

ARBITRATOR'S OPINION AND AWARD

In the Matter of Arbitration Between:

[REDACTED]

United Food and Commercial Workers
Local 1445

and

[REDACTED]

[REDACTED]

Before

Elizabeth Neumeier, Arbitrator

Representing:

The Union: Alfred Gordon, O'Connell, Esq.
Pyle Rome Ehrenberg PC

The Company:

[REDACTED]

Statement of the Award:

The grievance is sustained. The Grievant shall be reinstated and made whole for all losses, less interim earnings. The undersigned Arbitrator will retain jurisdiction for sixty (60) days solely for the purpose of resolving questions raised either party about this remedy.

BACKGROUND

The United Food and Commercial Workers, Local 1445 (Union) and [REDACTED] (Company) are parties to a collective bargaining agreement (CBA) effective September 3, 2020, through September 3, 2024. The Grievant was employed by the Company as a Processing Technician 2. Pursuant to that CBA the Union filed a grievance on his behalf after the Company terminated his employment on September 26, 2022.¹

After the parties were unable to reach a resolution, the Union submitted the grievance to arbitration pursuant to Article VIII of the CBA. The undersigned Arbitrator was selected by mutual agreement of the parties. A virtual hearing was held on May 10 and September 7, 2023, at which both parties were represented by counsel and were afforded the opportunity to introduce exhibits, to present witnesses and cross-examine opposing witnesses. The hearing was transcribed by a certified court reporter. The parties submitted post-hearing briefs.

The Company offered three witnesses. Processing Manager [REDACTED] testified about the Grievant's job performance and the reasons underlying his termination, as well as Company rules and policies. Processing Supervisor [REDACTED] also testified about the Grievant's job performance and prior discipline. Processing Team Lead [REDACTED] testified about the Grievant's job performance.

The Union offered three witnesses. Bargaining Director Shaun Murphy ("Murphy") testified about the Company's policies and alleged comparator discipline. The Grievant testified about his experience and interactions in his employment, as well as his work performance and prior discipline. Steward [REDACTED] testified about working conditions at the Company.

The following facts are undisputed:

The Company harvests, processes, and sells cannabis in a highly regulated industry. The Grievant was hired on or about January 14, 2020. The first CBA between these parties went into effect in September 2020. At all times relevant to this grievance, the Grievant was a Processing Technician. The job description for a Processing Technician states as follows:

The Processing Technician/Trimmer is responsible for properly weighing, manicuring, and inspecting all cannabis flower intended for packaging. This position is an integral piece of the post-harvest process at [REDACTED], ensuring that only the highest-quality, well-manicured cannabis flower is packaged for sale to our patients. [REDACTED] is dedicated to becoming the foremost provider of sustainably grown premium cannabis products to our communities. Grown with love.

¹All dates are 2022 unless otherwise noted.

As a Processing Technician, the Grievant was primarily responsible for de-stemming and trimming cannabis flower from plants. He was also responsible for cleaning tools and equipment used in the harvesting and trimming processes. His job description specified that he must be able to “meet target production rates in grams per hour of trimmed cannabis flower buds” and maintain “constant movement and use of hands/fingers and limbs.”

The Grievant received a Written Counseling dated January 18 and a Final Written Counseling dated February 15 both for tardiness. The Company’s Employee Handbook recognizes Written Counselings and Final Written Counselings as forms of progressive discipline.

On March 2 the Grievant was placed on a Performance Improvement Plan (“PIP”) to last through April 1, which listed the following Performance Deficiencies:

1. Productivity – Pace is not on par for the expectations of the department. Team members are expected to destem at least 800g/hour. Constant conversation [affects] productivity as well and causes a distraction.
2. Attitude – [the Grievant] speaks negatively about himself, the department/company, and his coworkers. This can cause hostility in the work environment.
3. Reliability – [the Grievant] has been late on numerous occasions . . . [the Grievant] has received a counseling for Punctuality and Attendance.
4. Dress Code – [the Grievant] has been [spoken] to regarding complaints about his pants falling down and his underwear showing while working. This is inappropriate in the workplace.
5. Following Directions – not following Lead’s instructions – at M2, Mich had to take the broom from him so that he could start wiping the racks with the team as she instructed. [CX 11, pg.1]

The PIP listed the following items where improvement was needed:

1. [The Grievant] should refrain from holding long conversations with coworkers and stopping between tasks/in hallways to chat with those around him also working. He will maintain his position at his workstation unless instructed to do otherwise.
2. [The Grievant] will meet destem and trim goals. [the Grievant] will keep pace with his coworkers.
3. [The Grievant] will keep any negative comments to himself instead of

expressing them to his coworkers. He can meet with Leads, AMs, Manager as well as HR to express negative feelings he may have.

4. [The Grievant] will arrive on time for all his shifts unless otherwise approved by [REDACTED] ahead of time.
5. [The Grievant] will ensure that his underwear is not visible at work.
6. [The Grievant] will follow instructions given to him by his Leads/AMs regardless of building or shift. [CX 11, pg. 2.]

The Grievant successfully met the conditions of the PIP and was released after April 1.

On September 26 Processing Manager [REDACTED] J [REDACTED] issued the Grievant a Notice of Termination. The notice stated in relevant part:

In March 2022 [the Grievant] was placed on a PIP to improve his performance within Processing. [the Grievant] had frequently been distracting other employees and was not meeting his goals within the department. [REDACTED] had passed the PIP in April 2022 but his productivity has since fallen back down. [The Grievant] was spoken to on 7/12/2022 and 8/15/2022 regarding his Supervisor's and Manager's observations with his productivity in the room that is affecting both his work and those around him.

On 9/12/2022 and 9/13/2022, it was observed that [the Grievant] was chatting with his team members, causing him to work slower and distracting those around him. After reviewing the data collected it was discovered that [REDACTED] did not reach the goals set for the department on either day and showed the lowest performer in the processing department for the month of September. [The Grievant]'s negative attitude and low productivity sets a negative expectation for the new hires.

This is in violation of our [REDACTED]'s Handbook Ch. 2 Sec. V Employee Conduct and work rules, which states: "To ensure orderly operations and provide the best possible work environment, the Company expects employees to follow rules of conduct that will protect the interests and safety of all employees and the Company. The performance standards listed below, and other standards that the Company may establish from time to time, are not all-inclusive, but may indicate some of the types of actions that are unacceptable in the workplace."

- Unsatisfactory performance or conduct [JX 1.]

RELEVANT PROVISIONS OF THE EMPLOYEE HANDBOOK

SECTION V. EMPLOYEE CONDUCT & WORK RULES

* * *

Employees should understand that discipline is directed at the specific act, not the individual. Employees should be aware that engaging in the following actions or violating other Company rules while on Company property or during the performance of their duties will subject an employee to disciplinary action, up to and including suspension or immediate termination:

- Violating the Company’s rules, policies, or practices as set forth in this handbook or elsewhere

* * *

- Negligence or improper conduct leading to damage or loss of Company property or the property of another employee

* * *

- Insubordination including refusal to comply with the appropriate instructions of a supervisor

* * *

- Excessive absenteeism or tardiness . . .
- Failing to report to work punctually as scheduled, to be available for work during scheduled work hours, or to give timely and proper notice (as outlined in the attendance policy) whenever unable to report to work or report on time

* * *

- Unsatisfactory performance or conduct

* * *

SECTION W. CORRECTIVE ACTION

When an employee’s work performance or behavior falls below Company standards, the Company may take corrective action to address an issue as it deems appropriate under the circumstances. Corrective action may include, but is not limited to, verbal counseling, written warnings, suspension, or termination of employment, without prior notice, depending on the situation. Management retains the right to amplify whatever corrective action procedure it deems appropriate under the circumstances, including immediate termination. Nothing in this policy constitutes a contract of employment based on any specified

conditions, implied or otherwise, and in no way alters the Company's policy of at-will employment.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article III - Management Rights

Section I. The management of the business of the Employer and the direction of its personnel, including but not limited to: the right to hire, promote, demote, schedule hours of work, reduce hours of work daily or weekly, assign duties, transfer or relieve employees from duty for lack of work or other legitimate reasons, discharge and discipline for just cause; to establish reasonable rules and regulations is the exclusive responsibility of the Employer, subject to the terms of this Agreement. The Employer shall be the exclusive judge of its business and the methods, processes, means and material to be used. Nothing contained in this Agreement shall be intended or construed as a waiver of any of the usual, inherent, or fundamental rights of the Employer, whether the same has been exercised heretofore or not; and these rights are hereby expressly reserved to the Employer.

Copies of rules, policies and procedures and changes thereto will be given to the Union and to all employees.

Section II. As a condition of this Agreement, the Employer agrees to abide by all legal business requirements of the state in which it operates. Given the nature of the industry, the Employer and the Union understand the importance of adhering to professional, legal, ethical and safe business standards. Those standards include:

- a. Responsible customer service and access in a clean and secure environment that assures customer and worker safety.
- b. Safe and secure storage and other practices that anticipate and respect community and neighborhood concerns.
- c. Responsible dispensing in a manner compliant with Massachusetts law.
- d. A demonstrated commitment to prevent and discourage diversion.
- e. A commitment to the development of continuing education

and eventual certification of industry and workplace standards.

Section III. The Employer and the Union will work as partners to assure that these standards are met, but all legal responsibility for meeting these standards shall rest with the Employer.

Section IV. The Union and the Employer acknowledge and understand the unique nature of the cannabis industry and the need to advocate for and protect the rights of workers and customers. The Union and the Employer will continue to work collaboratively towards this end and will publicly and legislatively oppose efforts to undermine or interfere with these rights, to the extent permitted by law.

Article VIII - Grievance Procedure

Section I. In the event of a dispute or grievance over the interpretation of this Agreement the following procedure shall be followed:

- a. When a grievance arises, the employee (with or without the Union representative) may attempt first to settle the matter with the General Manager or his or her designee.

If the employee chooses to meet with the General Manager or his or her designee without Union representation and the matter is not resolved, a second meeting will be scheduled between the Employer's designee or his or her designee and the Union representative.

- b. In the case of wage discrepancies, . . .
- c. Any claimed grievance of any kind to be acted upon or accepted as valid for any reason must be filed in writing with the Employer and the Union within thirty (30) calendar days after the employee has knowledge of the occurrence giving rise to the grievance.
- d. Any controversy over the interpretation of or the adherence to the terms and provisions of this Agreement, including all claims for wages which cannot be settled by negotiations, shall be submitted to mediation pursuant to Section II . . .
- e. Any dispute or controversy concerning the interpretation, application or adherence to the Diversity Plan for Equitable

...

Section II. MEDIATION. . . .

Section III. ARBITRATION. If a dispute or discharge, other than a discharge for an act or omission that is in gross violation of the employee handbook or in violation of any statute, regulation, or ordinance enacted by, or any policy or directive from the Commonwealth of Massachusetts or any agency, department, or subdivision thereof, is not resolved by the provisions of the Section I and Section II of this Article, either the Union or the Employer may refer the matter to arbitration by notification to the other party, in writing, of its desire to arbitrate the issue. Any decision of the Employer to discharge an employee for an act or omission that is in gross violation of the employee handbook or in violation of any statute, regulation, or ordinance enacted by, or any policy or directive from the Commonwealth of Massachusetts or any agency, department, or subdivision thereof shall not be subject to further review beyond mediation as described in Section II above. Reprimands and discipline not resulting in a loss of pay shall not be subject to grievance procedure.

For purposes of the foregoing paragraph, the following is a non-exhaustive list of misconduct which constitutes "gross violations:"

- Theft
- Threats or acts of violence
- Discrimination or harassment, including but not limited to sexual harassment and sexual assault
- Sale of product to anyone under the age of 21 or without a medicinal marijuana card
- Submission of false information in connection with an application for employment
- Being intoxicated or inebriated on the job, whether by alcohol, illegal drugs or controlled substances that are not being used under the supervision of a licensed health care professional or in accordance with valid prescription
- Conviction or plea of no contest to a felony

The Employer may discharge employees for other offenses even if not gross violations, provided that there is just cause.

A representative of the Union and a representative of the Employer shall meet and attempt to agree on a neutral third party to hear and

decide the Grievance. If within seven (7) calendar days of notification, the parties cannot agree on a neutral party, . . .

The neutral party shall meet with the parties to the dispute, hear all evidence in the case or cases referred and render a decision as soon as possible.

Each party shall bear the expenses of preparing and presenting its own case. The expenses of the neutral party shall be equally shared by the parties.

There shall be no recourse to any other method of settlement, unless a party fails to accept and comply with the award, in which case the award may be enforced by further action of the party in whose favor such award has been given.

The decision of the arbitrator shall be final and binding upon all parties to the dispute.

Status Quo: . . .

Section N. LIMITATIONS ON ARBITRATOR. The arbitrator shall not have the authority to decide questions involving the jurisdiction of any local, or of the International, or which may in any way affect or change the Union security clause, nor shall the arbitrator have the authority to effect a change in, modify or amend any of the provisions of this Agreement.

Section V. TIME LIMITS. . . .

CONTENTIONS OF THE PARTIES

The Company's Contentions

The Company contends that the evidence showed that there was just cause to discharge the Grievant after he consistently failed to meet his production goals, distracted other employees, and exhibited a negative attitude in the workplace. The Grievant acknowledged his job expectations when he signed the written job description on the day he was hired. He was also provided a copy of the Employee Handbook as well as multiple performance discussions with his Manager, Supervisors and Leads. The Grievant acknowledged specific performance concerns when he signed his PIP. J [REDACTED] testified that, although the Grievant was able to meet the conditions of the PIP and show that he had the skills to do the job correctly, the deficiencies that led to the PIP reappeared shortly after it ended. J [REDACTED] said that the Grievant laughed when she met with him to discuss performance concerns, and Processing Lead F [REDACTED] testified that when

she tried to address issues with him, the Grievant responded, “You’re always complaining.”

J██████ referenced an “accountability log” that she keeps on all of the employees in her department and said that the Grievant violated Company policies and rules regarding excessive absenteeism or tardiness and leaving the work area during regular working hours. She cited the Written Counseling and Final Written Counseling he received for tardiness. ████████ then explained that the Grievant was placed on a PIP after he received the prior discipline and several discussions about his performance, attendance, and attire.² She said that, while he was on the PIP, the Grievant had meetings with his managers to discuss his progress on March 2, 9, 23, and April 4. J██████ made clear that the Grievant was told during these meetings that, “Failure to maintain performance expectations after the completion of the PIP may result in additional disciplinary action up to and including termination.” She testified that, during his final PIP meeting, she warned the Grievant that slipping into his “old ways” would put him back in the same position.

J██████ continued that, after the conclusion of the PIP, the Grievant’s attendance and performance issues continued. He left work early on April 5 and called out of work on April 18. On May 2 J██████ said that the Grievant failed to complete a waste log – something required by a State regulatory agency – correctly, including with missing information, incorrect numbers and illegible handwriting. J██████ and/or M██████ and/or F██████ testified that they spoke to the Grievant on May 2 regarding the waste log; on July 12 regarding “falling back into his old ways” and negative attitude; on July 20 regarding texting and taking selfies while on the clock; on August 11 about his performance issues; and on August 17 about keeping his hands moving. Additionally, M██████ stated that she coached the Grievant multiple times about making his goals and facing his workstation instead of turning away from it to speak to his co-workers.

J██████ testified that, on September 12 she observed the Grievant sitting back in his chair while trimming/destemming and getting material all over the floor. She explained that it was after that observation that she contacted ████████ S██████ in Human Resources and told S██████ about his performance issues and low production numbers. ████████’s email to S██████ stated as follows:

Regarding [the Grievant]:

- Sets a bad example for the rest of the team
- goofs around and dances around the department
- holds broom while dancing to “pretend” he is sweeping
- stops working to talk
- not a team player

² Specifically, J██████ said that she and/or another supervisor or lead spoke to the Grievant on November 15, 2021, about his performance; on December 14, 2021, regarding his productivity; on February 7 regarding his pants and exposed underwear; and on February 14 regarding not meeting his goals and his negative attitude.

On 5/2/22 [REDACTED] spoke to him about rushing through the waste process and not documenting properly

On 7/12/22 I spoke to [the Grievant] about him falling back into his old ways with his behavior and his bad attitude. I told him he is not setting a good example for the new hires. He laughed at me.

On 8/15/22 I spoke to [the Grievant] about my observations the previous day. Him and another tech talking with their heads together and not working. I also observed him on this day the same way with the same tech talking and taking over 30 minutes to wipe down the same rack. This prompted me to speak to both separately.

On 9/12/22 I walked by [the Grievant], and he was sitting in his chair lazily working while making a mess all over the floor the way he was completing his task. I told him to work on top of the table, so he does not make a mess. Then when I walked past him again, I observed him ripping the buds off the stems rather than using shears as the top colas still had moisture in them. I walked him out to the hallway to explain to him that he is setting a bad example for the rest of the team.

These are two examples of how [the Grievant] was working on 9/12 and 9/13/2022 [REDACTED] attached two tables. The first indicated that, on September 12, during a 2 hour and 15 minute observation period, the Grievant processed significantly less product than 6 of his fellow team members, and came in below the goal of 1800 units. The second table showed that, on September 13, during a 4 hour and 55 minute observation period, the Grievant processed less than three of his co-workers and came in below the goal of 4000 units.]

The Company argues that the above evidence satisfies its burden to show that the Grievant was terminated for just cause after he consistently failed to follow the required procedures and to meet required production goals. It maintains that the Grievant knew or should have known that his conduct violated Company policies, and that the penalty was appropriate in light of all of the circumstances.

Regarding the Grievant's notice that his conduct could lead to dismissal, the Company cites his prior discipline and PIP, all of which warned that additional discipline would occur if the actions were not corrected, and none of which were grieved. It further cites grams per hour production quotas and attendance requirements, which were provided to the Grievant on his hire date, when he acknowledged receipt of a copy of the Employee Handbook and a copy of his job description. The Company maintains that the Grievant was provided consistent feedback regarding his unsatisfactory performance issues and how to better perform his duties.

The Company argues that the Grievant's testimony about his alleged health conditions should be disregarded because, other than his asthma and use of an inhaler, none of those alleged conditions were diagnosed by a medical professional or brought to the Company's attention prior

to arbitration. It further insists that the Grievant never requested any accommodations, and it emphasizes that in fact he declined an offer to accommodate his breathing issues by moving him out of the processing department.

The Company contends that the Grievant was treated consistently with his peers. Regarding the employee who the Union cited as having received a second Final Written Counseling after completing a PIP, the Company asserts that even the Union's witness testified that the Grievant's failure to make quota, distracting his coworkers, and improperly handling product were more serious infractions than what Mr. Melillo was cited for when he received the second Final Written Counseling for not covering his beard properly. The Company stresses that Melillo had no other infractions after completing his PIP, unlike the Grievant who consistently violated Company rules and failed to meet Company standards.

The Company maintains that termination was appropriate after the Grievant was repeatedly warned and reminded to improve his performance. It stresses that the Grievant was capable of improving his performance while he was on the PIP, claiming that that evidence should defeat any argument by the Union that the Grievant did not understand what the Company expected of him.

Regarding the Grievant's assertion that [REDACTED] had an inappropriate interest in him (and/or his relationship with a female coworker) or that he was discharged after he complained to the Union about J [REDACTED], the Company argues that these allegations were never raised before the hearing and were never brought to the attention of Human Resources. The Company further maintains that the Grievant's testimony was not credible.

The Company argues that Steward [REDACTED] H [REDACTED]'s testimony regarding it being common for leaves to fall off the plants and get all over the floor is irrelevant, as [REDACTED]'s testimony and contemporaneous notes made clear that it was "product" on the floor, not leaves.

The Company contends that the Grievant's seniority in the department and tenure of service are not mitigating factors and that, in fact, they make his inability to conform to Company expectations more egregious.

The Company stresses that the Grievant's prior discipline cannot be challenged in this proceeding because it was not grieved within the contractual time limits.

The Company asks the Arbitrator to deny the grievance.

The Union's Contentions

The Union contends that the Company has failed to satisfy its burden to show that discipline was appropriate for the "hodgepodge" of reasons alleged in the notice of termination. It claims that there was no evidence to support the allegations against the Grievant, that the Company failed to follow the steps of progressive discipline, and that the Company failed to conduct a thorough investigation.

The termination notice cites three reasons for the termination: (1) Being spoken to on July 12 and August 15 regarding his productivity; (2) Chatting with team members and not meeting productivity goals on September 12 and 13; and (3) being the “lowest performer in the processing department” for the month of September.

The Union contends that there is no evidence that anything improper happened on July 12. The termination notice states that the Grievant was “spoken to” on that day, without specifics. The July 12 entry from J[REDACTED]’s accountability file states, “Spoke to [the Grievant] briefly with [REDACTED] present. I told him I’d heard he is falling back to his old behavior of complaining and being negative. Told him we have new hires and he should not be complaining in front of them. I told him to complain on his own time. He laughed at me.” The Union contends that, when asked during her cross-examination, J[REDACTED] was unable to provide any specific examples of anything negative the Grievant might have said on July 12.

The Union contends that it is not sufficient for the Company to generally allege that the Grievant made negative comments. Rather it must present evidence of the statements that were made so that it can be determined if they were improper. Further, the Union argues that employees have the right, under the NLRA, to discuss working conditions in a way that the employer may find negative. Finally, the Union maintains that, to the extent the Company is seeking to substantiate its decision to terminate the Grievant on the allegation that he made self-deprecating comments, self-deprecation is not grounds for discipline.

The Union contends that there is no evidence that anything improper happened on August 15 when J[REDACTED] testified that she saw the Grievant and a female co-worker talking and spending what she thought was too much time cleaning a rack. The Union maintains that there was no evidence presented regarding the Grievant’s “productivity” on August 15 or about other work he could have been doing other than cleaning the rack. The Union further cites the Grievant’s testimony regarding J[REDACTED]’s alleged inordinate interest in his relationship with the female co-worker.

The notice of termination states that the Grievant was chatting with co-workers, distracting them and working slower on September 12 and 13. The Union contends that no evidence was presented about the Grievant “chatting,” and that instead J[REDACTED]’s testimony was about the way he was sitting while destemming and getting leaf all over his clothing and the floor. The Grievant testified that he had never been counseled by anyone at the Company about how he sat while destemming, and the Union argues that there is no evidence the Grievant was getting more leaf on himself than any of his co-workers. [REDACTED] H [REDACTED] testified that it is impossible to destem without getting leaf on your clothing, the table and the floor.

J[REDACTED] also testified that, after the Grievant changed the way he was sitting based on her instruction, she observed the Grievant use his hands to remove a bud from a plant when he should have used shears. The Union contends that the Grievant had never been spoken to about whether to use his hands or shears, and that the instructions he received in the department had changed during the time he worked for the Company. The Grievant testified that he was told to use shears and at other times he was told to use his hands in order to speed up the destemming

process. The Union references the Company's witnesses, who acknowledged that SOPs regarding destemming were kept in binders in the processing room, not distributed to employees individually, and that they changed over time without employees being required to view the new SOPs.

The Union contends that the Company has failed to establish that the Grievant deserved discipline for the way he sat or for using his hands to destem on September 12 because he had never been put on notice that there was a problem with the way he sat while destemming and J [REDACTED] testified that he immediately corrected the way he was sitting when she instructed him to. It further contends that the Grievant had never been put on notice that removing a bud with his hands would lead to discipline, citing J [REDACTED]'s acknowledgment that no employee had ever been disciplined for using their hands to remove a bud. The Union insists that these were both very minor issues. However, the Grievant testified that he complained to the Union after [REDACTED] "screamed" at him on September 12 after which [REDACTED] commenced the process of terminating him.

Regarding the Grievant's alleged production numbers on September 12 and 13 the Union contends that the numbers indicate the Grievant "just barely missed" production goals set for those days. The Union further argues that the chart J [REDACTED] attached to her email to HR should not be taken at face value because the Company failed to present evidence to establish the accuracy of the chart. Specifically, the Union maintains that, according to J [REDACTED], the productivity numbers are generated by a supervisor or lead who, while performing other tasks, looks at a clock on the wall to establish start and end times for the productivity assessment, after which the weight of product in each employee's pan is measured. The Union emphasizes that no evidence was presented regarding the start and end times that were used on September 12 or 13 and that the person or persons who were responsible for watching the time and weighing the product did not testify, so there was no way to probe whether that person was distracted or measured a shorter time than indicated on the chart. The Union contends that there is no way to know whether the Grievant was performing other tasks during the time those measurements were made that would have caused his numbers to be lower than those of his coworkers.

The Union contends that the Company failed to follow progressive discipline. The Grievant had no prior discipline for performance issues, as a PIP is not recognized as a form of discipline in the CBA or Employee Handbook. The Grievant received counselings for attendance in January and February and he testified that he had some attendance issues related to being diagnosed with COVID and his self-diagnosed seasonal affective disorder and depression. The Union maintains that it is inappropriate for the Company to rely on allegations documented in a "secret" accountability calendar in order to establish progressive discipline, as those allegations were never discussed with the Grievant and he had no chance to respond to them.

The Union stresses that the point of progressive discipline is to put employees on notice of performance or conduct issues so that they have the chance to correct those issues, and that this is not possible when the employer keeps secret notes that are only revealed after it has decided to issue discipline. No discipline was issued to the Grievant contemporaneously with the entries in the accountability calendars. Thus, the Union contends that the contents of the

accountability calendars should not be considered as relevant evidence of prior counseling or misconduct, or resurrected months later as part of a “kitchen-sink justification” for termination. The Union contends that the Grievant was entitled to clear notice of the Company’s expectations and the opportunity to improve his conduct, which he did not receive without progressive discipline.

The Union contends that the Grievant successfully completed his PIP and should have been treated the same as another employee, Melillo, who was placed on a PIP around the same time after receiving a Final Written Counseling, and then received a second Final Written Counseling several months later rather than termination.

The Union argues that the Company did not provide the Grievant with basic due process, which includes the right to discuss alleged misconduct before discipline is issued. The Grievant was not interviewed about anything that happened on the dates cited in the termination notice. He testified that he was not asked for his side of the story during the meeting in which he was informed he was being terminated.

The Union contends that J██████ orchestrated the Grievant’s termination as a result of her bias towards him. The Grievant testified that he informed the Company he was going to raise the issue of her inappropriate conduct, which he described as screaming at him over a very minor issue in front of his co-workers, with the Union less than 24 hours before she began the process of terminating him. The Union asserts that it is likely the Grievant’s termination was motivated by his act of notifying the Union of J██████’s inappropriate conduct.

The Union requests that the grievance be sustained, and that the Grievant be reinstated and made whole. The Union asks the Arbitrator to retain jurisdiction for sixty days to address any disagreements regarding remedy.

ISSUE

Did the Company have just cause to discharge the Grievant? If not, what the remedy shall be?

FINDINGS

On this record the Employer has not sustained its burden of proving that there was just cause to terminate the Grievant.

The Grievant was terminated for consistently failing to meet his production goals, distracting other employees, and exhibiting a negative attitude toward the workplace.

The Grievant was placed on a PIP on March 2. The PIP states that the purpose is:

to define performance deficiencies, clarify performance expectations, and allow you the opportunity to demonstrate your

ability to meet the performance expectations outlined below. [CX 11.]

Under the Section W of the Employee Handbook a PIP is not corrective action. Therefore, the fact that the Grievant was placed on a PIP cannot be treated as a step in progressive discipline.

In addition, the improvement the Grievant demonstrated while on the PIP shows that he is amenable to improving his performance. The notes from April 4 state:

We have noticed that [the Grievant] has not been holding long conversations with his teammates and has been staying at his workstation. He has raised his destem numbers and I have noticed him staying on track. His mood has been better more upbeat and happier. He has been on time and able to cover up his pants with wearing aa larger shirt and using zip ties. He has also been following the leads directions.

We spoke about him progressing forward on this track and not slipping behind to his old ways. If that happens we will be back in the same position. He understood.

[The Grievant's] #s
Destem 975 – goal is 800
Trim – 216 – goal is 120 [CX 11, pg. 5.]

As shown on the “prior counseling” section of the termination notice, the Grievant had received a “Final Written – Punctuality and attendance – Final” on February 16. However, it also shows that there was no “Written Report” prepared for the July 12 “Attitude and Negativity” or for the August 15 “Being unproductive and distracting to others” entries.

The “Final Written – Punctuality and attendance – Final” document states, under “Required Corrective Action”

Moving forward, [the Grievant] must show up to work on time for all his scheduled shifts. Any additional occurrences will result in further progressive counseling up to and may include termination. [CX 10.]

M [REDACTED] testified about the “Final Written – Punctuality and attendance – Final” as follows:

Q And why was he given this final written warning?

A This written warning was on his punctuality and attendance, so it was on missing work.

* * *

Q Are the attendance and employee conduct work rules all part of the same track for discipline, or do you have separate tracks, one for attendance and one for performance?

A I would say attendance and performance are different, but the two points on this final written both, I would say, fall under attendance or punctuality. It does affect work performance.

Q Right, since they're not there, they're not attending, or they're late, that's going to affect their numbers, right?

A Yes -- well, yes and no. Their output will be different. It won't affect their grams per hour because they're not being tracked for that time, but it will affect their ability to perform if they're not there at all. [Tr.V.1, pg. 186]

This testimony established that the Grievant's only prior discipline, the February 16 "Final Written" document, was for attendance issues, alone.

The Company, relying upon the instances recorded in the accountability calendars, maintains that the Grievant was provided consistent feedback regarding his unsatisfactory performance issues and how to better perform his duties. However, there is no evidence that the Grievant was ever given written notice of those deficiencies, a necessary step in progressive discipline. The fact that he was "spoken to" on 7/12/2022 and 8/15/2022 does not establish that progressive discipline was followed for the performance issues that formed the basis of the Employer's decision to terminate the Grievant. The Grievant also was never given written notice that the September 12 and 13 alleged violations of ██████████'s Handbook Ch. 2 Sec. V Employee Conduct and work rules would lead to "further progressive counseling up to and may include termination" as had been the case for the attendance issues.

The testimony of Employer witnesses does show that the Grievant had difficulty maintaining the expected level of performance. That does not, however, relieve management of its obligation to provide the Grievant with due process, as asserted by the Union. The Grievant should have been notified, in writing and in a timely manner, of behaviors that in management's view were putting his job in jeopardy. He was not so notified. On this basis the grievance will be sustained. It is, therefore, not necessary to consider the additional arguments raised by the Union.

The grievance will be sustained. The Grievant shall be reinstated and made whole for all losses, less interim earnings. The undersigned Arbitrator will retain jurisdiction for sixty (60) days solely for the purpose of resolving questions raised either party about this remedy.

The Company maintains that the Grievant was provided consistent feedback regarding his unsatisfactory performance issues and how to better perform his duties.

AWARD

The grievance is sustained. The Grievant shall be reinstated and made whole for all losses, less interim earnings. The undersigned Arbitrator will retain jurisdiction for sixty (60) days solely for the purpose of resolving questions raised either party about this remedy.



Elizabeth Neumeier, Arbitrator

December 4, 2023