

IN ARBITRATION

SPECTRULITE CONSORTIUM, INC.,) FMCS No. 91-19371
AND)
LOCAL 250, UNITED PLANT GUARD) Arbitrator's File 91-28-1414
WORKERS OF AMERICA (UPGWA),)
JUDITH KIEFFER, Grievant.) Date of Hearing:
November 13, 1991,
Madison, Illinois.

APPEARANCES

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Date of Award: January 31, 1992

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O P I N I O N

Issue

Was Grievant discharged for just cause? If not, what shall the remedy be?

Facts

Grievant was employed by the Company as an armed security guard. Her duties were to patrol the premises to guard it against intruders. To assist her, she wore a sidearm. Grievant was trained in the use of the sidearm, and in the safety aspects concerning it.

Grievant was discharged as a result of an incident that occurred on the evening of March 10, 1991. Prior to that time, she was having an affair with a fellow employee ("U") who was married.

The affair apparently, by all accounts, seemed to have been a tempestuous one, causing Grievant great emotional stress. After the affair began, fellow employees noticed changes in Grievant's conduct. She appeared to be under stress and depressed. She experienced crying spells.

Grievant was aware of this, and told her Ob-Gyn of her crying spells, and that she was eating and sleeping abnormally. Her Ob-Gyn suggested that she advise her general practitioner of her problems. This she did. In addition, she no longer was enjoying her previous leisure activities. She had been an avid weightlifter and an expert at billiards. By September, 1990, she had lost interest in these activities.

The general practitioner gave Grievant an antidepressant drug, Pamelor, and placed her on a work restriction of 8 hours a day. Her depression, however, did not improve but worsened. Her general practitioner referred Grievant to a psychologist late in 1990.

Grievant commenced psychotherapy every other week with the psychologist late in 1990. The treatment focused exclusively on her relationship with "U" and the resultant depression. However, her symptoms did not improve, but became worse.

As a result of her depression, Grievant suffered physically. She was not eating properly, and frequently would eat only candy. Her weight dropped some twenty pounds by late January, 1991.

Grievant became obviously withdrawn and depressed.

Grievant knew the Company's Human Resources Manager, and told her in late 1990 that she was seeing a doctor for depression and was taking an antidepressant. The Human Resources Manager suggested at one point that Grievant seek help from the Company's employee assistance program. Grievant did not do so.

Other employees of the Company were aware of Grievant's problems, although not necessarily the cause. She did advise one or two that the cause was her relationship with "U".

In late 1991, the psychologist added the antidepressant Prozac to the other drug Grievant was taking in an attempt to counteract her deepening depression. It did not help.

According to Grievant, she had thoughts of suicide at that time. At one point during a discussion with "U" at Grievant's home, according to Grievant, she gave her gun to "U" and told him to shoot her so that it would all be over and "you wouldn't have to worry about things any more."

Grievant's problems reached a climax on the night of March 10, 1991. She was scheduled to begin work at 10:30 p.m. Prior to the shift she spoke by phone at great length with "U" about their relationship, her depression, her medication, and her suicidal thoughts. She told "U" that she felt so bad that she did not think she would go to work that evening. "U" urged her to go to work because she needed to be doing something.

When she arrived at work that evening, she went directly to the guards' locker room. She was followed there by "U". He asked her how she was and she told him that he knew how she was since they had had such a long discussion earlier in the evening. Grievant was crying very heavily.

Grievant then pulled her gun from its holster and threatened to shoot herself. "U" grabbed Grievant's hand and started to wrestle with her for possession of the gun. He called

for assistance. Another employee entered the locker room, but seeing the gun being waived about by Grievant, generally in his direction, he ducked. However, "U" then was able to take the gun away from Grievant. She kicked and cursed at him for doing so.

Grievant was taken to the hospital following this incident, where she stayed until March 16. She was treated by a psychologist in the hospital, and continued this treatment after she left the hospital. She was released for work by the psychologist on April 15.

Grievant, however, suffered a relapse on April 22, and received additional treatment. She was later re-examined and pronounced able to return to work. Upon her return to work, Grievant was advised that she was, after an investigation, suspended pending discharge. She was offered an alternative position to the guard position as a process control technician in the Technical Department. She declined this offer. She was thereupon discharged.

Grievant testified in detail as to her meeting "U" and dating him even though she knew he was a married man. She testified to the mental turmoil that this had caused her. This turmoil was compounded by the fact that "U" had pledged to leave his wife and marry Grievant but did nothing to fulfill his pledge.

Grievant had disclosed her feelings of depression and stress at her annual check-up to her Ob-Gyn. This doctor had referred her to her general practitioner. She discussed her psychological problems with this general practitioner, and he had

prescribed Pamelor, an antidepressant. It did no good. She started to lose weight because she was eating improperly, sometimes only M&M's during the day. She lost between twenty and twenty-five pounds as a result. Her superiors noticed the change in her. Late in 1990, according to Grievant, she told her superior that she was seeing a doctor for depression and had been prescribed an antidepressant. Others noticed the same changes.

In January, 1991, she was given Prozac to take with the Pamelor. This seemed only to make her condition worse.

Grievant stated that during the incident of March 10 she had no intention of hurting anyone else, and she had told "U" that she might run her car off of a local road at high speed when no one else was around.

From the time of the incident through May 7, 1991, when Grievant was finally discharged, she was placed on salary continuation. Since her discharge, she has had no relapse into depression.

Discussion and Award

Position of the Company

Grievant was an armed security guard. All of the Union witnesses who testified, including the president of the Union and other armed guards, admitted that armed plant guards are held to a higher standard of conduct than others. This is because plant guards are responsible for the safety of other Company employees, and because the guard force is armed due to the dangerous neigh-

borhood in which the Company's premises are located. Grievant's misconduct in her misuse of her gun was so egregious as to justify discharge.

Grievant's conduct was a clear violation of the Company firearms policy. This policy forbids even the display of a firearm except in the performance of duty. Obviously, Grievant violated this provision.

Grievant's misconduct endangered her life and the lives of her co-workers. It also placed the Company at risk for future harm, because the Company is now on notice as to possibilities of Grievant's actions. Illinois tort law recognizes negligent hiring and retention as grounds for employer liability.

Grievant was on notice that misuse of a firearm would result in discipline. Another security guard who had mishandled his firearm during a training exercise was placed on deferred discipline. He was saved from discharge by the fact that the Company inadvertently missed the appropriate contractual deadline for discharging him. However, after that the Company made it clear to all security guards that future incidents of firearms mishandling would result in discipline.

The Union has urged, and will undoubtedly urge, that Grievant's mental state of depression should excuse her misconduct. The Company's firearms policy states that violation of the policy, even for the first occasion, may result in discharge. Grievant knew this.

There is no contention by Grievant or the Union that she

was unable to control her actions at the incident. The Company has a duty to maintain a safe work place. An armed security guard who acts as Grievant has done does not create a safe work place. This is true even though Grievant's psychologist has diagnosed her as "major depression, single episode."

Contrasted to that is a psychiatrist whom the Company had examine the situation, who testified that people who suffer from an episode of major depression are likely to have recurrent episodes with similar behavior. Further, this behavior generally recurs without warning.

Grievant's psychologist did not testify. The Union and Grievant refused to execute a release that would have permitted the psychologist to discuss Grievant with the Company. Neither was the psychologist called to testify for Grievant. All that was available were two written releases signed by him.

Grievant's efforts at self help in therapy are laudable, but are not sufficient to overcome the uncertainty of her situation. Grievant admitted to suicidal ideation several times before the incident. She did not enter a hospital until she had to be physically restrained from shooting herself. Prior to that time she did not believe that her depression was affecting her job. This would indicate that her judgment is faulty. She only recognized her lack of control after it became so obvious it could not be denied.

In the future, the Company fears, Grievant would again not get treatment until she thought she needed it. What would

trigger, again, such an obvious need is something that the Company cannot chance.

Grievant's discharge was justified by her misconduct, which endangered the lives of Grievant and her co-workers, violated the Company's firearm policy, and subjected the Company to possible legal liability. The grievance should be denied.

Position of the Union

Grievant's actions on March 10, 1991, are not and should not be viewed as misconduct. Grievant was mentally and emotionally ill in the months leading up to this incident.

Her obvious illness was testified to by everyone, both Company and Union, who observed her during this period.

The Company's Human Resources Manager, who knew Grievant quite well, herself testified to the change in personality that she noticed in Grievant.

Right after the incident the Company did not view her actions as misconduct, and as a matter of fact placed her on salary continuation. Salary continuation is available to an employee under the care of a physician for the condition causing the absence whenever the period exceeds five working days. The absence is not due to willful and/or malicious misconduct, and lastly the absence is not the result of employment for wages or profits outside the service of the Company. The Company's Human Resources Manager made it clear that she would not have placed Grievant on salary continuation if Grievant would not have been eligible for it.

Grievant's psychologist, who was very familiar with Grievant, having treated her, made it clear that Grievant had a major depression which required treatment for several weeks. She was then viewed as suffering from an illness. Clearly the Company at that time viewed Grievant's actions as the desperate act of an ill woman.

Discharge, or other discipline, can only be assessed when there is misconduct. But the Company had originally viewed Grievant as having been ill. Someone who is ill is not responsible for conduct which is the product of the illness, even though Grievant has admitted that she does have some blame for the March 10 incident. She had her own rule of not dating a married man or a co-worker, and she acknowledged having violated this rule. As a matter of fact, her violation of this personal rule partly contributed to her depression.

The other employee, "U", is also at fault here, but has not been disciplined. He was dating Grievant while a married man. He had made promises to her that he did not keep. He knew of Grievant's threats of suicide yet never reported them to the Company, even though he was a member of the Company's safety and security department.

"U" had told another Company employee of Grievant's suicide threats. This employee also did nothing about this.

Grievant's psychologist shares in the blame because he did not monitor Grievant's course of conduct more closely than he did. He saw her growing suicidal tendencies and did nothing

about them.

Other employees also did not do what they could have and should have done in the situation. The person who probably could have done the most, and yet did nothing, was the Human Resources Manager who knew Grievant quite well. She knew Grievant was suffering from depression, she saw that Grievant was becoming debilitated, and yet she did nothing. The Human Resources Manager did suggest that Grievant enroll in the employee assistance program, but this was a year before the locker room incident and at a point where the matter had not become as serious as it later did. Once having been rebuffed, she failed to follow through.

What Grievant should have is treatment and compassion for her problems, not discipline.

As a matter of fact, if discipline is appropriate for some alleged "misconduct," discharge is not the proper penalty. Grievant's weapon did not discharge, she was not pointing it at anyone, nor did she intend to harm anyone else. Further, she sought and received treatment which has been effectual. In addition, another employee whose conduct on the target range was particularly appalling received no discipline of any sort. The Company explained this away by saying that it "blew the time limits." That is insufficient. If the conduct was as bad as the Company alleged, it would have discharged the guard immediately, and there would have been no question of time limits.

The final piece of evidence showing that discharge is inappropriate is the Company's offer to Grievant of a job outside

the security department. This shows that the Company itself believed discharge to be too severe, and that Grievant was a capable employee.

The medical evidence introduced by the Union showed that Grievant's conduct was what is called a "single episode" and is unlikely to be repeated in light of Grievant's treatment and psychotherapy. She has learned coping skills, and ways to handle stress in her life. This will make her a better employee now than before the incident, when all acknowledged that she was an excellent employee.

In short, there is no justification or need for the action that the Company has taken regarding Grievant. She should be reinstated with back pay.

Arbitrator's Discussion

If one were to view this matter from the standpoint of emotion, all the sympathy must lie with Grievant. However, emotion and sympathy are dangerous methods of evaluating situations. A more certain way of handling judgment of a situation is by using reason and logic. I will view the situation accordingly.

Grievant's job requires her to possess a deadly weapon. This must be kept in the forefront. A gun can kill, even though the person shooting it is the nicest and best-intentioned person one would want to meet. Most observers view people who possess guns as the insurer of the safe use of the gun. That is, there is practically speaking almost no excuse for mishandling a gun. Possibly an infant who fires a gun, not understanding what guns

are or what they can do, or someone who is totally and completely mentally incompetent, may be excused for misuse of a gun. Short of that, it is difficult to excuse the misuse of a gun. This would be particularly true of an armed security guard, aware of the lethal nature of a gun, and the need for gun safety.

It is possibly somewhat of an excess of caution for a Company to discharge someone who misuses a firearm to which they were entrusted. But, I believe, the Company had no choice but to err, if it does, on the side of caution where a gun is involved. That being the case, I believe Grievant's discharge was for just cause.

The Union has advanced a number of reasons opposing this conclusion which I find very cogent and worthy of consideration. These reasons, however, have not compelled me to change my conclusion. For instance, Grievant was placed on salary continuation, which the Union argues does not then indicate a misconduct.

However, Grievant is entitled to salary continuation under other sections of the contract. As long as she complies with the requirements of salary continuation she is entitled to it regardless of the reasons for which it is needed.

The Union also finds fault with the Company in that, according to the Union, the Human Resources Manager observed Grievant's deteriorating condition and did nothing to seek help for her.

This argument ignores the fact that at one point the

Company suggested that Grievant seek treatment under its employee assistance program. It is true that this was early in the situation, but nonetheless the suggestion was made. The Company has to draw a fine line between seeking to help an employee and interfering in an employee's private life. To some extent, the Company is damned if it does and damned if it doesn't. I think that the Company did about as much as it could on that score, lest it be accused of interference.

The Union and Grievant attempt to minimize the incident by saying that the gun did not discharge, she was not pointing it at anyone, she did not intend to injure anyone, and therefore it should not be called misconduct. The problem with this argument is that it ignores the potential for injury. Guns can discharge, the bullet go through a wall, and injury still result to someone not in the room. Therefore, the potential for injury with the misuse of a weapon is so great that the fact that no injury did occur does not absolve the person of their actions.

The Union argued that the example of another employee whose misconduct at the target range resulted in no discipline should act as a precedent here. However, that was a case of ineptitude on the Company's part, by letting time limits go for discipline. The Union refused to extend the time limits for discipline. Of course, the Union had no choice but to refuse to do this. The Union argued that Grievant should have been discharged immediately if her conduct was as bad as the Company alleges. However, it does take a while to investigate a matter

properly to support a discharge. Therefore, the fact that the Company did not act hastily is not a criticism of the Company.

The Union also argued the medical situation of Grievant. Her psychologist said that this was a single episode, and was unlikely to be repeated. However, a doctor skilled in psychiatry argued otherwise. He said that there was an appreciable likelihood that the episode might be repeated. Faced with a choice between a diagnosis of a psychologist who is not an M.D., and an M.D., the Company could reasonably accept the determination of the M.D.

The Union also argued that the Company offered Grievant another position, hence it felt that she was a worthwhile employee. The answer to this is yes, Grievant was, is, and probably would in the future be a worthwhile employee -- in some position other than as an armed guard. The Company recognized that there are different jobs for different people. It felt that while Grievant could be a technician, she could not be an armed guard. It therefore offered her an alternative. Having offered her an alternative does not mean that the Company is admitting that she was capable as a guard.

In short, it is my belief that the Company was justified in the action it took, in view of the fact that Grievant would be in the future in possession of a weapon. The Company would have to err, if it did at all, on the side of caution.

Award

The grievance is denied.

In accordance with the provisions of the Collective Bargaining Agreement, Article 4, Section 3, the costs are assessed against the Union.

Dated: January 31, 1992.



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