Arbitration Decisions

Labor Arbitration Decision, HP Hood, 2021 BL 506784, 2021 BNA LA 423

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October 8, 2021

OPINION AND AWARD

IN ARBITRATION PROCEEDINGS

PURSUANT TO A

COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between

HP Hood, Employer

and

Stationary Engineers Local 39, Union

A___ Termination

FMCS Case No. 210122-03277

October 8, 2021

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LABOR ARBITRATION

SUMMARY

[1] Discharge - Poor Performance - Progressive Discipline ►118.651 ►118.301 ►118.03 ►118.303 ►118.806 [Show Topic Path]
Arbitrator Paul D. Roose held that dairy processor HP Hood didn't have just cause to discharge a maintenance mechanic for poor performance, even though his performance deficiencies over four and one-half months employment were well documented in 60, 90 and 110-day evaluations, since it failed to properly apply progressive discipline before discharge. Once the grievant completed his 120-day probation, the employer was obligated by the CBA to use progressively more serious discipline to correct performance deficiencies, and written evaluations do not constitute discipline. The grievant's discharge is reduced to a written warning based on the 110-day evaluation and it should summarize performance deficiencies and state clear expectations for improvement; the grievant must be reinstated with full back pay and interest.

APPEARANCES:

For the Employer: Mark S. Spring, Attorney

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For the Union: Gary Provencher, Attorney

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PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was mutually selected as the arbitrator from a list of arbitrators supplied by the Federal Mediation and Conciliation Service. The matter was heard on June 3, 2021, on the Zoom videoconferencing platform.

The parties stipulated that the matter was properly before the arbitrator. The parties also stipulated that the arbitrator retains jurisdiction over the implementation of the remedy if the arbitrator grants a remedy.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. The parties concluded their presentation by written briefs. The briefs were received by the arbitrator on September 30, 2021, and the matter was submitted for decision.

ISSUE

The parties did not stipulate to the issue in this matter and ceded to the arbitrator the authority to determine the issue. The Employer proposed the following as the issue statement:

> Was A___ termination supported by just cause as required by Article V of the Collective Bargaining Agreement?

The Union did not offer a proposed issue statement.

The arbitrator's formulation of the issue statement is as follows:

1. Was the Grievant A___ discharged for just cause?
2. If not, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

Collective Bargaining Agreement by and Between HP Hood LLC and the International Union of Operating Engineers Stationary Engineers Local 39 — March 1, 2018 — February

Article V

Section 3: Discharge

The Employer shall not discharge or suspend any employee without just cause. Just cause consists of, but is not limited to, dishonesty, drinking related to his employment or gross insubordination.

The Union shall have the right to protest any such discharge, providing that such protest shall be presented in writing to the Employer and his authorized bargaining representative within five working days after the discharge, and if not presented within such period, the right of protest shall be waived.

Employees shall be on probation during the first one hundred and twenty days of their employment and may be subject to discharge during this period without recourse.

FACTS

The Grievant Was a Maintenance Mechanic at the Employer's Sacramento Dairy Processing Facility: The plant processes raw dairy products into consumer milk products. The plant has two separate sides — extended shelf life and aseptic. The facility runs 24 hours a day, seven days[*2] a week. The onset of Covid-19[*2] in March 2020 put the facility, as an essential service, into a growth mode.

The Grievant was hired as a maintenance mechanic, or maintenance engineer, on June 1, 2020.[1] He had previously worked for a parcel delivery company, maintaining conveyors and other equipment in the warehouse.

The job of the maintenance mechanic is to perform preventative and repair maintenance on the pumps, valves, belts, and lines in the facility. The plant has approximately 2,500 pumps and 15,000 valves.

The Grievant Completed His 120-Day Probationary Period on September 29, 2020: On September 24, 2020, Mr. Linder sent a memo to the Grievant. The subject was "Extending Probation Period." The memo reads as follows:

> A___, Stationary Engineer has been employed with HP Hood since 6/1/2020. On 9/24/2020, met [sic] with Tim Linder, Maintenance Manager, Steve Bashaw, Chief Engineer and Cyndi Fischer, Sr. HR Manager regarding his training and performance. This memo is acknowledgement that A___'s probation will be extended for 2 months due to performance.[2]

The memo was signed by the Grievant and Mr. Linder. It was copied to other managers and to Eddie Ramirez, Business Agent Local 39.

Mr. Ramirez recalled that he received a memo from Ms. Fischer regarding the Grievant's probation extension, with the attached extension document. Mr. Ramirez testified that he never received advanced notice from Ms. Fischer or anyone in management that the Grievant's probation period would be extended. He stated that, in a discussion with Ms. Fischer on another matter about a week later, the topic came up. He testified as follows:

> I just let her know that there was no extension of probation, and the discussion was just, "Well, we've already signed it, and we're going to honor it."

Mr. Ramirez also recalled a phone conversation with Mr. Linder during which Mr. Ramirez informed Mr. Linder that the Union would not consent to extending the probation period for the Grievant.

Mr. Ramirez was made aware that, prior to his assuming the business agent role for the Union at HP Hood, the Union had previously agreed to extensions of probation for two other bargaining unit employees.

The Employer Identified Performance Deficiencies During the Four and a Half Months of the Grievant's Employment: On July 29, 2020, the Grievant received his 60-day evaluation. He was rated "satisfactory" in most areas but marked "needs improvement" in

"Understanding of GMP [Good Manufacturing Practices] and "Understanding of SQF [Safe Quality Foods]."

Timothy Linder is the senior maintenance and engineering manager at the Sacramento facility. He participated in the Grievant's evaluations. He wrote "could not explain GMP's" and "did not know his role in SQF" on the Grievant's evaluation form.

Mr. Linder also marked the Grievant "needs improvement" in "Initiative / Self Direction," adding a comment, "Need to be able to make sure doing the higher priority." He rated him "needs[*3] improvement" in "Accuracy of Paperwork," "Documentation,"[*3] and "Qual Card Review."[3]

Along with chief engineer Bashaw (identified on the form as "Evaluation Superintendent"), Mr. Linder recommended the Grievant for continued employment. The Grievant signed and dated the form on August 4, 2020, acknowledging that:

> This Performance Assessment has been discussed with me and I have had an opportunity to address all my concerns and questions with my Superintendent.

On August 28, 2020, the Grievant received his 90-day performance assessment. He had improved in the areas of "Understanding of GMP" and "Understanding of SQF" to a "Satisfactory" rating. He had also improved in the areas of "Accuracy of Paperwork," "Documentation," and "Qual Card Review." However, the Grievant was rated "needs improvement" in areas not previously marked as deficient: "Follows Direction," "Initiative / Self Direction" and "Competence in Jobs Learned."

Again, the Grievant was recommended for continued employment by Mr. Linder and Mr. Bashaw.

The Grievant's 110-day assessment, due before the end of September, was delayed until mid-October. That assessment was ultimately signed by the Grievant on October 15, 2020, after the extension of his probation noted above. It called out many problems, including (for the first time) "needs improvement" in an attendance-related area. The following chart shows the performance deficiencies and comments in areas marked "needs improvement:"

Item	***Comment***
GMP Quiz	unable to give a overview
SQF Quiz	unable to give a overview
Physically Able to Perform Tasks	still slow on day to day tasks
Accepts Responsibility	still not completed his training and Qual Card
Competence in Jobs Learned	pump seals, valve rebuilds, and other repairs are still problems
Completes Work in a Timely Manner	not complete repairs timely
Qual card review	Need to complete — really behind
Explain job duties in detail	
Physically walk work area, identify equipment and explain how the process works	could not explain the flow of milk or the ammonia flow or Boiler system

Item	***Comment***
Additional Comments Regarding Performance	A__ is really behind and needs to show improvement quickly. Probation was extended for 60 days.

On October 7, 2020, the Employer issued a "Final Warning + One day suspension" to the Grievant for being absent and failing to call in on October 5, 2020.

Mr. Bashaw testified that the Company has the option of verbal warnings, written warnings, suspension, final warnings, and terminations in the discipline of bargaining unit employees.

On October 23, 2020, the Employer Terminated the Grievant, Terming it a Probationary Release, and the Union Grieved: The memo from HR manager Fischer stated that the Grievant's employment ends on that date. It states, in relevant part:

> Your employment with HP Hood ends on 10/23/20 due to not meeting the requirements of probation.

On that same day, the Union filed a grievance on behalf of the Grievant. The "Nature of Grievance" was stated[*4] as "Member was terminated without just cause." It cited Article V Section[*4] 3 and asked for a make whole remedy. It is that grievance that is now before the arbitrator.

EMPLOYER'S POSITION

The Employer acknowledges that it did not properly extend the probation period because it did not have the "express permission" of the Union. However, the Company argues that the termination of the non-probationary Grievant was "for good cause."

The Union is now attempting to improperly frame the grievance as concerning non-contractual extension of the probation period, the Employer asserts. However, the Union's own grievance stated the issue as termination "without just cause." That is indeed the issue, the Employer argues.

It is telling that the Grievant did not testify to refute the many performance deficiencies identified by Company witnesses, the Employer argues. The Grievant "did not offer a shred of testimony or documentary evidence to counter (a) the testimony of Mr. Bashaw, (b) the testimony of Mr. Linder; or (c) the significant documentary evidence/exhibits demonstrating the vast performance deficiencies in A___' job performance after only 4.5 months and providing ample just cause to support the termination decision," the Employer writes in its brief.

The Grievant was given "industrial due process and progressive discipline," the Employer contends. "A___ and the Union had ample notice that the termination decision was made based on performance/just cause reasoning," the Employer writes in its brief.

The 60-day, 90-day and 110-day evaluations constituted progressive discipline, the Employer asserts. "A___' performance warranted just cause termination," the Employer concludes and asks that the grievance be denied.

UNION'S POSITION

The Union argues that the unilateral extension of the probation period violated the CBA. The Union also contends that the Company was barred from bringing a just cause justification forward because the "Notice terminating Mr. A___ contains absolutely no mention of 'just cause.'"

The Union argues that there is no past practice of extending probationary periods.

The arbitrator should not consider the just cause arguments put forth by the Company. Even if the arbitrator does consider these arguments, they "still must fail."

The Company a) did not timely notice the Grievant that he was being discharged for just cause, b) did no investigation into the charges related to Mr. A___ being fired for just cause, and c) never gave the Grievant an opportunity "to explain his side of the story before discipline being imposed."

Even if the substantive charges are allowed by the arbitrator, they do not come "remotely close to justifying discharging an employee for cause," the Union writes in its brief.

The Union asks that the arbitrator sustain the grievance, order the Grievant to be returned to his previous position, award full back pay (including lost wages and benefits, with interest)[*5] and any other relief deemed appropriate.

DISCUSSION

The Grievant Was Not on Probation When He Was Terminated: The CBA[*5] is crystal clear that the probation period is 120 days. During that period, an employee may be discharged "without recourse." Implied in that sentence is recourse "to the grievance procedure." The just cause requirement set by the earlier paragraph in Article V does not apply to probationary releases.

The Grievant was hired on June 1, 2020. He completed his probation on September 29, 2020. He was not terminated until October 23, 2020, well past the end of his probation period.

During earlier discussions with the Union about this matter, Employer representatives argued that past practice allowed them to extend an employee's probation period without Union consent. However, at the arbitration hearing and in closing argument, the Employer retreated from this assertion. It acknowledged that it did not have the right to unilaterally extend a bargaining unit employee's probation period, even with the employee's consent. Accordingly, this arbitration decision will not further address the past practice issue raised at the hearing.

The parties agree that the Grievant was not a probationary employee when he was terminated on October 23, 2020. The analysis in this opinion and award then shifts to the question of just cause. Was the Grievant terminated for just cause?

The Union argues that the arbitrator should not even reach the issue of cause, primarily due to the wording of the termination letter. That letter succinctly states that the Grievant was being terminated "due to not meeting the requirements of probation." It gives no further explanation. The Union is correct that the employee and Union are entitled to know the nature of the charges so that a proper defense can be mounted if a defense is warranted.

The termination letter lacks specifics because it was issued as a probationary release, wherein details are not required. The undersigned arbitrator concludes that, despite this deficiency, the Grievant and Union were aware of the Employer's concerns about the Grievant's work performance. It was well-documented in the evaluation process. Accordingly, the remainder of this decision will treat this as post-probationary disciplinary action and hold it up to the traditional just cause standards.

The Concept of Progressive Discipline is a Cornerstone of Just Cause Under a Collective Bargaining Agreement: Indeed, it is one of the most fundamental employee rights under a "just cause" provision in a CBA. The CBA in the instant case is no exception. The contract prohibits the Employer from discharging or suspending an employee "without just cause." It goes on to define "just cause" as consisting of, but not limited to, "dishonesty, drinking related to his [sic] employment or gross insubordination."

This short list of offenses, preceded by "not limited to," reflects an agreement by the parties that certain offenses rise to the level of[*6] immediate suspension or discharge without antecedent discipline. Three infractions[*6] are named, but the language is clear that others also might constitute just cause.

Such short lists of offenses in CBAs do not preclude management from issuing discipline for other reasons. Attendance infractions are presumed subject to discipline. Indeed, the Grievant was given a one-day suspension for a no-call no-show incident.

Also generally considered by arbitrators as cause for discipline are work performance deficiencies. The Employer has a right to an employee who, if properly trained and directed, performs adequately according to standards established by the Employer.

The Employer, in its closing brief, acknowledged the principle of progressive discipline. A Company witness identified a full range of disciplinary options — from verbal warnings through written warnings and suspensions and terminations — used by the Employer.

In the instant case, the Employer identified work performance deficiencies on the part of the Grievant. Supervisors and managers documented those shortcomings thoroughly on the various evaluation forms used during the Grievant's probation period.

The Union argues that the Grievant was never properly notified of the charges against him and thereby was not allowed to give his side of the story and / or refute the charges. This argument has some merit, but two factors suggest that the arbitrator should proceed with the just cause determination. One, written warnings (not named in Article V) are presumptively not grievable under this CBA. As explained below, a written warning is the correct level of discipline in this matter. Two, the Union had an opportunity to call the Grievant as a witness during the arbitration hearing and chose not to do so.

Management witnesses gave unrebutted testimony that the Grievant had significant work performance deficiencies. Those performance issues, summarized in the chart above, were not marginal or trivial but lay at the core of his vital job as a maintenance engineer in the dairy-processing plant. For the sake of food safety, employee safety, and efficient production, the Company had (and has) a right to expect better work from the Grievant.

As important as the items were that the Company identified during the Grievant's evaluations, none rise to the level of termination, let alone suspension, for a first offense. A written evaluation is not discipline and does not serve as a discipline substitute in the steps of progressive discipline. If the Grievant were in the future to be warned properly through lesser discipline and were he to continue to perform inadequately, then discharge could be the ultimate result.

The Termination is to Be Reduced to a Written Warning: Once the Grievant had completed his probation, which he did on September 29, 2020, the Company was obligated by the CBA to use progressively more serious discipline to correct any performance deficiencies. **[*7]** They did not do so. The termination of the Grievant on October 23, 2020 was therefore not for just cause.

The termination notice**[*7]** must be removed from the Grievant's file. In its place, the Company may issue the Grievant a written warning based on the 110-day evaluation. The written warning should summarize the performance deficiencies identified in that evaluation, as noted in the chart above. It should state clear expectations for improvement. And it should put the Grievant on notice that further, more serious, discipline could result if he does not show sufficient improvement.

The Proper Remedy is Reinstatement and for the Grievant to be Made Whole: The Company is ordered to reinstate the Grievant to the position of maintenance engineer he held when he was terminated. He is to be paid full back pay and made whole for all loss of benefits. The Union has requested interest on the back pay. Due to the circumstances of this case, that request is granted. The back pay will include interest at an annual rate of 3%, the current rate for back pay posted by the federal Office of Personnel Management.

While is impossible to anticipate all disagreements that might arise in calculating back pay, the parties have requested that the undersigned arbitrator retain jurisdiction over the implementation of the remedy. The following are guidelines that may help avoid disputes.

For the period of back pay, it is proper for the Employer to deduct replacement earnings. These are earnings made doing a job that the Grievant sought out after being terminated to replace his lost income. It is not proper to deduct any earnings he may have received through additional employment that he had both before and after his termination.

If the Grievant had no replacement earnings during the back pay period, or during only a portion of that period, it is proper for the Employer to require that the Grievant demonstrate that he made a reasonable effort to mitigate his losses. Typically, such demonstration would be based on a record of job applications.

AWARD

1. The Grievant A___ was not discharged for just cause.
2. The Grievant is to be returned to duty with full back pay and made whole for all loss of benefits. Back pay will be augmented by interest at an annual rate of 3%. Back pay shall

be offset by any interim earnings as outlined above. His seniority shall be calculated as if he had not been terminated.
3. The Employer may issue the Grievant a Written Warning upon his return to duty. The Written Warning may include work performance identified as deficient during the Grievant's probation period. The Written Warning will constitute the first step in progressive discipline.
4. The arbitrator retains jurisdiction over the implementation of the remedy.

Paul D. Roose, Arbitrator

Date: October 8, 2021

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fn 1 The Grievant, Mr. A___, did not testify at the hearing.

fn 2 Ms. Fischer did not testify at the hearing.

fn 3 "Qual Card" refers to a checklist of tasks during training, to be signed off by the trainer and trainee.[*8] A blank Qual Card was in evidence at the hearing, but not the one utilized[*8] by the Grievant during his training.