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Zimmer Surgical, Inc.
Decision of Arbitrator

FMCS Case No. 16/03046-6

August 28, 2017

In re ZIMMER SURGICAL, INC. [Dover, Ohio] and UNITED STEELWORKERS LOCAL 2737-15

Arbitrator(s)

Arbitrator: Lynette A. Ross, selected by parties through procedures of the Federal Mediation and Conciliation Service

Headnotes

DISCHARGE

[1] Falsification of work records — Honesty policy ▸118.6484 ▸118.656

Company proved that grievant falsely reported his reason for unauthorized time off work in violation of plant rules, even though he provided doctor's "disability certificate" stating that he was "totally incapacitated" by back pain from working his regular Friday shift and mandatory overtime shift on Saturday, where photo posted on Facebook shows grievant, in no apparent discomfort, hosting birthday dinner for co-worker at local winery on Friday during his shift, and grievant admitted he was not "totally incapacitated" and that he made dinner reservations earlier in week.

[2] Falsification of work records — Discrimination — Union representatives — Work records ▸118.6484 ▸118.67 ▸118.6609

Company had just cause to discharge grievant who falsely reported his reason for unauthorized time off work, where this misconduct irreparably damaged managment's trust in him, there was no evidence of disparate treatment or that he was discharged because of his role as union steward or to discourage others from taking allowable time off, and there were no mitigating circumstances as he was two-year employee who had been progressively disciplined under company's attendance policy.

Attorneys

For the employer—Ryan Funk (Faegre Baker Daniels, LLP), attorney.

For the union—George C. Thompson, staff representative.

Opinion Text

Opinion By:

LYNETTE A. ROSS, Arbitrator.

Statement of the Issues

The issue as framed by the Arbitrator is as follows:

> Whether the Company had just cause to discharge Grievant M__ for allegedly falsely reporting the reason why he missed work on July 8 and 9, 2016. If not, what shall the remedy be?

Page 1735

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Agreement Provisions and Company Policies

A. PERTINENT CONTRACTUAL PROVISIONS [1]

ARTICLE I
RECOGNITION AND UNION MEMBERSHIP

Section 1. The Company recognizes the Union as the exclusive bargaining agent with respect to rates of pay, hours of employment and other conditions of employment for all hourly-paid production and maintenance employees of the Company, but excluding all office and clerical employees, guards, professional employees and all supervisors as defined in the Labor Management Relations Act of 1947, as amended.

* * *

ARTICLE II
MANAGEMENT RIGHTS

Section 1. The management of the plant and works and the direction of the working forces and the operations at the plant and works, including the making or reasonable rules not in conflict with the Agreement, the hiring, promoting of employees, discharging or otherwise disciplining of employees for cause …, are the exclusive functions of management; provided, however, that in the exercise of such functions, the management shall not violate the provisions of this Agreement …

* * *

ARTICLE III
ADJUSTMENT OF GRIEVANCES

* * *

Section 4. Should any differences arise between the Company and the Union as to the meaning and application of the provisions of this Agreement or as to any question pertaining to the rates of pay, hours of work, or other conditions of employment of any employee, there shall not be any suspension of work or slow down of work on account of such differences, but an earnest effort shall be made to settle such differences promptly in accordance with the provisions of this Agreement in the manner hereinafter set forth.

* * *

Section 6. For the purpose of orderly and expeditious adjustment of grievances, which arise out of differences between employees and the Company not disposed of under Section 5 above, the following procedure shall be followed:

STEP 1

If the difference is not adjusted to the satisfaction of the employee within one (1) working day after presentation to the supervisor as provided for in Section 5 above, the employee shall state the grievance in writing within three (3) working days …

STEP 2

If the grievance is not adjusted to the satisfaction of the employee within three (3) working days after receipt of the written grievance, such grievance shall be considered at the next grievance meeting between the Grievance Committee and a representative of the Company … Any decision reached at a grievance meeting shall be communicated in writing to the committee within ten (10) working days following the meeting.

STEP 3

If the decision reached by the Grievance Committee is not satisfactory, the grievance shall be discussed at a meeting to be held at the Company office within thirty (30) calendar days of the Step 2 answer … The Company's answer will e within ten (10) working days after the meeting.

STEP 4

Within ten (10) working days after the answer from Step 3, the Union may appeal the entire dispute to an impartial arbitrator for determination. Such appeal shall be filed with the Federal Mediation & Conciliation Service and a copy thereof shall be sent to the Company. The expenses of the arbitration shall be paid equally by the parties hereto. The decision of the arbitrator shall be final and conclusive except that the arbitrator shall have no authority to add to, subtract from, or in any way modify the terms of this Agreement.

* * *

ARTICLE V
HOURS OF WORK AND OVERTIME

Section 1(a). The normal regularly scheduled work week … shall consist of five (5) consecutive days of eight (8) hours each, Monday through Friday. Regular starting time, except for a department working three (3) continuous shifts,

will be 10:30 p.m. for the Midnight shift and 7:00 a.m. for the Day shift and 3:30 p.m. for the Afternoon shift.

* * *

ARTICLE IX
SENIORITY

* * *

Section 5. Seniority shall be lost for any of the following reasons:

* * *

(b) Discharge for cause.

B. PERTINENT COMPANY POLICIES

1. ZIMMER BIOMET HUMAN RESOURCES POLICY [2]

* * *

In addition to the conduct described previously, you are prohibited from:

* * *

• Falsifying or altering any Zimmer Biomet record or report, such as reports prepared for any government agency, application for employment, a medical report, a production record, a time card or an expense report, or giving false or misleading information to Zimmer Biomet management. (Co. Exh. 1 at 12.)

* * *

Prohibited Conduct

The following acts or conduct are prohibited:

* * *

• Falsifying any reports or records (including but not limited to time cards, employment applications, or production records). (*Id.* at 17.)

* * *

Violation of Plant Rules

A Team Member who fails, at any time, to maintain proper standards of conduct or who violates any of the above rules shall be subject to disciplinary action up to and including discharge in accordance with any applicable collective bargaining agreement. (*Id.* at 18.)

* * *

2. STANDARD OPERATING PROCEDURE - PLANT RULES [3]

* * *

2. *THE FOLLOWING ACTS OR CONDUCT ARE PROHIBITED* (Emphasis supplied.)

* * *

• Falsifying any reports or records (including but not limited to time cards, employment applications, or production records). (Er. Exh. 2 at 3.)

* * *

4. *DISCIPLINARY ACTION*

• An employee who fails, at any time, to maintain proper standards of conduct or who violates any of the above rules shall be subject to disciplinary action up to and including discharge. (*Id.* at 5.)

* * *

3. POLICY & PROCEDURES - ATTENDANCE POLICY (Applies to Hourly Employees) [4]

* * *

Absences

If an employee is absent for more than four hours during any part of the scheduled shift, it will be treated as one full day's absence … (Er. Exh. 3 at 1.)

If an employee is absent for two or more consecutive days due to the *same illness* …, the consecutive days will be counted as one absence … (Emphasis supplied.) (*Id.*)

A note from the physician verifying illness and date(s) will be required by the supervisor and will then be considered an excused absence. It is the employee's responsibility to turn in all appropriate paperwork upon returning to work. (*Id.*)

> … Absences due to approved FMLA will not count toward disciplinary action. If absence is due to disability or FMLA, the employee must state this to their supervisor when calling in. (*Id.*)
>
> * * *
>
> *Reporting Absences/Tardiness*
>
> It is the employee's responsibility to report all incidents of absence and tardiness directly to a supervisor prior to the start of the shift. (*Id.* at. 2.)
>
> **Page 1737**
>
> *Point System for Disciplinary Action*
>
> Incidents of unexcused absence, both full and partial days, are recorded on the following point system:
>
> One-half (1/2) point for each occurrence of an appropriately reported partial day's absence of four hours or less (including arriving late and leaving early).
>
> One (1) point for each occurrence of an appropriately reported absence for more than four hours.
>
> One-half (1/2) point will be added for failure to report absences and tardiness before the start of the shift.
>
> Accumulation of more than 3 points of unexcused absences in a six month period and/or absenteeism exceeding 10% of total attendance, with or without physician slips, will be grounds for disciplinary action. *The Company reserves the right to review overall patterns of absenteeism and initiate progressive discipline*. (Emphasis supplied.) (*Id.* at 2-3.)
>
> * * *
>
> Once a disciplinary notice has been issued the employee must work a full year without any additional notices for that discipline to be removed. If the employee receives a discipline notice within that year, the employee must go a full year starting from the second discipline in order for those disciplines to be removed.
>
> * * *
>
> The progression of disciplinary action will be a counseling, verbal warning, written warning, 3-day suspension, and discharge, depending on the occurrence and severity of the problem.
>
> * * *
>
> *Amendment to the Attendance Policy - Effective January 5, 2004*
>
> *A note from the physician verifying illness and date(s) will be required by the supervisor and will then be considered an excused absence. It is the employee's responsibility to turn in all appropriate paperwork within two working days of the employees' return. Physician notes turned in after this time frame will not be recognized as an excused absence.* (*Id.* at 3.)

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[1] The Agreement entered into as of the 16th day of May 2015, by and between Zimmer Surgical, Inc., a Delaware Corporation, or its assigns and successors, (hereinafter referred to as the "Company") and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC on behalf of Local 2737-15 (hereinafter referred to as the "Union"), governs the instant dispute. (Jt. Exh. 1.)

[2] The Zimmer Biomet Human Resources Policy Handbook for Surgical Union Team Members, Revision 1, Effective 1/1/2016, was in effect at the time of this dispute. (Er. Exh. 1.)

[3] (Er. Exh. 2.)

[4] (Er. Exh. 3.)

Factual Background

Zimmer Surgical ("Company") operates a manufacturing facility at Dover, Ohio, for the production of supplies for surgical procedures. Its primary product is the Pulsavac, a gun with changeable tips used to clean wounds with a saline solution. The Company operates an irrigation department, in which employees, classified as "general labor," are assigned to work one of two shifts. Employee M__ ("Grievant") held a second shift position in the Irrigation Department. His shift commenced at 3:30 p.m., and was supervised by Production Supervisor Richard Stoffer. (Er. at 2.) The above-referenced Agreement between the Company and United Steelworkers ("Union") covers approximately 170 of the 350 employees at the Dover facility, including the Irrigation Department employees. (*Id.*)

The Grievant commenced employment with the Company in 2014. The Grievant's testimony and training documents also entered into evidence serve to establish that he had been trained on the manufacturing procedures necessary for the performance of his duties as a laborer, the standard operating procedures and plant rules, and on the various Company policies, including those concerning attendance. (Er. Exhibits 2 and 4.)

Concerning the Company policies germane to this matter, the documentary evidence consisting of the Grievant's training record (Er. Exh. 4.) conveys he was afforded training as follows:

- 2/28/14 and 7/21/15 - Plant Rules (*Id.* at 3; lines 87 & 88.)
- 1/9/15 - HR Policy Handbook Instructions - Revision 1, including the Company's provisions relating to honesty and discipline. (*Id.* at 5; line 164.)

The Grievant clearly testified he had been trained on the Plant Rules and the HR Policy Handbook Instructions and had access to them. He testified he had been trained on how to report absences, including absences necessitated by doctor appointments.

On Friday, July 8, and Saturday, July 9, 2016, [5] the Grievant was scheduled to work his second shift assignment commencing at 3:30 p.m. The Grievant's supervisor, Second Shift Manufacturing Manager Richard Stoffer, testified that the Saturday shift represented mandatory overtime work at the plant necessitated by production demands. The Grievant testified that, on Tuesday, July 5, he had made an appointment with his chiropractor for Friday, July 8, at 3:30 p.m., because his back had been bothering him. He also testified that on that Tuesday, July 5, or Wednesday, July 6, after having made the chiropractor appointment, he had made a reservation at the nearby Gervasi Vineyard for a celebratory birthday dinner on the evening of Friday, July 8. Stoffer testified that at the time the Grievant had made his doctor's appointment and dinner reservation,

Page 1738

the Grievant would have known his work schedule for the next several days, including the overtime scheduled for Saturday, July 9, because work schedules had been posted by Wednesday of the prior week.

[5] All dates reference calendar year 2016 unless otherwise noted.

Second Shift Manufacturing Manager Richard Stoffer testified that, on Friday, July 8, the first shift supervisor had taken the Grievant's phone call that he would not be in on Friday or Saturday, and passed that information on to Stoffer, who, in turn, reported the Grievant's absences with his roster at the end of his shift. The Absentee Reports submitted by Stoffer for July 8 and 9 reveal that, on July 8, the Grievant's absence was due to a "Dr. apt. this evening," and that, on July 9, the Grievant was "written off of work by Doctor." (Er. Exh. 7.)

Manager Stoffer essentially testified that, on Saturday morning, word began circulating among the workforce that, instead of working on Friday night, the Grievant actually attended a birthday dinner with three friends at the Gervasi Vineyard, in Canton, Ohio. In this age of pervasive social media, a photo posted on Facebook depicting the Grievant and a female co-worker standing in front of the restaurant during the Grievant's Friday evening shift was circulating throughout the plant. (Er. Exh. 11.) Day Shift Manufacturing Manager Matt Goodwin was apprised of the Facebook post on Saturday morning. Goodwin alerted Stoffer, who, in turn, sent an e-mail to Human Resources Generalist Dan Esway on Saturday, July 9, Esway's day off. (Er. Exh. 8.)

On Monday, July 11, Day Shift Manufacturing Manager Goodwin approached Human Resources Generalist Esway and told Esway he found the Facebook post that other employees had brought to his attention. Upon his return to work that afternoon, the Grievant presented to Second Shift Manufacturing Manager Stoffer a Disability Certificate signed by his doctor, stating that the Grievant, "has been under my professional care and was totally incapacitated from July 9th to July 10th." (Er. Exh. 10.) Upon comparing the Facebook post with the doctor's note, Esway doubted the veracity of the Grievant's Disability Certificate asserting the Grievant's total incapacitation. Esway printed a copy of the Facebook post showing the Grievant and his friend appearing relaxed and amicable in front of the Gervasi Vineyard. (Er. Exh. 11.)

Mr. Esway then arranged to meet with the Grievant and Union Vice President Lisa Barbee for the purpose of discussing the discrepancy between the Facebook post and the content of the Disability Certificate. (Er. Exh. 10.) That meeting took place on Wednesday, July 13, at which time the Grievant and Barbee were shown both the Facebook post and the doctor's certificate. According to Esway's meeting notes (Er. Exh. 13), the Grievant admitted he had been at the Gervasi Vineyard with a co-worker, and explained did not realize he had been required to return to work after calling off for a doctor's appointment. (*Id.*) Esway noted that the Grievant had become "visibly upset," and took the rest of the day off for vacation. (*Id.*)

Mr. Esway's notes for Thursday, July 14 (Er. Exh. 13) reflect that he, Ms. Barbee and the Grievant met on that date also to discuss the Grievant's termination. According to his notes, Barbee essentially requested that the Company extend leniency to the Grievant in the form of a three-day suspension and Last Chance Agreement in lieu of termination. (*Id.*) Esway responded that the Company did not regard this matter as an attendance issue, "but the fact that Andrew falsified why he was off for the day." (*Id.*) On more than one occasion, Barbee expressed that the Union believed the Company's action in terminating the Grievant's employment was unjust, and that the Union would file a grievance. (*Id.*) According to Esway's notes, the Grievant expressed that he felt termination was unfair, to which Esway responded that the Company's position was final, and that he would try to move the grievance process along "for Andrew's sake." (*Id.*) The Grievant was directed to collect his belongings, turn in his I.D., and was escorted from the premises without incident. (*Id.*) Prior to leaving, the Grievant was provided a succinct letter, dated July 14, which Esway also read to the Grievant in Barbee's presence, terminating his employment. The letter succinctly served to, "confirm [his] termination of employment from Zimmer Biomet, effective 7/14/2016 … for false reporting of reason for unauthorized time off work." (Jt. Exh. 2.)

On July 15, Union Committee Member George Teischinger filed a Step 1 “Report of Grievance” (Grievance No. 9-16) (Jt. Exh. 3) on the Grievant's behalf, and submitted it to Human Resources Generalist Esway. The “Description of Grievance” reads, “The Union Feels M__'s Firing Was Not For Just Cause.” (*Id.* at 1) The “Remedy Requested” states, “Full Reinstatement Immediately.” (*Id.*) On that same date, Mr. Esway denied the Grievance 9-16, with a singular sentence stating, “The Company's stance will not change.” Mr. Teischinger immediately moved the grievance to Step 2. (*Id.* at 2.)

On August 2, Human Resources Generalist Esway again denied Grievance 9-16 in his Step 2 response, which stated, “The Company's stance remains Grievance denied.” Union representative Barbee acknowledged the grievance denial on August 3, and, on behalf

Page 1739

of the Grievant, moved Grievance 9-16 to Step 3. (*Id.* at 3.)

On August 31, Human Resources Generalist Esway again denied Grievance 9-16 in his Step 3 response, which simply stated, “The Company's stance remains.” On September 1, Union representative Teischinger rejected the Company's stance, and the Union subsequently moved the dispute to arbitration. (*Id* at 4.)

Subsequent to the Grievant's discharge on July 14, and while the parties handled the matter pursuant to Article III of the Agreement, the Union presented correspondence from the Grievant's chiropractor in purported clarification of the July 8 Disability Certificate (Er. Exh. 10), stating that the Grievant was “totally incapacitated from July 8th to 10th>.” Employer Exhibit 16 consists of a Disability Certificate dated July 15, and signed by the Grievant's chiropractor, Dr. Brown. The clarified certificate shows the word “totally” blacked out with respect to the phrase “totally incapacitated,” and “Remarks” added, as follows:

> This is to clarify that the patient was not to go to work from 7-8-16 to 7-10-16. Excuse me for using the word “Totally.” In all of my 47 yrs. in practice I have not had anyone be so “picky.” Please see Reverse side! The Patient (M__) has a lumbar spinal condition that I am treating him for. The recent exacerbation caused him to be seen on 7-8-16. It was my professional opinion that he would respond better to my care if he did not work until Mon. 7-11-16. Thank you for allowing me to further explain this situation. Respectfully, R. L. Brown, DC (Er. Exh. 16.)

On July 19, a letter prepared on the Grievant's behalf from Dr. Brown was submitted to the Company while the instant grievance was in process. That letter reads:

> To Whom It May Concern:
>
> To further explain my disability certificate of July 08, 2016. I would add the following comments.
>
> I did not want M__ working or standing on the job for ten hours with repetitive motions of twisting, lifting, reaching and bending. None of these activities relate to eating in a restaurant. Sitting in a restaurant would not be harmful to his condition.
>
> Respectfully Submitted,
> Richard L. Brown, D.C.
>
> (Er. Exh. 15.)

Overruling the Union's objection, the Arbitrator held that the Grievant's disciplinary record regarding attendance was germane to this dispute, and would be admitted into the arbitration hearing record as so moved by the Company. According to such documentary evidence, discussed more fully below, since the date of the Grievant's hiring in 2014, until the date of termination, his record reflects he had been counseled, warned, and disciplined for various attendance issues. Such actions were undertaken pursuant to the Company's “Policy & Practices Attendance Policy” pertaining to hourly workers. (Er. Exh. 3.)

Specifically, on June 27, 2014, the Grievant was counseled for accumulating over three attendance points within a six-month period from December 26, 2013 through June 25, 2014. (Er. Exh. 5-E.) On July 9, 2014, the Company rescinded the counseling upon the Grievant's submission of a doctor's slip for an April 29, 2014 absence under review. (*Id.*)

Approximately one month later, the Grievant was absent without excuse on July 29, 2014; on August 1, 2014, he was counseled under the Attendance Policy for accumulating over three points within a six-month period. (Er. Exh. 5-D.)

On February 6, 2015, the Grievant was issued a verbal warning for attendance, upon accumulating four points during the six-month period from August 1, 2014 through January 31, 2015. (Er. Exh. 5-C.)

On June 17, 2015, the Grievant was issued a written warning for attendance, upon accumulating 3.5 points during the six-month period from December 13, 2014 through June 12, 2015. (ER Exh. 5-B.)

On October 15, 2015, the Company assessed the Grievant a three-day actual suspension for having accumulated 3.5 points during the six-month period from April 10, 2015 through October 9, 2015. (Er. Exh. 5-A.) As in the previously issued counseling and warning letters, the letter assessing the suspension closed with the admonishment, “Improvement in your attendance is necessary. Failure to do so will result in further disciplinary

action up to, and including termination." Slightly below the middle of the page of the suspension letter is a check box with an "X" marked through it, to the left of a sentence, reading "Offered copy of Attendance policy." The Grievant signed the letter on October 21, 2015. (Er. Exh. 5-A.) Again, the Grievant's testimony reflected familiarity and training on the Attendance Policy.

Under the Company's Attendance Policy, the Grievant's October 15, 2015 suspension and all previous discipline would have been removed if he had worked a full year, until October 15, 2016, without any additional notices. However, the Grievant began accumulating points on April 2, and, hence, failed to establish a "clean slate." According to Employer

Page 1740

Exhibit 6, and the accompanying testimony, The Grievant had accumulated 2.0 points Second Shift Manufacturing Manager Richard Stoffer over the six-month period from January 15 through July 14.

It was based on these facts that this case came to me for final resolution.

Contentions of the Parties

A. The Company

According to the Company, the instant dispute is not an attendance case, despite the introduction of evidence and testimony establishing the poor state of the Grievant's attendance record at the time of his termination. The Company stresses that this case concerns the Grievant's dishonesty, a "terminable offense," when, on July 11, he provided an admittedly false doctor's note to excuse his absences, on July 8 and 9, in order to avoid being assessed attendance points. (Co. at 14.) The Company avers that the Grievant's undocumented absences on those dates likely would have resulted in point assessments under the Attendance Policy (Er. Exh. 3), or, if excusable, would have been counted against him under the Attendance Policy's 10% rule. (*Id.*) However, such sanctions may not have led to his termination. Rather, management determined that the discipline of discharge was warranted, and, thus, assessed, for the Grievant's admitted and proven dishonesty by falsely reporting the reason for his absences.

The Company's Plant Rules as found in Zimmer's Standard Operating Procedure (Er. Exh. 2) and provisions contained in the Human Resources Policy Handbook for Surgical Union Team Members (Er. Exh. 1) promulgate clear warnings and the consequences for employees who violate them; including, "disciplinary action up to an including discharge." (Er. Exh. 1 at 18; Er. Exh. 2 at 5.) The Grievant admitted at hearing to his awareness that discharge was a possible consequence of providing false or misleading information, or falsifying reports or records, and that the Company prohibited dishonesty and would not tolerate it. (Co. at 15.)

Furthermore, the Union has never grieved the reasonableness of the rules at issue in this case. Zimmer stands by its right to make and promulgate reasonable rules that are not in conflict with the Agreement. In a 2013 dishonesty case adjudicated by Arbitrator Philip W. Parkinson involving these same parties, Parkinson held, with reference to Employer Exhibit 2, "Standard Operating Procedure - Plant Rules - Zimmer Surgical (Dover, OH), that "the Company's prohibition of falsification … is a legitimate exercise of management authority under the parties' Agreement." (Er. Exh. 17 at 12.)

It is the position of the Company that a fair and proper investigation into the incident at bar was properly conducted by management before reaching a final decision as to discipline. *See*, *Arthur F. Schultz Co.*, 136 LA 1125 (Imundo, 2016); *see also*, *Exxon Mobil Corp.*, 136 LA 567 (Williams, 2016). Zimmer conducted a timely, thorough, and impartial investigation before deciding to discharge the Grievant, who, in the presence of his Union representative, was interviewed by Human Resources Generalist Esway and permitted the opportunity to tell his side of the story. The Company's investigation of this matter was completed in "short order" because the facts were relatively uncomplicated. The Grievant himself provided the evidence necessary to establish that he had dined the Gervasi Vineyard during the evening of July 8, after reporting off work for a doctor's appointment, and failed to explain why he was not at work on July 9, when he had no doctor's appointment and might have been assigned light duty had restrictions been placed upon him. According to Esway's testimony, during the interview the Grievant acknowledged that the doctor's note was false, and admitted that by going out to dinner he was not "totally incapacitated" at the time. Clearly, the Company based its decision to terminate the Grievant upon its full investigation of the facts. (Co. at 17.)

As set forth above, on Monday, July 11, the Grievant submitted the Disability Certificate, dated July 8, from Dr. Brown, stating he was "totally incapacitated from July 8th to July 10th" when such was not the case. (Er. Exh. 10.) The Grievant admitted in his testimony that on the evening of July 8, during hours he normally would have been working, he was celebrating a birthday dinner at the Gervasi Vineyard as depicted in the Facebook photo. (Er. Exh. 11.) The Grievant engaged in misconduct by calling in prior to his shift on July 8, and reporting off for "Dr. apt this evening," and, on July 9, for "Written off of work by Doctor." (Er. Exh. 7.) As an employee "highly familiar" with medical certifications, given he had submitted dozens over his short tenure with the Company based on evidence admitted into the record (Er. Exh. 21), the Grievant should have known that a diagnosis of "total incapacitation" was tantamount to the most extreme medical reason to miss work. Again, the Grievant alone bears responsibility for his misconduct by knowingly engaging in the dishonest behavior of falsely reporting the reason for obtaining time off from work. (Co. at 19.)

It is the firm position of the Company that, in light of the entirety of the established facts

Page 1741

and circumstances, it was reasonable for Zimmer to discharge the Grievant for his proven act of dishonesty. According to the Company, "In the common law of arbitration dishonesty is always a terminable offense." Citing *Cadillac Products, Inc.* 76-2 ARB 8541 (Forsyth, 1976), and other authorities, the Company emphasizes that "falsification is a serious matter [and] progressive discipline is not appropriate in an offense of this nature." (*Id.*)

With regard to this particular attendance matter, the Company emphasizes that Zimmer needs employees to come to work when able, and that the Attendance Policy (Er. Exh. 3) allows employees to avail themselves of reasonable amounts of unexcused leave before progressive disciplinary measures are undertaken. The governing Attendance Policy is based on trust; the Company cannot micromanage employees as regards their attendance, and expects all employees to behave honestly with respect to requesting and managing time off. The Employer cannot tolerate employees who "game the system," and when violations become apparent will address them appropriately and fairly under the Attendance Policy. (Co. at 22.)

It is furthermore the position of the Company, that the Grievant's dishonesty caused Zimmer real financial harm. His absence prevented Manufacturing Supervisor Stoffer from running an additional Pulsavac gun cell or assembling more tips on July 8 and 9. (Er. Exh. 19) The Grievant's absence contributed to his department's failure to meet its production targets (Er. Exh. 20), and, as noted above, his absence for false reasons occurred on a date on which mandatory overtime had been scheduled with proper advance notice to all employees. Testimony by Human Resources Generalist Esway established that, if the Grievant had been honest about his physical limitations or medical restrictions, management might have been able to accommodate him by assigning light duty, especially on Saturday, July 9, when overtime had been scheduled. (Co. at 22-23.) Even if the Grievant's absence had had no impact upon production, discharge for the Grievant's dishonesty was the appropriate penalty. *See*, *Columbus and Southern Ohio Elec. Co.*, 84-1 ARB 8009 (Perry, 1983); *see also*, Arbitrator Parkinson's Award in the similar case involving Zimmer employee White. (Er. Exh. 17.)

Lastly, the Company avers that there is no mitigating factor that can make discharge inappropriate when an employee has violated honesty policies. Arbitrators commonly find that duration of employment, for example, is irrelevant in dishonesty cases. *See*, *In re Century Link and Communication Workers of America, Local 3682*, 131 LA 1030 (Oberdank, 2013), and other authorities; *see also*, Arbitrator Parkinson's Award upholding the discharge, for reason of proven dishonesty, of Zimmer employee White, "a twenty year employee with an unblemished record." (Er. Exh. 17.)

In conclusion, the Company avers that the evidence shows that the Grievant was familiar with all Company policies prohibiting falsifying reports or records, and, likewise, was aware of the possibility of being discharged if caught engaging in such misconduct. Discharge is a heavy, but reasonable, penalty in this case for the Grievant's proven misconduct of submitting a medical certification that was knowingly false. The Company afforded the Grievant due process upon learning of the possible misconduct and during the grievance procedure. Condoning such dishonesty by sustaining the grievance would send the wrong message to the work force that engaging in dishonesty may not be career-ending offense. Hence, the Company was provided with just cause to discipline the Grievant for his misconduct. Given all of the facts and circumstances, the Arbitrator should uphold the discipline and deny the grievance in its entirety.

B. The Union

The Union argues that the instant case is "unique and the first of its kind," involving a decision by this Employer to discharge an employee in order to discourage other employees from taking any time off from work. The Grievant was a Union Steward at the time, and the "so called 'unauthorized time off work'" occurred on Friday, July 8, when the Grievant saw his doctor for therapy and treatment of a pre-existing back condition. (Un. at 2-3.)

The Union asserts that the Grievant's July 8 doctor's visit occurred during regular working hours and was properly documented by correspondence from the doctor's office and the treating physician, Dr. Brown. (Er. Exh. 10.) After following proper procedures for reporting off (Er. Exh. 7), on Monday, July 11, the Grievant submitted a doctor's note verifying his July 8 visit and treatment, and subsequently submitted an additional Disability Certificate (Er. Exh. 16) and a letter from his doctor (Er. Exh. 15) in further explanation of his treatment and reason for the July 8 doctor's visit. (Un. at 3.)

It is also the position of the Union that the Company unduly delayed the grievance process by waiting a month before responding to a Union inquiry and after the Union had submitted a formal, written, information request. Upon receipt of the information, the Union concluded that the Company had no justification

for discharging the Grievant, and evidence of bias exists in the form of remarks made by Director of Surgical Operations Sue Shay, who, upon being questioned by the Union if she had played a role in the Grievant's termination, responded "You're damn right I fired his ass." During the arbitration hearing, it became known that Shay's employment with the Company had been terminated. (Un. at 3-4.)

The Union contends that after reporting off in accordance with Attendance Policy procedures (Er. Exh 3) and upon being excused for the day in accordance with customary past practice (Er. Exh. 7), the Grievant apparently committed a supposedly fatal act of going out for dinner on the same day he had received treatment from a doctor for an existing medical condition. There is no evidence that the Grievant violated any work rule, policy or recognized past practice with respect to reporting off for a legitimate medical reason. Similarly, there is no indication that he behaved contrary to instructions or limitations placed upon him by his treating physician. The fact that the Grievant chose to dine a restaurant as opposed to eating at home should not have subjected him to

additional scrutiny, and certainly should not have served as any basis for terminating his employment with Zimmer. (Un. at 4.)

In terms of the Employer's burden of proof in this case, it is the Union's firm position that the Company did not meet its evidentiary burden. Referencing Elkouri & Elkouri, *How Arbitration Works*, 5th Ed., the Union quotes, as follows:

> Discharge is recognized to be the extreme industrial penalty since the employee's seniority and other contractual benefits, and reputation are at stake. Because of the seriousness of this penalty, the burden generally is held to be on the employer to prove guilt of wrong-doing, and probably always so where the agreement requires "just cause." *See*, Elkouri & Elkouri, *How Arbitration Works*, Ch. 15 at 905 (5th ed. 1997).

Again citing Elkouri & Elkouri, *How Arbitration Works*, 5th Ed., the Union emphasizes that the doctor's notes furnished by the Grievant were valid and served to properly excuse the Grievant for the dates in question. The Grievant had a right to rely on the notes prepared by his doctor, a medical professional, concerning his ability to work. Union quotes, as follows:

> A frequent use of medical evidence concerns written certificates from doctors stating that employees named in the certificates were examined on a stated date and were found to be ailing. Arbitrators have held that these certificates, although not conclusive, should be given significant weight in determining whether the absence from work is to be excused due to illness. *See*, Elkouri & Elkouri, *How Arbitration Works*, Ch. 8 at 468 (5th ed. 1997).

According to the Union, the highly stringent standard of proof consisting of "beyond a reasonable doubt" is applicable to this case involving the Grievant's alleged misconduct involving dishonesty. *See*, DISCIPLINE & DISCHARGE by Duane Beeler at 21. However, even if the Arbitrator were to find that lesser standards of proof, such as clear and convincing evidence or a preponderance of the evidence, should be applied, the Union is adamant in its opinion that Company has failed to meet its burden of proof. (Un. at 12.)

The Union furthermore submits that the Company lacked just cause for discharging the Grievant, especially when the Seven Question Test, established by Arbitrator Carroll Daugherty, is applied to the facts of this case. *See*, *Grief Bros. Cooperage Corp.*, 42 LA 555 (Daugherty, 1964.) According to the Union, when each of the seven questions comprising Arbitrator Daugherty's multi-faceted test [6] are applied to the Grievant's case, all answers must consist of a resounding "No" based on the insufficiency of the Company's evidence and case in chief. (Un. at 13-17.)

[6] Summarized briefly, the "Seven Tests" for determining whether discipline or discharge was predicated upon "just cause" consist of the following: (1) Reasonableness of the rule or order; (2) Notice or forewarning; (3) Proper investigation prior to administering discipline; (4) Proper investigation with respect to employee representation and due process; (5) Development of evidence or proof; (6) Equal treatment; and (7) Appropriateness of the penalty.

In summary, the Union avers that this case is unique because it is stems from the Company's assessment of discipline based upon the Grievant's suspected motives or intentions, *to wit*, a deliberate act of making of a doctor's appointment and using the diagnosis from that appointment as a pretext for missing work in order to engage in personal pursuits. The weight of the evidence shows that the Grievant followed established practice of reporting off for a doctor's appointment during which time the doctor treated him for recurring back pain and disqualified him from work. As the Company points, out, at the time of the incident, the Grievant's points under the Attendance Policy were so low, he could have simply called off work and received a single absentee point and not have reached the level that would have triggered discipline. (Un. at 18-19.) Here, it is clear that the Company's decision to terminate the Grievant's employment was not based on his failure to comply with a past practice, policy or work rule.

Page 1743

Rather, it was solely and exclusively due to a single Facebook post that showed the Grievant standing in front of a local restaurant on a day on which he had been excused from work by his personal physician. (Un. at 19.)

In closing, the Union maintains that the evidence supports a finding that the Company did not have just cause to discharge the Grievant, that no discipline was warranted, and that the Grievant be returned to work and made whole with respect to wages, benefits, and seniority.

Discussion and Findings

As discussed above, it is the firm position of the Union that my due study of the testimony and evidence presented during the arbitration hearing should result in a finding that the Company lacked just cause to terminate Grievant M__. According to the Union, the record absolutely shows that the Grievant followed all Company procedures for reporting off prior to his shifts on Friday and Saturday, July 8 and 9, was excused by a supervisor from working on both dates as the Absenteeism Reports (Er. Exh. 7) establish, and, that, upon returning to work on Monday, July 11, immediately furnished the Disability Certificate (Er. Exh. 11) as completed by his doctor, who treated him for

back pain. In the Union's view, the Grievant violated no Company rule, policy, procedure, or doctor's recommendation by going out to dinner on July 8; such action was merely an alternative to eating at home.

It is the strong viewpoint of the Union that the Company failed to establish by any standard of evidence any proof of the Grievant's intent to deceive the Company by reporting off on July 8 and 9. According to the Union, the Facebook post simply depicted the Grievant having dinner out, again, instead of staying in, on the same date he had been treated for back pain attributed to a pre-existing medical condition.

The Union submits there was no just cause for termination. According to the testimony, the Grievant had other paid time off available to him, and even if he had reported off without furnishing any medical excuse, dismissal would not have been warranted under the Attendance Policy. (Er. Exh. 3.) Moreover, the Grievant also had been granted intermittent leave under the FMLA for a blood disorder condition, but did not abuse his FMLA privileges by requesting leave under the FMLA for a chiropractic treatment. Again, it is the Union's firm position that management's decision to terminate the Grievant's employment was not established by any tangible or credible evidence whatsoever.

Alternatively, the Company maintains that the Grievant's discharge for “false reporting of reason for unauthorized time off work” is supported by the requisite evidence, and that the record well shows that the Grievant was aware of Zimmer's honesty policies prohibiting falsifying reports or records and giving false or misleading information to Company managers. The Company further avers that the evidence shows that the Grievant was cognizant of the possible disciplinary consequences for failing to maintain proper standards of conduct, and knew that discipline for offenses involving dishonesty may rise to the level of discharge.

Upon my careful study of the testimony and evidence adduced at the arbitration hearing, I concur with the Company that the facts in this matter are relatively straightforward, and that the incident was properly investigated by management both prior to any assessments of discipline and thereafter. The Grievant apparently followed the proper procedures as set forth in the Attendance Policy (Er. Exh. 3) for reporting his absences when, on Friday, July 8, he called the first shift manager to report off of his second shift because of a doctor's appointment, and on Saturday, July 9, because of physical incapacitation. (Er. Exh. 7.) Upon his return to work on Monday, July 11, the Grievant furthermore complied with the Attendance Policy by submitting the Disability Certificate (Er. Exh. 11) signed by his doctor showing he was “totally incapacitated from July 8th to July 10th.”

[1] However, as the indisputable factual record shows, on the morning of Saturday, July 9, day shift management became aware that on the previous evening when the Grievant was not at work after calling off for a 3:30 p.m. doctor's appointment, he instead apparently hosted a birthday dinner for a co-worker at a local winery, as evidenced by the Facebook post of the photo portraying the Grievant and his friend outside the establishment. As the record further shows, in addition to missing work on Friday, July 8, the Grievant missed work on Saturday, July 9 after being excused for reason of having been “written off work by his doctor.” On Monday, July 11, when Human Resources Generalist Esway became involved, and compared the Facebook photo with the Grievant's Disability Certificate conveying that July 8 and 9 represented dates on which the Grievant was “under professional care and totally incapacitated,” Esway suspected that the Grievant's act of reporting off was for false pretenses, and believed the Grievant was not “totally incapacitated” as the note indicated.

As the Grievant's testimony shows, during the Grievant's meeting with Mr. Esway and his Union representative, he acknowledged he was not “totally incapacitated” as the Disability

Page 1744

Certificate so indicated, and that by going to dinner he showed that such was not the state of his general health. The timing of the events leading up the Grievant's absences, specifically, the known fact of plant overtime for Saturday, July 9, and the Grievant's making of the Friday night dinner reservation on Tuesday or Wednesday of that week either in conjunction with or shortly after he had made his Friday, July 8, doctor's appointment constitute proof that the Grievant intended to secure the time off for personal reasons, and that, whether intentional or not, he did mislead the Company with regard to his reasons for being off work.

Accordingly, based on the full record properly before me in this case wherein the parties agree there is no procedural bar to my review of the merits, I find that the Company's determinations that the Grievant engaged in proven misconduct of “false reporting of reason for unauthorized time off work,” in violation of plant rules prohibiting giving false or misleading information to Zimmer Biomet management are supported by the necessary proof consisting of a preponderance of the evidence. The Facebook photo of the Grievant and his companion (Er. Exh 11) is very clear, and depicts him with a relaxed demeanor with no signs of having been treated or experiencing back pain, and absolutely no signs of someone suffering from ill health to the point of being “totally incapacitated,” purportedly due to back pain, as indicated on the July 8 Disability Certificate (Er. Exh. 10) tendered by the Grievant on July 11.

Based on the evidentiary record, I must concur with the Company that when management considered the reasons given by the Grievant prior to the start of his 3:30 p.m. shift on July 8 for absences on both July 8 and July 9, as reflected by the Absentee Reports (Er. Exh. 7), in conjunction with the Facebook photo (Er. Exh. 11) and Disability Certificate (Er. Exh. 10), it arrived at a plausible and logical conclusion that the Grievant's conduct was shown to be in violation of the Zimmer Biomet Human Resources Policy Handbook for Surgical Union Team Members (Er. Exh. 1) prohibiting giving false or misleading information and the Standard Operating Procedure - Plant Rules (Er. Exh. 2) prohibiting falsifying any reports or records.

I find to the Grievant's discredit his attempts at submitting the so-called clarifying information from his doctor, as presented subsequent to his discharge, for the purpose of legitimizing his absences. (Er. Exhibits 15 and 16.) Dr. Brown's statement on the revised Disability Certificate (Er. Exh. 16) to the effect that in all his years of practice he "[had] not had anyone be so 'picky'" is evidence of the physician's disregard for Zimmer's policies requiring honesty with respect to employees reporting off work for legitimate medical reasons. The Grievant had other means of reporting off available to him, as discussed above, and even if he had reported off without furnishing any doctor's notes, he likely would not have been discharged. Why the Grievant instead pursued the apparent course that led to management's well-founded conclusions calling his honesty and integrity into question, and casting his employment into jeopardy, is not for this Arbitrator to speculate upon.

[2] Turning to the quantum of discipline assessed in this particular case, I find that the discipline of dismissal was warranted, and was not arbitrary or capricious or unfair. I find no evidence of disparate treatment, despite the apparently blunt, insensitive and unprofessional response of a former manager, as rightly called into question by the Union. Moreover, I find no proof whatsoever that the Grievant was discharged because of his role as a Union Steward or because the Company desired to make an example of him for a nefarious purpose of discouraging employees from taking time off as allowable under Company policies.

Instead, the evidence persuades me that the Grievant's misconduct served to irreparably damage management's trust in him which is at the heart of the employer-employee relationship. *See*, *In re Lincoln Electric System and International Brotherhood of Electrical Workers, Local 1536*, 125 LA 1185, 1200 (Gaba, 2008) ("Honesty is an absolute necessity for the relationship between employee and employee …). In this specific case, given the serious nature of the Grievant's proven offense of dishonesty with respect to providing misleading information by portraying himself as completely unable to work for two days because of physical incapacitation and then enjoying an evening out when other employees were working in his stead, I conclude it was not incumbent upon the Company to relent by administering progressive discipline. This is especially so, again, given the dishonesty offense which was amply proven on this record, and in light of the three-day actual suspension the Grievant already had been assessed on October 15, 2015, for another attendance offense.

As to the question of mitigating circumstances, I wholly agree with the Employer that the Grievant had no such conditions in his favor. Notwithstanding the Employer's argument that no amount of seniority or service is sufficient to overcome serious misconduct of proven dishonesty, the fact remains that the Grievant was a junior employee, hired in 2014. Again, over his short tenure with Zimmer, the Grievant had been progressively disciplined

under the Attendance Policy, through assessments of counseling, verbal and written warnings, and a three-day suspension. (Er. Exhibits 5-A through 5-E)

Therefore, given the above, I reiterate that the Company had just cause to terminate the Grievant's employment for his proven dishonesty consisting of "false reporting of reason for unauthorized time off work" based on the preponderance of the evidence. I cannot over emphasize that the Grievant's testimony and documentary evidence well establish that as an employee of Zimmer Surgical the Grievant had been trained on and was familiar with the Company's rules and procedures regarding reporting off, and that during the pre-discipline investigation and at hearing, as well, he acknowledged such training and admitted he had not been "totally incapacitated" as the July 8 Disability Certificate so conveyed.

Therefore, it is the conclusion of this Arbitrator that based on the totality of the record properly before me, the Company's decision to discharge the Grievant was a legitimate exercise of management's rights as promulgated in Article II, Section 1 of the governing Agreement, and did not constitute an abuse of managerial discretion. The discipline as imposed was not arbitrary, capricious, or unfair. The Grievant alone bore responsibility for his misconduct. Accordingly, I find no reason to interfere with the Company's determinations in this matter, and so I rule.

AWARD

For the reasons set forth above and incorporated herein as if fully rewritten, the instant grievance is hereby denied in its entirety.

- End of Case -

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