

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

AFSCME DC 33, LOCAL 1510

Union,

-- and --

OPINION & AWARD

**Case No. 01-18-0004-1792
(Montgomery Discharge)**

CITY OF PHILADELPHIA

Employer.

ARBITRATOR: James M. Darby, Esq.

APPEARANCES: For the Union:
Nicholas J. Botta, Esq.
Spear Wilderman, PC

For the City:
Daniel Unterberger, Esq.
Assistant City Solicitor

This case arose on April 30, 2018, when the City of Philadelphia (“the City”), suspended Custodial Supervisor 1 Phillip Montgomery (“the Grievant”) without pay, and later terminated him effective May 21, 2018, for falsifying time and leaving work without permission on January 15, 2018. On August 22, 2018, AFSCME DC 33, Local 1510 (“the Union”) filed a grievance alleging that the discipline lacked just cause (Joint Exhibit 1).

By letter dated December 27, 2018, from the American Arbitration Association (“AAA”), the undersigned was notified of his selection as Arbitrator of this dispute. Hearings were held on September 13 and December 2, 2019, at the AAA offices in Philadelphia, Pennsylvania, where the parties were afforded a full opportunity to present testimony, exhibits and arguments in support of their positions. The parties submitted post-hearing briefs and the record was closed. After fully considering all of the evidence and arguments presented, the matter is now ready for final disposition.

QUESTIONS TO BE RESOLVED

Whether the City had just cause to terminate the Grievant, Phillip Montgomery? If not, what shall the remedy be?

REMEDY REQUESTED

The Union requests that the grievance be sustained, and that the Grievant be reinstated and made whole (Union Brief p. 28).

FACTS

1. Background

The City hired the Grievant in December 1998 to work in its Division of Aviation at the Philadelphia International Airport (“the Airport”). Since 2014 he has worked as a Custodial Supervisor 1 (“CS1”). At all material times the Grievant worked the 6:00 a.m. to 2:00 p.m. shift.

As a CS1 the Grievant supervises approximately 70 custodial workers and crew chiefs. His daily responsibilities involve inspecting all seven Airport terminals, as well as certain Airport facilities outside the Airport grounds. CS1s – who are supervised by CS2s -- also receive trouble calls from the Job Control center pertaining to specific cleaning issues (spills, bathroom floods, refill toilet paper, etc.). They are provided I-Phone “Chirp” communication devices to receive such calls. Upon receipt the CS1s will usually dispatch the trouble call assignment to their custodial staffs.

The Airport maintains both secured and unsecured work areas. To enter or exit a secure work area, CS1s must swipe an electronic badge. The swipes are recorded on a Card Swipe Report. Additionally, the Airport maintains a video surveillance system throughout its terminals.

The Card Swipe Report from [REDACTED], as well as a photograph from the video system, show the Grievant leaving a secure area of the Airport (the Communications Center) at 8:17 a.m. and leaving the terminal. A different photo and the Card Swipe Report show him returning to the terminal and entering the Communications Center at 11:33 a.m. The record also shows that during this time period, the Grievant did not respond to any trouble calls from Job Control or his supervisor CS2 T [REDACTED] G [REDACTED]. The Grievant did not receive permission to leave the Airport premises that day, nor did he put in for leave time to do so.

On April 30, 2018, the City suspended the Grievant without pay for falsifying his time and leaving work/assigned area. May 21, 2018, the City served the Grievant with a Notice of Intent to Dismiss, based on the same charges. Thereafter, effective May 31, 2018, the City terminated the Grievant's employment. (Joint Exhibit 3.) The termination decision stated as follows:

On April 26, 2018 you had a disciplinary hearing regarding the following violations: Falsification of Time First Occurrence - Dismissal and Leaving Work or Assigned Area Without Permission - Dismissal. On Monday [REDACTED] [REDACTED] [REDACTED] J [REDACTED] S [REDACTED], Custodial Manager received a complaint which stated that you were unresponsive to answering calls on the Duty Phone from Job Control during the duration of your shift on the holiday, [REDACTED]. Ms. Stressman retrieved your card swipe report, CC video and checked your swipe report for discrepancies and loss of time. After a review of the Card Swipe Report and Security CC video you were recorded as follows: Leaving through Communication Center at 8:17 AM and returning through the Communication Center at 11:33 AM. You left the airport area for more than 3 hours, during which time you had no badge swipes recorded in the Airport Facility. During your absence you were still registered as being on duty in the Stromberg System. You failed to notify the Custodial Work Supervisors 2 on duty that day that you were leaving the airport premises. In addition, you stated that you left the airport and went to the employee lot to give a family member your car after which you stated that you returned to the airport and worked in the unsecured area. As a Custodial Work Supervisor 1, your position requires you to conduct yourself in a manner befitting a supervisor. Your conduct on [REDACTED] is unacceptable. Furthermore, Leaving Work or Assigned Area without Permission and Falsification of Time are violations against the Division of Aviation's Code of Conduct. Your violation of the Employee Code of Conduct warrants dismissal.

(*Id.*)

The Grievant denies leaving the Airport for three hours. He claims he left the Communications Center at 8:17 a.m. to get his car from the employee

parking lot and meet his son at Terminal B because his son needed to use the Grievant's vehicle. The Grievant testified that he returned to the unsecured terminal area at approximately 9:00 a.m. and continued to work there until later in the morning when he left the terminal again to retrieve his car from his son and return it to the employee lot. He returned to the terminal's unsecured area and then entered the Communications Center at 11:33 a.m.

The record shows, and the City does not dispute, that prior to [REDACTED], the City had difficulty contacting staff with its Chirp system. About 60% of the calls issued from Job Control were not being received by custodial staff, depending on their location within the Airport. According to the testimony of the Building Maintenance Group Leader W [REDACTED] W [REDACTED] (who has worked in Job Control) the failure of custodial staff to respond to Chirp calls due to disconnections, battery issues and dead spots is a "normal daily occurrence." The evidence reflects the Grievant complained to the IT Department prior to this incident that he was not receiving trouble calls from Job Control and had visited the IT Offices with Custodial Operations Manager E [REDACTED] S [REDACTED] to try to resolve the problem. (Transcript pp. 127, 156.) However, as of [REDACTED], the problem had not been fixed.

Additionally, the City presented a document showing that Job Control created various work orders to be dispatched on [REDACTED] between 8:25 a.m. and 1:45 p.m. (City Exhibit 1). However, there is no log of actual attempts by Job Control or Supervisor G [REDACTED] to contact the Grievant. Also, while CS2 G [REDACTED]

recalled searching for the Grievant from 9:00 a.m. until a little after 10:00 a.m. on [REDACTED], the Card Swipe Report does not fully support this testimony (Union Exhibit 2). Moreover, the City acknowledged that it failed to preserve videotape surveillance footage which could have provided the “best evidence” regarding the Grievant’s actual whereabouts between 8:17 a.m. and 11:33 a.m. (Transcript p. 143).

Perhaps due to the foregoing, the City in its post-hearing brief no longer asserts that the Grievant left the Airport premises for three or more hours. Rather, it simply maintains that the Grievant admits he left his work area on two occasions without supervisory approval and received pay for this time even though he was not working. The City submits that based on these facts the charges of falsification and leaving work without permission are still valid, and that termination was warranted.

2. Relevant Testimony

In this regard, Manager S [REDACTED] testified that on [REDACTED] the Grievant clocked in at 6:02 a.m. and clocked out at 2:10 p.m., without clocking in or out at any other time that day (City Exhibit 6). She stated further that the Grievant was required to inform his supervisor if he was leaving the airport premises or going to the employee parking lot. He failed to do so. S [REDACTED] introduced the “Sample Schedule of Violations and Penalties” which shows that a first offense for leaving work without authorization is a written warning; for falsification of time records it is dismissal (City Exhibit 7).

S [REDACTED] testified that another employee had left the Airport for three hours because his daughter was taken to the hospital. He returned with medical documentation and “the violations were reduced” (Transcript p. 121). According to S [REDACTED], the Grievant was terminated because he left work for longer than his allotted break and lunch time, which is a total of one hour (two - 15 minute breaks and a half-hour lunch). He did not clock out at any time when he claims he left the Airport premises. S [REDACTED] testified further that had the Grievant left the premises for an hour or less he would have received a written warning.

On cross-examination, S [REDACTED] averred that the Airport Division does not maintain a written falsification of time policy. It has never informed the Union that if employees leave the premises for more than an hour it constitutes falsification of time. She stated that this is based on “precedent set by me ... more or less” (Transcript pp. 153-154). S [REDACTED] emphasized that the Grievant was terminated because he left the premises for more than an hour without letting anyone know (Transcript pp. 138-139).

According to S [REDACTED], had the Grievant actually returned to work after giving his son his car, and then left a second time to move his car back to the employee lot, “the penalty more likely would have been reduced.” However, she added that leaving without permission and not responding to calls results in “pretty stiff violations.” (Transcript pp. 147-148.) Additionally, S [REDACTED] testified that the City had terminated another employee for leaving and not returning for the rest of his shift.

Human Resources Associate Tamara Whitfield testified that she participated in the termination decision along with Ms. S [REDACTED]. She added that the Grievant had no assigned work responsibilities in the employee parking lot, and he admitted that he left Airport grounds. He never submitted a leave slip to be off from work. Whitfield also averred that she recently terminated an employee for falsification of time who arrived at work and spent the shift sitting in the custodial closet. On cross-examination, Whitfield testified that in November 2017 an Airport mechanic was given a one-day suspension for using a City-vehicle to go “trash picking” outside the Airport during his work time (Union Exhibit 1).

The Grievant testified that after leaving the terminal at 8:17 a.m. it took him a total of 45 minutes to wait for, then take the shuttle to the employee lot, get his car, drive it to Terminal B to meet his son and return to work. He stated he never left the Airport grounds, believed his actions were permitted, and never expected to be terminated. The Grievant later received a call from his son who was returning the vehicle. According to the Grievant, he met his son at the Terminal B baggage claim; drove his car to Wawa (off-Airport grounds) to pick up lunch; dropped his car off at the employee lot; and took the shuttle back to work. He stated that he has gone to Wawa in the past to get lunch, his supervisors knew about it and he has seen supervisors there. The Grievant stated he was gone a total of 30 minutes when he left to pick up his car.

On cross-examination, the Grievant testified he could not say for sure, but it is possible some of the trouble calls from [REDACTED] listed on City Exhibit 1 may have come through to his phone, but he did not respond. He also stated that Job Control will occasionally reach him on his personal cell phone with jobs. The Grievant averred that he did not get permission on the day in question to go to Wawa.

DISCUSSION

The parties' positions can be briefly summarized.

The City maintains that it had just cause to terminate the Grievant for falsification of his time and leaving his work area without permission. The Grievant admits he left the workplace twice for a period in excess of 75 minutes, without permission, and was paid during this non-work time. The City emphasizes that a first offense for falsification of time warrants termination. It also insists that termination was appropriate given the Grievant's "position of responsibility and trust." Given the Grievant's abandoning his position and being paid for this time, any reinstatement remedy "would legitimize and condone his misconduct" and send a message to other employees that it is appropriate to engage in similarly egregious misconduct.

Citing both judicial and arbitral precedent, **the Union** contends that the City's falsification charge cannot succeed because it has not shown by "clear and convincing" evidence that the Grievant intended to deceive the City. It argues

that instead of pointing to an “overt act” showing deliberate deception, the City merely relies on the Grievant’s passive receipt of pay which is insufficient to meet its heightened burden. Indeed, S [REDACTED] admitted she never considered the Grievant’s intent before charging him with falsification of time. Nor could she demonstrate that her “absences of more than one-hour” falsification policy was ever disseminated or used against other employees.

The Union also submits that the record does not show the Grievant received any calls. However, even if he failed to respond to calls the penalty for a first offense disobedience of orders is a two-day suspension. It also submits that the Grievant was never told he could not leave to go to Wawa or the employee lot; even if this was not permitted the penalty for a first time offense for leaving the work area is a written warning. According to the Union, the City could not present one example of another employee being terminated for leaving the work area for more than an hour, while the Union presented two examples of employees engaging in behavior similar to the Grievant who received at most a one-day suspension. This inconsistency, and the lack of a written disseminated policy, renders the termination invalid.

The undersigned must determine whether the City had just cause to terminate the Grievant for falsification of time and leaving his assigned work area. As set forth earlier, the City originally charged the Grievant with having

left the Airport premises for three hours and during this time failed to respond to any work assignments. It now maintains it had the right to terminate the Grievant based solely on his admission that he left his work area on two occasions without permission for a total of 75 minutes. For the following reasons, I conclude that the City's position cannot be sustained.

The instant record indisputably shows that the Grievant left his work duties behind and engaged in personal activity on two occasions on [REDACTED] – the first for 45 minutes to get his car and meet his son to give him his vehicle and the second time for 30 minutes to get his car back from his son. On neither occasion did he ask for permission to leave his work area to handle these personal errands.

However, it is also undisputed that employees are entitled to one hour of paid personal time each day (two 15 minute breaks and a half-hour for lunch). There is no contention (nor any evidence) that on [REDACTED] the Grievant took his breaks and lunch time *in addition to* taking the total of 75 minutes to run his personal errands. Based on this, the Grievant was away from his work area without permission for just 15 minutes. This would appear to warrant discipline significantly less severe than termination.

It certainly cannot support a finding of falsification of time. First, the short absence does not meet S [REDACTED]'s one-hour threshold for being away without permission to constitute falsification of time and justify termination. Even were the undersigned not to credit the Grievant with the one hour of free break/lunch

time (and the entire 75 minutes away was unauthorized) the charge of falsification of time still must be set aside. Strassman admitted the rule that employees who are missing for more than an hour are deemed to have falsified or stolen their time was her own unwritten policy “more or less,” and it was never shared with the Union. The absence of a disseminated written policy in this regard raises serious questions regarding whether bargaining unit members were on notice that leaving their work area for more than an hour without permission would be treated as theft and result in termination.

Indeed, the City could not cite one example prior to [REDACTED] where employees were charged with stealing time and terminated based simply on leaving their work post and later returning without clocking out. This is not a situation where the Grievant left the premises and never returned or sat in a closet for the entire shift without performing any work. Indeed, only two months before this incident a bargaining unit employee who left the Airport during his shift in a City vehicle to go trash picking only received a one-day suspension for misuse of the City vehicle and a written warning for leaving his post. The employee was never even charged with falsifying time.

Based on the foregoing, I conclude the Grievant could not be charged with falsification of time. Thus, there was no just cause for his termination.¹

¹ For this reason, it is unnecessary to address the Union’s assertions that there must be evidence of intent to charge an employee with falsification of time, and that the City’s failure to retain the video surveillance footage constituted a spoliation violation. .

This does not end the analysis. The Grievant was a supervisor responsible for dozens of crew chiefs and custodial workers. It was his responsibility to assign work orders to custodial crews and inspect terminal areas to ensure the work was properly getting done and the terminals remained safe and clean. Even though employees are entitled to one-hour of break time during their eight-hour shifts, this does not mean they can simply leave the work premises at any time, whenever they feel like it, to handle personal errands.

Common sense dictates that employees make their supervisors aware in advance if they desire to leave the workplace to run personal errands at times other than their 15 minute breaks or 30 minute lunch time. By failing to let G■■■ know his whereabouts here (or explaining he would be using some of his break/lunch time to run an errand), G■■■ had every right to expect that the Grievant was handling his work assignments as usual between 8:30 a.m. and 11:30 a.m. on ■■■■■■■■■■.

Furthermore, while the record clearly shows the Chirp communication system failed to operate consistently and effectively, one would have reasonably expected with a 60% effectiveness rate that the Grievant would have received at least one of the many trouble calls G■■■ testified were dispatched. It seems to this Arbitrator just too convenient that the Grievant went an entire morning without receiving *any* work-related assignments on the very same morning he left work twice without permission to handle a personal errand. Perhaps this explains his admission on cross-examination that he possibly received some

calls on his phone during the time frames represented on the work order list, but did not respond to them. Of course, had he let G■■■ know in advance he was leaving his work post to run a personal errand he would have learned that G■■■ was trying to reach him.

Accordingly, based on the foregoing, the grievance is sustained in part and denied in part. After considering the City's table of penalties and the treatment of other bargaining unit employees, the Grievant's termination shall be reduced to a two-day suspension due to his leaving his work area without informing his supervisor and failing to respond to trouble calls. The City shall immediately reinstate the Grievant and restore any unpaid salary and benefits (minus interim earnings) consistent with this Award and adjust his discipline record accordingly.

Consistent with the foregoing discussion and findings, the Arbitrator renders the following

AWARD

The grievance is sustained in part and denied in part.

The Grievant's termination shall be reduced to a two-day suspension due to his leaving his work area without informing his supervisor and failing to respond to trouble calls. The City shall immediately reinstate the Grievant and restore any unpaid salary and benefits (minus interim earnings) consistent with this Award and adjust his discipline record accordingly.

A handwritten signature in black ink, appearing to read 'James M. Darby', written over a horizontal line.

JAMES M. DARBY
Arbitrator
Lancaster, Pennsylvania
March 12, 2020