to above, because Doe did not want to grieve.

Gutzke testified that, on January 14, 2009, he talked to Hass about the missing pills. He conceded that Hass said a substantial number of pills were missing, but he testified that Hass did not want to see the grievant discharged and that the reason Hass reported the loss of the pills was that he was concerned that plant safety might be impaired with employees working after taking the medication. Hass told Gutzke that he accepted the grievant's apology and that he thought the matter was concluded after that. Gutzke testified that he thought Hass was "believable."

The Union presented in evidence a series of emails, the first of which was sent by Brobjerg to Tourville and to Thomas Milas, the new Plant Manager, on December 16, 2008; it summarizes the information Brobjerg obtained from Hass that day. Its last paragraph is set out below:

Would you like me to speak with [the grievant] with his supervisor present, and/or a Union Steward? Under General Work Rule 21 "Theft or unauthorized possession of Company property or that of another employee" results in discharge.

The next morning, December 17, 2008, Milas responded to Brobjerg and Tourville:

Why would we deviate from Union General Work Rules? Can we discharge and bring someone back from layoff? This type behavior is not acceptable in any organization Union or non-Union.

About a half-hour later, Brobjerg sent the following response to Milas and Tourville:

On a follow-up note, [Hass] came back this morning, and said he forgot to mention that [the grievant] approached him a few days after the apology and asked [Hass] if he could have some more of his Percocet, to which [Hass] said, "no, you wiped me out and I still have a week to go until my Dr. appointment for a refill."

Tom, [the grievant] is a problem child from way back. He has an active WC claim that is a disaster and we have him working in a light duty capacity. He also has a history of strong chemical dependency abuse, so bad that the Doctors will not allow him to have any pain medication because he abuses the prescriptions. I spoke with the WC carrier and they believe his claim is probably going to be a permanent total claim, due to his issues. Sentry will dispute TTD payments in the future, should we terminate him and will probably send him for an IME. They will put him in job placement, but we will probably still get stuck with wage loss where they will have to pay the difference of what he earns here and what he might be capable of earning at a new position for up to four years. Regardless if [we] keep him employed or terminate him, his WC claim will cost us dollars.

My personal opinion is that I would like to see him discharged, as we need to enforce the Work Rules and send a message that this will not be tolerated.

About a half-hour later, Milas sent Brobjorg and Tourville the following response:

Please proceed with the discharge. I am in total agreement of enforcing the Work Rules.

The grievant testified as follows. In early November, when he took the Percocet from the container Hass had left on the shop floor, he was in extreme pain, and he had no current prescription for the medication because of his chemical dependency treatment plan. He testified that he took only five pills, that he has never stolen from a co-employee before and that it is not in his character to do so. The first time he learned that the Employer was contemplating discipline for the incident was on January 6, 2009, the day he was discharged. No

management representative had asked him to tell his account of the incident.

The grievant explained that in the spring of 2008 he had reported a home break in and theft of a camera and medication to the Employer's Workers' Compensation insurer rather than what had occurred -- the theft of those items by a relative. He did so in order to protect the relative from criminal prosecution.

On January 29, 2009, the parties met in a third step grievance meeting, attended by Tourville and other management representatives and by the grievant and Union representatives.

On February 6, 2009, Tourville wrote a summary of what occurred at the third step meeting in a letter addressed to Richard Ryan, Business Representative for the Union; parts of that summary are set out below:

The Company had good cause to terminate [the grievant] supported by the following undisputed facts:

- It is undisputed that the Company's longstanding work rule #21 prohibits "[t]heft or unauthorized possession of Company property or that of another employee" and that the designated discipline for a first offense is discharge.
- In the 3rd step grievance meeting [the grievant] admitted to taking prescription medication from a fellow bargaining unit employee, Duane Hass, without permission. [The grievant] did not seriously dispute that his conduct amounted to theft and, in fact, only disputed the number of pills taken. . . .

Simply on the basis of the foregoing, the Union cannot credibly claim that the Company lacked "just cause" for the discharge of [the grievant]. However, the Company obtained and considered additional evidence in the course of its initial decision-making and the grievance process, all of which further supports the discharge decision. That additional evidence includes, but is not limited to, the following:

[I omit reproduction of three numbered paragraphs that state much of the evidence I have described above.]

4. In the 3rd Step grievance meeting [the grievant] stated that he did indeed take the pills but that it was only 5 or 6 pills. While the Company's decision would have been the same whether it were 5 or 6 pills or a greater number, the Company has a reasonable basis for concluding that [the grievant] was not being truthful even in his admission during the grievance meeting. As stated earlier, the container is 4 inches tall and holds 120 pills when full. Mr. Hass has stated that his Percocet medication was 3/4 full that morning and then down to 1/4 when he noticed the pill on the floor. Not only does Mr. Hass have no reason to exaggerate the number of missing pills, it is hard to believe that he would have noticed the missing pills at all if only 5 or 6 were taken from the bottle.
5. The Company's doubts about [the grievant's] credibility in this situation are supported by other experiences the Company had with [the grievant] within the past 12 months. Most directly, the Company was alerted by its Worker's Compensation carrier that in March of 2008 [the grievant] asked the pharmacy at Timesys to refill a prescription that he had just received ten (10) days earlier. He claimed that his house was broken into and that his medication was stolen along with his wife's camera and filed a police report. Our Worker's Compensation carrier later found out through their Special Investigative Unit that he had actually lied about the entire incident and that he was just trying to get more medication. We were asked if we wanted to file charges with the State of Minnesota as this is considered fraud. We opted not to do this at that time. . . .

To the extent that [the grievant] has attempted to grieve the discipline by disputing the number of pills taken, [the grievant's] statements are judged by the Company to be less credible than those of Mr. Hass. Moreover, the number of pills taken is not the issue, but rather whether [he] engaged in theft. The above record leaves no doubt that [he] did so and creates a strong impression that [he] has not been forthcoming about the true extent of his actions.

The Company denies the grievance and the termination stands.

On February 12, 2009, Ryan sent Tourville the following response to Tourville's summary of the third step grievance meeting:

The Union is not satisfied with your response of 6 February 2009 on the grievance of [the grievant]. While the Union does not dispute the facts of the case since [the grievant] admitted to Mr. Hass that he took some quantity of pills; we feel the grievant's remorse for his actions, his long record of service to the Company (32 years), the Company's long delay in investigating the case, the failure to interview the grievant before the decision to terminate was made, and the denial of the grievant's Weingarten Rights during the termination meeting, add up to sufficient cause to overturn the Company's decision.

Simply put, if the offense was serious enough to cause the Company to terminate [the grievant], why did it take the Company two (2) full months after it learned of the theft and his admission to do it?

[I omit the remainder of Ryan's letter, which concerns efforts to settle the grievance.]

DECISION

The Union casts its primary arguments that the Employer did not have just cause to discharge the grievant by referring to the "seven tests" that Arbitrator Carroll Daugherty used to define "just cause," in Grief Bros. Cooperage Corp., 42 LA 555 (Daugherty, 1964). In that case, Daugherty decided that, as a prerequisite to a finding of just cause for discharge, an affirmative answer must be given to seven questions he posed -- thus using seven tests to define just cause. I summarize Daugherty's questions as follows:

1. Did the employer give forewarning, usually by work rule or order, of disciplinary consequences of the conduct alleged?
2. Was the work rule or order reasonably related to the operation of the employer's enterprise?
3. Did the Employer make a fair investigation of the alleged conduct, including an interview of the employee, before making the decision to discharge?
4. Was the investigation fair and objective?
5. Was the evidence supporting discharge substantial?
6. Did the employer apply discipline without discrimination?

7. Was the degree of discipline reasonably related to the seriousness of the offense and to the employee's record of service?

In the present case, the Union argues that the Employer did not inform the grievant that it was considering possible discipline for the theft of pills from Hass until January 6, 2009, the date of his discharge, and that the Employer did not give the grievant an opportunity to be heard before the decision to discharge him had been made -- thus requiring a negative answer to Daugherty's third question.

The Union also argues that the Employer's investigation was not fair and objective because it was influenced by a financial motive, to save money by eliminating an employee with a potentially expensive Workers' Compensation claim -- thus requiring a negative answer to Daugherty's fourth question.

The Union also argues that, because the Employer relied solely on the statements of Hass in deciding that the grievant had stolen the pills, it did not have substantial evidence of the theft before the discharge decision was made -- thus requiring a negative answer to Daugherty's fifth question. It urges that the grievant's admission of the theft at the January 29, 2009, third-step meeting should not be considered as additional evidence of the theft because that admission occurred after the discharge.

The Union argues that the level of discipline selected by the Employer, discharge, was not reasonably related to the circumstances -- thus requiring a negative answer to Daugherty's seventh question. The Union urges that, although theft is a serious offense, the Employer should have considered 1) the

grievant's thirty-two years of service with only one disciplinary warning in the past ten years and 2) the fact that the grievant was suffering from extreme pain when he took the pills, pain that arose out of a work-related injury in October of 2007.

In its post-hearing brief, the Union cites other authorities than Daugherty's seven tests of just cause, but the synopsis of the Union's arguments that I have given just above fairly summarizes the Union's positions.

The Employer makes the following primary arguments. Grievance arbitrators recognize universally that theft in the workplace is serious misconduct that justifies discharge. The decision to discharge the grievant was based on his admission of theft to Hass, which is shown by uncontradicted evidence. The Employer's reliance on Hass' account of the grievant's admission was clearly sufficient evidence to justify the decision to discharge. There is no suggestion that Hass had any motive to fabricate his account. Hass' account was consistent and detailed, and his good record as an employee added credibility to his account.

The grievant has never denied that he made the admission to Hass. Indeed, at the third-step meeting and at the arbitration hearing, the grievant confirmed, not only that he made the admission to Hass, but that he took the pills. The Employer argues that Hass' account that more than fifty pills were taken from his supply is more credible than the grievant's contention that he took only five or six pills. Moreover, the Employer argues that, as Tourville testified, the number of

pills taken is not relevant because even the taking of the smaller amount was clearly theft, done without Hass' knowledge.

The Employer argues that the time between the theft of the pills, in early November, 2008, and the Employer's notification to the grievant, on January 6, 2009, that it was discharging him, was not an unreasonable amount of time. As Brobjorg testified, she was busy with layoffs during November and early December, and, as Tourville testified, the decision not to inform the grievant of his discharge until after the holiday shut-down period was reasonable and compassionate.

The Employer argues that work Rule 21 has been in existence for many years. It clearly states that discharge is the appropriate discipline for the first occurrence of theft. There is no showing that the Employer has deviated from the policy that underlies Work Rule 21. Even if there were a putative requirement that discharge should occur only in "serious" cases of theft, the grievant's theft must be considered serious because it was the theft of a controlled substance.

The Employer notes that the grievant had Union representation at the meeting of January 6, 2009, where he was notified of his discharge.

The Employer argues that a full reading of the emails of December 17, 2008, that were exchanged between Brobjorg and Milas shows that the decision to discharge the grievant was based on a legitimate operational purpose. Brobjorg expressed that purpose as the "need to enforce the Work Rules and send a message that this will not be tolerated," and Milas responded,

in agreement that she should "proceed with the discharge" and that he was "in total agreement of enforcing the Work Rules."

I resolve the parties' arguments as follows. In accord with most labor arbitrators, I find Daugherty's seven-test definition of "just cause" to be deficient. Some of Daugherty's seven questions relate to the substantive reason for an employer's decision to discharge, i.e., the "cause" of the decision (usually, either misconduct or poor performance), but some of the questions relate, not to cause, but to the procedure an employer uses in making the decision that it has cause to discharge, i.e. "due process." Certainly, arbitrators should consider issues relating both to substance -- whether the cause alleged is sufficient to meet the requirement that it be "just" -- and to procedure -- whether a fair process is used in determining that the cause is just.

Just cause and progressive discipline. In the following discussion, I give a fair summary of substantive "just cause" as defined in American labor law. The essence of the employment bargain between an employer and an employee (or a union representing an employee) is that the employer agrees to provide the employee with pay and other benefits in exchange for the agreement of the employee to provide labor in furtherance of the employer's enterprise. When the employer and the employee (or a representing union) have also agreed that the employer may not terminate the employment bargain except for "just cause," they intend that discharge will not occur unless the employee fails to abide by his or her bargain to provide labor in a manner that furthers the employer's enterprise.

The following two-part test of "just cause," derives from that intention:

An employer has just cause to discharge an employee whose conduct -- either misconduct or a failure of work performance -- has a significant adverse effect upon the enterprise of the employer, if the employer cannot change the conduct complained of by a reasonable effort to train or correct with lesser discipline.

Under this two-part test, an employer must establish 1) that the conduct complained of has a serious adverse effect on the employer's operations and 2) that the employer has attempted to prevent repetition of the conduct by training and corrective discipline, thus seeking to eliminate any future adverse effect from the conduct before taking the final step of discharge.

Nevertheless, some conduct is so obviously prohibited that neither a rule nor a warning against it is needed to inform the employee of the prohibition. Thus, no rule or previous warning is required to inform an employee that he or she may be discharged for theft, for fraud or for attacking a supervisor. Because such conduct violates an implied prohibition, an employee may be discharged for it, regardless whether an express rule has been issued prohibiting the conduct.

The application of the first part of this test requires a determination whether particular conduct is significantly adverse to the enterprise. Some conduct may create such a threat to the enterprise that discharge should be immediate and need not be preceded by an attempt to change the conduct by training or progressive discipline, as required under the second part of the test. Such serious misconduct may be so adverse to

an employer that the employer should not be required to risk its repetition. For example, an employer should not be required to use training and corrective lesser discipline in an effort to eliminate the chance of repetition for most thefts, for drug use in circumstances that threaten the safety of others or for insubordination so extreme that it undermines the employer's ability to manage its operations.

Some misconduct or poor performance is only a slight hindrance to good operations. For example, a single instance of tardiness will not have a significant adverse effect on the operations of most employers. Conduct, however, that is only slightly adverse when it is infrequent, may have a significant adverse effect on operations if it occurs often. Thus, tardiness and absence that become chronic will usually cause a serious disruption to operations, and, if progressive discipline does not eliminate such poor attendance, it will accumulate in its adverse effect and constitute just cause for discharge.

Similarly, an isolated instance of poor work performance will not, in most circumstances, have a significant adverse effect on an employer, but poor performance that persists even after a reasonable effort to correct it will undermine the essence of the employment relationship -- that, in exchange for wages and benefits, the employee will provide the employer with satisfactory work in furtherance of the enterprise.

The Grievant's Conduct as Cause for Discharge. The evidence clearly establishes that the grievant stole Percocet from Hass in early November, 2008. He admitted the theft to

Hass shortly after it occurred, and later, during grievance processing, he admitted the theft to the Employer. I rule that the theft of Percocet, a controlled substance, whether fifty pills or five, was serious misconduct and that the Employer's selection of discharge as the appropriate discipline was justified, notwithstanding the grievant's many years of employment and his previous lack of discipline. An employee who steals from an employer or from other employees creates such a threat to operations that progressive discipline should not be required. General Work Rule 21 gave the grievant notice that a first occurrence of theft would lead to discharge.

Due Process. The requirement that adjudicative procedures provide "due process" to a person charged with violation of law or, as in the present case, with violation of a proscriptive rule, is a requirement that those procedures be fair and objective. Though it is possible to frame general procedural rules that, if followed, will provide fairness in most cases, in particular circumstances, fairness may still be afforded despite variations in the application of general procedural rules. For that reason, a tribunal deciding issues of due process should examine the circumstances of the case at issue. Accordingly, in the following rulings about due process, I have considered the particular circumstances of this case in applying principles of procedural fairness, avoiding a "mechanical" application of Daugherty's seven tests.

The Union argues that the Employer's investigation of the grievant's conduct was unfair because the Employer failed to

interview the grievant before reaching its decision to discharge him. The Union urges that, if the Employer had interviewed the grievant, it would have learned his account of the theft -- that he took only five or six pills.

In addition, the Union argues that, though the Employer reached its decision to discharge the grievant in mid-December of 2008, it did not act promptly to inform him of that decision until January 6, 2009, almost two months after the Employer first had knowledge of the theft. The Union argues that the Employer's failure to inform the grievant of its decision at the time it was made, in mid-December, was unfair.

The Union argues that, because the Employer relied solely on the statements of Hass in deciding that the grievant had stolen the pills, it did not have substantial evidence of the theft before the discharge decision was made. It urges that the grievant's admission of the theft at the January 29, 2009, third-step meeting should not be considered as additional evidence of the theft because that admission occurred after the discharge.

The Union also argues that the Employer's investigation was not fair and objective because it was influenced by a financial motive, to save money by eliminating an employee with a potentially expensive Workers' Compensation claim.

First. I agree with the Union that in most cases an employer's discipline investigation should include an interview of the employee whose conduct is at issue. In the circumstances of the present case, however, I find that the grievant suffered

no adverse effect from the failure to interview him. Presumably, if he had been interviewed, he would have confirmed the admission of theft he made to Hass. Though the grievant may have asserted that he took only five or six pills, I accept the Employer's position that it would have discharged the grievant for the theft of any number of pills. The omission of a procedural step that would ordinarily be followed is not a denial of due process if, on particular facts, it is of no consequence. In other words, the omission of a procedure cannot be unfair if that omission had no effect. I rule, therefore, that the failure to interview the grievant was not a denial of due process because such an interview would merely have confirmed the evidence upon which the discharge was based -- Hass' account that the grievant admitted stealing his pills.

Second. Similarly, I rule that the three-week delay between the Employer's mid-December decision to discharge the grievant and January 6, 2009, when the Employer informed him of that decision, was not a denial of due process. The evidence does not show that the grievant suffered a loss of pay or benefits between the early November theft and the date of discharge, nor does it show that the delay had any other adverse effect on him.

Third. I rule that the Employer's reliance on the statements of Hass in deciding that the grievant had stolen the pills was not a denial of due process. In the circumstances of this case, with no witnesses to the theft itself, it appears that the available evidence consisted of Hass' account of the

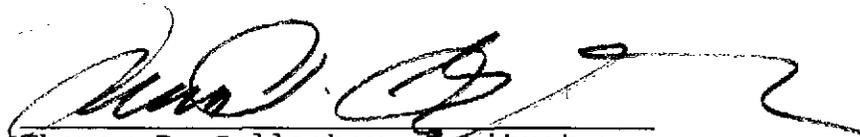
grievant's admission of theft and the grievant's account confirming the theft. Though the grievant did not give that account until the third-step meeting on January 29, 2009, he did confirm Hass' account that he took pills without permission -- except that he disagreed about the number of pills taken, a disagreement not relevant to the basis for the discharge, the Employer's determination that a theft occurred. Thus, I rule that the Employer's reliance on Hass' account of the grievant's admission of theft was a reliance on sufficiently substantial evidence and not a denial of due process.

Fourth. I rule that the emails exchanged between Brobjorg and Milas on December 17, 2008, show that the primary basis for the decision to discharge the grievant was a legitimate operational concern -- that General Work Rule 21 be enforced in order to "send a message that this [theft] will not be tolerated."

AWARD

The grievance is denied.

October 26, 2009



Thomas P. Gallagher, Arbitrator