

IN THE MATTER OF THE ARBITRATION BETWEEN

Teamsters Local No. 120,

UNION

-and-

BMS No. 13-RA-0533
Grievance No. 09-10907

SuperValu, Inc.,

EMPLOYER

ARBITRATOR: Christine Ver Ploeg

DATE AND PLACE OF HEARING: October 2, 2013
SuperValu, Inc.
Hopkins, Minnesota

DATE OF RECEIPT OF POST-HEARING BRIEFS: December 9, 2013

DATE OF AWARD: December 28, 2013

ADVOCATES

For the Union

Katrina E. Joseph
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For the Employer

Adam Paul-Tuzzo
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Anthony Harmon, Grievant

ISSUE:

Did the Employer have just cause to discharge the Grievant? If not, what shall be the remedy?

BACKGROUND

This case has been brought by Teamsters Local 120 (hereinafter “Union”) on behalf of the Grievant, who is challenging his discharge by his Employer, the SuperValu, Inc. (hereinafter “Employer”). The Union is the Grievant’s exclusive representative.

This Arbitration stems from the Employer’s discharge of the Grievant for allegedly directing a racial slur toward a co-worker in the workplace and for possessing marijuana on company property. The Union submits that the Employer’s discharge of the Grievant was not for just cause as the parties agree their Agreement requires (Art. 13). The Employer submits that this discharge was for just cause. The evidence has established the following:

In July of 2005 the Employer hired the Grievant as a Warehouse Order Selector. On October 3, 2012, it issued a Notice of Disciplinary Action to him that stated he was being discharged for violating two Employer policies,” either one of which are grounds for termination:”

1. You were involved in a verbal altercation with a coworker, during which you made verbal statements that were racially derogatory in nature while on Employer property.
2. You violated Supervalu’s drug-Free Workplace Policy by being in possession of marijuana while on Employer property.

The event that triggered this action occurred on September 25, 2012. Although the facts are in dispute, the evidence reveals the following. On that day the Grievant reported for work and began to perform his normal duties as an order selector. Sometime prior to 7 A.M. one of the Grievant’s co-workers approached a supervisor and reported that the Grievant was on drugs, operating equipment unsafely and had directed racial epithets towards him, the co-worker. This employee indicated that another worker had witnessed part of these events.

Upon receiving this verbal report the supervisor sent the following email to the risk control manager at 8:04 A.M. That email stated in part:

I have an employee (DE) that just approached me and stated that (the Grievant) just came zooming up on him full speed and stopped just short of the employee. No horn no warning, nothing. (ED) stated, “Hey man wacha doing, watch out.” (The Grievant) responded, “Listen here nigger, don’t get up on my shit today.” At this time, (BS) came around the aisle because he

had heard the conversation. (DE) went over to him, and (the Grievant) continued on with his order.

Here's the kicker; (DE) told me (the Grievant) is on drugs. I asked him if that was a metaphor or if he knew of (the Grievant) taking drugs at the workplace. He stated; "Hell no man, he comes in, gets dressed, goes back out to his car and comes back reeking. (smelling)...."

I asked (DE) how long ago this happened and he stated about 30 min ago. (at 7:45 A.M.).

The Employer proceeded to investigate this matter and the risk control manager interviewed the co-worker (DE), the alleged witness (BS) and the Grievant. In addition, each subsequently provided written statements which are discussed below.

During the course of his interview with the Grievant, the risk control manager concluded that the Grievant was displaying behaviors that suggested he was under the influence of drugs. The manager, who had been a sheriff's deputy 16 years earlier, used the Employer's Reasonable Suspicion Checklist and marked the indicators that were consistent with the Grievant's behaviors. Those included excitedly getting up-and-down from his chair several times and showing many of the signs listed on the checklist, including being agitated, anxious, restless, irritable, moody, loud, boisterous, hyperactive and fidgety. The manager also observed that the Grievant's eyes were bloodshot and showed much yellowing around the whites of the eyes.

Based on these observations the manager required the Grievant to submit to a reasonable suspicion drug test at the Employer's on-site clinic. When the Grievant's urine sample came back "non-negative" for marijuana, the manager suspended the Grievant pending confirmation of further lab results. This was standard protocol pursuant to the Employer's Drug and Alcohol Policy.

As part of this suspension the manager escorted the Grievant to his locker to collect his belongings and then await a ride home. The manager left briefly to retrieve the Grievant's i.d. card from a nearby office and after learning it was not there he returned to the locker room to ask the Grievant where he had left it. The Grievant thereupon retrieved it from a pile of clothes he had placed on the bench in front of him and handed the i.d. to the manager. When the Grievant next picked up his freezer bibs from the pile, the manager heard the sound of change hitting the floor beside the Grievant. The manager stepped to the opposite side of the bench to help the

Grievant pick up the change and immediately noticed two small ziploc baggies on the floor amidst that change. One was empty and the other contained a leafy green substance which the manager recognized as consistent with marijuana. He picked up the bags and has testified that he detected the unmistakable smell of marijuana.

The manager then reported this matter to the Employer's labor relations department and was instructed to call local police. The police did arrive and photographed and destroyed the contents of the bag. At that time a police sergeant admonished the Grievant for bringing drugs onto the Employer's property but did not arrest or cite him because of the small amount involved.

At this time the Grievant's cousin arrived to pick him up, but because cousin smelled of alcohol the police refused to let the Grievant go home with him. Thus, pursuant to Company policy which prohibits employees who test non-negative for a controlled substance to drive, personnel drove the Grievant home.

On October 2, 2012, the Employer received a lab report confirming that the Grievant had tested positive for marijuana. On October 4, 2012 the Employer terminated the Grievant for committing two Group 1ⁱ offenses: making racially derogatory statements toward DE and possessing marijuana on Employer property.

On behalf of the Grievant, the Union filed a timely grievance protesting the Employer's action. The parties were unable to resolve their differences concerning this matter in earlier steps of the grievance process, and have agreed that this dispute is now properly before the arbitrator for resolution. The parties and the arbitrator met for a hearing on this matter on October 2, 2013, and the parties subsequently submitted post-hearing briefs which were received on December 9, 2013. At that time the record was closed.

ⁱ The Company has unilaterally created Work Rules and Regulations which describe various types of misconduct and their accompanying types of discipline. Under this policy, misconduct is divided into two groups, the most serious of which are Group 1 offenses. The Employer reserves the right to immediately discharge any employee who commits a Group 1 offense, and racially derogatory statements and possessing an illegal substance on company property fall within this Group.

RELEVANT CONTRACT PROVISIONS

ARTICLE 13

Drunkenness, dishonesty, insubordination or repeated negligence in the performance of duty; unauthorized use of or tampering with Employer's equipment; unauthorized carrying of passengers; violations of Employer's rules which are not in conflict with this agreement; falsification of any records; or violation of the terms of this agreement shall be grounds for immediate discharge.

DISCUSSION AND DECISION

In this case the Employer has had the burden of proving that it had just cause to discharge the Grievant. For the following reasons I find that the Employer has met that burden.

1. What happened? Findings of fact regarding racial epithet

The Employer has discharged the Grievant in part because he allegedly directed racial epithets toward a co-worker on the morning of September 25, 2012. The Employer offered the following evidence regarding this allegation: (1) the email that a supervisor sent to the risk control manager at 8:04 A.M. that morning indicating that an employee had just reported that 30 minutes earlier (at 7:45 A.M.) the Grievant had, among other things, called him "nigger" and was on drugs, (2) the risk control manager's testimony regarding his interviews of DE, another employee (BS) and the Grievant, and the Grievant's behaviors that morning and (3) the written statements of DE, BS and the Grievant.

The Union challenges this evidence based upon what it claims are the numerous and fatal inconsistencies in DE's very specific written statement. The Union further argues that neither DE's nor BS's written witness statements should be given any weight as the Employer did not explain their failure to testify in this matter.

Failure to testify: I have considered the Union's evidence and argument regarding DE's and BS's failure to testify and find that although they are important witnesses this is not a fatal flaw. First, it is widely understood that union members are very reluctant to testify against fellow union members. Thus, although the absence of live testimony subject to cross-examination is highly relevant in assessing the credibility of a person's written statement, it does not mandate

complete disregard of that statement. Instead, the credibility of these statements must be assessed in conjunction with all of the available evidence, one important factor of which is the Union's inability to cross-examine that witness. By the same token I note that the Grievant also did not testify in this matter. This is not a criminal proceeding in which the 5th Amendment applies, and the Union's arguments could similarly be used to cast doubt on the Grievant's written versions of these events. However, those written statements have also been weighed in conjunction with the larger body of evidence.

DE's alleged inconsistencies: The Union also argues that DE's allegations are not credible because the events set forth in his lengthy and very specific written statement could not have happened as he claims. Specifically, the Employer's electronic records, known as the "pick" and "red prairie" reports are contrary to DE's written statement which unequivocally asserts that the Grievant was picking an order in the 1351 Slot, that BS was standing somewhere between the FH and FG aisles when the alleged incident occurred and that DE was at Slot 2981 of the FK aisle talking to BS when the Grievant allegedly again cursed at DE. The electronic records do not support these assertions.

I have considered this evidence but agree with the Employer that the inconsistencies between DE's written statement and the electronic records are minor and understandable. On the contrary, those records support the essential assertions found in both DE's and BS's statements. Those essential assertions include: DE and the Grievant were both working in aisle FJ, Grievant stopped working at slot FJ 2082 at 6:50 A.M., DE's pick rate of six cases per minute was suddenly interrupted from 6:52 - 6:53 A.M. near slot FJ2711, the Grievant had to pass DE on his way from slot FJ2082 to FJ3011 where he arrived at 6:53 A.M., the Grievant did not pick a single case from 6:52 to 6:53 A.M. and DE went from picking six cases per minute prior to 6:52 A.M. to picking a total of two cases from 6:52 A.M. to 6:53 A.M., and BS was working in the cross aisle between FH and FK between 6:46 A.M. and 6:51 A.M., thereby close enough for him to hear and be drawn into a confrontation between the Grievant and DE.

In addition, DE's written statement is consistent with his initial verbal reports to his supervisor and later to the risk control manager. On both occasions DE verbally reported what he later wrote in his written statement, including his assertion, "I jump on my LT (pallet jack) to let (the Grievant) pass, as he's still yelling to the top of his (lungs), "You don't know me Nigger!"

Similarly, BS's verbal comments have been consistent with his written statement that:

I heard yelling in the J aisle and heard (DE) telling (the Grievant) to not ride upon him so close. (The Grievant) told him to shut up Nigger I will beat your ass and kept on repeating this to (DE). (The Grievant) seemed to be very wired.

By contrast, the Grievant has admitted in his two written statements that on the morning of September 25, 2012 he did have a confrontation with DE, but he insists that DE was the instigator of the altercation, that DE has long harassed him in the workplace and sought to have the Grievant discharged.

In reviewing the Grievant's verbal and oral statements it should be noted that he too is not accurate as to when and where events occurred. However, just as DE has not been held to a standard of perfect recall, neither has this been a fatal flaw regarding the Grievant's written statements. These events appear to have occurred over a very brief time and, notably, there appears to have been no clock in the area in which they occurred. Inconsistencies regarding time and aisle and slot numbers have not been given much weight in making these findings of fact.

However, the Grievant's shifting claims regarding the nature of this confrontation have worked very much against him. In his first written statement, prepared the date of the incident, the Grievant claimed:

I (the Grievant) came to work today, signed in to my order began to pick by 7:45-7:55 [illegible] the jack isle + saw Dean E [in front] of me picking and when he saw me coming he jump out from his LT after picking his case to jump in front of my LT so he can get hit by me and I told him if he do that again I was going to take him to human resources.

The risk control manager testified that when interviewed the Grievant changed his story concerning whether the word "nigger" was used at all during the confrontation. At first, he claimed that DE called him a "nigger." When asked to elaborate, the Grievant changed his story and claimed that DE actually called him a "black dumb African mother-fucker." When the Union business agent asked the Grievant if DE called him a "nigger" the Grievant changed his story again, claiming that DE had done so in the past but not that day.

Finally, to discount the Employer's evidence it would be necessary to conclude that two Union members conspired to lie about the Grievant in order to get him fired. There has been no evidence of any gain for these Union members to do so, and reporting on a fellow Union member carries a downside among co-workers unless something truly bad has happened. In short, DE's and BS's written statements have been believable, even considering their failure to testify in this matter.

Based upon the above evidence, I find that the Employer has carried its burden of proving that the Grievant directed a racial epithet against a co-worker in the workplace on the morning of September 25, 2012.

2. What happened? Findings of fact regarding possession of marijuana on Employer property

The Employer has also discharged the Grievant in part because he allegedly was in possession of marijuana on the morning of September 25, 2012. The Employer offered the following evidence to support this allegation: (1) the email that a supervisor sent to the risk control manager at 8:04 A.M. that morning indicating that DE had just reported that the Grievant frequently smoked and smelled of marijuana while at work, (2) BS's written statement which describes the Grievant as appearing "wired" during his confrontation with DE, (3) just hours before the marijuana was discovered the risk control manager determined that the Grievant was displaying behaviors of someone who was likely under the influence of a controlled substance, (4) just shortly before the risk control manager discovered the marijuana the Grievant provided a urine sample which later tested positive for marijuana, (5) and the manager found the marijuana on the floor beside the Grievant amongst the loose change that had just fallen out of the Grievant's freezer bibs.

The Union challenges this evidence based upon the undisputed fact that the manager did not actually see the Grievant in possession of the marijuana and because over 100 persons have access to the locker room in which the substance was found. The Union submits that mere proximity to a criminal activity does not establish that the person is engaged in that activity.

I have considered the Union's evidence and argument regarding this matter and find that the Employer has carried its burden of proving this allegation. This is not a criminal trial which requires proof beyond a reasonable doubt. Rather, common sense must be applied to determine

whether it is far more likely than not that the substance in question was marijuana and that the Grievant was responsible for its presence in the workplace.

There is been no serious suggestion that the leafy green substance in question was not marijuana. The risk control manager is a former police officer – albeit several years earlier – and had been trained to recognize it by sight and smell. The police officers who arrived on the scene immediately agreed that the substance was marijuana; they admonished the Grievant but did not cite him because of the small quantity. The substance was photographed and then destroyed. This is sufficient proof to demonstrate that the substance was more likely than not marijuana.

The essential question is, of course, did the marijuana belong to the Grievant? All of the evidence, itemized above, demonstrates that it is far more likely that it was than not. To find otherwise would be to accept that an extraordinary number of factors, each highly unique, converged simultaneously: the report of a co-worker that the Grievant was under the influence, the observations of a manager to that same effect which were later confirmed by a drug test, and the presence of marijuana directly in front of the Grievant and his locker amidst his possessions which had just fallen out of his freezer bib.

For these reasons I find that the Employer has met its burden of proving that the Grievant was in possession of a controlled substance while on company property.

3. Does the evidence of the Grievant's misconduct support the penalty of discharge?

The Union has argued that the Employer's workplace policies are not a substitute for just cause. That is correct. However, the Employer's workplace policies are relevant in assessing whether the rules that prohibit racial epithets in the workplace and possession of illegal substances in the workplace are reasonable and whether the Grievant had notice of them. Neither of those factors is in dispute.

The question now is whether the Employer had just cause to immediately discharge the Grievant for what have now been found to be his violation of two workplace policies which he knew could subject him to such. In concluding that the Employer did have just cause it has been relevant that the use of racial epithets is uniformly considered to pose a workplace danger in that it frequently instigates physical confrontation. Similarly, employers are not required to run the many safety, productivity and legal risks associated with employees who possess illegal drugs on company property.

There are no mitigating factors in this case. Thus, the Employer did have just cause to discharge the Grievant.

AWARD

For the above reasons this grievance is hereby denied.

December 28, 2013

A handwritten signature in black ink, reading "Christine Ver Ploeg". The signature is written in a cursive, flowing style.

Christine Ver Ploeg, Arbitrator