

IN THE MATTER OF ARBITRATION BETWEEN

Minnesota Judicial Branch,
First Judicial District
“Employer”

BMS Case No.14 PA 0766

and

Decision and Award

International Brotherhood of Teamsters
Local 320, representing Clerical Administrative
and Technical Employees
“Union”

John W. Johnson, Arbitrator

Date of Hearing:

October 3, 2014

Date of submission of Post Hearing Briefs:

October 31, 2014

Advocates:

For the Union:

Paula R. Johnston
General Counsel
Teamsters Local 320

For the Employer

Carla Heyl
Legal Counsel; Division Director
State Court Administrator’s Office

Witnesses:

The grievant

Carolyn Renn, Court Administrator
Jenni Johnson, Human Resource Coordinator
Becky Schneider, Court Operations Manager

Statement of Jurisdiction

The hearing was held in the above matter on October 3, 2014 in the First Judicial District Administration office, in Hastings, Minnesota. The Arbitrator, John W. Johnson, was selected by the parties pursuant to the Minnesota Public Employment Labor Relations Act of 1971, as amended (PELRA).

At the hearing each party was given the opportunity to present evidence and arguments. The parties then submitted post hearing briefs, which were emailed on October 31, 2014.

Issue

Was the grievant terminated from her employment for just cause, and if not, what is the remedy?

History of Grievant's Employment

The grievant was employed by the First Judicial District of the Minnesota State Court System, prior to her discharge. The following timeline summarizes the grievant's employment history with the Judicial District.

April 20, 2005 – Grievant hired by First Judicial District.

July 28, 2010 - Oral Reprimand

For absenteeism and tardiness.

April 14, 2011 – Three day suspension without pay. Employer Exhibit 2.

For failure to disclose criminal record

April 14, 2011 – Written Reprimand. Employer Exhibit 3.

For tardiness and short notice unexcused absence

July 1, 2011 - Written Reprimand. Employer Exhibit 4.

For absence without leave following exhaustion of FMLA leave

July 27, 2011 – Written reprimand. Employer Exhibit 5.

For tardiness on July 27. Arrived at 9:41 am instead of 8:00 am start time.

August 2011 – A completed fiscal year performance evaluation was electronically signed by grievant and grievant’s first and second level supervisor. All ratings were either “requires improvement”, or “meets expectations”. Requires improvement ratings were for “Integrity and Public Stewardship”, “Accountability”, and “Quality”. Grievant’s Personnel File, Union Exhibit 21.

July, 2012 – A completed fiscal year 2012 performance evaluation of grievant was electronically signed by grievant and grievant’s first and second level supervisor. All ratings were either “meets expectations” or “exceeds expectations.” Meets expectations ratings were for “Integrity and Public Stewardship”, “Accountability”, and “Quality”. Union Exhibit 21.

May 2013 – A completed fiscal year 2013 Performance Appraisal of grievant was electronically signed by the grievant and grievant’s first and second level supervisors.. All ratings were either “meets expectations” or “exceeds expectations”. Meets expectations ratings were for “Accountability” and “Quality”. Union Exhibit 21. As part

of her 2012 performance evaluation the grievant had been given attendance goals, which she had met as of her 2013 evaluation. Testimony of Renn.

July 9, 2013 through July 22, 2013 – Grievant hospitalized. Family and Medical Leave Act (FMLA) leave was requested and granted. Union Exhibit 15.

August 5, 2013 – Grievant received a doctor's excuse for absence from July 31 through August 2, 2013, due to hospitalization, to return on August 5 (Monday) with no restrictions. Union Exhibit 16.

August 12, 2013 – Written Reprimand. Employer Exhibit 6.

For multiple occasions of tardiness, February 28, March 18 and 19, May 2, 8, 14, and 16, June 3, 6, 5, 12, and 20, and July 20, 2013, plus an unexcused absence on July 29, 2013 .

August 12 2013 – Grievant received a Performance Improvement Plan. Employer Exhibit 7.

August 13, 2013 – grievant did not show up for work

August 13 2013 – Grievant called Ms Schneider twice, at 3:02 and 3:03 pm. Union Exhibit 13, p 1. The employer called her back at 3:53 pm. Id. Grievant said she was in the emergency room and would be back the next day Testimony of Schneider

. Grievant's testimony about this conversation was that she told Ms Schneider she was looking for a place to be admitted, and would contact the employer again when she got in somewhere, but that she did not say she'd be in the office the next day. Testimony of grievant.

August 14, 2013 – Grievant called the employer 4 times, the first at 7:47 am. Union Exhibit 13, pages 2-3.

August 15, 2013 – Grievant called her supervisor at 8:01 am, to let her know her status Id. at p.3. Grievant was admitted to the hospital. Testimony of grievant.

August 16, 2013 – Grievant called Ms Schneider at 8:17 am. Employer Exhibit 9. Grievant said she was in the hospital and didn't know for sure how long. Testimony of grievant.. Ms Shneider told grievant she should contact HR and have FMLA paperwork sent. Testimony of Schneider. Greivant did contact HR and ask that FMLA paperwork be sent. Testimony of grievant. FMLA paperwork sent to grievant by Jenni Johnson. Testimony of Johnson.

August 23,, 2013 – The FMLA paperwork was completed by one of the gtievant's Doctors. Union Exhibit 18. It was the grievant's understanding that the paperwork would be sent by the hospital to the employer. Testimony of grievant.

August 27, 2013 – Grievant released from hospital. Testimony of grievant.

August 28, 2013 – Grievant called and left a message asking about the status of her FMLA paperwork. Testimony of Johnson who said the message came 12 days after she had sent the FMLA paperwork.

August 29, 2013 The following telephone conversation occurred: Testimony of Ms. Johnson, who described this conversation as happening the day after she received the phone message from the grievant asking about her FMLA paperwork:

*Ms Johnson emphasized the importance of returning the FMLA paperwork by August 31.

*The grievant said she'd given the FMLA paperwork to her caseworker and that she'd follow up with her caseworker about the paperwork.

*The grievant said she had a release to return to work on September 5, 2013, but didn't say anything about a later return date. The grievant's testimony is that she told Ms. Johnson that her leave had been extended to September 9, and that she would be returning on that date, but also said that she had a Dr's appointment September 9, 2013, and would ask the Dr. to complete the FMLA paperwork at that appointment..

*After the conversation, Ms Johnson sent to the grievant paperwork for Short Term Disability, as requested by the grievant, and another set of FMLA paperwork.

August 31, 2013 – The FMLA paperwork was not received by the employer.

September 5, 2013 – The Grievant did not return to work. The employer was prepared to give the grievant a Loudermill notice (notice of intent to discipline – with the opportunity to meet prior to action being taken) and had a meeting scheduled for September 6, 2013. When the grievant did not appear on September 5, the Loudermill notice was mailed to the grievant's home address and the meeting rescheduled for September 9, 2013. The grievant testified that she was unaware of the notice prior to September 9, because she did not check her mail over the weekend.

September 8, 2013 – Grievant left a message for her employer saying she would be in on September 10, 2013. Employer exhibit 9. In her testimony Ms Renn stated that she was aware of the September 8 phone message, but that the grievant had on past occasions not come in when she said she would..

September 9, 2013 - Grievant did not appear for the scheduled meeting. Grievant did meet with her Dr, who completed the FMLA paperwork, so that for the first time, grievant had possession of completed FMLA paperwork. Testimony of grievant.

Following grievant's failure to appear at the scheduled meeting, a notice of termination of employment was mailed to her. Union Exhibit 9.

Discussion

FMLA

The question of whether or not the employer had just cause to terminate the grievant's employment is in part a question of what the employer's and the grievant's obligations were under the Family and Medical Leave Act, (FMLA) and whether or not those obligations were met. Relevant parts of the FMLA are the following:

29 CFR 825.313 (b). [In part]

“In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for the employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the 15-day time period until a sufficient certification is provided.”

29 CFR 825.305 (b): {In part]

“The employee must provide the requested certification to the employer within within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good

faith efforts or the employer provides more than 15 calendar days to return the certification.”

29 CFR 825.305 (c): [In part]

“The employer shall advise the employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous or non-responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employees diligent good faith efforts) to cure such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with 825.313. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes failure to provide certification.”

29 CFR 825.305 (d) {in part}

“*Consequences.* At the time the employee requests certification the employer must also advise the employee of the anticipated consequences of an employee’s failure to provide adequate certification.”

It is undisputed that the grievant did not submit a certification within 15 days. It is also clear that the “cure” provisions do not apply, since the certification was not submitted prior to the grievant being terminated from her employment. That leaves three questions: “Was an extension of time given by the employer for the grievant to submit a certification?”; “Were there extenuating circumstances affecting the grievant’s ability to submit a certification within the 15 days, and/or a good faith effort on the part of the grievant to submit a certification within the 15 days?”; and “ Did the employer meet its obligation to advise the employee of the consequences of the employee’s failure to provide adequate certification?”

The employer’s witness, Ms. Johnson, testified that in her conversation with the grievant on August 29, 2013, she emphasized the importance of returning the certification by August 31, 2013. The employer, in its post hearing brief argues that no extension was given. And the evidence does not show that any extension was expressly given by the employer. On the other hand, the union argues that the employer’s actions in sending out a second certification form after the conversation between Ms. Johnson and the grievant on August 29, with a post it note stating “FMLA-For doctor to fill out (if you can’t track down form previously sent). Return to HR via fax 651-437-3750.” Union Exhibit 20, .strongly implies that the grievant would have more time to return a completed certification, thus making it reasonable for the grievant to make that assumption. The union further argues that since the grievant received the second certification form on or about August 30, it would have been impossible for the grievant to get the form completed and return it by August 31, again implying that an extension was granted.

With respect to the existence of extenuating circumstances, the union argues that the grievant's medical condition, and the hospitalization it required, are just the kind of extenuating circumstances the CFR refers to. In support of this argument the Union cites Growmark Inc and Teamsters Local 650 100 LA 785 (Ver Ploeg 1993), in which a grievant's medical circumstances, which were similar to the circumstances of the grievant in the instant case, were viewed by the arbitrator as constituting extenuating circumstances.

As for diligent good faith effort, the Union argues that since the grievant provided the form to her caseworker at the hospital where she was being treated, reasonably assumed the hospital would send a completed form to the employer, called after her release from the hospital to confirm that it had been received, only to find out that it had not, informed the employer of her leave extension to September 9, and that she would have her Dr. complete the form when she saw the Dr on the 9th, and did so, that constitutes good faith. The employer's witness, Ms. Johnson, when asked on cross examination if she thought that the grievant giving the certification form to her caseworker at the hospital constituted good faith, answered "yes". The employer argues that good faith requires "at least that the employee contact his employer by telephone and make it aware that he is unable to return his certification before the deadline" Washington v. Fort James Operating Co., No. CIV.99-1300-JO, 2000 WL 1673134, at *5, (D.Or. Nov.7,2000), and Peter v. Lincoln Technical Institute, Inc., 255 F. Supp. 2nd at 441.

The Washington, case can be distinguished from the instant one. In Washington the employee was under a last chance agreement. He failed to contact the employer at all regarding the delay in submitting the FMLA certification, between receiving it on June 12, and submitting it on July 1. In the instant case, the grievant did contact the employer prior to the expiration of the 15 day period, inquired about whether or not the certification had been received, and made efforts to get it completed.. In Peter, the defendant employer's motion for summary judgment on the plaintiff's FMLA claims was denied, based on the judge's opinion that a reasonable jury might find good faith based on the facts of the case, where the plaintiff had given the required certification to her medical doctor but the doctor did not complete and return it within the 15 days.

The Peter case also provides some guidance on whether the employer in the instant case met its obligation to inform the grievant of the consequences of failure to return the certification within 15 days. Another reason for denying summary judgment identified by the judge in Peter , noting the requirement that the employer notify the employee of consequences, was that the employer never told the plaintiff that she would lose her job if she did not get the certification in within the 15 day time period.

It is clear to me that the employer granted no extension of time to the grievant to submit the FMLA paperwork. An extension has to be conscious and overt in order to be "granted" by employer. It is not enough for the grievant to perceive an implication that the deadline had been extended.

As for extenuating circumstances, the grievant was impaired by her medical condition. which did make it much more difficult for her to deal with the time requirement.

Regarding good faith effort, I conclude that the grievant's efforts to get her certification filled out by her Dr., her inquiry to her employer following her release from the hospital, and her subsequent efforts to get the certification completed constitute good faith.

In addition, nowhere in the evidence presented is there any indication that the grievant was told she would be discharged if she didn't get the FMLA certification returned within the 15 day time limit, although she had been informed, in the written reprimand dated August 12, 2013, that "continued unsatisfactory work performance and unacceptable behavior will result in further discipline, up to and including discharge."

Just Cause

Given that grievant made a good faith effort to get her FMLA paperwork in, is there still a basis to conclude that there was just cause for discharge? At least two considerations affect that determination. One consideration is that, as the employer's brief states, an employee who requests or is on FMLA leave has no greater rights than an employee who remains at work, and may be discharged if the discharge would have occurred regardless of the request or leave being taken. Another consideration is the grievant's history of previous discipline for attendance and work performance and how the employer has addressed it. In connection with the second consideration, it is important to note that up through August 12, 2013, the employer was satisfied that the grievant's behavior merited

a written reprimand and a performance improvement plan. Based on these two considerations, the question of just cause becomes, “Was there just cause to discharge the grievant based on events that occurred after August 12, 2013, for reasons that would have applied regardless of the request for FMLA leave? The previous discipline history of the grievant provides a context for determining the appropriateness of the level of progressive discipline, but acts that occurred prior to August 12, 2013, for which the grievant had already been disciplined, cannot themselves be the basis for subsequent discipline.

The notice of intent to discipline letter dated September 9, 2013 describes the following basis for discipline:

“We have had continued discussions with you about your behavior, specifically the importance of arriving at work on time, holding short notice unscheduled absences to a minimum, and not being absent without leave. The scheduled hours of work for your position are from 8:00 am until 4:30 pm, Monday through Friday. As we’ve discussed many times, it is very important that you be in the office and ready to begin your work promptly at 8:00 am every work day. When you arrive at work late or are absent from work, you are not available to serve the public when the counters open. Tardiness and unscheduled short notice absences have a drastic impact on our ability to ensure adequate staff to serve the public:

Over the last few months, this unacceptable behavior has continued:

On February 28, March 18 & 29, May 3, 8, 14, & 16, June 3, 5, 12, & 20, and July 30, 2013 you were late for work.

On July 29, 2013, you failed to report for work resulting in your supervisor inquiring about your status.

On May 6, & 20, June 7, July 31, and August 1 & 2, 2013, you called in sick.

On August 12, 2013 you received a written reprimand and we put a performance improvement plan in place.

On August 13, 2013, you failed to report to work. When we finally connected later in the day we stressed the importance of reporting for work and contacting us.

On August 14 you again failed to report to work

On August 15, you again failed to report to work, calling us later in the morning.

On August 16 you again failed to report to work, calling us at 8:17 am
From August 17-27, you failed to report to work or contact us.

On August 28, 2013, you again failed to report to work, calling us at 1:41 pm.
During the phone conversation you said that you would return on Thursday September 5, 2013.

From August 29-September 4, you failed to report to work or contact us.

On September 5, you were expected to report to work at 8:00 am., you again failed to report to work or contact us.

On September 6, 2013, you again failed to report to work, calling us at 7:54 am and indicating that you “were back out of the hospital”.

On September 9, 2013, you were expected to report to work at 8:00 am, you again failed to report to work, calling us at 9:17 pm on Sunday September 8, 2013, indicating that you would return to work on Tuesday September 10, 2013.”

Each of the incidents listed for dates after August 12, 2013 are reviewed below:

August 13, 2013. The grievant did not show up for work, and did not call until the afternoon. The explanation for the late call is that she was in desperate straits and was trying to find a hospital to be admitted to. This in my view is an acceptable reason for calling in late, and the grievant did contact her employer on that date.

August 14, 2013. The grievant called her employer at 7:47 am, prior to the beginning of her shift. There is inconsistency in the testimony about what was said in this conversation, as indicated in the timeline above. The employer’s witness testified that

the grievant said she'd be in the next day. The grievant testified that she told the employer she was looking for treatment and did not know when she'd be back to work. Since the grievant was looking for and found treatment, it is not logical that she would have told the employer she would be in the next day, even though that is the employer's witness's recollection. And there was no mention of the grievant having said she'd be in the next day in the September 9, 2013 notice of intent to discipline. The grievant's recollection is consistent with other information presented.

August 15, 2013. The grievant called her supervisor at 8:01 am. She was also admitted to the hospital on that date.

August 16, 2013. The grievant called her supervisor at 8:17 and told her she was in the hospital and didn't know for how long. FMLA paperwork was sent to the grievant. It is true that the grievant called after the start of her shift, but the supervisor already knew that the grievant was seeking to be admitted for treatment.

August 17, through 27, 2013. As stated in the notice of intent to discipline, the grievant neither called in or showed up for work. But the grievant had not been required to report in every day during a previous absence, when she was hospitalized in July 2013.

Testimony of Renn. Also, for the July 2013 hospitalization, her FMLA certification was not received by the employer until after she returned to work. Union Exhibit 21. She therefore could reasonably believe that she didn't have to call in daily during her August hospitalization. And at this point the employer knew that the grievant was in the hospital,

that the reason for her admission could reasonably be the basis for FMLA leave, and that the grievant didn't know how long she'd be hospitalized. Under these circumstances it is understandable that the grievant would not expect that she needed to call in again until she had more information about her status, and her likely return to work date.

August 28, 2013. The grievant called at 1:41 pm. Although the notice of intent refers to a conversation that occurred on that date, the evidence indicates that the grievant left a message inquiring about the status of her FMLA paperwork

August 29, 2013: The notice of intent letter says the grievant failed to contact the employer, but the evidence indicates that the conversation referred to in the notice of intent as occurring in August 28, actually occurred on August 29. However, regardless of which of the two dates it occurred on, there is conflicting testimony about what was said, as noted in the timeline above. Even if the grievant stated, as the employer's witness recalls, that she would not be back until September 5, 2013, there is reason for the grievant to have concluded that she was not expected to call in every day from August 30 through September 4.

The evidence that the employer was prepared to give the grievant a "Loudermill" notice on September 5, 2013 is consistent with its reported expectation that the grievant would be back to work on that date. On the other hand, there is no reason to doubt the genuineness of the grievant's recollection that she told the employer in that conversation

that she would be back on the 9th. The conflicting testimony about return dates cannot be easily resolved.

Even discounting the grievant's testimony about what she told the employer about her return date, that leaves only two work days, September 5 and 6, when she might be considered to have neither called nor shown up, without a reasonable explanation.

It is also germane that in her testimony, Ms Renn stated that if she had received the FMLA certification, she would not have made the decision to terminate the grievant's employment. Given that testimony, it is hard to conclude that the grievant would have been terminated regardless of the request for FMLA leave.

In the discharge letter sent to the grievant on September 9, 2013, the stated reasons for terminating the grievant's employment include reference to unsatisfactory work performance, specifically "failure to perform job tasks accurately and timely." Since these were not mentioned in the Notice of Intent to Discipline, and since the grievant's performance evaluations from 2011 to 2013 showed improvement from "requires improvement" to "satisfactory performance" on "Accountability" and "Quality", I find the performance factors cited in the September 9 2013 termination letter to be insufficient support for termination of employment.

Conclusion

In reviewing the grievant's actions after August 12, 2013, I find that they do not provide just for terminating her employment. It is understandable that the employer was frustrated with the grievant's attendance and tardiness. These had continued for some time, and made it very difficult to staff adequately. It is also understandable that the employer had come to expect that the grievant would not necessarily do as she said. And the grievant's attendance was unsatisfactory. But the employer knew she was ill. The employer knew she was hospitalized. The grievant did communicate with the employer about her condition and expected return to work date. She also made a good faith effort to get her FMLA paperwork in. And the employer had available a lesser level of discipline, suspension, that it could have applied.

Award

The grievant must therefore be reinstated to her former job. This reinstatement will include maintenance of the grievant's seniority, but will not include retroactive payment. This is in effect a very long suspension, but the grievant needs to be fully aware that her attendance was unsatisfactory, and that it must improve upon her reinstatement.

John W. Johnson

January 26, 2015

