

IN THE MATTER OF ARBITRATION BETWEEN

UNITED HOSPITAL,)	
)	
Employer,)	
)	
and)	SELDEN DISCHARGE
)	GRIEVANCE
)	
SEIU HEALTHCARE MINNESOTA,)	
)	
Union.)	
)	FMCS CASE NO: 090804-59502-3
)	

Arbitrator: Stephen F. Befort

Hearing Dates: April 28, 2010

Post-hearing briefs received: May 28, 2010

Date of Decision: June 21, 2010

APPEARANCES

For the Union: Roger A. Jensen

For the Employer: Sara G. McGrane
Grant T. Collins

INTRODUCTION

SEIU Healthcare Minnesota (Union), as exclusive representative, brings this grievance claiming that United Hospital (Employer) violated the parties' collective bargaining agreement by discharging David Selden from his position as lead painter without just cause. The Employer maintains that it properly discharged the grievant for theft of time. The grievance proceeded to an arbitration hearing at which the parties were

afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

- 1) Did the Union request arbitration in a timely manner under the parties' collective bargaining agreement?
- 2) Did the Employer have just cause to discharge the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 6

CORRECTIVE ACTION AND DISCHARGE

- (A) Just Cause:** The Employer shall not initiate corrective action, discharge or suspend an employee without just cause. Employees who . . . are dishonest . . . shall be considered to have engaged in acts that are grounds for discharge.

ARTICLE 7

GRIEVANCE AND ARBITRATION PROCEDURE

(A) General Provisions

Any claim of an employee arising out of the interpretation, application or adherence to the terms of provisions of this Agreement or arising out of disciplinary and discharge actions taken by the Employer shall be subject to the Grievance and Arbitration procedure.

(C) Arbitration and Mediation Procedure

In the event the grievance is not resolved [in Steps 1 and 2], either the Union or the Employer shall have the right to appeal the grievance to Arbitration. All disputes referred to the Board shall be filed with the Director/Vice President of Allina Labor Relations within thirty (30) calendar days after receipt of the Employer's written [Step 2] decision.

FACTUAL BACKGROUND

The Employer is an acute care hospital in St. Paul, Minnesota. The Employer is part of Allina Hospitals & Clinics, which is a nonprofit network of health care facilities in Minnesota and Wisconsin.

David Selden has worked for the Employer for more than 21 years. At the time of his discharge, he occupied the position of lead painter and was assigned to the Maintenance Shop (Shop) which is located on the first floor of the facility's "cloverleaf" building. As lead painter, he bought paint and other supplies and coordinated the work of the other painters. During the winter months, Mr. Selden also coordinated snow removal on the Employer's campus. Mr. Selden has a stellar work record with positive performance evaluations and no prior discipline.

Mr. Selden worked the 7:00 am to 3:30 pm shift. He was expected to check in and out by swiping his badge on the Kronos clock, the Employer's automated timekeeping system. According to the Employer's Attendance Policy on which Mr. Selden was trained, employees are expected to be at their station and ready to work when they punch in on the clock.

In 2001, shortly after the Kronos system was implemented, management learned that some Shop employees were punching in to work early by calling in on their cell phones while still in transit to work. John Zellmer, Manager of the Maintenance Department, testified that he called a meeting at which he informed Shop employees that the Employer had adopted a "zero tolerance" policy prohibiting this practice. Mr. Selden attended this meeting.

Employee Relations Specialist Samara Calderon testified that the Employer received an anonymous tip on its “integrity line,” alleging that some Shop employees were engaged in the practice of first driving up to the cloverleaf building’s rear entrance and swiping in on the Kronos system and then parking at a nearby parking ramp and walking back to their work station. This tip led to an investigative report that examined both the Kronos and parking ramp entry times for several employees, including Mr. Selden. This report found 66 occasions from August 2008 to February 2009 in which Mr. Selden punched in first on the Kronos clock and then gained entry to the Gold Ramp which is situated about a block away. On most days, the computer records showed that Mr. Selden punched in on the Kronos clock shortly before 7:00 am and then entered the parking ramp a few minutes after 7:00 am. It would then take another four or five minutes to walk from the ramp to the nearby Shop.

Mr. Selden does not dispute the alleged practice, but claims that he was engaged in work activities immediately after swiping in on the Kronos clock. In his testimony, Mr. Selden stated that he typically would engage in any of the following three activities that were part of his assigned duties: 1) making a quick inspection of the campus from his car and sometimes talking with members of the grounds crew; 2) driving to the paint store or other retail outlet for supplies; and 3) driving to the warehouse or another parking facility to check out snow removal equipment or to perform snow removal activities. Although Mr. Selden testified that he had oversight responsibilities for the grounds crew, Mr. Zellmer, his supervisor, testified that the grievant was charged with responsibility for snow removal, but not grounds maintenance.

Following the investigation, the Employer discharged Mr. Selden on February 19, 2009, for what is noted on the Employment Separation Form as “Theft of Time.” Mr. Zellmer testified that the decision to terminate the grievant was very difficult, but that it was warranted given the large number of violations. The Union filed a grievance challenging the termination on that same day.

The parties disagree with respect to some of the timelines relating to the processing of the grievance. According to the Employer, it denied the grievance at Step 2 of the grievance procedure by sending both a letter and an email to the Union on May 15, 2009. Steve Sitta, a SEIU officer, testified that he received the letter on May 20, 2009, but that he never received the email. The Union responded by faxing a request for arbitration to Labor Relations Consultant Tim Caskey on June 15, 2009. The Employer, in turn, responded that the Union had sent the fax to the wrong person per the parties’ contract, and that it was untimely because it was not received within 30 days calendar days after May 15, 2009. Mr. Sitta then sent the same letter to Tim Kohls, Director of Labor Relations, on June 18. Mr. Kohls received this letter on June 19.

POSITIONS OF THE PARTIES

Employer:

The Employer initially contends that this matter is not procedurally arbitrable because the Union did not submit its request for arbitration within the timelines specified in the parties’ collective bargaining agreement. Turning to the merits, the Employer claims that it had just cause to terminate the grievant for theft of time. As the Employer points out, the grievant acknowledges that he frequently punched in on the Kronos clock before parking his vehicle. While the Union argues that Mr. Selden performed work

immediately upon punching in and that the Employer's time records are not sufficiently reliable, the Employer argues that these assertions simply are not credible. In terms of remedy, the Employer maintains that discharge is appropriate for the Mr. Selden's misconduct, particularly since the parties' contract expressly provides that acts of dishonesty are grounds for discharge. The Employer also submits that repeated acts of theft are sufficiently serious to dispense with the need for progressive discipline.

Union:

The Union claims that the grievance is arbitrable because it appealed the grievance to arbitration within 30 calendar days as required by the parties' collective bargaining agreement. As to the merits, while the Union does not dispute that Mr. Selden frequently punched in before parking, it contends that Mr. Selden performed a variety of work-related tasks following his punch-in time. The Union further argues that the accuracy of the Employer's time records is suspect because the Kronos clock and the parking ramp time clock are not synchronized on the same server. Finally, as a matter of remedy, the Union argues that Mr. Selden's long and exemplary work record, combined with the lack of any prior warning from the Employer, makes discharge an overly harsh sanction in the circumstances of this case.

DISCUSSION AND OPINION

Procedural Arbitrability

The Employer contends that this dispute is not arbitrable because the Union's request for arbitration was untimely. The operative provision of the parties' agreement is Article 7(c) which provides that if a grievance is not resolved after the first two steps of the grievance procedure:

. . . either the Union or the Employer shall have the right to appeal the grievance to Arbitration. All disputes referred to the Board shall be filed with the Director/Vice President of Allina Labor Relations within thirty (30) calendar days after receipt of the Employer's written [Step 2] decision.

The Employer's core allegation as to arbitrability is that the Union did not perfect its appeal within the 30 day time period specified in Article 7(c). According to the Employer, it denied the grievance at Step 2 of the grievance procedure by sending both a letter and an email to the Union on May 15, 2009. The Employer received no response from the Union until Labor Relations Consultant Caskey received a fax requesting arbitration on June 15, 2009. The Employer objected that the Union had sent the fax to the wrong individual under the parties' contract, whereupon the Union then re-sent the same letter to Director of Labor Relations Kohls on June 18. Mr. Kohls received this letter on June 19. Based on these facts, the Employer asserts that Mr. Kohls did not receive the request for arbitration within the requisite 30 days.

The Union relies on a somewhat different version of the facts to claim that its request for arbitration was timely under Article 7(c). As noted above, SEIU Officer Sitta testified that he received the Employer's May 15 letter on May 20, 2009, but that he never received the email. Based upon these assertions, the Union argues that Mr. Kohl's receipt of the Union's appeal on June 19 was within the contract's 30-day window.

Not surprisingly, the Employer raises questions concerning the veracity of Mr. Sitta's testimony concerning the missing email and the very slow snail mail. The record, however, contains no evidence to refute Mr. Sitta's assertions. Given this state of the record and the fact that the Employer's labor relations staff was made aware of the Union's desire to advance this matter to arbitration within the 30-day time frame under any version of the asserted facts, I find this grievance to be arbitrable.

The Merits

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decisions. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS* 948 (6th ed. 2003). Each of these steps is discussed below.

The Alleged Misconduct

The Employer based its disciplinary action on the allegation that Mr. Selden's clocking in practice constituted "theft of time." According to the Employer, Mr. Selden was aware of company policy requiring employees to be ready to work upon checking in on the time clock. Since Mr. Selden acknowledges that he routinely drove to the parking ramp after punching in, the Employer concludes that Mr. Selden knowingly deprived the Employer of several minutes of work time on each of the 66 instances in which he deviated from company policy.

The Union challenges the theft of time allegation on two grounds. First, the Union claims that Mr. Selden performed work activities during the period between his initial punch-in on the Kronos clock and his return to the Shop after parking his vehicle. The Union's argument sorts these occurrences into the following three categories:

- 1) On approximately 52 occasions, the investigative report shows that Mr. Selden pulled into the parking ramp approximately 3 to 10 minutes after punching in on the Kronos clock. With regard to these short-term gaps, the Union claims that Mr. Selden was making a quick inspection of the campus

from his car and sometimes talking with members of the grounds crew prior to entering the parking ramp.

- 2) On five occasions, the report shows a gap of between 12 and 40 minutes in the two swipe-in times. Here, the Union maintains that the grievant likely drove to the paint store or other retail outlet for supplies.
- 3) On six other days, the report shows multiple parking lot entries, often during early morning hours. The Union claims that these entries represent instances in which Mr. Selden drove to the warehouse or another parking facility to check out snow removal equipment or to perform snow removal activities.

Based upon the evidence submitted at the arbitration hearing, I find the Union's contentions with respect to the latter two categories to be plausible. The purchasing of painting supplies and snow removal are part of the Mr. Selden's assigned duties, and the time records for these dates logically correlate with the performance of these activities. On the other hand, I do not find the Union's explanation plausible with respect to the first category. On this issue, Mr. Zellmer testified that Mr. Selden had no responsibility with respect to grounds maintenance other than for snow removal. Moreover, the timing and frequency of Mr. Selden's actions suggests that this practice was more for the benefit of Mr. Selden than that of the Employer.

The Union's second argument is that the Employer's time records are suspect because the Kronos clock and the parking lot clock are not synchronized. This assertion is based on the testimony of Bill Anderson, Manager of Voice and Data Systems for Allina, who acknowledged that the Kronos clock and the parking lot clock are maintained on separate servers. In response, the Employer elicited the testimony of Parking Coordinator Rochelle Rasmussen who testified that she regularly checks the time on her desk phone, which is connected to the same server as the Kronos clock, and the time on the parking lot clock. She testified that she has never seen the two times differ by more

than twenty seconds. Given the investigative report's consistent pattern of showing that parking ramp check-in times vary by a few minutes from the Kronos check-in times, it appears that the time records are sufficiently accurate so as to corroborate the Employer's claim of unproductive time loss.

Based on the above, the record supports a finding that Mr. Selden clocked into work before parking his vehicle on more than 50 occasions in the six months preceding February 2009. This finding establishes the Employer's contention that the grievant engaged in misconduct warranting discipline.

The Appropriate Remedy

The Employer contends that discharge is an appropriate sanction for Mr. Selden's repeated theft of time. In support of this contention, the Employer points to contract language providing that "employees who . . . are dishonest . . . shall be considered to have engaged in acts that are grounds for discharge." In addition, the Employer cites to authorities in support of the proposition that arbitrators frequently do not require progressive discipline with respect to acts of theft because such behavior is "inimical to employer-employee trust." *See*, DISCIPLINE AND DISCHARGE IN ARBITRATION 296 (2nd ed., Brand & Biren eds. 2008).

Although these assertions are not without some merit, I find that the Union's arguments in favor of a lesser penalty are more compelling. First of all, the grievant's transgressions are more aptly categorized as attendance rather than theft problems. Because of the lesser degree of culpability generally associated with attendance issues, arbitrators generally require progressive discipline before upholding a discharge decision

based on attendance concerns. *See* DISCIPLINE AND DISCHARGE IN ARBITRATION 118 (2nd ed., Brand & Biren eds. 2008).

Second, Mr. Selden has a long and exemplary record of employment with the Employer. Such a record militates against a rush to termination.

Finally, and most importantly, the purpose of progressive discipline is to correct inappropriate behavior. While an immediate discharge is appropriate for serious misconduct that is unlikely to be rectified by a lesser sanction, this ultimate penalty is not appropriate if a less severe disciplinary step is likely to correct the grievant's behavior.

DISCIPLINE AND DISCHARGE IN ARBITRATION 65-66 (2nd ed., Brand & Biren eds. 2008).

In the instant context, it is likely that a lesser form of discipline would have deterred any future attendance problems. The Employer's own evidence supports this conclusion.

When the Employer discovered widespread call-in problems with the Kronos clock in 2001, Supervisor Zellmer called a meeting of Shop employees, including the grievant, and told them that future conduct of this sort would not be tolerated. This warning served to halt that practice. There is no reason to believe that a similar warning would not have accomplished the same result in this instance, particularly with respect to a long-term, good employee such as the grievant.

In conclusion, while Mr. Selden engaged in misconduct warranting discipline, discharge is too severe of a penalty. Under the circumstances, the sanction should be reduced to a 20-day suspension without pay.

AWARD

The Grievance is sustained in part and denied in part. The Employer had just cause to discipline the grievant, but the sanction is reduced to a suspension of twenty (20) days without pay. The Employer is directed to reinstate the grievant and to make him whole for any resulting loss in pay and benefits less any compensation earned in mitigation. The Employer also is directed to correct the grievant's personnel file to reflect this determination. Jurisdiction is retained for a period of sixty (60) days from the date of this award to determine any remedial issues as may be necessary.

Dated: June 21, 2010

Stephen F. Befort
Arbitrator