The Labor Relations Connection

Shaw's Supermarkets, Inc. Methuen Distribution Center	Case #: LRC 311-17
And	Gr: Attendance Policy
UFCW, Local 791	Award: May 21, 2018

Arbitrator: Roberta Golick

Hearing: March 26, 2018

Appearances:

For the Company
Brian P. Fitzsimmons, Esq.
Director of Labor Relations

For the Union
Tod A. Cochran, Esq.
Pyle Rome Ehrenberg PC

The Issue

The parties agreed to frame the issue as follows:

What shall be the disposition of the grievance?

The parties further agreed that within the parameters of the stated issue is my authority to award a remedy, as warranted.

The Agreement

The collective bargaining agreement between the parties provides, in relevant part:

Article 21 Management Rights

Section 1. The Union recognizes and agrees that the Company reserves and retains the sole and exclusive right to manage its business and to direct the working force except only to the extent that the express provisions of this agreement specifically limit or qualify this right. The Company's right to manage its business includes, but is not limited to, the right…to make, revise, and enforce reasonable work rules of conduct and regulations not inconsistent with the terms of this Agreement…

Article 23 Discipline – Discharge

Section 1. …Warnings and suspensions shall not be used for disciplinary purposes after twelve (12) months…

Methuen Distribution Center Attendance Policy

…

4. Disciplinary steps for unexcused occurrences are as follows:

# of Occurrences	Discipline
1	Verbal #1 warning
3	Verbal #2 warning
5	Written warning
7	1 Day unpaid suspension
9	Termination

…

6. (a) Warnings will remain active for one year after the date of issuance except that if an employee is absent for greater than thirty (30) consecutive calendar days, the one (1) year period shall not continue to run during the time of the absence.

(b) When a prior incident of discipline becomes more than one (1) year old…the employee will be considered to have two (2) less occurrences than he/she had when the prior discipline was active.

…

10. …If perfect attendance is maintained for 60 straight days as listed above, the employee will lose their oldest attendance occurrence on record under the attendance policy.

Background

The operative facts are not in dispute. There has been an attendance policy in effect at the Methuen Distribution Center for many years. In brief, Associates receive an annual allotment of available sick leave, depending on their tenure with the Company. When the allotment is exhausted, or for absences that do not fall into one of several categories of "excused absences," the Company records "unexcused absences," referred to as "occurrences." The policy sets forth a schedule of progressive discipline based upon an employee's tally of occurrences.

Prior to November 2015, the attendance policy attached a Verbal #1 warning for the first occurrence, a Verbal #2 warning upon the 3rd occurrence, a Written Warning for 5 occurrences, a 40-hour unpaid suspension for 7 occurrences, and termination upon the 9th occurrence. The old policy also provided, in pertinent part, that "Warnings will remain active for one year after the date of issuance"; also that "When a prior incident of discipline becomes more than one (1) year old…the associate will be considered to have two (2) less occurrences than he/she had when the prior discipline was active"; and that "All associates will be given the opportunity to lose an occurrence by maintaining perfect attendance for 60 straight days."

Until November 2015 when the Company implemented a revised attendance policy, management handled the "perfect attendance" component of the policy by awarding an associate who made it to 60 straight days of perfect attendance a "freebie," to use the parties' vernacular. What this meant in practice was that an employee who earned the freebie would get his next occurrence without it counting.[1] So, for example, if an employee had 60 days of perfect attendance following a written

[1] I use "his" and "him" in this decision to include both "her" and "she."

warning (5 occurrences), the next occurrence would not be counted, and the employee remained with just the 5 occurrences on his record.

In November 2015, after a period of bargaining, the Company unilaterally implemented a revised Attendance Policy. The Union challenged the manner by which the Company implemented the new policy. In a decision dated April 14, 2016, Arbitrator Michael Ryan ruled that Shaw's did not violate the CBA by the manner in which it implemented the new policy effective November 1, 2015.[2] The new policy, currently in effect, is similar in several respects to the old policy.[3] The current policy still contains a disciplinary scheme for 1, 3, 5, 7 and 9 occurrences, but the penalty upon the 7th occurrence is now a one- day unpaid suspension (rather than the previous 40-hour penalty). The parties refer to the occasion of reaching 2, 4, 6 and 8 occurrences as a "skip step." By that they mean that while the occurrence is registered, the associate receives no discipline at that point. So, for example, if an employee receives a Verbal #2 for 3 occurrences, the next occurrence, which would be the employee's 4th, will not trigger further discipline. The next disciplinary event would be upon the employee's reaching his 5th occurrence, at which point he would receive a written warning.

The current policy still provides that "Warnings will remain active for one year after the date of issuance," and that "When a prior incident of discipline becomes more than one (1) year old…the employee will be considered to have two (2) less occurrences than he/she had when the prior discipline was active." Where the *old* policy provided that "All associates will be given the opportunity to lose an occurrence by maintaining perfect attendance for 60 straight days," the *new* policy provides, "If perfect

[2] Arbitrator Ryan noted that the right to unilaterally implement a changed attendance policy during the life of the CBA was established in the Management Rights article, which provided, "The Company will notify the Union and bargain the effects of any proposed changes in the attendance policy." Shaw's Supermarkets, Inc. and United Food & Commercial Workers, Local 791, LRC 521-15, Ryan, Michael, Arb., April 14, 2016.
[3] Most of the changes in the policy are not germane to this dispute.

attendance is maintained for 60 straight days…the employee will lose their oldest attendance occurrence on record under the attendance policy."

When the parties were meeting for effects bargaining prior to the implementation of the new attendance policy, the Company advised the Union that it intended to change the way it handled the "perfect attendance" incentive. Whereas before, the Company provided the successful employee with a "freebie" to be 'cashed in' on the next occurrence, now, the Company intended to eliminate the "oldest attendance occurrence" on the employee's attendance record. As the Company explained it to the Union, upon achieving 60 days of perfect attendance, an employee's first occurrence on the books (if there are any) and the Verbal #1 accompanying it would be removed, and all remaining occurrences renumbered. So, for example, if, after a Written Warning (occurrence #5) in November the associate had two straight months of perfect attendance, occurrence #1 and Verbal #1 would be dropped; occurrence #2 would then become occurrence #1 and reflect a verbal #1 warning; occurrence #3 would be renumbered occurrence #2 and reflect a skip step; and so on. The end result of that would mean that upon the next occurrence, the employee would be charged with occurrence #5 (Written Warning) rather than progressing, as he otherwise would, to occurrence #6 (skip step). At the table, the Union responded to management's explanation, saying it did not agree to that method of handling incidences of perfect attendance, and further, that such a system was inconsistent with the words of the Company's own written policy and with the CBA.

When the Company implemented the new attendance policy on November 1, 2015, it voluntarily set all employees' attendance records back to zero occurrences. Everyone started with a clean slate.

Over the next several months, employees began accumulating occurrences, but for a long time no one was suspended because suspensions are not imposed until an employee reaches the 7th occurrence, and the parties have an agreement that the Union will not grieve warnings. Accordingly, when the first employee was suspended as a result of the parties' differing views of the policy, the Union filed this grievance.

At the arbitration hearing, the Union explained its complaint. Counter-intuitive as it may sound, the Union's complaint is that upon an employee's attainment of 60 days of perfect attendance, management is wiping out *both* the oldest occurrence on the record (which, of necessity, would have to be the occurrence labelled #1) and the discipline that was imposed at the time the unexcused absence occurred. What the Union contends should happen upon the attainment of 60 days of "perfect attendance" is that the Company should remove just the oldest occurrence, but not erase the discipline on the books. Why would the Union advocate for that? Because – and this is admittedly hard to follow or put into words – when Section 6(b) of the attendance policy (which calls for the reduction of two occurrences when discipline becomes a year old) should take effect, an employee makes out better if the discipline attached to the oldest occurrence had remained active on the books for the full year. Why is that? Because if the discipline disappears along with the oldest occurrence upon an employee's attainment of two months of perfect attendance, so does the one-year anniversary of the discipline, and thus, an employee does not get the benefit of Section 6(b), that is, the reduction of two occurrences pursuant to Section 6(b) that would ordinarily accompany the one-year anniversary of the discipline. In other words, the one-year anniversary of attendance-related discipline still on the record gets moved forward, and the employee has to wait longer for the '365-day washout,' as the parties referred to it, to occur.

The parties presented a few scenarios at arbitration to illustrate their different views on how a period of perfect attendance in combination with the benefits of Section 6(b) – the anniversary washout of discipline and 2 occurrences – should operate. The following is the "Jim" hypothetical:

1/10/16	first occurrence	verbal #1
3/15/16	second occurrence	skip step
3/25/16	third occurrence	verbal #2
5/1/16	fourth occurrence	skip step
7/3/16	fifth step	written warning
9/1/16	sixth occurrence	skip step
10/5/16	seventh occurrence	suspension

10/6/16-
12/7/16 Jim has perfect attendance for 60 days

1/10/17 one year from the occurrence dated 1/10/16

2/12/17 new occurrence

At issue is whether, under the current attendance policy rules, this 2/12/17 occurrence is a 7th occurrence or a 5th occurrence.

According to the Union, on December 7, 2016, when Jim achieved 60 days of perfect attendance, his first occurrence should have dropped off, resulting in the March 15 occurrence to be renumbered first occurrence; the March 25 occurrence to be renumbered second occurrence and so on, up to his October 5 occurrence now being renumbered his sixth. But Jim's *disciplinary* penalty dated January 10, 2016, should have remained active and untouched, the Union contends. Then, when January 10, 2017 arrived, Jim reached the one-year anniversary date of the Verbal #1 on his record, and on that date Jim was entitled to the two benefits compelled by Section 6(b): the one-year-old discipline should have become inactive ("washed out") and Jim should have been considered to have 2 fewer occurrences. That is, he should have gone from six to four occurrences on his attendance record. When Jim had his next occurrence on February 12, 2017, it should have counted as occurrence #5 – a written warning.

According to the Company, the 60-day perfect attendance achieved on December 7 properly resulted in the dropping off of the oldest occurrence (occurrence #1 from January 10, 2016) *as well as* the discipline that accompanied that occurrence, the Verbal #1. Then, according to the Company, everything after that was rejiggered. The March 15 "second occurrence" became a "first occurrence" with a discipline of Verbal #1. The March 25 "third occurrence" became a "second occurrence" reflecting a skip step. The May 1 "fourth occurrence" became a "third occurrence" with a discipline of Verbal #2. And so on, until the "seventh occurrence" converted to a "sixth occurrence" and became a skip step. Here's the rub: On January 10, 2017, there was no Section 6(b) benefit owing because the Verbal #1 that *used to be* on Jim's record was wiped out along with occurrence #1 when Jim made his 60-day perfect attendance milestone. His anniversary for purposes of the Section 6(b) washout became March 15, 2017. Thus, when Jim racked up another occurrence on February 12, 2017, he was deemed to be at occurrence 7, and was suspended.

Other scenarios highlight the same disparity in the Union's and the Company's interpretation/ application of the attendance policy. The bottom line is that as the Union reads the attendance policy, a 60-day period of perfect attendance affects the occurrence <u>number</u> only. The oldest occurrence drops off and the remaining occurrences, if any, are renumbered. If, following that renumbering, the employee reaches the one-year mark of attendance-based discipline, the Union contends that the discipline becomes inactive (in accordance with both Section 6(a) of the attendance policy and the CBA Article 23 – and the 2 oldest occurrences drop off. The Company reads the language of the policy as requiring the washout of both the occurrence <u>and</u> the attendant discipline from the associate's record upon his reaching 60 days of perfect attendance, thereby pushing the one-year anniversary of any possible discipline on the associate's record to a later date.

The parties were unable to resolve their differences through the grievance procedure, and brought the matter to arbitration where it is now ripe for decision.

Positions of the Parties

The Union argues that the language of Section 10 of the attendance policy is clear and unambiguous, and consistent with Article 23 of the CBA. The policy states plainly that upon reaching 60 days of perfect attendance, the employee loses his "oldest attendance occurrence on record under the attendance policy." The term "occurrence" is distinct from the term "discipline." Further, the Union continues, the Company's interpretation of Section 10 is undermined by the parties' long-standing past practice. Though the Company changed the language of Section 10 in its new attendance policy, the incidental modification represents a distinction without a difference. Historically, the Company removed what amounted to the occurrence without also removing the discipline on the employee's record. Importantly, the Union points out, the Company's interpretation should be denied because it means that employees forfeit a benefit. Employees are worse off by the Company's methodology in that they lose the combined anniversary benefits provided under Article 23 of the CBA and Section 6 of the attendance policy. Finally, should the language of the policy be deemed ambiguous, the Union argues, any ambiguity should be resolved against the Company as the drafter of the language, particularly where the Company's interpretation is less favorable to the Union than the Union's reading of the language.

As a remedy, the Union asks that the Company be directed to apply the attendance policy in accordance with the actual policy language, and that the Company be directed to make whole any employee who was suspended as a result of the Company's improper interpretation.

The Company contends that this case is an attempt by the Union to infringe on management's right to revise and enforce reasonable work rules to manage its business and maintain efficiency in the operation. The Union is seeking "another bite at the apple" by challenging management's rights that were upheld by Arbitrator Ryan in the initial arbitration. The Union has not carried its burden of proving a violation of the CBA, the Company argues. Management exercised its right to implement reasonable policies, and it did so properly when it introduced the new attendance policy. The Union is improperly asking the arbitrator to substitute her judgement for that of the Company by adding to or changing the terms of the CBA. The Union's interpretation of Article 23 of the CBA, wherein it demands that discipline remain active until 12 months have expired is "tortured" and contrary to the plain language and contrary to common sense. The Company changed the attendance policy in 2015 in order to simplify it and avoid confusion. The Union's interpretation makes the policy more complicated than it needs to be and is inconsistent with the way management communicated that the policy would be implemented. The Company urges that the grievance be denied.

Discussion

Contrary to the Company's assertion, the dispute at hand is not an attempt by the Union to retry the case decided by Arbitrator Michael Ryan in 2016. That case involved the fundamental claim that the Company had implemented the 2015 attendance policy without bargaining to agreement or impasse with the Union. Ruling for the Company, Arbitrator Ryan stated unequivocally:

> Article 21 constrains the Company's "make, revise, and enforce" work rules with the requirement that such rules be "reasonable." The policies are rather complicated, but they are not unreasonable. They provide clear definitions of UA and tardiness. The expectations set forth are not excessive or impracticable. There is a definite, predictable sequence of progressive discipline. There are opportunities to clear one's attendance record, through perfect attendance or the passage of time. The policies also recognize that extenuating circumstances may justify lenience.

The Union here is not challenging the policy. Rather, it is seeking to enforce it as written. Specifically, it asks that the Company apply Sections 6 and 10 according to their plain terms.

As described in the Background above, the source of the parties' disagreement is the Company's treatment of an associate's attendance record upon the associate's reaching 60 days of perfect attendance. The Company contends that the policy calls for the elimination of the oldest occurrence along with the discipline (warning)[4] that went along with it. The Union contends that the policy calls for the elimination of the oldest occurrence, period; the discipline imposed in connection with that oldest occurrence remains "active" until the discipline becomes inactive on the one-year anniversary.

I agree with the Union that the Company is misapplying its own written policy when it throws out the recorded discipline along with the oldest occurrence when an employee reaches 60 days of perfect attendance. In the context of the attendance policy, there is nothing ambiguous about the language of Section 10.[5] If perfect attendance is maintained for 60 straight days, the employee will lose his oldest "attendance occurrence on record" under the policy. Occurrences are unexcused absences, nothing more, nothing less, and each occurrence is numbered. An occurrence is not the same thing as a disciplinary penalty, nor does an occurrence necessarily trigger a disciplinary penalty (i.e. occurrences 2, 4, 6 and 8). And though it would seem on first blush that the Company is benefiting the employee by removing the warning from the record, the evidence demonstrates that in so doing, the Company is harming the employee by delaying, and therefore diminishing the benefit spelled out in Section 6(b) of the policy.

[4] I believe it would be impossible for the oldest discipline to be anything other than a warning.
[5] The only possible ambiguity in the paragraph could be whether the parties intended 60 days to be 60 calendar days or 60 workdays. Based on the hypotheticals that the parties jointly relied upon to illustrate their positions, it is clear that they mutually regard the 60-day reference to be 60 calendar days.

As written, Section 6 is also unambiguous. Section 6(a) states that warnings will remain active for one year after the date of issuance. This section introduces the concept of "active" (versus, implicitly, "inactive" discipline). Section 6(b) describes what happens in one year: On the anniversary of the attendance-related discipline, the employee is considered to have two fewer occurrences that he had when the prior discipline was active. Like Section 10, Section 6(b) speaks to the number of occurrences, not to the attendant disciplinary penalty. It reinforces the notion of active versus inactive discipline on an employee's record. This language follows logically from the portion of Article 23 of the CBA that provides, "Warnings and suspensions shall not be used for disciplinary purposes after twelve (12) months." When the Company removes the warning that goes along with the oldest occurrence, it contradicts the plain declaration that warnings will remain active for one year, and it in turn devalues the guaranteed process that is supposed to occur on the one-year anniversary of the prior discipline.

In colloquy at arbitration, the Union described the warning untethered from the oldest occurrence as "floating in space" until its anniversary. The Company in its brief argues that the notion of "floating in space" is not found in the policy and is the type of confusing element management sought to avoid in revising the old attendance policy. While "floating in space" might not have been the best choice of words, the concept of discipline remaining unchanged on the books is really not confusing, and in fact, what is supposed to happen is *not* that the discipline floats in space, but that it remains "active" on the attendance record until the policy calls for it to become inactive.

And though the Company's view of what is supposed to happen at the 60-day perfect attendance mark might not involve floating in space, it does involve shifting sands: As described at arbitration, when the Company has eliminated both the oldest occurrence and the accompanying discipline, it then goes

about renumbering the remaining occurrences (as it should) but also relabeling all the remaining discipline. So, for instance, what was a *non-disciplinary* event (occurrence #2) suddenly becomes a disciplinary event as the date of what *was* a "skip step" becomes the date of a verbal #1. A date upon which discipline *had been* imposed (occurrence #3) suddenly shows no related discipline, because the discipline was moved to an earlier point in time. In short, the Union's interpretation of the policy is certainly no more confusing than the Company's, and has the added attraction of actually reflecting the language of the policy.

The Company's defense that it told the Union during bargaining how it intended to implement Section 10 of the policy does not change the fact that the language as currently written plainly says something different. At bargaining, the Union responded that it did not agree with the Company's intended methodology and that such methodology conflicted with the terms of the policy.[6] But the Company had a right, as recognized by Arbitrator Ryan, to revise its attendance policy so long as the resulting policy was "reasonable," and it is not unreasonable for the Company to drop the "oldest attendance occurrence" rather than offer a future freebie. There is a difference between the two, and that is what the redrafting of Section 10 accomplished. Under the old 'perfect attendance' language and practice, the Company did not alter an employee's prior disciplinary history; it offered a "get out of jail free" card. Under the new language, an employee, upon "losing his oldest occurrence," essentially repeats the occurrence number of his most recent occurrence the next time he has an unexcused absence. So, for example, if, after serving a suspension (occurrence #7) an employee has perfect attendance for two months (resulting in the 7th occurrence being renumbered occurrence #6), his next unexcused absence will be deemed occurrence #7 and he will receive another suspension. But the revised language of

[6] Granted, what the Union wanted at that point in time was for the Company to continue its long practice of providing employees who attained 60 days of perfect attendance a "freebie" on their next unexcused absence.

Section 10 did not, and does not, secure for the Company the right to stray from the clear language of Section 6, which provides that warnings will remain active for one year. By taking the liberty of dropping an employee's oldest discipline as a "reward" for perfect attendance, the Company not only ran afoul of Section 6(a), but it diluted the benefit spelled out in Section 6(b), resulting in harm to certain employees upon the anniversary of the discipline that accompanied their oldest occurrence.

For these reasons, the Union's grievance is sustained.

Remedy

The Union has requested as a remedy that employees who were suspended as a result of the Company's improper application of the attendance policy be made whole.[7] The calculation of who, if anyone, is entitled to a monetary remedy could be a complex exercise, since much depends upon the dates of occurrences, the dates of perfect attendance, and the anniversary dates of discipline.[8] I will leave it to the parties to work together to review attendance records to determine who, but for the Company's breach, would not have been suspended. I will retain jurisdiction for a period to assist, if either party requests, in the implementation of the remedy.

[7] I regard the requested remedy to be limited to reimbursement for any wrongful suspensions and readjustment of affected employees' attendance records. The Union did not specifically ask for and I am not granting a remedy that involves the reinstatement of employees who may have ultimately been terminated.

[8] It is not clear on this record that Joe Duffy – one of the employees presented as an example at arbitration – is entitled to a monetary remedy. Duffy's attendance record as presented at arbitration ends on October 20, 2016, when Duffy reached his 6th occurrence, a skip step. If Duffy had no further occurrences between then and December 18, he should have been deemed to be at the 4th occurrence, and the next would be #5, a written warning. If Duffy did have an occurrence between October 20 and December 18, that would have been his 7th occurrence and he would have been properly suspended. Then, on December 18, he would have been entitled to lose the December 18, 2015 Verbal #1 and two occurrences, leaving him at occurrence #5. Thus, Duffy either went from #7 to #5, or from #6 to #4.

Award

The Union's grievance is sustained. The Company improperly applied the November 15, 2015 attendance policy, as discussed in detail in the above decision, resulting in harm to certain affected employees.

Employees who, but for the improper application of the policy, would not have been suspended, are entitled to be made whole. The Company is directed to apply the November 15, 2015 attendance policy in accordance with the actual policy language.

I will retain jurisdiction until July 20, 2018, to assist, if requested, in the implementation of the remedy.

Roberta Golick, Esq.
Arbitrator

Date: May 21, 2018