

IN THE MATTER OF ARBITRATION BETWEEN

ABBOTT NORTHWESTERN HOSPITAL)	
“Employer”)	
AND)	FMCS Case No.
)	0653147
SEIU, LOCAL NO. 113)	Termination
“Union”)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: November 8, 2006; Minneapolis, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: December 18, 2006

APPEARANCES

FOR THE EMPLOYER: Paul J. Zech, Esq.
Felhaber Law Firm
220 South 6th Street, #2200
Minneapolis, MN 55402
Christopher Chicoine, Former Supervisor
Kevin McKenna, Labor Relations
Candice Washington, Community Relations Specialist

FOR THE UNION: Brendan Cummins, Esq.
Miller O’Brien
120 South 6th Street, #2400
Minneapolis, MN 55402
Walter Singh, Grievant
Karmen Lee Ortloff, Business Rep.
Joyce Cronk, Community Relations Specialist
Joe Biros, Food Server

STATEMENT

Walter Singh (hereinafter the "Grievant") was terminated by Abbott Northwestern Hospital effective November 14, 2005. The Grievant was terminated on the charge of dishonesty arising from his actions on November 1, 2005. Those allegations included:

1. Misrepresenting himself and his time on a timecard by clocking in on Tuesday, November 2 at approximately 12:44 p.m. and clocking out at 7:46 p.m. despite the fact that he ostensibly performed services for the Employer for only a portion of that period.
2. He was not authorized to be at work during the week of October 31, 2005 and violated his supervisor's instructions with respect to the Grievant volunteering his services for a charitable event that day.
3. He specifically refused to follow his supervisor's directives with respect to his actions that day including, but not limited to, driving the Hospital's moving truck.

A grievance was filed on the Grievant's behalf on November 14, 2005. The parties were unable to resolve the dispute and the matter was referred to arbitration. The hearing was held on November 8, 2006 with additional testimony from Eric Eoloff by telephone conversation on November 21, 2006. The record was then closed pending submission of post-hearing briefs.

THE ISSUE

The parties have stipulated to the following statement of the issue: Was the Grievant discharged for just cause? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISION

ARTICLE 9

Discipline and Discharge

No Discharge Without Just Cause. The Employer shall not discharge or suspend an employee without just cause...dishonesty...shall be considered grounds for discharge.

STATEMENT OF FACTS

Abbott Northwestern Hospital is a large, acute care, multi-disciplinary hospital in the Phillips neighborhood of Minneapolis, Service Employees International Union Local 113 has represented certain employee classifications at the Hospital for decades. The Grievant worked at Abbott for approximately 17 years prior to his termination. The position he held at Abbott Northwestern Hospital at the time of his termination was that of "mover," a warehouse position.

He was the only mover within the Abbott Northwestern facility. His work was varied in nature and often required self supervision.

Prior to 2005, the Grievant had largely been independent in his work. New Warehouse Director Cris Aloof early in 2005 raised concerns regarding his work was organized, scheduled, and monitored; how his time was being accounted for; and whether the amount of overtime had been getting paid virtually on a weekly basis was justified.

The Grievant's direct supervisor, Chris Chicoine then began reporting to him. Eoloff testified that one of his first directives was to assert greater control and monitoring over the Grievant's daily activities. Eoloff testified that there had been customer satisfaction concerns raised regarding the Grievant's approach to his duties and one of Eoloff's initiatives was to improve his department's customer satisfaction ratings. The Employer presented no documentation to support any such customer complaints.

Chicoine met with the Grievant in January of 2005 to review his performance. During their review of that evaluation, the Grievant was advised of the need to improve his performance in a number of areas. These directives included:

- Service – “Walter needs to improve customer care and gain a new focus on delivering excellence to his customers.”
- Innovation – “focus on embracing change and the willingness to grow in the Department.”
- Partnership – “try to understand all points of view and using those idea to better help the customer.”
- Patient and Employee Safety – “Walter needs to focus on improving moving safety procedures...Walter must evaluate on a regular basis moving truck, moving supplies, and safety gear to ensure his safety as well as the product he is transferring.”
- “Through the move tickets are being completed, the focus needs to be directed on ensuring that the moves are being completed on a timely basis. Walter must learn to use the support team around him to help him complete his jobs in an efficient manner.”
- Paperwork and Phone Messages – “Walter must work on his ability to manage his time. The eight hour day given to him should be...adequate to finish his daily work.”
“For Walter to move forward and exceed expectations, he must focus on learning continuously and deliver excellence in all of the work he provides.”

This performance evaluation (see Employer Exhibit 1) concluded that Singh's overall performance rating was that of “partially/does not meet expectations.” Chicoine, Eoloff, and Singh all signed this performance evaluation document on January 18, 2005.

None of these directives were mentioned as being violated by the Grievant as a reason for his termination. Candice Washington testified that prior to the early 2005 timeframe the Grievant routinely claimed overtime and was a frequent visitor to her office to seek to have changes made administratively to his timecard. No violation of overtime claims were charged as cause for termination.

Despite the performance evaluation given in January, and the advice regarding efficient use of his time, customer satisfaction, etc. On February 22, 2005 the Grievant was issued a written warning. That warning noted that on February 7, 2005 he had scheduled himself for overtime and declined to obtain approval from his supervisor. The Grievant was once again advised as to the proper procedure for seeking and obtaining approval for unscheduled overtime and was advised that if "this issue" continues there would be further progressive discipline. The Grievant nor the Union grieved the disciplinary notice.

On Thursday, October 27, 2005 Abbott Northwestern Hospital received by fax a "Medical Documentation for Leave" from one of the Grievant's treating health providers stating that he would be "unable to perform any kind of work" from October 31, 2005 to November 6, 2005. The physician confirmed that the Grievant would be able to return to work without restrictions as of November 7, 2005. As a result of this documentation, the Grievant was granted a medical leave of absence (under the Family and Medical Leave Act) for the one week period in question.

On Monday, October 31, 2005, the Grievant and Chicoine spoke briefly about the Grievant's desire to "help out" on Tuesday, November 1 with a social event for United Way volunteers of Abbott. The Grievant and Joe Biros (Catering Manager for Abbott campus) had previously discussed the Grievant providing assistance with this volunteer event. Biros testified that the discussion the two men had was relatively brief, probably several weeks prior to the event.

Chicoine testified that he reminded the Grievant that he had asked for and was granted a leave from work for the entire week and that he was not to be working. He told the Grievant what he does on his own time is up to him and if he helped Biros with the volunteer event that he would be doing so on his own time and that he was not to be "on the clock." Moreover, Chicoine testified that he advised the Grievant that he was not authorized to use the Abbott moving truck for any such volunteer work. The Grievant testified that Chicoine never mentioned use of the truck and that with his injury Chicoine must have understood that his help to Biros would include driving supplies.

The Grievant clocked in at 12:44 p.m. on Tuesday, November 1. Consistent with Chicoine's directives that the Grievant could help Biros but not lift anything, the Grievant testified he merely drove the truck and that he mostly watched as Biros and his "crew" loaded up the truck. Biros testified the Grievant shared the work of loading the truck.

Once the truck was loaded (with the Grievant's assistance) he advised Biros that he needed to leave for an appointment with his daughter at her doctors.

Biros testified that the Grievant was gone for several hours, presumably with his daughter, and that when the Grievant did return and the party ended, the Grievant helped reload the truck. The Grievant then drove the vehicle back to Abbott where he helped unload. It was not until Friday, November 4 that Chicoine learned anything as to the Grievant's conduct.

On Friday November 4th, the Grievant went to the office of Candice Washington to ensure that his timecard would not contain a claim for hours worked. When she logged on to the payroll system to address the Grievant's concerns, she observed that he was on an authorized medical leave for the week including Tuesday, November 1, but that he also had recorded 6.5 hours of time worked. When she inquired of the Grievant regarding this apparent inconsistency, the Grievant stated to her that his supervisor "had okayed him" to work that day. However, when she conferred with Chicoine and learned that he had not authorized the Grievant to work on the clock that day, she confronted him with this information. The Grievant again stated that Washington should just remove his claimed work hours from his timecard. Washington testified that she "became nervous" concerned at this point regarding his intentions and declined to remove his time. She reported this to Human Resources who also alerted his manager and supervisor.

After receiving the information from Washington, Eloff and Chicoine undertook to investigate the Grievant's actions of November 1. They came to learn that the Grievant had in fact clocked in and out for a work shift despite being told not to do so, and he appeared to have performed services "on the clock" contrary to his medical restrictions, that he had stayed on the clock even though he spent several hours attending to personal matters that day. During the Hospital's investigation, the Grievant admitted that he had submitted a timecard which reflected hours far different than the time he spent on the volunteer event.

As a result of this alleged misconduct, and in light of the recent waning for less egregious violations, the decision was made to terminate the Grievant's employment.

POSITION OF THE EMPLOYER

The Labor Agreement here restricts terminations to a finding of "just cause." While the contract does not attempt to limit the circumstances in which a finding of just cause could be made, the agreement does give examples, which include "dishonesty."

Under the general concept of "just cause" the Hospital asserts that the Grievant's actions here fully support a conclusion that his termination was just. Grievant violated a handful of the most important covenants of the employer-employee relationship. Any one of those violations alone would provide cause for serious discipline. Combined, especially in the context of the employee's prior performance evaluation and written warning, they support fully the Employer's decision to terminate the Grievant.

Barely nine months earlier the Grievant had received the lowest possible performance evaluation score: "partially/does not meet expectations." That evaluation made clear how critical important it was that the Grievant: improve customer service, embrace change and growth within his department, improve safety, and manage his time. Nine months later, he was given a serious "written warning" for failing to abide by his supervisor's directives by regarding his time management.

Regarding the events of November 1, he was given directive that if he was free to use personal time to help out in the charity activities, but he could not do such on company time and he was absolutely prohibited from using the Hospital's truck. He punched in and took the Hospital's truck anyway. He involved a co-worker in his misconduct by having Biros drive the vehicle without authorization. He left the event without punching out in order to spend several hours on personal matters with his daughter.

He attempted to involve yet another innocent co-worker, Washington, by getting her to validate his false time record. Actions of this nature, which are intended to flaunt the directives of his supervisor cannot be ignored. To ignore such is to invite contempt for the Employer's authority and the dismissal by co-workers of any need to comply with other directives. Furthermore, the Grievant's actions created serious risk of harm and liability. His physical actions were inconsistent with his physician's restrictions. Driving the Hospital's vehicle contrary to an express directive could have created a liability risk in the event of an accident. Allowing his co-worker to drive a vehicle without any authorization would have presented the same liability risk. Timecard misrepresentations would undoubtedly subject the Employer to sanctions for Fair Labor Standards Act and Department of Labor Regulatory violations.

More directly pertinent to this matter is the specific contract provision stating that "dishonesty" is, as a matter of the "law of the shop," just cause for discharge. There is no dispute that dishonesty automatically meets this standard.

Here, the Grievant's actions, statements, even his testimony at hearing, lead inexorably to a conclusion of dishonesty in his dealings with the Hospital so as to warrant termination.

- The Grievant sought and obtained medical leave of absence benefits on the basis that he was physically unable to perform any duties during the week in question. He either misrepresented himself and his physical condition to his employer, or perhaps to both.
- He misrepresented to Biros that he was authorized to use the Hospital's truck in their activities on that day.
- He admitted during the investigatory and grievance phases, in the presence of Chiccone, Eoloff, and McKenna, that he had been told he could not use the truck and then claimed at the hearing in this matter that he never heard this before.
- He claimed at the hearing that he only drove the truck and did no physical lifting or moving. Biros' testimony confirmed, however, that the Grievant was lying and that he did, in fact, help physically move product and equipment.
- He clocked in as if working on the day in question and then left the scene to spend hours on personal activities while still on the clock. He made no effort to account for or correct this time on his card.
- He lied to Washington about Chiccone authorizing him to work the day in question as evidenced by his immediate "about face" when confronted with the facts.

The reality is that there is more than enough evidence here to conclude that the Grievant was dishonest in his dealings with the Employer to a degree that justifies a finding that he was discharged accordingly.

The Employer submitted evidence that a timecard/records falsification alone automatically justifies termination. The Employer has uniformly and consistently applied this policy to Local 113 employees and there is simply no basis for deviating from the policy here.

Even if the Grievant's story is accepted, that he believes he was authorized by Chicoine to work the shift in question (as he told Washington), then he still undeniably submitted and attempted to stand by a patently false time record. Even the Grievant does not contest the fact that he left the scene for several hours to attend to personal matters which would be inconsistent with his contention that Chicoine somehow authorized him to work the shift, not show up and leave.

If one decides to believe a slightly nuanced version of the Grievant's current tale – that he clocked in merely to show that he took the truck as part of his official duties but did not expect to be paid – there is no explanation or justification for why he did not go directly to Chicoine the next day to clarify his timecard. Instead, he went to Washington, despite being told repeatedly by her to go to Chicoine instead on such matters.

The fact is that the Employer has demonstrated that the Grievant engaged in timecard falsification here, a matter that always results in termination and which, by definition, equates to dishonesty under the contract. The Employer respectfully suggests that it is not properly the role of the arbitrator to create inconsistencies in the application of a long standing and justifiable disciplinary standard by substituting his own judgment here.

The Union has put forward a number of theories and defenses in an effort to redirect the focus away from the Grievant's obvious misconduct. None of the Union's assertions withstand scrutiny.

First, the Union and Grievant contend that Chicoine not only allowed the Grievant to work the day in question, but that he actually encouraged it and even authorized the Grievant to use the Hospital's moving truck. On its face, the suggestion is absurd. There is no possible motivation for Chicoine to do as suggested by the Grievant and Union. Chicoine had urged the Grievant to improve his personal safety practices and it makes no sense that he would then instruct the Grievant to work in contravention of his medical restrictions. Notably, it was not until the arbitration hearing in this matter that the Grievant even hatched this claim. It is also entirely inconsistent with everything Chicoine has said since this issue first came up. If, in fact, Chicoine had instructed/permitted the Grievant to work the event, why would he deny such in his conversation with Washington and why would he repeatedly confirm that he told the Grievant he could not be "on the clock" that day? There was no incident resulting from the event and Chicoine could easily have simply advised Washington either that he did approve the work or he could simply have told Washington to adjust the Grievant's timecard and that would have been the end of it.

As for the claim that Chicoine approved the use of the truck that, too, makes no sense. Again, this would have involved the Grievant working outside of his restrictions. Moreover, if Chicoine had authorized the use and the event concluded without any incident, as it did, what would motivate him to use the issue of the truck as a foundation for recommending the

Grievant's termination? This issue did not even come up in the conversation with Washington; it became an issue only when Chicoine was investigating the matter and he learned that the Grievant had directly disobeyed his instructions.

The Union points to the initial lack of consensus on the termination decision as reflected in Joint Exhibit 10. The Union notes that Labor Relations was not entirely "on board" with the decision to terminate and was recommending suspension instead. As Eoloff and McKenna made clear, however, Labor Relations' preliminary stance was based on limited knowledge regarding the facts, was likely skewed somewhat by McKenna's presentation due to his personal relationship with the Grievant, and was nothing more than an opinion in any event. As both Eoloff and McKenna testified, Labor Relations often has an opinion but the business unit lead makes the decisions on discipline, not Labor Relations. Eoloff, together with Chicoine, had the full perspective on the Grievant's conduct, prior conduct and communications, etc. Labor Relations had only the factual picture presented by McKenna and he admitted that his portrayal of the situation was very possibly clouded by his relationship with the Grievant. Subsequently, Labor Relations has consistently supported the termination decision and it continues to do so to this day.

The position held by the Grievant was one of independence and autonomy. Even if he had conformed to the more disciplined process requested by the Employer, the Grievant would still have had relatively free rein during the work day. Such apposition, where direct supervision and oversight is not possible, requires the individual in the position to be completely trusted to carry out initiatives and abide by policy. When the Grievant elected to disregard his supervisor's order not to use the Hospital's moving truck, and when he submitted as accurate a time record he knew to be false, the Grievant effectively demonstrated that he cannot be trusted to police his own behavior. The Grievant was advised in his January performance evaluation that he needed to be vigilant about a number of important facets of his job, and he was disciplined a month later for failing to do so. The record shows the Grievant to be a likeable and capable worker, but it also shows the Grievant to have serious issues with persons in authority. Over the years, the Grievant effectively created his own routine and he often found a way to create overtime opportunities for himself.

Any decision that would return the Grievant to work would undermine management's authority and send a completely inconsistent message to the workforce. Eoloff expressed his grave reservations over such a possibility out of respect and concern for an organization by which is no longer even employed. The arbitrator truly should resist any temptation in this case to substitute judgment here simply because the Grievant is a generally affable character.

POSITION OF THE UNION

The Employer argues that the Grievant was properly discharged because he purportedly misrepresented himself on his timecard and thus was "dishonest" within the meaning of the contract. "Dishonesty" entails intentional misrepresentation. Arbitrators have found that just cause for discharge does not exist where intentional dishonesty is not clearly shown.

In this case, the evidence shows that the Grievant did not intentionally make a misrepresentation in order to receive extra pay for time not worked. He admittedly clocked in on November 1, 2005 because he wanted to account for the use of the truck that day and avoid any concerns about his use of the truck. He did not expect to get paid for that day. Indeed, he requested that the time be removed in his meeting with Candice Washington on November 2, 2005.

After being made aware of all of the relevant allegations, Labor Relations Representatives Kevin McKenna and Tim Caskey concluded that “there is no evidence of malicious fraud or intent to commit fraud on the Grievant’s part. Chris did give the Grievant permission to be on property that day but not to use the truck. Walter clocked in because he did not want anyone questioning the fact he was here loading his truck. On this basis, the Labor Relations Department recommended against termination but unjustifiably overruled.

It is important to note that Singh actually would have received less pay in clocking in for 6.5 hours on November 1 than he would have received for a full 8 hours pay for a sick day. Even taking account of an evening shift differential of .60 cents per hour.

Moreover, Chicoine admitted that Grievant had approximately 700 hours of accumulated sick pay available at the time of his termination. Thus, it cannot credibly be argued that he clocked in for the purpose of avoiding the use of sick time.

It is also significant that Grievant actually worked on November 1, 2005. Director Eric Eoloff admitted that helping Biros perform moving tasks in connection with the Park House event was within the scope of Grievant’s job duties. Thus, the Grievant did not misrepresent the fact that he performed work on the Employer’s behalf that day. The Employer argues that the Grievant made a misrepresentation because he stayed on the clock while not working. However, the Grievant did not expect to be paid at all for his work on November 1, 2005 and only clocked in to avoid concerns regarding his presence at work and the use of the truck.

Grievant did not hide the fact that he was going to take his daughter to the doctor and openly attended the Employer sponsored party prior to assisting with moving tasks after it concluded. In fact, he specifically told Biros that he was going to take his daughter to the doctor. If the Grievant intended to defraud his employer, he would not have been so direct and open about his non-work activities on that day.

He should also be given the benefit of the doubt regarding clocking in on November 1 because the situation of working off the clock was unusual, and the directions from Chicoine were unclear. Clear warnings as to what conduct is prohibited and the consequences of a violation are a prerequisite to discharge.

Here, Eoloff admitted that the Employer did not typically allow employees to perform work within their job duties without getting paid. In a conversation with Chicoine on November 7, 2005, Grievant explained to Chicoine that he had never been in a situation where he was asked to work without pay, and he was not sure of the correct action to take with regard to his timecard.

Chicoine told him that he could help Biros but “not to work or drive the truck on company time.” Chicoine thus authorized the Grievant to perform work in the scope of his job duties but not to do it on “company time.” Grievant understood this to mean that he would not get paid for the time – not that he must refrain from clocking in.

The Employer introduced evidence of past timecard adjustments for the Grievant to attempt to raise the inference that he misrepresented his timecard on prior occasions. There was no evidence that any prior adjustments were due to misrepresentations, and the adjustments only support the conclusion that the Grievant did not equate clocking in with automatically being paid.

The fact that the Grievant asked Washington on November 4, 2005 to remove the hours worked for payroll purposes is further evidence of the Grievant’s good intentions and understanding that he was not expecting to be paid for his work on November 1.

In sum, the Grievant did not act with intent to deceive his Employer, as the Labor Relations Department recognized in recommending against termination. Accordingly, the employer lacked just cause to discharge.

One factor traditionally considered by arbitrators when determining whether just cause for termination exists is whether the employee could reasonably be expected to know his conduct would subject him to discipline. “Just cause requires that employees be informed of a rule, infraction of which may result in suspension or discharge...” Elkouri & Elkouri, How Arbitration Works, 990-91 (6th ed. 1003) (citing *Lockheed Aircraft Corp.*, 28 LA 829 831 (Hepburn, 1957)).

“An employee can hardly be expected to abide by the ‘rules of the game’ if the employer has not communicated those rules, and it is unrealistic to think that, after the fact, an arbitrator will uphold a penalty for conduct that an employee did not know was prohibited.” Elkouri & Elkouri, How Arbitration Works, 990 (6th ed., 2003) The Employer contends that the Grievant disobeyed a clear order from him (1) not to use the truck and 92) not to clock in on November 1, 2005. (Joint Exhibit 7) However, Chicoine’s contemporaneous notes dated November 7, 2005, which describe his conversation with Grievant, do not reflect that such a clear command was made.

Chicoine admits that he told the Grievant that he could help Biros with the Park House event, but that it would be “on his own personal time.” Chicoine instructed the Grievant that he “was not to work or drive the truck on company time.”

Nowhere does Chicoine’s contemporaneous statement say that he instructed Grievant not to clock in. Nor does Chicoine's contemporaneous statement say that he instructed him not to drive the truck. He simply told him “not to work or drive the truck on company time.” Indeed, Chicoine admitted that Grievant could reasonably conclude that the authorization to help Biros meant using the truck, since using the truck is an essential part of what the Grievant does to help Biros. Additionally, employer witness Washington admitted that Grievant recognized that adjustments could be made to previously recorded time, such that clocking in is not equated with

getting paid. Indeed, the very purpose of Grievant's visit to her office on November 1, 2005 was to remove compensable hours from his timecard.

Chicoine did not clearly communicate that Grievant was not to drive the truck at all, and that he was not to punch in on November 1. Instead, he communicated that he was not to drive the truck on company time, i.e., that he would not be paid for his work helping Biros. Grievant behaved consistently with what he reasonably understood Chicoine's instructions to be.

An additional mitigating factor is that the situation was unusual and confusing. Chicoine allegedly authorized Grievant to come in from medical leave to do his job without pay, and to do his job – which involves using a truck – without using the truck on company time. Eoloff acknowledged that the Employer does not typically authorize employees to perform work within the scope of their job duties without pay. In this unusual setting, Grievant's confusion about how he would handle his timecard is all the more understandable.

Under the Fair Labor Standards Act ("FLSA"), work performed by an employee is compensable when "the activity is performed with the knowledge and approval of the employer and for the employer's benefit." Elkouri & Elkouri, How Arbitration Works, 983 (6th ed., 2003) (citing Reich v. Department of Conservation & Natural Resources, 28 F.3d 1076 (11th Cir., 1974)). When Chicoine authorized the Grievant to perform work within his job duties without getting paid, he directed an employee to work without pay for the benefit of the employer in violation of the FLSA. Eoloff testified at the hearing that helping Biros was part of the Grievant's job and that if the Grievant had not performed the work, either he or Chicoine would have had to "take the ball and run with it." Grievant was technically entitled to be paid for work within the scope of his job duties but pointedly declined to accept compensable time.

"Consideration generally must be given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record and it may be aggravated by a poor one. Indeed the employee's past record often is a major factor in the determination of the proper penalty for the offense." Elkouri & Elkouri, How Arbitration Works, 983 (6th ed., 2003).

Here, the Employer ignored Grievant's virtually spotless 17 year work record. The Employer overlooked the enthusiastic and creative volunteer work that Grievant performed on behalf of the employer in the community, including stints as an Elvis impersonator and Wild West re-enactor. Witnesses who testified about his contributions, including Joyce Krook and Kevin McKenna, praised his attitude and contributions beyond the call of duty. Nonetheless, the employer summarily terminated the Grievant thereby violating the principle of progressive discipline implicit in just cause while ignoring his long years of contribution to the Hospital.

The concept of progressive discipline is set forth in the Employer's own Disciplinary Action Notice which lists four forms of discipline from verbal warning to termination since the Grievant has been subject to only one minor previous disciplinary notice dated February 22, 2005 for unauthorized overtime.

The previous discipline, like this one, involved alleged unauthorized work for the employer. The discipline made clear what the consequences of another occurrence would be as follows: "If this issue continues there will be one more warning, after which a suspension will be advised." (Employer Exhibit 2) Based on this prior notice, Tim Caskey of Labor Relations recommended a one day suspension for the Grievant following the event of November 1, 2005. A summary discharge is excessive and violates progressive discipline called for in the Employer's own policy.

The Employer relies on one performance appraisal and one disciplinary action notice in support of its decision to terminate. While the Employer also referred to an alleged June 2005 performance appraisal, the Employer failed to produce it, and it should be disregarded.

Moreover, a review of the evidence makes clear that the performance appraisal and disciplinary action notice were delivered on the same day and do not constitute separate warnings. The Employer attempted to rely on the patched-together performance appraisal document at Employer Exhibit 1 in an attempt to demonstrate that Grievant was previously warned that he must "work on his ability to manage his time." This document has multiple dates and forms that do not seem to be a part of the same original document. The first page of the document lists the current review date as 09/01/2004 and the next review date is identified as 9/1/05, but the signatures are dated 2/21/05 and the run date is 2/22/05 – the same date as the discipline was imposed for unauthorized overtime.

Thus, assuming the "run date" is the date the document was generated, it would appear that the performance appraisal was issued on the same day as the discipline, and cannot be considered as a previous "warning" of some kind. Finally, the last page of the document is a form dated 1/18/05 that has a different letterhead and subscript at the bottom of the page, and simply contains an innocuous comment: "For Walter to move forward and exceed expectations, he must focus on learning continuously and deliver excellence in all the work he provides." This general statement does not constitute a separate warning regarding unauthorized use of time. Given the confusion in the dates in this document, the performance appraisal regarding use of time should not be considered as anything other than a duplication of the discipline dated February 22, 2005.

The Grievant's signature is not present on the performance appraisal until the last page which was signed on an entirely different date. The Grievant testified that he did not remember signing the final page of the document. Two explanations are viable for the Grievant's inability to remember signing the document. First, the signature is dated 1/18/05, which is almost two years ago. Second, the date of the last page of the exhibit does not correlate with the prior pages and the Grievant may have never seen the document together.

The Employer also attempts to rely on alleged failures of the Grievant to follow move procedures. However, the Grievant was never disciplined for failing to follow move procedures. Additionally, Washington testified that she had to institute a system for the Grievant to follow for timecard adjustment because he frequently requested them. However, she admitted that he followed the system without fail until the present grievance.

The Employer produced a table of employees terminated for falsification of records in an attempt to show that the proper punishment was termination. However, when asked if the circumstances surrounding the decision to terminate the employees on the list were similar to the Grievant's circumstances, McKenna could not remember. For example, he could not remember if any of the employees had similar excellent work records or long work histories, or if they had requested that the allegedly "falsified" time be removed from the system. Given the unique circumstances of the Grievant's termination, it is highly unlikely that the issues were similar. In the absence of any detail from the employer, the Arbitrator should assume that the circumstances are not similar.

The Employer's lack of support for the Grievant's termination is even more suspect given the fact that the Grievant had increasingly been complaining of workplace injuries, and was on medical leave due to work related injury. After he returned from medical leave on November 7, 2005, he re-injured himself moving a table at work. He was examined by a doctor and given work restrictions. On November 11, 2005, Eoloff appeared to become angry with the Grievant when he said he could not move a heavy freezer. The Grievant's termination occurred on the next business day, for conduct that even the Employer's Labor Relations Department believed did not justify termination.

DISCUSSION AND OPINION

Certain findings of fact are needed in order to reach a fully informed decision in this matter. The single most critical fact to be established in this case is the precise reason or reasons relied on by the Employer as just cause for the decision to discharge the Grievant.

Obviously, just cause depends on the adequacy or sufficiency of the basic justification cited for the termination of employment. Unless and until the real justification for the disputed decision is identified, no truly relevant defense can be mounted nor can the evidence presented to support the charge be effectively tested.

In the instant case, the definitive answer to the real reason for the discharge decision came from the person who made that decision, former Abbott warehouse director Eric Coloff. In his telephone testimony, Eoloff stated unequivocally that while he considered the Grievant's assistance to Biros a serious violation of his instructions to avoid performing work that was not directly approved by supervisor Chicoine, the real reason for the discharge was that he believed that the Grievant had "misrepresented his timecard" – "he clocked 6.5 hours but worked less than three. He admitted that he took his daughter to the doctor without clocking out – in other words he did so on company time. This was a breach of trust and I decided then that Walter was no longer a trusted employee."

Eoloff testified further that he first became suspicious that the Grievant was guilty of misrepresenting his timecard when Candice Washington, who handled payroll for the unit at the time, reported to Chicoine who relayed to him that Walter Singh had asked that his hours reported for November 1 be removed from his timecard. Eoloff stated that he had seen the Grievant at the charitable event assisting Biros but thought he was helping out on his own time.

Findings and Conclusions: No reasonable doubt can remain over the fact that the fundamental and definitive reason that the Employer discharged the Grievant was the belief that he had committed a dishonest act by deliberate misrepresentation of his timecard consisting of claiming compensable work time while taking his daughter to a doctor's appointment without checking out.

This conclusion stands reinforced by several other sources besides Eoloff's testimony. Human Resources Generalist Lisa Habisch who wrote in her rejection of the Union's January 18, 2006 request for reconsideration that "Walter Singh was discharged for falsifying his timecard..." (Joint Exhibit 4).

In its presentation at the hearing of this matter the Employer submitted into the record a document showing Abbott Northwestern's consistent record of terminating employees found guilty of falsification of records. The document shows 12 other employees, in addition to the Grievant, who are listed under the heading "Action" as "Termination" for "Falsification of Records." (Employer Exhibit 4)

There remains, of course, the additional charges that the Grievant clocked in and drove the company truck without authorization. Neither of these alleged violations were cited as standing alone reasons for termination, however, and will be addressed further in this review.

Analysis of Falsification of Timecard Charge

The essence of the offense of falsifying or misrepresenting a company record, including a timecard is the dishonest nature of the offense. General Electric Co., 72 LA 391 (McDonald 1979). The commonly applied standard of proof for terminations on the grounds of dishonesty is clear and convincing evidence. Rarely can a standard of proof less than the preponderance of the evidence be found for this kind of offense or any other containing, as it does, elements of criminal intent or moral turpitude.

The reason for such a high standard of proof in arbitrations of discharge for dishonesty lies in the adverse effect on the future employability of a person found guilty of violating the trust of the employer. It needs to be noted, again, in this regard that Eoloff stated that [the Grievant] "took his daughter to the doctor without clocking out – in other words on company time. This was a breach of trust. I decided then that Walter was no longer a trusted employee." (Emphasis Added)

Arbitrator Arnold Zach, professor of law at Harvard and past president of the National Academy of Arbitrators advises that in cases of termination for dishonesty:

The following circumstances should be examined:

1. Did the employee profit by receiving money or other valuable consideration?
2. Were the discrepancies inherently impossible or improbable so as to make a mere mistake unlikely?

3. Was the conduct repeated and therefore unlikely to be a mistake?¹

In response to the question of whether the Grievant had anything of value to gain from clocking in on the day in question, the fact is that he was on sick leave at the time guaranteeing him a full eight hours pay at his regular hourly wage rate. Thus, there could have been no possibility that he could have realized any financial gain from “going on the clock” by punching in.

The Employer next submitted the alternative supposition that the Grievant may have sought to falsify his timecard to preserve the sick leave payday from deduction from his sick leave bank. Chicoine admitted, however, that the Grievant had some 700 hours of sick leave entitlement at the time. This undisputed fact makes the supposition that the Grievant sought improperly to conserve eight hours of this entitlement by falsifying his timecard entirely implausible.

These findings of fact and conclusions leave the Grievant’s explanation for clocking in as the only reasonable rationale for his doing so. He testified credibly that he punched in because he was unsure of the legal or insurance implications if he had an accident with the truck while not in some kind of official employment status.

Whether or not the Grievant’s concerns had any actual legal/insurance legitimacy is irrelevant. The necessary conclusion can only be that he acted, at worst, out of an excess of caution rather than from any dishonest motive in clocking in without explicit authorization to assist caterer Biros by driving party supplies in the company truck.

In light of the fact that the Grievant sought to have the 6.5 hours on his timecard removed so that no compensable time would be reported reinforces the conclusion that he never meant to have his clock in cover anything but potential legal/insurance consequences of a possible accident while operating a company vehicle. In short, the Grievant acted to eliminate any misunderstanding that he expected compensation for the hours shown on his time card.

From these undisputable facts it follows as surely as the rear wheels of a car follow the front wheels around a corner that the Grievant could not possibly have committed a dishonest act by taking his daughter to the doctor at a time when his payroll status was that of paid sick leave. In plain truth, I remain mystified as to how the three management representatives who testified in this case could possibly have concluded that he sought some dishonest gain by clocking in for a mere 6.5 hours on a day when he was already guaranteed a full eight hours.

One might conceivably understand how they might have been briefly confused by the contradiction of the Grievant clocking in when he was already on fully paid leave status but such confusion should certainly have been cleared up by his explanation that, in effect, he sought to avoid any potential adverse consequences to the Employer by so doing.

¹ 20.07 Causes of Discipline, Labor and Employment Arbitration, ed. Bornstein and Gosline. Mathew Binder (cont. series), NYC, NY.

In seeking to find some rational basis for the decision-making process of Washington, Chicoine, and Eoloff, I have painstakingly revisited their testimony. I remain at a loss to understand how they could possibly infer that the Grievant committed a “dishonest act” by “misrepresenting” his time card. The record facts adduced at the hearing portray the following sequence of events regarding the charge of dishonesty against the Grievant:

(1) After he had punched in and clocked some 6.5 hours while helping the caterer and driving his daughter to a doctor’s appointment, the Grievant went to Candice Washington’s office. At the time, she handled payroll records for the unit in which he worked.

The Grievant requested that she remove the hours shown as work time on his timecard. He told her that Chicoine approved his assisting the caterer but he did not want to be paid for the hours shown on his timecard.

Ms. Washington testified that she called Chicoine about the Grievant’s request to take the hours off the timecard because this request seemed to her so “unusual” in light of the fact that he was already on paid sick leave status. She stated that such a request “made her nervous and she didn’t feel right about taking the hours of his timecard.” Washington never explained why she inferred from the Grievant’s request that he not be paid for these hours indicated a dishonest intent.

(2) When Ms. Washington reported her suspicions to Chicoine, he told her that he had not authorized the Grievant to clock in or to drive truck – that he had told him that any help he gave Biros was to be on his own time.

Chicoine testified that when he subsequently saw the Grievant’s payroll record for Tuesday, November 1st, he noted that there was no interim clock out for the time spent in taking his daughter to a doctor’s appointment. Chicoine stated that at this time he “came to believe Walter’s actions were dishonest” and that he communicated this belief to Eoloff and to Human Relations personnel.

On cross-examination, Chicoine admitted that he knew the Grievant was on paid leave at the time and that he understood that he would receive eight hours pay. Despite these facts, Chicoine somehow concluded that the Grievant acted to dishonestly misrepresent his timecard by requesting that the hours shown as time worked be removed from his November 1st report. Chicoine testified further that he considered the Grievant’s 17 years of honest unblemished service and recommended that he be terminated for “using work time to take his daughter to the doctor while on the clock.”

Chicoine never explained how it could possibly be dishonest for the Grievant to take his daughter to a doctor during a time when he was officially on paid sick leave and when he had asked that his timecard be cleared of any record of compensable work time.

(3) It remained for Eoloff to answer the question of why the Employer considered the Grievant’s actions dishonest for clocking in that day and, as Eoloff put it, taking his daughter to the doctor while “on the clock.” He flatly rejected the explanation that the Grievant punched in

to cover the Employer from any insurance/legal complications in the event of an accident with the truck.

Instead, he found it more logical to impute a dishonest motive to the Grievant. Such motive, Eoloff testified, consisted of an attempt to save the one day sick leave from being deducted from his sick leave bank. Eoloff stuck with this fanciful conclusion despite the facts that:

- It fails to square with the Grievant requesting Candice Washington to remove the 6.5 hours from his timecard.
- It takes a highly unlikely stretch to imagine that he would place his job at risk to save a mere one day out of a 700 hour sick leave bank – especially when an eminently logical explanation for the Grievant's actions was otherwise provided to the Employer.

Conclusion

The erroneous and unsupportable conclusion that the Grievant acted with dishonest intent by seeking to have compensable time removed from his timecard and/or by temporarily leaving the charitable event to take his daughter to a doctor while he was serving as an unpaid volunteer defies elemental logic. Indeed, the true difficulty in crafting this decision and award arose from having to make commentary on the obvious.

The obvious in this case cannot be more directly stated – the charge of dishonesty against the Grievant is squarely contradicted by the facts.

Because the Grievant committed no timecard falsification, certainly he should not be included in the list of those submitted into evidence by the Employer as proof that in the past such a violation consistently warranted termination.

For any and all of the foregoing reasons the discharge of the Grievant should be and is, hereby, vacated.

**

There remains only the charge that the Grievant “made unauthorized use of a company vehicle.” (Joint Exhibit 7).

The support for this charge includes that it subsumes two other infractions, i.e., that he was told by Chicione that any work he did on November 2 was to be on his own time and that he clocked in without authorization. Chicione testified that he had instructed the Grievant not to clock in, work on the clock, or drive the truck when he asked permission to do so, on the previous day.

The Grievant testified that his understanding was he could assist Biros but only on his own time. He stated that because he had the OK to help out he assumed it included driving the truck since his sore arm and wrist limited any significant lifting. He testified further that by

permission to help “on his own time” was the reason he sought to have the hours removed from his timecard to make sure no one would conclude that his assistance to Biros was meant to be paid work time.

Analysis: A careful review of the testimony of both Chicoine and the Grievant suggests a misunderstanding concerning driving the moving truck. The strong inference to be drawn from the conflicting testimony favors the Grievant’s version of having failed to understand that he was not to do any truck driving in the course of assisting the caterer. Indeed, his subsequent actions firmly indicate that he believed he had permission to do so.

It simply makes no sense to conclude that the Grievant would brazenly disobey a clear instruction of the contrary by driving about the scene of the celebration – in clear view of supervisors who had the power to severely discipline him for insubordination. In sum, he stated that he understood Chicoine to say “Don’t punch in to help Biros. It’s OK to do it on your own time.” This unclear direction could and was taken by the Grievant to mean don’t put in any worktime on the clock for helping out Biros.

The Grievant’s failure to understand Chicoine’s instructions not to drive the truck, however, is actionable. This failure represented the kind of lapse in attention to work directives of which he was told in a previous performance evaluation and advised that he needed to improve upon. Under the principles of corrective, directive discipline embodied in relevant Employer policies, the appropriate penalty is a written warning. Such penalty accords with his previous discipline which stated “If this issue continued there will be one more warning after which a suspension will be advised.” (Exhibit No. 2).

SUMMARY OF DECISION AND AWARD

1. As to the discharge for dishonesty, the Employer has failed to show just cause.
2. The Grievant, therefore, shall be reinstated to his former position and be made whole for all loss of wages and benefits from the date of his last working day until his first day back on the job.
3. As to the charge that the Grievant disobeyed orders not to drive the truck on November 2, 2005, the offense is reduced to that of failing to pay sufficient attention to supervisory directives.
4. The penalty for this lapse is a written reprimand and warning.
5. The Arbitrator retains jurisdiction in this case for a period of ninety (90) calendar days solely to resolve any disputes over remedy.

12/28/2006
Date

John J. Flagler, Arbitrator