FEDERAL MEDIATION AND CONCILIATION SERVICE

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In the matter of the arbitration between

IGUA Local 150

And

Centerra Group

OPINION

and

AWARD

Grievance: Tolson discharge FMCS Case No. 240321=04627

X----------X

BEFORE: Roger D. Meade, Esq., Arbitrator

APPEARANCES:

For the Union

Scott Kamins, Esq.

For Centerra Group

Kevin J. Morris, Esq.

In accordance with the parties' collective bargaining agreement, ("CBA") effective from March 18, 2023, to February 28, 2024, the undersigned Arbitrator was selected by the parties to hear the grievance and render a final and binding determination. A virtual Hearing was held on July 18, 2024. The hearing was not transcribed by a court reporter.

The parties were accorded a full and fair hearing, including the opportunity to present evidence, examine witnesses and make oral arguments in support of their respective positions. Briefs were filed by the parties on August 26, 2024. Thereafter, the record was closed.

ISSUE: Whether the grievant was discharged for just cause?

If not, what shall be the remedy?

RELEVANT COLLECTIVE PROVISIONS

Article 4, RIGHTS Of MANAGEMENT

"The company has the right to… discipline and discharge employees for just cause…"

ARTICLE 25 NO STRIKE OR LOGOUT

"Neither the Union, its officers… or any Employee will authorize, instigate, aid, condone, participate or engage in any strike, work stoppage, slow down, boycott, sit-down, sit-in or other interruption of the work or the business of the Employer…"

FACTS

Frank Pescatello is the "Program Manager" for the DOE contract at the Forrestal facility**.** He testified that the Employer has had the DOE contract since May 16, 2022. His responsibilities include ensuring compliance with that DOE contract. He was hired in March 2023 following 27 years as an MP in the US Army.

Pescatello testified initially regarding the Employer's operations under the DOE contract. It requires that Centerra provide inside and outside security services at three facilities; Forrestal, (also known as Headquarters), Germantown and a much smaller facility, referred to as Portal. The events set forth herein refer only to operations at the Forrestal facility

There is a facility manager, program manager, deputy program manager and a captain and lieutenant at each facility, with Security Police Officers ("SPO's") providing physical security at access points and through static and roving posts. SPO's report to a lieutenant on each of their assigned shifts and provide physical security on a 24/7 basis. SPO's work two 12-hour shifts and additionally, two four -hour shifts which are staffed Monday through Friday during the daytime operations at the facility.

SPO's are assigned to provide security at access points to the facility, using magnetometers and other electronic equipment. There are also static posts and roving patrols, the latter which provide security characterized as "first responders." All SPO's are armed with Glock 17 semi-automatic pistols. Upon hiring, SPO's each receive eight weeks of training in weapons, hand-to-hand combat, restraint and other protection techniques.

Pescatello described the call off procedure as follows. SPO's wishing to call off must call the facility which request is transferred to a supervisor. The request is then logged in and placed on a "blotter." SPO's receive 56 hours of sick leave for each calendar year.

Pescatello described a "mass callout" on January 23 where 19 of 25 scheduled SPO's called off sick. He said that those many call offs were "suspicious" because they usually have no more than 3 call offs during a day. The attendance sheet for the grievant (Employer Exhibit 1) reflects that he called off for the January 23 morning shift, 7 t0 11 am shift. He called off the night before, giving more than 11 hours' notice that he would not be at work due to sickness.

The grievant and all other 18 SPO's returned to work the next day on January 24, if so scheduled.

Pescatello testified to the impact of the mass call offs. He said that due to numerous "open posts" on the 23rd, they attempted to provide coverage by reassigning other SPO's from the Germantown facility and using supervisors as well. Ultimately, there were 152 hours of uncovered "open posts." Not being able to provide coverage and the resultant open posts results in a "decrement." Ultimately, the Employer received a "negative observation" for failing to man many posts required under the contract.

There were no call offs at the Germantown facility. There are 90 SPO's assigned to the Forrestal facility and 70 SPO's assigned to Germantown.

As reflected above, Pescatello believed the mass call off was "suspicious" because they never had so many SPO's call off sick. He also characterized it as "coordinated." Later in his testimony, he summarized his belief that it was "not a mere coincidence, a coordinated act, and the timing was suspicious" with collective bargaining negotiations scheduled on that date. He noted that the prior negotiations on December 12 had proved difficult, and the Employer representatives had walked out of that bargaining session.

In response to what Pe4scatello characterized as a "mass call off" the Employer conducted an investigation. Its investigation consisted of an interview with each of the 19 SPOs, where Nabel Martinez read typed questions to each of them and hand wrote their answers below the question. See Employer Exhibit 3. Those interviews were the subject of Martinez' later testimony, in which he overheard an unidentified SPO talking about a planned call off for which he wrote a confirming memo. See Employer Exhibit 4.

Pescatello testified that three SPO's, the grievant, Crockett and Doeur, were suspended and then terminated at the end of the Employer's investigation because they called off sick without sufficient sick leave in their accounts. He noted that SPO's cannot substitute vacation time for sick leave.

The Employer held two meetings to address the grievant's termination, the latter with Union representation present. Pescatello told the grievant that he was terminated under article 25 for an "illegal work stoppage". The grievant made no response. He was not given any document reflecting the basis for his discharge.

On cross-examination, Pescatello stated that two other SPO's were initially terminated due to insufficient sick leave but both terminations were later withdrawn, one for having a doctor's note and the second for having sufficient sick leave at another facility.

Pescatello was asked about the reasons for the grievant's termination, since nothing in writing had been produced. Union Counsel noted the absence of any writing regarding the grievant's termination. This included, he said, the Employer's failure to explain the reason for the grievant's termination in its Third Step Response under the grievance procedure.

Pescatello testified candidly that the Employer "had to draw the line" because it knew they couldn't terminate all 19 SPO's. It would be too hard to hire experienced SPO's and "too hard to train new SPO's." Accordingly, the Employer used as a reason for termination the SPOs' failure to have sufficient sick leave in their accounts when they called off.

Asked about other reasons why the Employer had knowledge of a work stoppage, he referred to Martinez's subsequent testimony as to what he overheard an unknown SPO say regarding a planned call off. He agreed that Martinez did not recognize the speaker and that it was Martinez's first day on the job.

Pescatello was asked about the Employer's attendance policy, specifically where it stated a penalty for an employee who used sick time when he had insufficient sick leave on the books. Pescatella said that the penalty was a one-day suspension for a first-time offence.

Once again, Pescatello confirmed that he never gave the grievant a document reflecting that he was terminated for violation of Article 25, the no strike clause. He stated that the grievant was given no document setting forth the reason for his termination other than a paper from HR which did not provide a reason. The Employer did not place that HR document in evidence.

Pescatello confirmed that in the Employer's response to the grievance at the Third Step, Michael Goodman, the Employer's Director of Labor Relations, did not mention Article 25, the no strike/no slowdown article, and it gave no termination letter to the grievant.

On redirect examination, Pescatello stated that the grievant had 4.63 hours of sick leave prior to January 19 but because he took four hours off that day, he was left with .63 hours, clearly insufficient to support his call off on January 23.

Nabel Martinez has been the Forestall Facilities Manager since January 22, 2024. As part of his duties, he is in charge of the guard force and the main Employer contact for Union business.

Martinez was in the captain's office at 6:30 am on January 23 with no one else present. He heard SPO's talking in the hallway, after their regular morning briefing and before assuming their posts. He heard one man say, "he had gotten a call to not come to work." Martinez was later asked to memorialize what he heard in a memo, which was dated January 26, 2044. See Employer Exhibit 4

His memo read, in pertinent part, "I overheard a conversation that there was a call received that detailed the following: to call off for Tuesday, January 23, 2024, and to not give an excuse on (sic) the reason. I did not see who made the statement and no one outside, to my knowledge, knew I was still in the captain's office. This was my second day on the job, and I was shadowing the captain and did not have full access to the building." Subsequently, Martinez learned of a mass call off and told Pescatello later in the day what he overheard.

According to Martinez, this conversation and memo started the investigation. The memo was not initially received in evidence for the proof of his memo because it was hearsay. Upon Employer Counsel's representation, it was admitted to show what action the Employer took upon receipt of the memo.

Later, Martinez was asked to investigate by interviewing employees who had participated in the mass call off. He held the first meeting but without a union representative present, and it was discontinued. At the second meeting, he continued his investigation. Employer Exhibit 3, page 11, reflects his interview of the grievant. He typed a series of questions and wrote the grievant's answers in his own handwriting. The grievant described his illness on January 23 as "under the weather, feeling a little sick". He never said "asthmatic." He was asked whether he saw any medical professional to get "checked out" and he said "no, drank some tea."

On cross-examination, Martinez testified that he was hired January 22, 2024, as Facilities Commander, that he had seven years' experience as a deputy contract manager and his previous service included experience with a union.

He was asked about what he heard that morning. He said he heard the oral briefing to this SPO's and later some SPO's talking in the hallway. He didn't see who made the comment nor could he identify any of them by voice. He stated that he didn't know the context of the conversation.

Josh Howard is the Facilities Commander, having held that position for 12 months. Prior to that time, he was a facility captain for one year, reporting to the Facilities Commander. As captain, he was in charge of the SPO's. He was Facility Commander at Germantown and prior to such time, he was an SPO at Forestall before the Employer took over the DOE contract. All told, he had 24 years working on the DOE contract.

Howard testified that in his 22 years at Forestall, they never had 19 SPO's call off at one time. The ordinary call-off rate was 1to2 SPO's per day. He said that the largest number of call- offs on one shift before January 23 was 7 to 8.

He described the call off procedure as beginning with an SPO calling in and an SPO answering the call. That SPO then asks for a supervisor who puts his name and call-off in an attendance log. He testified that a supervisor has no access to the SPO' S sick leave account at that time.

On cross-examination, Howard testified that he has known the grievant for 17 years. "He is a good officer, reliable, and honest. He never falsified anything and always had integrity."

He acknowledged he may have told the Union that the Employer should take the grievant back. He also acknowledged that he told the same thing to Pascatello. He saw the grievant at work on January 19 but didn't see him leave early due to illness.

The Arbitrator asked Howard how the Employer would know how long an SPO had been on the contract, not merely working for Centerra but for predecessor employers as well. He replied that they keep a record of SPO seniority which is important because it determines what shift an SPO can bid on. As noted, he has known the grievant for 17 years.

The Union's case.

Donald Doering has been an SPO since May 2016. He has worked at DOE since October 2016 and knows the grievant from that date.

He testified that the grievant was his partner during an IMF session on January 7. (IMF stands for "intermediate force"). During that session, there was a lot of physical contact with the grievant including "grappling.". He said he began to experience sick symptoms the following week. Union Exhibit 3 reflects his text exchange with Lieutenant Lane on January 16 in which he said he was "feeling much better." Doering testified that he believed he got the flu from the grievant during IMF.

He saw the grievant following the IMF session and "his voice was completely gone."

On cross-examination, Doering acknowledged that on January 16, he was not sick and felt good enough to go to work. He was asked why then he called off on January 23 and he replied, "I was sick." He said he didn't see a doctor or receive a prescription for medicine. Rather, he took over-the-counter Tylenol.

Again, he stated that after January 16, the grievant's "voice was gone" and he was "barely pushing through." He said that the grievant didn't call off when he told them he was sick.

Clinton Turner worked as an SPO at the Forestall facility with 3 ½ years at that site. He knows the grievant, having worked with him, and saw that he was working on January 19. He was shown Union Exhibit 5, the grievant's schedule which reflected that he worked 3.25 hours that day. Turner said a shift normally lasts for 12 hours, but he relieved the grievant at 1500 hrs. because he was sick. He stated the grievant was coughing and the supervisor sent him home, with his voice raspy and pretty much silent.

He said he saw the grievant at 1000 hrs. on January 16. He had just finished a run when it was "freezing out there". He was sick on January 19.

On cross-examination Turner stated that Lieutenant Lane didn't say the grievant was sick on January 19 but just told him to relieve him. He repeated his earlier testimony that on January 16, he saw the grievant returning from a run when it was "freezing." He insisted that he saw the grievant sick on January 16 and January 19.

Tyrone Tolson ("the grievant") testified that he had worked at Forestall for 17 years. On January 19, he said that he was "losing his voice with weakness and very congested." He said his sickness started on January 7 from the IMF session. He didn't call-off at that time because he thought he had no sick leave. He said that he was scheduled to work on January 23 but he "stayed in sick all weekend" and on that day, (January 23) he was "still feeling weak". He said that his record showed he had 4.25 hours of sick leave before January 23.

Union Exhibit 6, his paystub for January 22, reflects that he had 4.63 hours sick leave. He logged onto ADP to get that information when he called off on January 22 and told Lieutenant. Anderson that he wanted to use sick leave. Anderson replied, "no problem." No Employer representative called back.

He said the Employer first held a disciplinary meeting with no Union representative present, so it was rescheduled. He was told at the time that he was suspended for having no sick leave. He said he" never received a reason why" (for his termination). He said he had no idea why he was fired, and he didn't do anything wrong.

He stated that no supervisor had ever accused him of dishonesty.

On cross-examination the grievant said that Lieutenant Lane, 1 to 2 weeks before January 19, "gave him a heads up" that he had exhausted his sick leave. But his supervisor allowed him to leave on January 19. He left early after working for 3.5 hours. His paystub reflected that as of January 19, he had 4.36 hours of sick leave and further, that he had used another 3.5 hours of sick leave at that time.

He had a first meeting with Martinez during which he was suspended. Martinez told him he was suspended for participating in "a mass call-off." Martinez held a second meeting in the conference room with his Union representative present, He was told the Employer would investigate the work stoppage.

The grievant described the investigative interview Martinez conducted. On Page 11 of Employers Exhibit 3. He stated he answered questions that Martinez posed. He said he thought he was taking vacation hours because he had exhausted sick leave. He thought he was using vacation hours because Lieutenant Lane told him he could leave early. He told Martinez he was "under the weather feeling a little sick." He acknowledged that he didn't see a medical professional.

He also stated that he had never seen 19 SPO's call-off at one time at Forestall.

He attended a meeting on February 7 with Pascatello, his Union representative Putnam and others. He was told at the time that he was terminated but no reason was given.

Latanya Lewis testified that she is the grievant's girlfriend of 15 years and they have lived together for seven years. She said he had been "extremely sick" for a few weeks, coughing, sneezing and

with a lost voice. She gave him Advil and told him to call off, but he didn't think he had any sick leave. She said he was "nervous" about the Attendance Policy.

She testified that the grievant normally worked a12 hour shift. He left work early on January 19, with Lieutenant Lane saying "okay." Normally, she said, the grievant never came home when he was sick. She said he had four hours' sick leave on Tuesday the 23rd. Talking about his illness, she said that he was taking over-the-counter medicine, drinking tea, taking broth and light food. He called off January 23 because he was still sick.

On cross-examination, Lewis testified that the grievant was taking Mucinex. She stated that he had been sick since his IMF session and had been using an asthma pump. She acknowledged that he never saw a doctor.

Adam Putnam is the Vice President of the Union, having held the position since October 2017. He is responsible for grievances and is a Union spokesperson at collective bargaining negotiations.

He testiffied that the Union took no activity on January 23. He would have known, he stated, if the SPO's called off from work. He testified that collective bargaining lasted from December to April 2024.

According to Putnam, there was nothing of significance going on in January regarding negotiations. He did not give any updates on the progress of negotiations to the SPO's. He was adamant that the Union never took any action against Centerra or its predecessor. There would've been no benefit, according to his testimony, and it would have hindered upcoming negotiations.

He testified that the Company walked out of the collective bargaining session in December.

DISCUSSION

The facts set forth above could have been construed by the Employer as a mass call off on January 23, 2024 and thereby an unauthorized work stoppage under article 25.

As Pescatello testified, the timing of the mass call off was" *suspicious.*" It came on January 23, 2024, a day when collective bargaining negotiations had been scheduled. (It is unclear from the record whether this collective bargaining session was the second meeting between the parties following their meeting in December). The evidence reflected that the Employer walked out of the December meeting. Accordingly, it is not unreasonable to believe, despite Putnam's denials, that the Union or the SPO's chose this date to demonstrate their power in negotiations. Moreover, even if the Union was not responsible for authorizing the call off, the no strike provisions of Article 25 are sufficiently broad to cover such actions by the SPO's.

The *timing* of the call offs was also designed or had the apparent effect of hindering the Employer's operations on January 23.

The number of SPO's involved in the mass call off on January 23 was entirely disproportionate to the experiential record of call offs in the past. Pescatello and Howard testified that the average call off during the workday was 1 to 3 SPO's. This number is dramatically less than the 19 SPO's who called off on January 23

As Pescatello testified, the mass call-off also appeared to be *coordinated*. This is supported not only by the overwhelming number of call-offs but by the testimony and confirmatory memo of Martinez. *See* Employer Exhibit 4. Although "the truth" of the overheard remark was foreclosed by the hearsay rule, the Employer was permitted to show that this evidence was one of the bases upon which it investigated this matter.

To be sure, the unidentified speaker did not say that he received a *call from the Union* or any other words that indicated that that *the Union* had authorized such a call off. Whether or not the Union authorized such a call off is immaterial, however, because the broad no strike provisions of Article 25 expressly include such prohibited action by employees.

For all these reasons, I find and conclude that the Employer *could* have considered the mass call off as an unauthorized work stoppage and arguably *could* have taken disciplinary action against those 19 SPO's who called off on January 23.

That does not end the inquiry, however. While I conclude that the Employer *could* have taken appropriate disciplinary action, including discharge, against all 19 SPOs who called off on January 23, it did not do so. Rather, the evidence is uncontroverted that the Employer took no disciplinary action against the other16 SPO's and, upon a cursory investigation, determined to discharge only three SPO's including the grievant.

Pascatello made it abundantly clear in his testimony why this was the case. He testified, unequivocally, that the Employer "had to draw the line" because it could not afford to discharge all 19 SPO's. The Employer recognized that their substantial experience would make it infeasible to hire inexperienced employees, particularly where they must receive eight weeks of training before being deemed fully ready to assume their new positions. In sum, the Employer recognized that if it discharged all 19 SPO's, it could never fully staff the SPO complement necessary to provide security services under the DOE contract.

So, instead of terminating all 19 employees, the Employer chose to discharge the grievant, among two others, for an entirely different reason other than Article 25. Namely, that the grievant had taken sick leave on January 23 when he did not have sufficient leave in his sick leave account to cover it.

This asserted reason is supported by other evidence in the case, although it was apparently raised for the first time in the Employer's testimony at hearing

At the time the grievant called off, he had approximately four hours in his sick leave account due to leaving early for illness on January 19, Accordingly, by calling off for eight hours on January 23, he went over that limit.

There was substantial testimony devoted to whether the grievant was truly sick on January 23. The affirmative evidence came from supporting Union witnesses and the grievant himself. But the evidence as to how he treated his illness for more than three days leads me to believe that he was not in fact sick on January 23. He may indeed have been sick on January 19, when he left early with his lieutenant's permission, after working 3.5 hours on shift. But it strains credulity to imagine how he remained ill over the weekend and through January 23, seeing neither a doctor nor receiving a prescription for medicine. Instead, his self-care consisted solely of tea, broth, "light food", and perhaps an asthma pump.

With due respect, however, I regard this evidence, although litigated in great detail at hearing and in the parties' briefs, as unpersuasive because the grievant was discharged not for falsifying his illness but for exhausting the sick leave in his account.

Contrary to the Employer's statement in its brief, the issue is not "whether the Union had responsibility for the mass layoffs." Rather, the issue is whether the grievant's discharge was for just cause. Analyzing all the evidence, there are several reasons why the grievant's discharge violated the principles of just cause.

At the outset, Pascatello essentially admitted in his testimony ("we had to draw the line") that the Employer's asserted reason for discharge was pretextual. This is so because the Employer evidently believed that discharge could have been warranted under the circumstances but chose not to do so. Instead, the Employer, deciding against discharge, asserted a false reason, namely that the grievant had exhausted the sick leave in his account.

Although the Employer's attendance policy was not placed in evidence, Pascatello testified without contradiction that the penalty for exhausting sick leave is one day suspension for the first offence. The disproportionate penalty of discharge is a prime example of disparate treatment, which is a well-settled basis for finding no just cause. The Employer argues in its brief that there was no disparate treatment, but I find this argument to be unavailing. It is a distinction without a difference.

The Employer's failure to provide a writing setting forth the reasons for the grievant's discharge also violated the principles of just cause. The grievant was told only that he violated Article 25 but was, in fact, discharged for exhausting his sick leave. The Employer thus provided a false reason for discharge, which is always a basis for a finding of pretext. Accordingly, his discharge was not for just cause.

Significantly, the grievant was given no document regarding the reason for his termination except by HR, which did not specify a reason. The Employer's Director of Labor Relations also gave no reason for the grievant's termination at Step Three of the grievance procedure. Union Counsel stated that Pascatello's testimony at hearing was the first time the Union became aware of the Employer's asserted reason for the grievant's termination; namely, that he had exhausted his sick leave account before calling off on January 23. Shifting defenses, as here, is a well settled basis for finding pretext and the absence of just cause.

The Employer's *treatment* of the grievant also violated just cause because he was given no meaningful opportunity to explain, nor given any writing that indicated the reason for his termination. He may have been permitted the opportunity to speak, but all he knew was that he had been discharged and 17 other employees had received no discipline for the same offense. How to explain the inexplicable?

The grievant was only told, although not given anything in writing, that he violated Article 25. If he knew what Article 25 was, which he likely did not, he still had been discharged when the 16 other employees had not even been disciplined for committing the identical act. It is well-settled that an employee has the right to be confronted by evidence of his asserted misconduct and afforded a meaningful opportunity to explain or otherwise justify it. This fundamental right of just cause had not been afforded him here. *See* Elkouri and Elkouri, *How Arbitration Works*, Chapter 15. 3. F. II, 7th

Ed. (2012). This right to be confronted with an alleged offense has long been enshrined in the body of arbitral law, arguably beginning with Arbitrator Carrol Doherty's development of the seven tests of just cause decades before.

In sum, the grievant was subjected to disparate treatment, given a false reason and provided "shifting defenses" for his discharge. Significantly, he was afforded neither a meaningful opportunity to explain nor given anything in writing regarding the reason for his discharge. Such failures by the Employer necessarily mean that the grievant's discharge was not for just cause. Since the proper discipline for exhausting sick leave, is one day suspension for a first offense, his discharge far exceeded the penalty set forth in its attendance policy

For all the foregoing reasons, I find and conclude that the grievant's discharge was not just cause and that a one-day suspension is the only appropriate penalty for his first offense.

My conclusion is further supported by the fact that the grievant had worked for the Employer, or the predecessor employers which provided services under the DOE contract, for more than 17 years. In addition to this uncontroverted testimony, the Employer was clearly aware of his lengthy service due to his seniority which governed, among other terms, his right to bid on certain shifts. Significantly, there is no evidence that the Employer ever considered the grievant's length of service in determining to discharge him.

Furthermore, there was no evidence that the grievant had received any discipline during those 17 years of employment. It is equally well-settled that an employee's asserted offense may be reduced or mitigated by a good past disciplinary record. In this regard, Howard credibly testified that the grievant was "a good officer, reliable and honest. He never falsified anything and always had integrity." *See Elkouri*, *op cit.,* Chapter 15 – 63. VIII and cases cited therein. This is such a case.

Wherefore, for all the foregoing reasons, I find and conclude that the grievant was not discharged for just cause. Accordingly, he should receive a one-day suspension for calling off sick when his sick leave account had been exhausted.

AWARD

The grievance is sustained. The Employer is ordered to reinstate the grievant and pay him backpay from the date he was discharged but excluding wages for his one-day suspension. Such backpay should be accompanied by no loss of seniority or other benefits. The Employer is also ordered to expunge the record of his discharge from his personnel record and instead substitute a one-day suspension for exhausting his sick leave account.

s/Roger D. Meade

Arbitrator

Dated: September 13, 2024