

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration
Between:

MI AFSCME COUNCIL 25,
LOCAL [REDACTED],

Union,

-and-

AAA Case No: 54 390 01228 09
Log No: A21732-[REDACTED]-09

[REDACTED]

Employer.

Gr: [REDACTED] / Termination

APPEARANCES

On Behalf of the Union:

Betty Gaston
Staff Representative
MI AFSCME Council 25
600 W. Lafayette, Ste. 500
Detroit, MI 48226

On Behalf of the Employer:

[REDACTED] Esq.
[REDACTED] PLLC
[REDACTED]
[REDACTED] MI [REDACTED]

Arbitrator:

JOHN A. LYONS

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration
Between:

MI AFSCME COUNCIL 25,
LOCAL [REDACTED]

Union,

-and-

AAA Case No: 54 390 01228 09
Log No: A21732-[REDACTED]-09

[REDACTED]

Employer.

Gr: [REDACTED]/Termination

_____ /

OPINION AND AWARD

BACKGROUND/FACTS

The hearing in the above case was held on Thursday, March 25, 2010 at the offices of the Employer. The Grievant, [REDACTED], had been employed from January 2003 as a zoo keeper until her termination on July 8, 2009. She was assigned to the Mammal Department. On July 8, 2009 she was charged with "unprofessional and inappropriate conduct alleging violation of the Code of Ethics and Duty of Loyalty" stated within the handbook by "wilfully creating and attempting to sustain a harassing work environment for [REDACTED] employee [REDACTED]". In addition it is alleged that she conducted herself in an inappropriate and unprofessional manner by initiating and engaging in disruptive and malicious communications with other employees, and lastly, was "grossly insubordinate in failing to follow direction to maintain confidentiality about the issue during the investigation." Essentially, in June 2009 the Grievant and a co-worker [REDACTED] were leaving work and were approached by [REDACTED]

██████████, Building Maintenance. Allegedly, Mr. ██████████ asked if they had seen the pictures that were being circulated by another employee, ██████████ of another employee, ██████████, who he had had a romantic relationship with at one time. The pictures or video were supposedly of a naked ██████████ ██████████ ██████████ denied any such conversation, however at hearing did say and admit that there might have been discussion about photographs; however they were not of any specific employee. He initially denied telling the Grievant or ██████████ anything about a video or pictures of ██████████ or another employee ██████████ ██████████ was also employed as zoo keeper and had been a friend of the Grievant. ██████████ had at one time been her boyfriend. At the time of hearing or the time of the incident, late June 2009, Mr. ██████████ was romantically involved with ██████████

At the time the Grievant was concerned about her friend ██████████ She contacted her, and told her what she and Ms. ██████████ had heard from Mr. ██████████ ██████████ denied saying anything about pictures or video probably because the facts would clearly point to him as initiating this whole incident. Nevertheless the Grievant contacted ██████████ who made a complaint with her supervisor and then went to visit the relatively new Human Resources Director. The HR Director contacted Mr. ██████████ who denied having or taking pictures or video. When he interviewed ██████████ she was not specific at all as to what was said. However, at hearing she did say that ██████████ suggested inappropriate pictures were being circulated. In any event ██████████ reaction was completely "over the top". She e-mailed ██████████ and threatened to kill him or have someone else kill him. In spite of her emotional testimony her reaction to the whole scenario it's clear she threatened another employee.

After she had been interviewed by the HR Director the Grievant was told not to talk to anyone. Later she was in an area where she was apparently pumping her breast because she recently had had a baby she saw [REDACTED] [REDACTED]. She told [REDACTED] what she had heard, and further suggested that perhaps Ms. [REDACTED] should check it out. Ms. [REDACTED] reaction was one of disbelief - she didn't believe any of it. In fact, her testimony at hearing was that this matter should never have been referred to Human Resources in the first place.

Nevertheless, testimony of the Grievant is that she was concerned about her former friend, Ms. [REDACTED], as well as Ms. [REDACTED] if the statements of Mr. [REDACTED] were true, and if [REDACTED] [REDACTED] had indeed been circulating photographs of either one of the women.

The Director of Human Resources conducted an investigation and found that it was the Grievant who initiated this whole incident, and that she wilfully created and attempted to sustain a harassing work environment. In other words the allegation was that the Grievant just wouldn't let it go. [REDACTED] was never considered.

She was given an additional charge of insubordination for failure to follow the directions to maintain confidentiality. After the investigation she was brought into Human Resources and given the termination notice identified as Joint Ex. 4 on July 8, 2009. From the record there does not appear any evidence that the Grievant was granted a hearing prior to the termination; rather she was just called in and terminated.

In addition to those employees mentioned, [REDACTED] [REDACTED], Chief Steward as well as the Human Resources Director, [REDACTED] [REDACTED] testified. Mr. [REDACTED] had been in the employ of the Zoo approximately two months prior to this case.

There were seventeen exhibits admitted; six joint exhibits, nine employer exhibits, and two union exhibits.

The contract standard of review of terminations is set forth in Article 2, Section A and Article 33, Section A. There is a just cause standard.

ISSUE

WHETHER THE GRIEVANT WAS TERMINATED FOR JUST CAUSE?

DISCUSSION

Article 2, Section A, states in relevant part that,

The Employer has the sole and exclusive right to manage its operations, facilities and services in the most efficient, orderly and economic manner possible. The Employer retains all of the Employer rights, powers, functions and authority which it possessed prior to the signing of this Agreement, except as such Employer rights are clearly, expressly and specifically limited by the provisions of this Agreement. It is expressly recognized, merely by way of illustration and not by way of limitation, that the foregoing Employer rights shall include, but shall not be limited to, . . . and to discipline and discharge employees for just cause and to adopt, revise and enforce working rules; . . .

Article 33, Section A, Maintenance of Discipline, states:

It is agreed that the maintaining of discipline is essential to the satisfactory operation of the organization. The right to maintain discipline and efficiency of employees is vested exclusively in the Employer. Discipline and discharge shall be for just cause subject only to the grievance procedure contained in this Agreement.

After hearing the testimony and listening to the witnesses the arbitrator believes Mr. [REDACTED] initiated and began this whole scenario. The Grievant and [REDACTED] did not seek Mr. [REDACTED] but rather he called them over and told them there were pictures of a sexual nature being circulated. The testimony of Mr. [REDACTED] the Grievant and Ms. [REDACTED] leads the arbitrator to believe there were some pictures of a sexual nature circulated, however, not necessarily of Ms. [REDACTED] or Ms. [REDACTED].

Interestingly, the reaction of Ms. [REDACTED] makes it appear that she was absolutely out of control. She threatened, in writing and texting, Mr. [REDACTED] her former lover, that if she couldn't she would get someone who could kill him if these allegations were true.

This threat was passed over by the Employer. The Grievant talked to Ms. [REDACTED] again as well as Ms. [REDACTED]. As a "fellow" employee she was concerned about the possibility of the alleged pictures. Ms. [REDACTED] confirmed that the Grievant was concerned about her. Obviously Ms. [REDACTED] had a completely opposite reaction.

According to the Human Resources Director this incident caused quite a buzz at the work place. Apparently there are no rules prohibiting fraternization between employees. Another girlfriend of Mr. [REDACTED], was somehow interjected into the mix. Ms. [REDACTED] testified she was annoyed that such an allegation was made. She testified at hearing that she thought this was much ado about nothing and that the matter should never have been referred to Human Resources.

The Employer argues that the Grievant violated standards of conduct and its ethics rules, and that the Zoo had just cause to terminate the Grievant. They cite an interesting case which is attached to their brief as Exhibit A. In the judgment of the arbitrator it is not on point. The Grievant in that case was discharged after he admitted that he produced and distributed a sexually offensive flyer that named a female employee. These facts do not resemble the facts in this case.

The Employer refers to the conduct of Grievant [REDACTED] as rumor mongering. The testimony, however, establishes that the Grievant was concerned about Ms. [REDACTED] and also concerned about Ms. [REDACTED] if the statements of Mr. [REDACTED] were true. She did talk to Ms. [REDACTED] while she was in a facility which is attached apparently to the work station of Ms. [REDACTED]. This was after the instruction by the Director of Human

Resources. It is characterized as gross insubordination. Without going into any serious detail, insubordination is generally established after an employee has been warned about specific conduct, a refusal and failure to correct can result in discipline up to and including discharge. Ms. [REDACTED] correctly characterized this whole situation. Was the Grievant spreading a rumor or was she suggesting that Ms. [REDACTED] and Ms. [REDACTED] be on the lookout for possible video pictures. The examples cited regarding insubordination and a refusal to carry out job functions are interesting and apply to an appropriate case. In the arbitrator's judgment this is not such a case.

Moreover, it is argued that termination is the appropriate discipline regardless because of the fact that there was a prior discipline. See Joint Ex. 6. In Joint Ex. 6 the Grievant was given a "verbal coaching" for apparently placing two male aardvarks in the same enclosure. Apparently males should not be put together. Her explanation was that she didn't see the other male. Regardless she received a "verbal coaching" as discipline. The Employer argues that in addition to the allegations that the verbal coaching supports a termination. It also suggests that the contract does not contain a progressive discipline requirement. While it is true there is no progressive discipline requirement stated in the contract, it is commonly understood that part of the due process concept of just cause requires corrective and progressive discipline in an appropriate case. The writers in How Arbitration Works, 6th Ed at p. 964 state:

It is said to be "axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." In this regard, an arbitrator explained "offenses are of two general classes: (1) those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justifies summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less serious infractions of plant rules or a proper conduct such as tardiness, absence without permission careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually not even for the second or third offense) but for some milder penalty aimed at correction."

The Union argues that the Grievant's termination was excessive and it quotes from the volume Common Law of the Workplace, at p. 172 the progressive discipline principle which reiterates the ideas from Elkouri & Elkouri. The Union points out that the Grievant came to ██████████ desk to apologize for putting her name in the middle of this mess. ██████████ testified she had asked the Grievant what really happened. The Union claims Ms. ██████████ also characterized this entire incident as silly. Ms. ██████████ asked about the incident, not the Grievant. The Union agrees that the Grievant should merely have apologized and left the area. It suggests her discussion in telling Ms. ██████████ what she understood does not rise to the level of gross insubordination. Importantly, the Union points out that Mr. ██████████ initiated the conversation about nude pictures to the Grievant and Ms. ██████████. Prior to that conversation the Grievant was not aware of any nude pictures. Mr. ██████████ admitted there were some nude pictures being shown in the Maintenance area but he could not remember who was present, or if he mentioned Ms. ██████████ or Ms. ██████████ name in context with the pictures. The Union argues that ██████████ denies this, of course. ██████████ also denies any involvement in this incident in that he was trying to protect his current relationship with Ms. ██████████. He had a vested interest in convincing everyone he was not involved. Interestingly the Union points out that ██████████ called Ms. ██████████ to find out what the Grievant had told her. Then he reported to Human Resources. It further argues that the Grievant had no intent to be malicious or harass anyone. The Grievant was trying to protect ██████████ because she had been considered a friend.

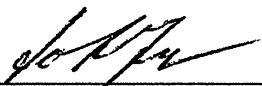
After carefully considering all the all the facts and argument I believe that the penalty of termination was too severe and excessive based on the facts and the disciplinary record of the Grievant. Thus, there was not just cause for the termination. A disciplinary suspension of five working days is appropriate to the facts in this case.

Therefore, it is the opinion of the arbitrator that the penalty assessed against the Grievant should be reduced and modified to a five day disciplinary layoff. Her seniority is to be reinstated and her record should reflect the loss of five working days and in all other regards including fringe benefits and health care. She should be made whole.

AWARD

The grievance is granted to the extent that the termination is reduced to a five day disciplinary layoff. The Grievant's record should reflect the modification and she should be immediately reinstated with back pay and benefits and seniority but for the loss of five working days for the alleged violations in this case.

Respectfully submitted,



John A. Lyons, Arbitrator

Dated: June 2, 2010