
In Re the Arbitration between:

FMCS No. 07-7413

Prospect Foundry, Inc.

Employer,

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

and

Glass, Molders, Pottery,
Plastics and Allied Workers
International Union, Local 63B,

Union.

Pursuant to **Article 16** of the Collective Bargaining Agreement effective December 19, 2003 through May 31, 2008, the parties have submitted the above captioned matter to arbitration.

The parties selected James A. Lundberg as their neutral Arbitrator from a Federal Mediation and Conciliation Service list of Arbitrators.

The grievance is properly before the single Arbitrator for a final and binding determination and there are no procedural issues before the Arbitrator.

The grievance was filed on December 13, 2006.

The hearing was conducted on October 10, 2007.

The record was closed upon receipt of briefs posted October 31, 2007.

APPEARANCES:

FOR THE EMPLOYER

Richard Dryg
Employers Association
9805 45th Avenue North
Plymouth, MN 55442

FOR THE UNION

Dale Jeter
GMP International Union
8530 N.W. 26th Street
Ankeny, IA 50021

ISSUE:

Whether the Employer had just cause to discharge the grievant, Javail Brewer?

If not, what is the proper remedy?

FACTUAL BACKGROUND:

The grievant, Javail Brewer, was hired by the Employer on August 23, 2005. He worked in the Cleaning (grinding) department at Prospect Foundry. Mr. Brewer, a short time employee, had a poor record under the Company attendance policy, which provides for discharge when an employee accumulates 100 points in a rolling twelve month period. On November 30, 2006 Mr. Brewer reported to work, although he was ill, and was ordered to leave work by his supervisor before the end of his shift. Mr. Brewer was given ten (10) attendance points on November 30, 2006, which brought his total attendance points above one hundred (100). On December 15, 2006 Mr. Brewer was discharged under the Company attendance policy.

The Letter of Understanding dated December 19, 2003, which is incorporated into the Collective Bargaining Agreement at paragraph 5 says:

5. Subject to the employee's availability, disciplinary action will be administered within two (2) working days of the Company's decision to issue the discipline. If the discipline is not administered within the two (2) working days of the Company's decision, subject to the employee's availability, the discipline will be void.

The December 19, 2003 Letter of Understanding also discusses a procedure for taking single days of vacation for sick leave at paragraph 6.

6. Employees may use up to two (2) of the single days of vacation (as outlined in Article 17, Section 9) in a Vacation Year (June 1 to May 31) as Sick Days. The employee

may call in before the start of his/her shift to notify their supervisor that they are sick and will be using a Sick Day and want to receive vacation pay. The employee therefore will not receive attendance points as under the Attendance Policy for these two (2) days.

According to Mr. Brewer, on November 30, 2006 he informed his supervisor, Al Sartwell, that he was ill before he punched in for work. Mr. Sartwell encouraged the grievant to stay at work and stick it out. The December 28, 2006 "Response to First Step Meeting" says "On the day in question, Javail was ill. Even before the start of his shift he had told his supervisor that he was not feeling well."

According to Mr. Sartwell's testimony, on November 30, 2006 the grievant did not inform his supervisor that he was ill until some time after he punched in for work. The January 26, 2007 "Response to Second Step Meeting" says "He [the grievant] did not discuss being sick with his supervisor, until after he had punched in and his shift had started."

Mr. Brewer was reluctant to go home on November 30, 2006, because he knew that he had accumulated a large number of attendance points. However, there is no evidence that he was aware of the specific number of points, ninety one (91), he had accumulated. Because Mr. Brewer was very ill, he had vomited in the rest room and his production on November 30, 2006 was far below normal, he was ordered to go home and he complied with the order.

It is undisputed that Mr. Brewer had at least one day available to take a Vacation Sick Day under the terms of a letter of agreement. On one occasion prior to November 30, 2006 Mr. Brewer took a Vacation Sick as provide for in the Letter of Understanding December 19, 2003 that is incorporated into the collective bargaining agreement. Mr.

Brewer took December 1, 2006 as a Vacation Sick day as provided by the Letter of Understanding dated December 19, 2003 that is incorporated into the collective bargaining agreement.

The Employer's attendance policy is found at page ten (10) and eleven (11) of the Employee Handbook. The policy identifies the instances wherein an employee will not be penalized as follows:

Employees will not be penalized for absences which:

Qualify under state and federal regulations governing absences

Are excused by contractual agreement

Are valid vacation days

Are granted in writing by the Company as Leaves of Absence

The point system used by the Employer is as follows:

The Points System

All instances of absence, tardiness, and leaving work prior to the end of the shift, should be reported by the employee to the employee's supervisor prior to the start of the shift so appropriate so appropriate adjustments can be made to ensure productivity. Points will be assessed for absences not excused in the above outlined exceptions. These points will be recorded and accumulated based on a rolling twelve-month period. Points will be given based on the following schedule:

Each hour or partial hour of absence during a shift 2 Points

Each full day of absence 10 Points

In addition to these 3 points, penalties will also be assessed for failure to give your foreman adequate notice of your absence:

Failure to notify of full day absence prior to shift 10 Points

Absence greater than 3 hours and less than the full shift 5 Points

Pursuant to the attendance policy Mr. Brewer was given a written warning after he accumulated 50 points and he received a Final Warning after he accumulated 75 points. However, the policy also indicates that it is the employee's responsibility to track his or her own absenteeism during the course of the year.

The Union grieved the issuance of ten (10) points to Mr. Brewer on December 13, 2007 for being sent home and the grievance was expanded to include the Mr. Brewer's discharge on December 15, 2007.

SUMMARY OF EMPLOYER'S POSITION:

The Employer argues that the attendance policy under which the grievant was discharged is a reasonable policy that has been consistently applied by the Employer.

The attendance policy was developed to improve employee attendance by clearing establishing the level tardiness and absence that will result in loss of employment. The policy is incorporated into the collective bargaining agreement and the policy was known and understood by the grievant. In fact, Mr. Brewer received a written warning under the attendance policy, when he accumulated fifty (50) attendance points and Mr. Brewer also received a final warning, when he accumulated seventy five (75) attendance points. Furthermore, Mr. Brewer's supervisor testified that he counseled Mr. Brewer regarding his need to improve his attendance. Mr. Brewer's supervisor also told Mr. Brewer that he might want to contact the Company's Employee Assistance Program if he needed help to improve his attendance.

The attendance policy requires that the employee track his or her own attendance record. In this instance, Mr. Brewer not only received two warnings that his points were rapidly approaching a level that would result in discharge but he knew on November 30, 2006 that his points were dangerously close to the limit. Mr. Brewer could have taken a vacation sick day on November 30, 2006 by calling in before work, an action he had taken in the past. Instead, Mr. Brewer went to work and did not inform his supervisor that he was ill, until after the work day had begun and after he had punched in at the time clock. The collective bargaining agreement includes a mechanism that Mr. Brewer could have utilized to avoid accumulating the final ten (10) points that resulted in his discharge but Mr. Brewer did not exercise his contractual rights. The collective bargaining agreement requires the employee to track his attendance points and does not require the Employer to manage the employee's vacation plan.

The Employer has consistently enforced the attendance policy since it was adopted. The policy went into effect in July of 2002 and eighty five (85) employees have been terminated for violation of the policy. Since January of 2007 there have been 15 terminations under the attendance policy. Grievant's supervisor estimated that he has issued approximately 75 written warnings, about 35 final warnings he has terminated 25 employees under the attendance policy in the past seven or eight years. In a recent discharge, the Employer terminated an employee who received points for being sent home prior to the end of his shift.

The attendance policy is reasonable and has been consistently applied by the Employer. The grievant violated the attendance policy by accumulating more than 100

attendance points. The grievant was discharge under the policy and the discharge should be upheld.

SUMMARY OF UNION'S POSITION:

The Union argues that Mr. Brewer informed his supervisor that he was ill prior to punching in for his shift and wanted to know whether he could take a vacation sick day. Because Mr. Brewer's inquiry came before the start of his shift, he should have been allowed to take November 30, 2006 as a vacation sick day. Mr. Brewer's testimony is corroborated by the First Step grievance report dated December 28, 2006 which says "On the day in question, Javail was ill. Even before the start of his shift he had told his supervisor that he was not feeling well." While the Second Step grievance report says that the grievant waited until after he punched in to tell his supervisor he was ill, the report closest in time to the incident should be deemed the more accurate report. A report created one month after an incident is more likely to accurately report what happened than a report created two months after the incident. Also, the Second Step report must be viewed with skepticism, the statement made in the First Step report provides exculpatory information that was changed in the Second Step report to support the Employer's case.

The collective bargaining agreement incorporates the Letter of Agreement dated December 19, 2003, which provides for vacation sick days. Mr. Brewer had a vacation sick day available and attempted to assert his contractual right to claim the vacation sick day in a manner consistent with the requirements of the contract. The Employer denied the grievant a benefit that was negotiated in collective bargaining and in the process ordered the grievant to go home and to incur points under the attendance policy, which

resulted in his discharge. The grievant was discharged as a direct result of the Employer's denial of an agreed upon benefit.

The Employer is asking for a strict reading of the attendance policy provisions of the collective bargaining agreement but ignores its obligation to promptly impose discipline found at paragraph 5 of the Letter of Agreement dated December 19, 2003:

5. Subject to the employee's availability, disciplinary action will be administered within two (2) working days of the Company's decision to issue the discipline. If the discipline is not administered within the two (2) working days of the Company's decision, subject to the employee's availability, the discipline will be void.

The attendance policy automatically makes the decision to discharge an employee once the employee accrues 100 points. If the 10 points given to Mr. Brewer when he was sent home on November 30, 2006 were properly assessed, Mr. Brewer should have been discharged within two working days. The Company did not act on discipline until December 15, 2006. According to a strict interpretation of the collective bargaining agreement the discipline is void. The Employer can not have it both ways.

The Union also points to a number of Arbitration Awards where Arbitrators found that it was not appropriate to assess points under a no fault attendance system, when an employee is ordered to go home. In the comparison cases presented by the Union, employees were told to go home and then discharged for their absence. The discharges were reversed.

The Union asks the Arbitrator to reinstate the grievance with full back pay.

OPINION:

It is the Employer's burden to establish the factual basis for a discharge by a preponderance of the credible evidence. In this instance, there is a discrepancy in the recollection of the grievant and his supervisor over when the grievant informed his supervisor that he was ill. The grievant testified that he told his supervisor that he was ill before he punched in for work. Grievant's supervisor recalled being told by Mr. Brewer that he was ill shortly after grievant punched in for work. If the grievant informed his supervisor that he was ill before he started work, he would have been eligible to take a vacation sick day and would not have been assessed ten (10) points under the attendance policy. The Step One grievance answer indicates that grievant told his supervisor he was ill, before he punched in for work. The Step Two grievance answer indicates that the grievant told his supervisor he was ill, after he punched in for work. The evidence is conflicting and insufficient to establish that grievant failed to inform his supervisor that he was ill before he punched in for his shift and insufficient to establish that grievant failed to timely seek a vacation sick day on November 30, 2006.

The discrepancy in testimony and documentation is over a circumstance that gives rise to the contractual right of an employee to take a vacation sick leave in lieu of receiving points under the attendance policy. In this situation, neither of the slightly different recollections of the sequence of events on November 30, 2006 is fully corroborated nor is either recollection refuted. The contractual right, if exercised, would have prevented imposition of the ultimate penalty in industrial justice and the evidence is insufficient to establish that the circumstances giving rise to the contractual right to take a vacation sick day were absent. Hence, the discharge based on an assessment of points under the attendance policy can not be sustained.

In addition to the factual discrepancy there are two other problems that arise from the circumstances surrounding Mr. Brewer's discharge. First, Mr. Brewer was ordered to go home. His absence was not volitional as presumed by the attendance policy. Second, the collective bargaining agreement requires prompt imposition of discipline, within two (2) days, following a determination that a rule has been violated. In this case, the decision to discipline was by policy made on November 30, 2006 but discipline was not imposed until December 15, 2006.

The Employer's Attendance Policy does not specifically address a situation where an employee is ordered to leave work by a supervisor, due to illness. However, the policy does excuse an employee without penalty for absences that qualify under state and federal regulations governing absences, valid vacation days and Leaves of Absence which are granted in writing by the Company. In this instance, the employee chose to work, which the attendance policy encourages. The grievant's absence was due to a managerial directive, which is remarkably similar in nature to an Employer authorized Leave of Absence and is clearly an absence encouraged by the Employer. Furthermore, the view expressed by Arbitrator Siegel in **American Federation of State, County and Municipal Employees, Local 2679 and Mt. Sinai Medical Center LAIG 3667: 12 LAIS 3246** is applicable in the case. In the above case, the Arbitrator determined that under a no-fault system an employee makes a personal choice whether to work or not. When an absence is caused by managerial directive, the absence should not be counted under the no fault system. If the parties intend to have absences caused by managerial directive accrue points under the attendance policy, the parties should negotiate over that condition of employment.

Under the attendance policy the decision to terminate is made at the time an employee accrues one hundred (100) points. According to paragraph 5 of the First Letter of Understanding dated December 19, 2003, discipline shall be administered within two (2) days of the Company's decision to terminate or the discipline shall be void. In this case the alleged accrual of one hundred (100) points occurred on November 30, 2006 but the employee was not discharged until December 15, 2006. Under the present arrangement, the administrator of the attendance program is clearly in an impossible situation. The contractual time limit is simply too short a period for the administrator to work within. However, the time limit was negotiated in the contract and the Arbitrator can not change or modify the terms of the collective bargaining agreement. A change in the time frame must be accomplished through negotiations.

Based on the evidentiary record and the terms and conditions of the collective bargaining agreement, the employer did not have just cause to terminate the grievant's employment on December 15, 2006. At the same time the grievant had a very poor attendance record and the grievant's recollection of the sequence of events on November 30, 2006 is no more verifiable than his supervisor's recollection of what happen that day. The reinstatement is not based upon the strength of his defense but upon a slight short coming in the evidence relied upon by the employer. In a similarly close case cited by the Union Communication Workers of America, Local 6138 and Southwestern Bell Telephone Co. 30 LAIS 3365: AAA 528-6, (September 20, 2002), Arbitrator Timothy J. Heinsz reinstated the grievant but pro rated back pay using the percentage of time that grievant had attended work over a three year period. The remedy in this case should also pro rate the back pay award.

There is little to be gained from reinstatement, if the grievant continues his prior attendance pattern. Hence, the reinstatement and a portion of the back pay award will be conditioned upon the grievant arranging and participating in a minimum of three counseling sessions through the Employee Assistance Program, which shall focus on his attendance problem. Within two weeks of reinstatement the grievant with the Employer's help shall contact the Employee Assistance Program and make arrangements for counseling services. The Employer shall obtain an estimate of the cost of three counseling sessions and shall reduce back pay by the amount of the estimate.

AWARD:

- 1. The grievance is sustained and the Employer is directed to reinstate the grievant.*
- 2. The Employer is also directed to pay back pay on a pro rata basis to the grievant from the date of discharge to the date of reinstatement using the percentage of time grievant attended work in the 12 month period prior to his discharge and less the cost of three counseling sessions through the Employer Assistance Program.*
- 3. The grievant shall within two weeks of reinstatement contact the Employee Assistance Program and make arrangements to attend counseling services, which shall include a minimum of three counseling sessions.*

Dated: November 14, 2007.

James A. Lundberg, Arbitrator