

IN RE ARBITRATION BETWEEN:

HONEYWELL

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1145

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 060517-56316-7

JEFFREY W. JACOBS

ARBITRATOR

January 3, 2007

IN RE ARBITRATION BETWEEN:

Honeywell,

Employer,

and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 060517-56316-7
Beattie grievance matter

IBT #1145,

Union.

APPEARANCES:

FOR THE UNION:

Russ Platzek, Hughes & Costello
David Beattie, Grievant
Mai Nguyen, Assembler
Vickie Hansen, Assembler/Union Steward

FOR THE COMPANY:

Chuck Bengston, Attorney for the Company
Larry Pederson, Mfg. Unit Leader
Helen Moore, Sr. Disability Administrator
Dave Adams, 2nd Shift Operations Leader
Terry Clapp, HR and Labor Relations Mgr.

PRELIMINARY STATEMENT

The hearing in the above matter was held on November 29, 2006 in the offices of Teamsters Local 120 in Minneapolis, Minnesota. The parties presented oral and documentary evidence at that time. The parties presented post-hearing Briefs, which were e-mailed and received by the arbitrator on December 18, 2006 at which point the record was closed.

ISSUE PRESENTED

Whether there was just cause to terminate the grievant under the facts and circumstances of this case. If not what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2002 through January 31, 2007. Article XV as well as a Letter of Agreement between the parties regarding grievance procedure provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service

EMPLOYER'S POSITION:

The Company took the position that it had just cause under the agreement and the Company's Attendance Policy to terminate the grievant since he was absent for more than 90 hours and was thus subject to immediate discharge under the No-Fault attendance policy. In support of these contentions the Company made the following arguments:

1. The grievant has been with the Employer since 1999 and was discharged once before. That discharge was overturned in arbitration.

2. The Employer has struggled with absenteeism in the past and has had to react to these in order to maintain production and to assure that other employees are not forced to take an unreasonable share of the workload to cover for employees who are gone all the time.

3. To address the issue of absenteeism, the Employer instituted a Time and Attendance Policy. This Policy provides for when and how employees can be disciplined for unexcused absences and calls for discharge once the employees accumulates more than 90 hours of such absences in a rolling 12-month period.

4. The grievant is subject to the Employer's No-Fault Attendance policy. He accumulated well in excess of the 90 hours provided for in the Policy and was thus subject to immediate dismissal under the policy. The employee contracted bronchitis in September of 2005 and was unable to work for a period of time due to that illness. The time from September 9, 2005 to September 28, 2005 was covered by appropriate leave and he was not charged that time as lost time under the terms of the Policy since the doctor indicated that the employee was too ill to work during that time. She indicated, as noted herein, that he could return to work without restrictions on September 29, 2005.

5. In addition, the grievant was eligible to apply for Weekly Indemnity, Weekly I, as it is known, under these circumstances. He was given the forms to fill out and give to his doctor for completion as well. These forms require the doctor to indicate why the employee is not able to work and what the nature and extent of the medical condition is that precipitates that absence.

6. Here the employees doctor filled out these forms and indicated that he could return to work full duty on September 29, 2005. Even though she clearly indicated that he could return on that date he failed to do so. He returned on October 3, 2005. His supervisors told him at that time that he needed get the doctor to cover the additional time. He gave the grievant 15 days to do so.

7. Despite having been given this very clear directive, the grievant worked on October 3rd and 4th but failed to appear for work from October 5th through the 18th. Weekly I forms were sent out on multiple occasions for the doctor to fill out. The Employer pointed out most strenuously that despite all of the effort to get the time covered by illness leave or Weekly I or some other form, the doctor still indicated that the grievant could return to work without restrictions on September 29, 2005. Irrespective of whether the time was covered as FMLA, or Weekly I, the doctor still needed to indicate that the employee's leave was extended. She did not do so and continued to certify a return to work date of September 29, 2005.

8. The Employer argued that the time lost after September 29, 2005 was lost time under the Policy and that those hours counted toward the 90 hour threshold for termination.

9. Once the employee returned to work on October 8th he was informed that he had gone well over the 90 hours threshold, in fact had gone slightly over 120 hours, and that pursuant to the clear terms of the Policy he was terminated due to excessive absenteeism.

10. The Employer cited several arbitration awards that discuss the need to maintain attendance at work and recognized the economic disruption absenteeism causes and the stress it places on other employees and the production schedule. In addition, the Employer cited to several arbitrations that have upheld the right of this Employer to impose discharge for excessive absenteeism under this or a very similar attendance policy.

11. The Employer countered the Union's claim that in fact, the grievant was truly too sick to work. The Employer argued that it cannot substitute its judgment for that of a physician. Here, despite being asked several times to extend the leave past September 29, 2005, the grievant's doctor did not do so. In fact on the form she apparently filled out on October 14, 2005 she still refused to extend the leave. The medical record shows that she saw the grievant on September 27, 2005 and again on October 18, 2005 and still refused to extend the leave. It is not the Employer's duty to second-guess why the doctor's medical opinion was what it was.

12. The Employer dismissed the claim that the grievant was too sick due to his inability to pay for his medications. He received some wage replacement and was further still eligible to receive medical coverage, including prescription medications during the time off. There was no reason he could not have gotten his medications during the time of his illness.

13. Finally, the Employer had no obligation to grant the grievant FMLA or other leave. The doctor refused to certify his disability past September 29, 2005. On this record there is nothing in his medical file to indicate that the leave was to extend beyond that.

14. The essence of the Employer's argument is that the terms of the Attendance Policy are clear and require termination once 90 hours of lost time is accumulated. Here the grievant clearly did accumulate more than that and despite several attempts to get his doctor to extend his leave she simply refused to do so. Here termination is the only appropriate remedy due to the clear violation of the Policy.

The Company seeks an award denying the grievance in its entirety and sustaining the discharge of the grievant for violation of the Company's Attendance Policy.

UNION'S POSITION:

The Union's position is that the Company did not have just cause to terminate the grievant. In support of this position the Company made the following contentions:

1. The grievant has been with the Employer since September of 1999 and by all accounts is a hard working, well-liked and respected employee.

2. The Union argued that the Attendance Policy was unilaterally imposed and was not negotiated between the parties and is subject to the just cause standards in the collective bargaining agreement. The policy does not supplant the just cause requirements for discipline and discharge.

3. Moreover, the version of the Policy used by the Employer at the hearing was not the Policy in effect at the time of this discharge. The 4-1-05 Policy provides in relevant part as follows:

If the employee accumulates lost time to reach the threshold for a fourth degree demerit, the supervisor will issue the fourth degree demerit to the employee and put the accompanying discharge on hold, pending disposition of the employee's request for leave. The supervisor will properly document and communicate this action and e-mail a copy of the personnel history entry to labor relations. Labor Relations will confer with Health Services and the supervisor to set a date by which the leave will either be approved or the employee will be discharged.

4. The Union pointed out that there is no dispute that the employee was in fact too ill to come to work. He contracted severe bronchitis in September 2005 and saw his doctor, Dr. Ann Marie Cole, on September 9, 2005 for this condition. She disabled him from work until September 29, 2005.

5. The grievant's bronchitis condition did not improve and he saw Dr. Cole on September 27, 2005. She noted that his condition had not improved; in some measure due to his inability to get the medication she had prescribed. This was due to the fact that he was without funds to pay for it since the Weekly I had not actually been paid at that time.

6. He attempted to return to work on October 3rd and worked for two days but was still too ill to work. The Union argued that there is nothing on this record to even intimate that he was faking his illness. He was sick with severe bronchitis and was not able to come to work due to that.

7. He left work and continued to call the supervisors to let them know his status. He returned to work on October 18th when he was well enough to do so.

8. The Union argued that while the attendance policy is not *per se* unreasonable, it was unreasonable as applied in these circumstances. The Union further argued that this policy does not supplant the requirement of just cause. The arbitrator does have the power to determine whether discharge is appropriate taking the facts of each case into account without regard to the otherwise Draconian consequences of the terms of the attendance policy, which calls for discharge for lost time over 90 hours without regard to the underlying facts and circumstances of an individual case. The Union cited an earlier decision in which the arbitrator ruled that she was bound by the terms of the collective bargaining agreement's more flexible "just cause" standard rather than the Employer's Policy which called for termination upon the accumulation of a certain number of demerit points.

9. The Union thus argued that while the number of points the grievant had accumulated is a factor to be considered in determining whether there was just cause to terminate him it is not dispositive. The Union further cited other decisions for the proposition that so-called "no-fault" policies begin but do not end the inquiry.

10. Here, the Union's argument is that the terms of this policy were unreasonable as applied to this grievant under these circumstances. Further, even during his absence between October 4th and October 18th, he was under the impression that he would be able to get the time excused by his doctor, since; after all, he was legitimately sick. It was only after October 18th that he realized the problem. Moreover, he was in communication with the Employer all during this time and at no point was he even aware that his job would be on the line.

11. Further, the Union argued that there was no true objective investigation of this situation as required by the terms of the just cause standard and the Attendance policy itself. The Employer knew what they were going to do well prior to calling the grievant into the meeting they had with him on October 18th and were simply going through the motions.

12. The Union laid out several options it contended were open to the Employer including telling him that adequately informing him that his absences would be held against him unless he could provide medical documentation and informing him that he could take the time as vacation or unpaid leave. None of these were, in the Union's mind, pursued and this failure violated both traditional notions of just cause but also the Policy itself.

13. The Union also argued that the Employer's action violated FMLA. The Union argued that the absence could not count against the grievant if it also triggered FMLA rights. Here the Union contends that it did. The grievant is a qualified employee under FMLA and could take up to 12 weeks unpaid leave if he suffered from a "serious medical condition" that disabled him from work.

14. Finally, the Union argued that termination under these circumstances is simply too severe a penalty and urges a far lesser penalty under these circumstances. It is well recognized that arbitrators have the power to fashion remedies, irrespective of Employer policies to the contrary.

Accordingly, the Union seeks an award of the arbitrator reinstating the grievant to his former position with all accrued back pay and contractual benefits.

DISCUSSION

The facts are relatively straightforward. The grievant has been employed by Honeywell since 1999. There was a vague reference to a prior discipline but that was overturned in arbitration and was not considered in this matter. There was no evidence of a chronic or longstanding attendance problem with the grievant although he had some absences on his record under the Attendance policy as set forth in Employer Exhibit 10. Prior to his illness in September of 2005 he had not accumulated sufficient lost time hours to arise to the level of a first-degree demerit.

The evidence showed that in early September 2005 he contracted a severe case of bronchitis and was unable to work due to that. Dr. Ann Marie Cole saw him for this on September 9, 2005 and filled out a disability form disabling the grievant until September 29, 2005. While it was somewhat unclear exactly when the form was sent in to the Employer, it was clear that she disabled the grievant until September 29, 2005 but indicated that he could return to work thereafter.

The evidence also showed that by September 27, 2005 he was not better and again in to see Dr. Cole on that day. The notes from that visit reveal that the doctor indicated that his “symptoms not resolved” and that he still had a productive cough and that “he is not better yet.” There was no mention of the problems he was having obtaining medication nor is there any sort of indication that the doctor spoke with him about that in her notes, cryptic though they are. The notes do indicate however that this is a probable *viral* URI, upper respiratory infection, however.

He returned to work on October 3, 2005 and worked for two days. He went off work again on October 5, 2005 and did not return until October 18, 2005. It is that time off work after September 29, 2005 that caused this action.

He met with his supervisor on October 3, 2005 and was told that he would need to get the time covered by his physician in order to meet the requirements of the Attendance policy. He was given 15 days to get that documentation. Significantly, there was nothing to indicate to the grievant that he would have difficulty getting that documentation. He had been into the doctor on September 27th had clearly told the doctor he was not better. He testified credibly that he simply thought that since he was sick he could get that documentation from his doctor within the prescribed time frame. The evidence also showed that he called the Employer regularly during his absence between October 5 and 18, 2005 and let them know his status. There was further no evidence on this record at all to suggest that the grievant was malingering or somehow fabricating his illness in order to avoid work. In fact the evidence was quite to the contrary.

What is clear too is that he slowly recovered and went to the doctor on October 18, 2005 to get the documentation he needed in order to cover the time lost between October 5 and 18, 2005 as he had been directed to do. For reasons that were never made clear, Dr. Cole refused to give him a return to work date beyond September 29, 2005. Her notes of the visit on the 18th were curious to say the least. They clearly indicate that the grievant was there and that he was there with bronchitis. There is a separate note that he was “seen in the clinic today for a medical condition.” The evidence as a whole shows that he was clearly there as a follow up to the bronchitis condition he had been seen for by this same doctor only a few weeks before and that for reasons unknown to anyone, she was reluctant to fill out the forms or give anything more than the most oblique reference to why he was there.

Based on this, the Employer imposed the discipline called for by the Attendance Policy. The Employer argued they simply applied the terms of the Policy to the number of lost hours the grievant now had, as of October 18, 2005, which was well in excess of 90 hours and discharged him. The argument was that the policy was clear and called for termination once more than 90 hours of lost time had been accumulated. The Employer further argued that it was not in a position to second-guess the opinions of a trained medical doctor regarding a return to work date. The Employer noted that whether this time was to be covered as Weekly I or FMLA the grievant would still have had to bring in appropriate documentation of his illness taking him off work for that time. He did not, despite several attempts. The Employer argued that pursuant to its Policy, there was little they could do except apply the strict terms of the Policy and terminate the grievant.

The Union raised several arguments in response. Taking these slightly out of order, the Union argued that the grievant’s FMLA rights were violated since he was not informed that he could take FMLA leave. The Union argued that an employee need not expressly ask for FMLA leave but only has to state that leave is needed.

Here he did inform the Employer that he needed leave; he called his supervisors regularly after October 3, 2005 letting them know his condition. The Union however acknowledged, almost in passing, that the Employer must provide 15 days to allow the affected employee to provide adequate documentation of the illness to qualify for FMLA.

The Union's argument with respect to FMLA is beyond the scope of this arbitration. Whether the grievant had certain rights under FMLA is not a matter that can be enforced in this forum. Moreover, he would still have had to obtain medical documentation of his disability under FMLA as well, which Dr. Cole refused to do. Further, the employee was given 15 days to bring in this document. The evidence showed that when he met with Mr. Adams on October 3rd he was specifically told that he would be given 15 days to get that documentation. Presumably, that is why he met with his doctor on October 18th, coincidentally 15 days later. The question is not whether his FMLA rights were violated but rather whether there was just cause under the labor agreement to terminate him.

Initially, the parties disagreed greatly over the standard to be used. The Employer argued that the Attendance Policy is the only document to be reviewed and that if he violated the terms of that policy he must be fired. The Employer simply points out, in a somewhat linear fashion, that the grievant was unable to provide the appropriate medical documentation for the time after September 29, 2005, despite several attempts to do so and that essentially ends the inquiry. He had thus accumulated more than 90 hours of lost time, ergo he is terminated.

The Union argued that the Policy can be used as a beginning point to determine just cause but that such policies are not the end of the inquiry. The parties cited several cases in support of their respective positions. On balance the authority cited by the Union is more persuasive. The decisions note that rigid no-fault policies are not to be used as a "one size fits all" standard for determining just cause. To do so would obviate the very need to analyze whether just cause exists and would undercut the traditional and long-established notions that have guided parties and arbitrators in determining the appropriateness and just cause for discipline and discharge for decades.

The essential question here is whether the grievant should be fired where the evidence clearly showed that he was ill, was in touch with the supervisor regarding his illness, was attempting to get the documentation from his doctor but where the doctor filled the forms out in apparent direct contravention to clear medical evidence of the employee's illness. Obviously neither the Employer nor the arbitrator can substitute their medical judgment for that of a licensed physician. That however is not the issue. The issue here is whether there exists sufficient just cause to terminate this grievant under these circumstances.

Clearly, the lay and medical information indicates that the grievant was in fact too ill to return to work after 9-29-05 despite what his doctor said. Why Dr. Cole refused to fill out the forms correctly was not clear. The determination is made based on the medical notes and other documentation from Dr. Cole's office; there was no need to substitute anyone's non-medical judgment on medical issues.

She indicated on two separate occasions that the grievant could return to work on September 29, 2005, including a form filled out apparently on or about 10-14-05. Dr. Cole saw the grievant on 9-27-05 and noted that his "symptoms not resolved. Has a cough which is productive and he is not better yet." She prescribed medications and for reasons that do not appear clear at all on the record indicated that he could return to work on 9-29-05. Apparently she filled out the Attending Physician's Statement on 10-14-05 on which she again indicated that the grievant could return to work on 9-29-05. How she could have known what his condition was without actually seeing him was not clear on this record.

Finally Dr. Cole again saw the grievant on 10-18-05. Her note is somewhat disturbing. The grievant gave credible testimony that he was still quite ill with bronchitis when he saw her that day. Her note indicates that the diagnosis is still bronchitis and that her understanding of why he was there was to fill out the proper forms from the visit on 9-27-05. Her additional handwritten note simply indicated that the grievant was seen for a "medical condition." Why the doctor did not indicate on that second note what the medical condition was or why she would be failing to document that was not clear on this record.

The record reveals that the Employer and the grievant were trying to work with each other and were trying to get the necessary documentation to get the leave approved such that it would not fall under the unexcused absence policy and thus not count toward the time called from in the attendance Policy that would result in discipline for the grievant. The doctor was clearly the problem here and was either confused about the forms or was somehow ignoring her own observations and diagnosis of this grievant, her patient. Obviously, this is an inquiry of just cause in arbitration and not an inquiry into the doctor's actions pursuant to the Board of Medical Examiners and, for the doctor's sake that may be a good thing.

The Union argued too that the strict terms of the policy were not followed in order to give the grievant sufficient time to get the medical information necessary. The evidence showed that he was given the time but that the doctor for whatever reason, contumacious or otherwise, simply refused to fill out the forms per the clear medical findings and diagnoses in her own chart notes.

The difficulty in a case like this is that neither party is truly innocent nor is anyone truly guilty. The Employer's argument is well taken in that it gave the grievant time to bring in the necessary documentation but he did not since his doctor did not give it to him. The grievant on the other hand had ever reason to believe he could get the documentation since he was clearly ill and was staying in touch with the Employer but got essentially crossed up by his own doctor on October 18th without any prior notice from her that she was going to do this to him.

Arbitrators have for years used a series of "tests" to determine whether just cause exists for the imposition of discipline. Not all use them but most do and even if they don't they always provide a good roadmap to see if the Employer has provided adequate proof of the existence of just and proper cause for employee discipline.

These tests were first articulated by Arbitrator Carroll Daugherty in *Grief Bros. Cooperage*, 42 LA 555, 558 (1964). See also, *Enterprise Wire Co.*, 46 LA 359 (Daugherty 1966). In these cases Professor Daugherty notes that a negative answer to any of these questions may well mean that there is insufficient cause for the discipline imposed. These tests are as follows:

1. Did the Company give to the employee forewarning or foreknowledge of the possible consequences of the employee's conduct?
2. Was the Company's rule or managerial order reasonably related to the orderly, efficient and safe operation of the Company's business?
3. Did the Company, before administering the discipline to the employee make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the Company's investigation fair and objective?
5. At the investigation, did the "judge" obtain substantial evidence of proof that the employee was guilty as charged?
6. Has the Company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the Company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Company?

Applying these standards to the instant facts it is apparent that discharge is simply not appropriate on these unique circumstances. The grievant was trying to comply with the Employer's directives but was unable to due to no fault of his own. Moreover, given the unique facts of this case, discharge is inappropriate given the severity of the "offense" and the grievant's length of service with the Employer and the underlying circumstances. In addition, the evidence did not show strict compliance with the employer's won Policy pursuant to Paragraph N 6 cited above. While it is not certain whether more time would have made any difference in allowing the grievant to get the documentation to cover the time between September 29, 2005 and October 18, 2005, it is certainly true that if one party insists on strict compliance with a particular policy, they must adhere to it strictly themselves. Here that did not appear to be the case. This too was a factor in making the determination that termination was not appropriate under these unique facts and circumstances.

The parties expressly gave the power to fashion a remedy. Several options were considered. Initially a reinstatement with full back pay was considered. Had there been evidence of a violation of its own Policy by the Employer, as the Union suggested, this may have been appropriate. Certainly, the Employer could have suggested other options such as other forms of leave once everyone realized what had happened with the doctor. Doing so might well have avoided this whole scenario but without further evidence no such speculation about that is appropriate. The Employer was thus not acting in bad faith or in a way that suggested any nefarious attempt to terminate the grievant for some other unstated reason. They have their Policy and they applied it – no more no less. Accordingly, a reinstatement with full back pay does not appear warranted.

Reinstatement with some arbitrary amount of limited back pay and benefits was also considered. The difficulty with this is that such a guess is just that – a guess and places the arbitrator in the position of essentially creating policy without any justifiable basis upon which to do that. Here too, the grievant is not entirely clean either. The assertion that he was not able to pay for medication due to lack of funds seemed thin at best. The argument that he was without funds for a month or more is plausible but if one's illness and the attendant absence it creates might well lead to one's discharge one had better figure out a way to get the medication. He retained medical insurance coverage at all times relevant here and his assertion that he was not able to get medication bordered on the disingenuous.

Here the most appropriate remedy, even though it too is always something of an attempt at pleasing everyone while pleasing no one is a reinstatement without back pay or accrued benefits. The arbitrator is fully cognizant of the economic hardship placed on the grievant by such a remedy. On this record and on these somewhat unusual facts the record as a whole supports this as the most appropriate outcome.

AWARD

The grievance is SUSTAINED IN PART and DENIED IN PART. The grievant shall be reinstated to his former position but without back pay or accrued contractual benefits as set forth above.

Dated: January 3, 2007

Jeffrey W. Jacobs, arbitrator