

IN RE ARBITRATION BETWEEN:

SEIU HEALTHCARE MINNESOTA

and

ALLINA HOSPITALS AND CLINICS – UNITED HOSPITAL

DECISION AND AWARD OF ARBITRATOR

FMCS # 1257575

JEFFREY W. JACOBS

ARBITRATOR

7300 Metro Blvd. #300

Edina, MN 55439

Telephone 952-897-1707

E-mail: jjacobs@wilkersonhegna.com

March 7, 2013

IN RE ARBITRATION BETWEEN:

SEIU Healthcare Minnesota,

and

DECISION AND AWARD OF ARBITRATOR
FMCS #1257575
Joe Blair Grievance matter

Allina Hospitals and Clinics, United Hospital

APPEARANCES:

FOR THE UNION:

Justin Cummins, Cummins & Cummins
Joe Blair, grievant
Sandy Koski, Steward

FOR THE EMPLOYER:

Sara McGrann, Felhaber, Larson, Fenlon & Vogt
Jennifer Gran, Employee Relations Specialist
Rob Flaherty, Perioperative Associate in OR
Jenna Lindsay, Patient Care Manager
Timothy Ewald, HR Director

PRELIMINARY STATEMENT

The hearing was held on January 22, 2013 at the Oracle Center in Minneapolis, MN. The parties submitted Briefs dated February 22, 2013 at which point the record was closed.

CONTRACTUAL JURISDICTION

Article 7 of the parties' labor agreement sets forth the grievance procedure. The arbitrator was selected from a panel provided by the FMCS. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

RELEVANT CONTRACTUAL AND POLICY PROVISIONS

**ARTICLE 3
MANAGEMENT RIGHTS**

Except as specifically limited by the express provisions of this Agreement, the management of the Hospital, including but not limited to, the right to hire, lay off, promote, demote, transfer, discharge or discipline for just cause, require observance of reasonable Hospital rules and regulations, direct the working forces and to determine the materials, means and the type of service provided, shall be deemed the sole and exclusive functions of management. Joint Ex. 1, Article 3.

**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 under the influence of drugs and/or alcohol, bring drugs or alcohol on the premises, are dishonest or violate rules directly affecting patient comfort or safety shall be considered to have engaged in acts that are grounds for discharge. Article 6.)

RELEVANT PORTIONS OF THE LETTER OF UNDERSTANDING (LOU) #1 TO THE CONTRACT - IMPLEMENTATION OF CORRECTIVE ACTION POLICY

[The employer] utilizes the Corrective Action Procedure for resolving employee performance and/or behavioral issues in a non-punitive fashion. *** [The employer] intends that managers and employees work together in a collaborative process which engages the individual in resolving the issue [and] intends to give employees reasonable opportunity to improve their performance whenever productivity, quality, efficiency or behavior is below an acceptable level. . . .

3. Neither this Letter of Understanding nor the Corrective Action Policy will limit Allina’s right to discharge or otherwise discipline an employee for a single serious offense or repeated offenses . . .

The Corrective Action Procedure intends —to give employees reasonable opportunity to improve their performance. . . (Joint Ex. 8, at 1.)

If three (3) related conversations/action plans have been completed and the performance/behavior is repeated (thus establishing a pattern), corrective action will proceed to the next level regardless of the time between incidents.

ISSUE

Did the employer have just cause to terminate the grievant? If not what shall the remedy be?

EMPLOYER’S POSITION

The employer’s position is that there was just cause for the termination and made the following contentions:

1. The employer asserted that even though the LOU allows employees to improve their performance where it may be deficient and that it strives to use a non-punitive way to impose discipline, the LOU also clearly provides that “if three corrective action plans have been completed and the performance/behavior is repeated (thus establishing a pattern), corrective action will proceed to the next level regardless of the time between incidents.” As noted below, the employer’s position is that the grievant’s action show a clear pattern on this record. The employer also emphasized that the “pattern” language was negotiated into the LOU and was not unilaterally implemented. This should be taken into account by the arbitrator since this was a mutually agreed upon provision preventing the very sort of behavior the grievant exhibited here.

2. Further, the next level of discipline from where the grievant was as of February 2011 was Level 5, termination and that even though more than one year had elapsed it was clear that the grievant had engaged in a pattern of very similar behavior thus triggering the “pattern” language set forth in the Corrective Action Policy. The crux of the employer’s case is that the grievant demonstrated a pattern not only of similar disrespectful behavior but also that his pattern was to wait until he thought the discipline had “dropped off” his record and then revert to his former actions.

3. The employer also noted that the hospital’s philosophy and its very clearly delineated expectation from the employees is that they encourage each other by offering to help and work cooperatively as a team. It further expects respectful behavior towards the other members of the team and that help is offered whenever it is needed. Finally, the employer expects trust and compassion towards one’s work and toward the other employees.

4. The employer noted that the grievant began his employment in 2003 and has a checkered record. The employer introduced testimony and documents showing multiple disciplinary suspensions, coachings, verbal warning and various other sorts of counseling given the grievant since his employment began. The employer further noted that the grievant has a pattern of similar, if not the same, behavior over time yet the grievant has failed and refused to conform his actions to the clear expectations of management.

1. The grievant received a 3-day disciplinary suspension in June 2004 without pay for inappropriate behavior toward a coworker as well as for making himself unavailable to assist co-workers. This was not grieved and is now part of the grievant’s record.

2. The grievant again received a 4-day suspension in October 2005 for very similar behavior and for failure to meet performance expectations and for disrespectful behavior toward co-workers. This was for arguing loudly with a co-worker and for disrespectful behavior. This also is part of the grievant’s record.

3. The grievant's final warning/suspension came in February 2011 when the grievant was placed on decision-making leave after he refused to get saline for a patient who needed it. This too is part of the grievant's record. The employer asserted that the grievant, while friendly and likeable, can be disrespectful and even callous in his comments. In addition, he many times refuses to help if he believes the work is somehow "beneath" him and has been observed doing personal things on work time when his co-workers are busy.

4. In addition to these 3 disciplinary suspensions the employer pointed to numerous counselings between the grievant and his supervisors regarding this same sort of behavior. The employer went through these exhaustively and noted that they were virtually all for the same sort of behavior; i.e. refusal to perform required duties, recalcitrant and disrespectful behavior towards co-workers and other staff and other inappropriate language and behavior.

5. The employer also introduced evidence of the notice given to the grievant through his evaluations. He was told numerous times that his behavior was at times inappropriate yet he continued to engage in them. The employer's witnesses also indicated that he would perform well at times for a short period of time and then fall back into the same actions again.

6. The employer noted that this was the same thing that occurred between the latest disciplinary suspension and the incident that occurred in March of 2012 that led to his discharge. His performance would improve – and did here. However, once the one-year period expired from the February 2011 suspension it was mere days until the grievant fell right back into the same pattern. The employer argued that this is precisely why the language regarding pattern was negotiated in to the LOU cited above.

7. The employer then pointed to the events of March 12, 2012 as the incident that led to the termination. The grievant failed to stock a block cart with essential supplies needed by the medical staff even though he was specifically asked to do it by another employee. He "smirked" and said he was waiting to take his break and would do it later – or words to that effect.

8. The employer's witnesses also countered the claim that the grievant was distraught by the death of a patient. They noted that the grievant was smiling and seemed in no distress whatever and was watching other employees perform work. Further, the claim that he was upset due to the death of a patient was not even raised until well into the grievance process and must be discounted by the arbitrator.

9. The employer asserted that the grievant's story must be discredited due to the lateness of the claim even being made and the obvious incentive to save his job. The employer further asserted that this was a difficult decision for those involved in terminating the grievant. He is a generally pleasant person and they liked him on a personal level. Still though, his actions simply cannot be tolerated and demonstrate a clear pattern of disregard for the need to perform all of the tasks of his position – not just those he wants to do.

10. Mr. Flaherty's version of the facts of what occurred should thus be accepted over the grievant's. He had no incentive to try to hurt the grievant or get him fired and stands to gain nothing from his testimony – and potentially something to lose if the grievant is returned to work.

11. The employer countered the union's claim that the other employees wanted the grievant returned to work. First, none of them even testified. They submitted written statements. Further, when the steward asked them their opinions she did so in a format which can hardly be given credence or much weight here. Finally, some of them even indicated that the grievant "failed to carry his own weight 30% of the time." This is exactly the problem – he will at times perform his duties and at others he will not. This cannot be accepted in a hospital setting.

12. The necessary elements of just cause were all met in this instance – there was little question of the grievant's history and little question that he failed and even refused to stock the block cart as was his job. The employer conducted a full and fair investigation and determined that the grievant was again engaging in a pattern of behavior that was virtually the same as he had been guilty of before.

13. The consequences are clearly set forth in the LOU which allows the employer to move to the next step – here termination – and does not require strict adherence to the progressive steps and allows the employer to impose discipline even where the discipline has “dropped off.” In response to the union's claim that nobody else has ever been fired for demonstrating a pattern of misbehavior, the employer argued simply that no one has ever engaged in this type of pattern before and that those who have gotten deeply into the progressive discipline steps have conformed their actions and have not gotten to level 5.

14. Finally, in terms of the appropriate discipline, the employer asserted that it has given the grievant every possible opportunity to consistently perform as expected and he continually fails to do so. At this point, it is clear that even if he is reinstated he will soon fall into the same sort of pattern as before. Accordingly, the grievance should be denied.

The employer seeks an award denying the grievance in its entirety.

UNION'S POSITION:

The union took the position that there was not just cause for the termination and in support of this the union made the following contentions:

1. The grievant is a 10+-year employee whose work performance is beyond reproach. He knows his job extremely well and by all accounts is a very competent and caring employee. He is also well liked by his coworkers and well respected as well. As evidence of the grievant's excellent performance the employer appointed him to the Strategic Alliance committee. He has even served as a temporary supervisor. Obviously he is both well regarded and trusted – both qualities in keeping with the philosophy of the hospital.

2. The union pointed to the provisions of the Corrective action Policy and noted that it requires progressive discipline and that it further calls for a time limit on the length of time that an offense may stay on the employee's record. Here the union asserted most strenuously that the grievant had no current discipline on his record as of the time of the discharge.

3. The union further asserted that in order to be consistent with the stated purpose and intent of the Corrective Action Policy each new discipline starts at Level 1, which is coaching. If the issue persists it can progress to Level 2 verbal warning. Only after if issue progresses does the discipline get to Level 3, written warning and then to Level 4 suspension. Only after going through these steps does the employee get to Level 5, discharge.

4. The union noted that under the Corrective Action Policy, the discipline imposed in February 2011 had been removed from the grievant's record as of February 2012 – well before the March 2012 incident. Thus even if the grievant is determined to be guilty of the conduct as alleged he should not be treated as if he were at Level 4.

5. Moreover, no one can recall an employee ever being disciplined under the employer's "pattern" theory. This has never occurred before and should not be allowed now if for no other reason than it is so novel and can rely upon very old discipline which has long ago been rectified.

6. In addition, the employer used very old and stale discipline – going back as far as 2004 and 2005 to establish discipline. It also relied upon non-disciplinary coaching and counseling, which should not even be considered in the determination of whether level 5 had been reached. Certainly, the union argued, this cannot be the intent of the language of the Corrective Action Policy. Further, discipline is always subject to just cause and the arbitrator should take into account the grievant's length of service, his excellent work performance and the fact that more than a year elapsed between his last discipline and the events of march 2012. The union also noted that the employer used attendance issues to bolster its "pattern" case even though the Corrective Action Policy clearly calls for attendance to be tracked separately.

7. Further, the union asserted that the grievant's behavior had improved so much that as of September 2011 his evaluation showed marked improvement in his workplace demeanor. He received glowing marks from his supervisors at that time. Moreover, there were no instances of further inappropriate behavior between February 2011 and March 2012. Thus the grievant is certainly able to conform his actions to the needs of the employer and is not "incurable" as the employer suggests.

8. The union further argued that much of the prior discipline was undeserved. February 2011 for example was a simple misunderstanding. The grievant was unaware that the saline was needed on a STAT basis. Had he been informed of that he would have gotten it faster.

9. The union countered the claim that there was a pattern here and argued that the employer failed to do an adequate investigation to determine the grievant's performance. They never even interviewed many of the grievant's co-workers. Had they done so they would have discovered that the grievant performs his duties well and enjoys the respect of his co-workers and other staff.

10. Further, the union argued that the degree of discipline was not in keeping with the minor nature of the claimed offenses. The union asserted that the "offenses" do not warrant termination and that the grievant should be allowed a chance to return to work.

11. The union also asserted that the grievant never refused to perform his work or stock the block cart. He simply indicated that he would do it later, when he returned from break. He was not made aware that stocking the cart was urgent. Moreover, he had just experienced his first patient death and was quite distraught when that happened that day. He needed some time to "decompress," as one might imagine. Thus he was not guilty of the charges against him even if one assumes that a pattern of prior behavior existed – there was no violation of the policy on March 12, 2012.

12. The essence of the union's claim is that the grievant did not refuse to perform his job nor was he disrespectful in March 2012. He is well liked and regarded by his co-workers, as evidenced by the statements submitted by his coworkers, virtually all of whom would like him back. The employer failed to conduct a proper investigation since they did not interview the people who like and respect him and that the minor nature of the claimed offense, even if true would not under any circumstances justify such a severe penalty.

The union seeks an award reinstating the grievant with full back pay and all accrued contractual benefits.

MEMORANDUM AND DISCUSSION

BACKGROUND

The grievant was hired in 2003 as a Perioperative Associate. His duties include stocking the carts needed by medical staff for the care and treatment of patients, the evidence showed that performing the stocking function was crucial and that if the carts are not correctly and timely stocked the medical staff's job is not only made more difficult but that it could endanger patients. His job also included running for supplies when called and it was clear that the medical staff would not know that a piece of equipment was not there until they needed it and if it were not there, they would have to call for it and waste valuable time treating patients. This was especially true in the surgical suite where seconds may prove the difference between life and death for patients.

GRIEVANT'S DISCIPLINARY HISTORY

There was much dispute about the grievant's record. The union asserted that many of the early problems were mere "growing pains" and were related at least in some instances to attendance. The union further asserted that the grievant's issues were largely resolved by 2005 or so and that these should not count at all in the determination of whether discharge was appropriate now.

The employer on the other hand showed that there were literally dozens of problems of various types from the very start of the grievant's employment almost up to and including the date of his latest disciplinary suspension in February 2011. The evidence on the record supported the employer's claims here.

The evidence showed by a preponderance that the grievant's troubles going back to 2004 were similar in nature. The 2004 3-day suspension was for inappropriate behavior toward a co-worker and for making himself unavailable. See employer exhibit 2. In October 2005 he was issued a 4 day suspension for disrespectful workplace behavior, arguing with a co-worker and for not completing "many tasks" while he was watching a football game on TV. See employer exhibit 3. It was also significant that the discipline referenced numerous counseling and coaching. The record supported this allegation.

The decision making leave, issued in February 2011, see employer exhibit 4, was again for failure to perform assigned work duties and insubordination. The union asserted that these were minor as well and should not be given much weight due to their staleness and because they may have lacked merit. However, these disciplinary suspensions are on the grievant's record and must be considered as factual at least in terms of their relevance to the progressive disciplinary steps..¹

There was considerable evidence of counselings and coaching meetings between the grievant and his managers over time. The evidence here showed that there was indeed a pattern of very similar, and in some cases virtually identical issues that arose over time starting very early on in the grievant's employment and continuing for many years.

¹ While there was some assertion by the union that the February 2011 discipline should not have been issued, the fact that this discipline was issued and that it was not overturned by arbitration or grievance process means that it is still "on the grievant's record." At this point it is beyond the arbitrator's jurisdiction to change or amend the discipline. The question, as discussed more below, is thus whether these should be considered a pattern under the terms of the Policy.

There were at least three separate written warnings for poor performance and lack of respect for his co-workers. See employer exhibits 8 and 9. In addition there were three separate suspensions for similar misconduct as outlined above. Moreover, the grievant was informed several times in evaluations and appraisals that his workplace demeanor needed to change and improve.² Significantly, there were many evaluations that spelled out in detail the issues with too much non-work related socializing, poor work attitude, occasionally saying things that offended co-workers, poor performance. See Joint Exhibits 2A and 2B. Significantly too, these issues did not go away and the evidence showed that they continued over time. See Joint Exhibit 2C. By 2009-2011 his evaluations had deteriorated to the point where he was in a “not meets expectations” situation. Joint Exhibit 2D. They showed that the grievant was on clear notice of the problems with his performance and workplace attitude. While progressive discipline is a factor the question here is whether the grievant knew what he needed to do to meet the expectations of the employer. Here he clearly did.

Certainly his September 2011 evaluation showed a marked improvement in his performance as well as attitude. If that were the sole piece of historical evidence here, the result might well have been different. However, a review the record as a whole shows that there were times where the grievant’s performance would improve – for a while – only to revert to the same pattern of difficulties as he had manifested in the past. The record showed that these “good” times varied in terms of length. Sometimes it was months before problems would recur. The problem here is that recur they did. Thus the mere fact that there as a period of approximately 12-13 months between the last disciplinary notice in February 2011 and the events of March 2012 was not unusual.

² The union asserted that these evaluations cannot be used for purposes of progressive discipline and that is indeed true here though, as discussed below, there was ample evidence of disciplinary actions taken to warrant progressing to the next level, especially when read in conjunction with the “pattern” language found in the Corrective Action Policy. The evaluations and other coaching sessions were relevant to show notice to the employee of the continuing problems in his performance. On this record it was clear that while the grievant would occasionally do well, he tended to fall back into his old ways and exhibit the same sorts of behaviors that led to the discipline.

It could also be the grievant knew exactly when the year was up pursuant to the Correction Action Policy and somehow felt safe at that point. There was no direct evidence of that on this record but the pattern of poor performance leading to discipline, followed by a period of improved performance and workplace demeanor only to see the grievant once again revert to the very behavior that got him into trouble again is undeniable.

Overall, the evidentiary record regarding the grievant's past history showed a clear pattern of similar problems that surfaced from almost the start of his employment for many years. It is against this factual backdrop that the events of March 2012 unfolded.

THE EVENTS OF MARCH 2012

The events that led to the grievant's discharge occurred on March 12, 2012. While these events may seem minor in nature they are indeed part of a disturbing pattern. It was apparent that the pattern language of the policy was inserted to address this very sort of scenario.

The evidence showed that the grievant was asked to re-stock a block cart and that this was a significant part of his job. As noted above, the block carts are crucially important and are like a file cabinet where needed medial items and equipment are stored and made ready for use in surgery and other medical procedures. It is important that they be stocked accurately and timely to ensure adequate patient care. The evidence showed too that stocking these carts was the grievant's job, it was also clear that he refused to stock it even though he had been asked to do it.

The co-worker who asked him to do this was not a supervisor and did not have the authority to order the grievant to do it. On this record however, the employer showed by a preponderance of the evidence that it is expected that team members help each other out in this very type of scenario. The employer's witnesses testified credibly that when asked the grievant was watching other employees fold towels and perform other tasks. He did not appear to be stressed or upset, as will be discussed more below, and simply refused to do the work as requested.

The record did not establish that the grievant was busy doing other tasks; he was standing around apparently waiting for another employee to finish her work so they could take break together. In addition, there was evidence to suggest that the grievant's response was somewhat terse and did not demonstrate the sort of respect towards co-workers that he had been counseled time and again to exhibit. See, Flaherty Testimony.

It should be noted that the grievant alleged that he was distraught over a patient who had recently died and that he was so upset by this that he needed to unwind, or words to that effect, and could not re-stock the cart or clean the back table. This evidence was unpersuasive on this record.

First, the credible testimony of other witnesses indicated that the grievant appeared to be in good spirits when asked to stock the cart and seemed in no distress or poor emotional state. Second, this claim appears not to have been made until well into the grievance process and was not apparently made contemporaneously with the events in question. While determining what occurred in a time past where there is no physical evidence is always a difficult task, here the testimony of uninterested employer witnesses were determined to be more credible on this record.

Moreover, there were other employees who were apparently there and heard the conversation yet they were not called to corroborate the grievant's story. It will never be known what they might have said. All that is known is what was said at the hearing. It is thus based on that actual evidence that this conclusion is made. It must thus be concluded that the grievant simply chose not to aid his coworker and refused to stock the cart.

He further claimed that he did not refuse to stock the cart outright but rather told Mr. Flaherty that he would do it later – after his break. The evidence here showed that this might well have been what he intended but the clear import based on the evidence as a whole was that it came across very differently.

The evidence also showed that the grievant failed to clean and “turn over” an anesthesia back table. These tables must be properly cleaned in order to prevent infections. This was again part of the grievant’s job. The evidence showed that indeed the back table was not cleaned and that the grievant was responsible for that but failed to do it. employer exhibit 24.

Taking the record as a whole, the evidence supported the employer’s version of the facts on March 12, 2012. That however alone does not end the inquiry here. The next question is what effect does the Corrective Action Policy have on these facts and what is the appropriate action to take here.

EFFECT OF THE CORRECTIVE ACTION POLICY

The union argued that by March 2012, the discipline imposed on February 22, 2011 had been removed from the grievant’s employment file and had essentially “rolled off” the grievant’s record by February 22, 2012 at the latest. See Joint Exhibit 8 at p. 1. The union thus asserted that the Corrective Action Policy compelled the removal of the February 2011 discipline from Mr. Blair’s file and that it cannot be used now to form the basis of the discharge. The union also argued that it is highly unusual to use the so-called “pattern” language found in the Policy to warrant dismissal of any employee, much less one that has demonstrated a willingness and ability to both perform exceptionally well and to conform his behavior to the needs of the department.

Without the language found in the Corrective Action Policy the union would be correct, the grievant reinstated with a penalty commensurate with his actions *only* on March 12, 2012 and the matter concluded. Cases are not decided on hypothetical facts and language however but on the actual language found in the entire relevant document.

Here the union's claims while articulately and passionately made, ignore the clear language found in the Policy set forth at Section 3 of the LOU as follows: “If three (3) related conversations/action plans have been completed and the performance/behavior is repeated (thus establishing a pattern), corrective action will proceed to the next level regardless of the time between incidents.”

It was also highly significant that this language was jointly negotiated between labor and management.³ As noted above, the unique facts of this case show a troubling pattern of conduct over time that is similar in nature and further demonstrated an unwillingness or inability to conform to the expectations necessary for the employees to perform their jobs respectfully and completely. Accordingly, on this record the pattern language applies.

As the employer pointed out, that language allows the employer to take matters to the next level irrespective of the length of time between offenses if there is evidence of a pattern of conduct. Obviously, the application of this language must be on a case-by-case basis but here it is apparent that the next level in the progressive disciplinary scheme is termination.

ADEQUACY OF THE INVESTIGATION

The union further asserted that the investigation was incomplete and unfair and that the discipline should be overturned the factual basis for this was the allegation that the employer failed to talk to everyone in the department and ignored those who actually like the grievant and enjoy working with him.

This argument was unpersuasive for several reasons. First, the real basis for this assertion was that the steward asked several co-workers whether they were comfortable working with the grievant. Many said they were and this gave the arbitrator some pause here. However none of them actually testified or even came to the hearing to support the grievant through actual testimony.

³ Obviously had the language been unilaterally implemented by management it would certainly still have been a relevant factor in the decision. Certainly too all discipline under this CBA is subject to the just cause provision but here, where there is a jointly negotiated policy the impact of such a policy is a bit clearer. Without this language the employer's argument would have been far more tenuous. Here, the clear intent of the parties in dealing with almost this precise scenario is to allow discipline even after it might appear to have fallen off an employee's record to be considered part of a pattern. Of course, this determination of whether any particular conduct should be considered a "patter" for purposes of applying this language is subject to the grievance and arbitration procedure. As noted, on this record, these unique facts showed just such a pattern and thus the language of the policy allowing prior conduct to be used to determine the appropriate disciplinary step can be used.

While there was no evidence whatsoever that the steward made this evidence up and it was clear that many told her that they did not mind working with the grievant. Several more indicated that he “does not always carry his weight.” This may well be a Minnesota nice way of saying something far deeper and more disturbing.

Moreover, the mere fact that some employees like the grievant does not result in a failure of the investigation. The evidence here showed that the employer spoke with all the relevant people who had knowledge or potential knowledge of the events of March 12, 2012. They further showed that they fairly and impartially reviewed the grievant’s personnel and disciplinary file and applied it even handedly pursuant to the LOU Policy set forth herein. The investigation was adequate on this record.

Finally, contrary to the union's assertions here, it is not required and perhaps not even advisable to discuss whether the rest of the work force may or may not want the discharged person back to work. Such an inquiry is not required to establish a thorough and fair impartial investigation under a just cause analysis.

APPROPRIATENESS OF THE PENALTY

It is always appropriate under a just cause analysis to review the penalty against the actual conduct, the grievant’s work history and disciplinary record to determine whether the penalty imposed by management is appropriate. As noted, the fact that there is a jointly negotiated policy limits this inquiry somewhat but since just cause is a requirement of the CBA, it is still appropriate to review this.

Here though, given the clear pattern, the fact that the conduct of March 12, 2012 appears to be in line with what the employer alleged it was and that it fell within a few days of the one-year time frame when the February 2011 conduct would otherwise have fallen of the grievant’s record, the penalty, while somewhat unsavory, is compelled by these facts. It was clear that the managers who made this decision harbored no ill will or personal animus against the grievant.

It was also apparent though that they were credible in their testimony that they felt that the grievant had been adequately warned and more than adequately told what to improve and that they made the decision to terminate his employment advisedly and in accordance with the LOU. Thus, on this record the discharge must be allowed to stand and the grievance denied.

AWARD

The grievance is DENIED.

Dated: March 7, 2013

Jeffrey W. Jacobs, arbitrator

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