



## FACTS

The Employer produces metal castings at its foundry in Mankato, Minnesota. The Union is the collective bargaining representative of most of the non-supervisory employees of the Employer.

The grievant, James L. Ganzel (hereafter, "Ganzel"), has been employed by the Employer since November, 1989. He works in the Pattern Department, and he is classified as a Pattern Maker. The grievant, David McDonald (hereafter, "McDonald"), has been employed by the Employer since March, 1993. He works in the Finishing Department, and he is classified as a Finisher, though he works as an Inspector.

At the time of the events relevant to this grievance, Ganzel was President of the Union and Chairman of its Bargaining Committee, and McDonald was Secretary-Treasurer of the Union and a member of its Bargaining Committee.

Blaine T. Johnson, Production Supervisor on the third shift, gave testimony that I summarize as follows. On March 6, 2007, Johnson saw McDonald leave his work area and go into the Pattern Shop -- a walled off room in the plant's production area -- where Ganzel was working. Because Johnson had seen McDonald leave his work area previously to go into the Pattern Shop, he decided to measure on his stop watch the amount of time McDonald was in the Pattern Shop. McDonald was there for twenty-seven minutes, from 4:06 a.m. till 4:33 a.m. Neither McDonald nor Ganzel entered a code for "idle time" on their time cards to account for this time, both remaining in pay status. Johnson

stayed outside the Pattern Shop and did not hear what McDonald and Ganzel were talking about.

At about 7:00 a.m. that morning, Johnson consulted with Harley Goff, Human Resources Manager, Kelley Peterson, a Vice President of the Employer, Jed Falgren, another Vice President, and Frank Fischer, Plant Superintendent, about disciplining Ganzel and McDonald. Johnson and these four management employees decided that it was appropriate to issue disciplinary warnings to McDonald and Ganzel, and they recommended such a disposition to Jean Bye, the Employer's President; Bye approved their recommendation. The grievants were not asked to explain their conduct before the warnings were issued -- though the management employees who recommended the discipline decided to delay the warnings to see whether the grievants would record the twenty-seven minutes taken for their conversation under the "idle time" code used in the Employer's time records. When no such entries were made by the grievants; the warnings were issued, as described below.

On March 9, 2007, James Headington, Ganzel's immediate supervisor, issued the following disciplinary notice to Ganzel:

On 3/6/07 Jim was observed talking with another employee [McDonald] from 4:06 a.m. until 4:33 a.m. During this time he was punched onto Code 85 (pattern work). This is the first step of a three-step disciplinary process. The next offense will result in a 3-day suspension.

On March 11, 2007, Johnson, who was McDonald's immediate supervisor, issued the following disciplinary notice to McDonald:

On 3-6-07 I observed Dave going into the pattern shop at 4:06 a.m. and speaking with another employee [Ganzel]

until 4:33 a.m. During this 27 minute time period Dave was punched onto 27 (Inspection). This is the 1st step in a 3 step disciplinary process. The next offense will result in a 3-day suspension.

On March 14, 2007, the Union grieved the discipline of Ganzel and McDonald, 1) as "inappropriate discipline," 2) as a violation of all contract provisions "that apply" and 3) as contrary to past practice. In addition, the grievance states that "past practice allows for some union business on company time" and that discipline was issued "to keep the union committee from taking care of union business."

Article 11, Section 1, of the parties' labor agreement provides:

Discipline or discharge of employees shall be for just cause: warning notice shall be given any employee for a complaint not considered cause for immediate discharge. Any employee may request an investigation as to his/her discipline or discharge. Company rules will be posted at a designated posting location and/or computer displays and will be incorporated into the employee manual.

The parties' arguments cite several provisions of the Production Employee Handbook (the "Handbook"), a twenty-nine page document, which is organized by titles rather than by numbered chapters or sections. Below are set out parts of the Handbook entitled, "Discipline and Discharge," appearing on page twenty-three of the Handbook:

DISCIPLINE PROCEDURE. The Dotson Company has a set structure for disciplines. Offenses warranting discipline are grouped into one of three general categories. The determination of whether a particular incident of misconduct is major, intermediate or minor is a matter of managerial discretion.

Major offenses are dealt with through immediate termination. Examples of serious offenses may include theft, altering time entry, fighting, sabotage,

bringing a weapon to work, intentional misuse of equipment or castings, refusing to do a job, etc.

Intermediate type offenses are subject to a three-step discipline process whereby the first step is a written warning, the second step is a three-day suspension and the third step is termination. This three step process is used for offenses such as safety violations, insubordination, flagrant disregard of work procedures, etc.

Minor offenses are subject to a five-step discipline process whereby the first step is a documented oral warning, the second step is a written warning, the third step is a one-day suspension, the fourth step is a three-day suspension and the fifth step is termination. This is used for minor offenses such as minor or unintentional production problems, general incompetence, etc.

All disciplines stay active for a minimum of 36 months. After 36 months they will no longer be used in the progressive system provided the employee has not had another similar discipline issue during that 36-month period. If another discipline has occurred during that 36-month period then all of the disciplines remain active for a period of 60 months after the most recent discipline.

Below are set out parts of the Handbook entitled, "Time Reporting," appearing on page eighteen of the Handbook:

. . . Breaks: All employees must clock in and out for breaks. You should always clock in and out on the closest computer terminal in your area. Once you have clocked out, then clean up and take your break. Long breaks will not be tolerated and could subject you to discipline. . .

Personal Time: If you leave your area to do personal business for more than 5 minutes, you must clock it under idle time. [Hereafter, I refer to this part of the Handbook, as the "5 minute rule," as the parties refer to it.] This allows us to do a better job of costing. Always inform your supervisor when you leave your area. . .

Mistakes. If you make a mistake in your time recording, you need to make sure it gets corrected. If the mistake does not involve missing time, print out your time report, mark your corrections on the report and turn it in to personnel the same day. If the mistake involves missing time, follow the process above, however, you must have a supervisor approve the changes.

The only evidence describing the subject of the twenty-seven minute conversation between Ganzel and McDonald was given in Ganzel's testimony. He testified as follows. During that conversation, they were discussing a recent notice McDonald had received of his possible deployment to Bosnia as a member of the National Guard. Ganzel and McDonald had been friends since they were in school together. McDonald asked Ganzel's advice about his right to re-employment upon his return. McDonald thought Ganzel would have some information about his right to re-employment because Ganzel had served in the military as a recruiter and was familiar with the laws relating to such re-employment. McDonald did not testify.

#### DECISION

The primary issue presented by this case is whether the Employer had just cause to issue an "intermediate" level disciplinary warning to each of the grievants. The uncontradicted evidence establishes 1) that on March 6, 2007, the grievants engaged in a twenty-seven minute conversation, 2) that the conversation was not related to work, 3) that the conversation was not related to Union business, and 4) that they did not "clock out" the time spent in that conversation to "idle time," as required by the text of the 5-minute rule.

The primary defense raised by the Union is that in the past the Employer has condoned violations of the 5-minute rule by consistent failure to enforce it, and thus has indicated to the workforce by practice a less restrictive requirement than the one stated in the text of the rule.

The evidence about past enforcement of the 5-minute rule is as follows. Ganzel testified that he has often talked with other employees about non-work related subjects for longer than five minutes without clocking out to idle time and without being disciplined. He testified that management employees know such conversations occur and that, indeed, he has had many such conversations with management employees. As examples, he described such conversations, with Johnson, a Production Supervisor, with Fischer, Plant Superintendent, about automobiles, and with Al Schouviller, a supervisor, about home remodeling. Ganzel also testified that conversations occur between non-management employees about subjects not related to work without clocking out, sometimes for up to twenty or thirty minutes and that these conversations have occurred without discipline both before and after March 6, 2007.

Guy B. Schultz, a Maintenance Technician and the Financial Secretary of the Union, testified that he has had conversations, without clocking out, with management and non-management employees about subjects not related to work, including several fifteen to twenty minute conversations with Johnson about fishing. Neither he nor other employees have been disciplined for these conversations. Sometimes, supervisors will tell employees engaged in such conversations to "break it up," but they have not required the employees to clock out or to amend their time cards to reflect idle time. Schultz testified that he knows of no employee who has been disciplined for violation of the 5-minute rule -- though he conceded that two

discharge cases, discussed below, could be described as partly based on violation of the 5-minute rule.

On cross-examination, Johnson conceded that he has had conversations with bargaining unit employees on subjects not related to work that have lasted as long as fifteen to twenty minutes and that he has not disciplined them for failing to clock out. He also testified that other bargaining unit employees have such conversations without being disciplined and without being required to adjust their time cards and that, "as a general rule," he would "just go up to the people talking and say, 'hey, break it up.'" Johnson conceded that he has never disciplined a bargaining unit employee for violation of the 5-minute rule and that he has witnessed them having conversations unrelated to work for as long as fifteen to twenty minutes.

The Employer presented evidence that Melissa Holmes, a bargaining unit employee, was discharged in September of 2005 for "theft of time," because she was on a personal telephone call for twenty minutes without clocking out. In addition, the Employer presented evidence that Zach Bastian, a bargaining unit employee, was discharged in July of 2005 for taking an unscheduled break, thus "stealing from Company/falsifying time card." Neither Holmes nor Bastian grieved their discharge, but Bastian was later rehired.

Jean E. Bye, the Employer's Executive Vice President, gave testimony I summarize as follows. She was consulted about the proposed discipline of the grievants by the five management

employees who decided to warn them, and she approved of that discipline. Enforcement of the 5-minute rule depends upon the judgment of supervisors whether an interruption of work for a conversation unrelated to work is disruptive to production. In the present case, she considered not only the fact that the conversation took twenty-seven minutes -- a length of time she considered excessive -- but the fact that McDonald left his work area untended, leaving other inspectors to do all of the work of inspection for an inordinately long time.

Peterson testified that the decision to warn the grievants was made with the provisos that, if, when they received the warnings, they had explained that they were discussing work, the warnings would have been withdrawn.

I make the following ruling. The evidence shows that management has not enforced the 5-minute rule consistently. Nevertheless, the lack of consistent enforcement of a rule requiring employees on the clock to perform work rather than engage in activities not related to work does not provide them with an unrestricted right to avoid the essential obligation agreed to implicitly by all employees -- that, in exchange for wages and benefits, they will perform their work.

As the Union argues, lax enforcement may lead employees to believe that they will not always be disciplined for engaging in discussions unrelated to work while not clocked out. Nevertheless, no employee should conclude from such enforcement that he or she has an unrestricted right to continue in paid status though not working.

The evidence shows that lax enforcement of the 5-minute rule has varied with circumstances. Employees have not been disciplined for having discussions with a supervisor that last more than five minutes and that are not related to work. Clearly, it would be unreasonable and unfair to impose discipline in such a circumstance -- in which the employee could reasonably conclude that the supervisor has waived enforcement of the rule. In addition, it appears from the evidence that, in the past, enforcement has been waived for conversations between bargaining unit employees that are unrelated to work and are less than about fifteen minutes, though Bye's testimony indicates that such a conversation must not disrupt the work of the employees involved. Holmes' discharge and that of Bastian in the summer of 2005 show that the Employer does impose discipline when it determines that circumstances make enforcement of the rule reasonable.

In this case, the Employer determined that enforcement was warranted because of two circumstances -- the twenty-seven minute length of the conversation and the fact that the conversation, participated in by Ganzel, caused McDonald to be absent from his work area for that length of time. I rule that it was reasonable in those circumstances to use a warning to enforce the rule.

The Union argues that because management employees decided to issue a warning to the grievants before interviewing them to hear their account of the incident, the Employer's investigation was defective -- made so by failure to provide

them with due process. I agree with the Union that the Employer's investigation should have included an interview with the grievants, but, because the discipline imposed was a warning and did not impose an immediate "tangible" penalty, as would discharge, I rule that the defect in the investigation was harmless error, corrected by the opportunity the grievants had to give their account after the warnings were issued.

In making this decision, I am guided by analogous rulings related to disciplinary due process in public sector employment. In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the United States Supreme Court decided that a public sector employee has a protected property right in his or her employment and that constitutional principles of due process require that the employee have a pre-termination hearing -- at least a preliminary opportunity to be heard -- before a decision is made to discharge. The courts have made no similar determination that private sector employees have a property right protected by constitutional notions of due process, but grievance arbitrators have found a right to "industrial due process," one of the features of which is the requirement that a pre-discipline investigation include an interview with the employee whose discipline is at issue -- a "due process" right similar to the right a public sector employee has to a pre-termination hearing under Loudermill.

Since Loudermill, many cases have interpreted and applied its principles, insofar as they relate to public sector employees. In Elkouri and Elkouri, How Arbitration Works (6th

Ed.) 1257, the authors discuss the nature of the pre-disciplinary hearing to be afforded a public sector employee under Loudermill due process, thus:

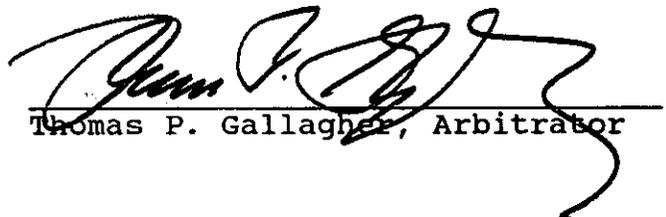
To be more than "window dressing," a pre-disciplinary hearing should be offered before the employer has reached its disciplinary decision. However, an employer may make a preliminary decision to terminate an employee prior to meeting with that employee, as long as the employer is prepared to reconsider that decision if the employee contests the grounds for termination. O'Neill v. Baker, 210 F.3d (1st Cir. 2000).

In the present case, the evidence shows that, though management failed to interview the grievants before deciding to warn them, the decision to issue warnings was a preliminary decision, which management was prepared to rescind if the grievants reasonably contested the basis for the discipline. Though the reasoning expressed above in the quoted passage from How Arbitration Works derives from public sector Loudermill principles of due process, I adopt that reasoning as appropriately analogous in this private sector case.

AWARD

The grievances are denied.

December 17, 2007

  
Thomas P. Gallagher, Arbitrator