

American Arbitration Association
Case Number: 01-19-0001-1848

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In The Matter of the Arbitration

Between

AFSCME DISTRICT COUNCIL 47
"UNION"

OPINION

-and-

AND

CITY OF PHILADELPHIA
"CITY"

AWARD

Grievance 2187-19-08 –
Shanda King – 30 Day Suspension
With Intent to Dismiss

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BEFORE: Randi E. Lowitt, Esq., Arbitrator

APPEARANCES

For the Employer

Frank E. Wehr, II, Esq.

For the Union

Lauren M. Hoye, Esq.

Willig Williams Davidson

Pursuant to the provisions of the collective bargaining agreement between THE CITY OF PHILADELPHIA (hereinafter, "the City") and AFSCME DISTRICT COUNCIL 47 (hereinafter, "the Union"), the above-named arbitrator was designated by the American Arbitration Association as Arbitrator to hear and decide the matter in dispute between the above-identified parties.

A hearing was held at the AAA, Philadelphia, PA., on November 20, 2019. The parties were represented by counsel and were afforded a full and fair opportunity to conduct direct and cross examination of sworn witnesses, to present relevant evidence and to argue their relative positions. The record was closed after oral closing arguments. All matters, while not necessarily cited in this Opinion and Award, have been considered. All Claims not expressly granted herein are denied.

Some quotation marks ("") may be used to denote parts of testimony. While no court reporter or stenographer was present and no actual record was taken of the proceedings, the quotation marks denote portions of the notes taken by the Arbitrator during the course of the hearing and represent a close approximation of what was said by a witness or by counsel. Those notes and all attendant materials will be destroyed at the time this Opinion is disseminated.

The Issue:

Is the dismissal of Shanda King supported by just cause?

If not, what shall be the remedy?

BACKGROUND

Ms. Shanda King worked for the City as a Social Work Services Manager 2. In or around [REDACTED], she submitted a request for Intermittent FMLA to DHS Human Resources. When the DHS Human Resources (HR) ultimately examined the document, it was concerned about what appeared to be a lack of clarity regarding the duration and frequency of the time she was to be permitted FMLA. Upon an alleged investigation, the City determined that Ms. King had fraudulently altered the document subsequent to having received it from her doctor but before submitting it to DHS Human Services. Charges were proffered against her and said charges were sustained by the appropriate Panel, which approved a thirty (30) day suspension with intent to dismiss. Ms. King grieved the action. The grievance was unresolved through the Step process, leading to the instant arbitration. (Joint Exhibit #1).

Ms. B [REDACTED] B [REDACTED] is the [REDACTED] with DHS Human Resources. At the time of the alleged falsification of the document, Ms. B [REDACTED] said that she was "helping J [REDACTED] with ...FMLA." J [REDACTED] J [REDACTED] B [REDACTED] is the [REDACTED] at DHS. She had asked Ms. B [REDACTED] to assist with the follow-up paperwork for FMLA, specifically with Ms. King's paperwork, which had been received by HR on [REDACTED]. Ms. B [REDACTED] explained that she "looked to see if I understood

what the intermittent usage would be and I couldn't understand it." Ms. King's form, as allegedly submitted to HR, said:

Frequency: 1-2 times per 1 week(s) 1 month(s)

Duration: 2-4 hours or 3 day(s) per episode

(City Exhibit #1)

According to Ms. B [REDACTED], "it didn't make sense to me, as well as J [REDACTED], and she asked me to call the doctor." Ms. B [REDACTED] ultimately received a fax from one of the nurses at Penn Medicine, on or about [REDACTED]. That form said:

Frequency: 1-2 times per week(s) 1 month(s)

Duration: 2-4 hours or day(s) per episode

(City Exhibit #2)

Ms. B [REDACTED] noted the inconsistencies between the documents and reported to Ms. B [REDACTED], telling her "what the doctor provided is not the same as the first document."

On cross examination, Ms. B [REDACTED] recalled that she, and a colleague named F [REDACTED] were assisting Ms. B [REDACTED] with FMLA, specifically because there was a high volume of FMLA certifications coming in at the time. She acknowledged that this was the first time she had been asked to look at FMLA. Ms. B [REDACTED] acknowledged that it was weeks between when Ms. King's FMLA document was received by HR and when the fax was received from the doctor's office. She did not recall when she received

the original FMLA request; she did not know who had the document had been prior to her getting it. "Somebody from the FMLA team, I don't know, other than the FMLA team, no body should've." Ms. B█████ was also unaware of who had date-stamped Ms. King's document when it was received by HR.

As to the fact that Ms. B█████ said it did not make sense to her, Ms. B█████ acknowledged that it would not make sense to a reasonable person, maintained it was common practice to call a doctor's office for clarification, but also acknowledged that, whatever either document said, no one would be able to get more than twelve (12) weeks intermittent FMLA, even if the first document seemed to give more time.

Ms. J█████ J█████ B█████ was supervising Ms. B█████ at the time of the alleged falsification of documents. Ms. B█████ recalled receiving Ms. King's original FMLA form, but did not know "how I received it...employees can drop it off to me, employees can drop it off to F█████, sometimes documents are mailed in, sometimes documents are emailed, sometimes documents are faxed...." Ms. B█████ did not recall hearing Ms. King say she gave the document to another employee in the office, D█████.

After having asked Ms. B█████ to look into the perceived inconsistencies on the form, and after reviewing the form faxed over by Ms. King's doctor's office, Ms. B█████ determined that "the document submitted by Ms. King was different than the fax from the doctor. ...I had

discussions with my supervisor...told her we received a document from Ms. King and questioned it...I inherited the duties and responsibilities of FMLA because the person who did it was on medical...I said the documents were different..." Ms. B [REDACTED] reviewed documents on the Department of Labor website, specifically those regarding falsification of documentation for FMLA, and determined that Ms. King should be disciplined for falsification of documents. (City Exhibit #3). An Employee Violation Report was issued. (Joint Exhibit #1).

Ms. B [REDACTED] determined that there was "falsification...appeared numbers were added, not removed...she said she did not change anything and she accused me of doing it...I did not." Ms. B [REDACTED] said she had not had any issues with D [REDACTED] changing or altering documents. Ms. B [REDACTED] said that she did not know Ms. King, personally, and had not ever worked with her.

At the hearing on September 21, 2018, Ms. B [REDACTED] said that Ms. King did not have any additional or new explanation as to how or why the form was altered. The Panel at that hearing recommended dismissal of Ms. King. The recommendation of the Panel was reviewed by the Commissioner, Ms. Cynthia Figueroa, who did not alter it.

On cross examination, Ms. B [REDACTED] reiterated how FMLA works, vis a vis time off, unpaid time, intermittent leave, and what would happen if a person were to exceed the permitted amount of leave. She

acknowledged that she did not know which person in the office received the original copy of the form from Ms. King, or how it was received by the office; nor did she know who date-stamped it or when she first reviewed it. She did recall speaking to Ms. B [REDACTED] about it and acknowledged that the form from the doctor's office was received weeks later, explaining that Ms. B [REDACTED] told her "she contacted the doctor and no one called back...she left a message...they played phone tag...finally a nurse called and gave her the information." Ms. B [REDACTED] acknowledged that she did not know where the form was actually, physically being held from the time Ms. King dropped it off at the office until the time she reviewed it, noting that she, D [REDACTED] and F [REDACTED] would have had access to it. Ms. B [REDACTED] also reiterated that there was a particularly high volume of forms to be processed because "there was not team to process...three people, F [REDACTED], D [REDACTED], B [REDACTED] and me...I guess B [REDACTED] could've received some." Ms. B [REDACTED] reiterated that she had "inherited the duties and responsibilities...probably February 2018..," of processing the FMLA paperwork.

When asked to review the initial document, Ms. B [REDACTED] acknowledged that the alleged fraudulent additions on the document make it very difficult to understand, and acknowledged that any reasonable person would have questions about what was intended. Ms.

B█████ said she was not aware of Ms. King's request, in November 2017, to change her work schedule.

As to what documentary evidence was presented at the hearing, Ms. B█████ acknowledged that the documents in evidence by the City, City Exhibit #1 and City Exhibit #2, were not the documents presented. Rather, Union Exhibit#2 and City Exhibit #4 were the documents presented. Ms. B█████ also acknowledged that Ms. King had applied for Intermittent FMLA in June 2017, which was approved by letter, in March 2018, which letter was signed by Ms. B█████. (Union Exhibit #3). That letter of March 2018 approved leave from July 15, 2017 through July 15, 2018. Ms. King had submitted a medical certification for that leave. (Union Exhibit #4). However, regarding the letter and the approval of the leave, Ms. B█████ said "based on the letter, I assume it was approved. I didn't write the letter. The person doing it went out on leave and I was trying to filling and we were trying to get information out that should be out. ...I put it under my signature because the other person wasn't there. This was a combination of what was there and I signed off. ...I signed the letter...think it was an existing letter...it should've been given to the employee earlier. She was using this time...not to penalize her...we didn't get the information communicated in a timely manner...there is no date stamp on Union 4...it probably was submitted...I wasn't the recipient."

Ms. B [REDACTED] acknowledged that the 2017 certification had a Duration of 2-4 hours and a Frequency of 1-2 times per week per month, and that this was approved by her, although she insisted that she “just signed off on it, I didn’t question it, I signed off because he wasn’t there to do it...I read it through but I didn’t question it.” She also did not call the doctor’s office for clarification on that form.

Ms. Loretta Weston is the Human Services Program Administrator, supervising social workers. She did not supervise Ms. King, but she did sit on the Disciplinary Panel with regard to Ms. King. She recalled the evidence presented, the two conflicting FMLA requests, and she recalled determining that the first one was “fraudulent, falsified, not the document that the doctor submitted to the Department.” She maintained that she believed Ms. King “added information to the form.” Speaking to the importance of trust in the workplace, Ms. Weston noted that “the department relies on trustworthiness and truthfulness of the staff...work on the honor system...falsification is not taken lightly.” Ms. Weston was troubled by the fact that Ms. King said “she didn’t know how it got falsified...didn’t blame anybody in particular,” but Ms. Weston believed Ms. King had altered the form in an attempt to use more time than had been given by the doctor. “All the blank spots were filled in...didn’t make a lot of sense...Panel just really couldn’t see the sense in a doctor filling all that out...we didn’t consider her employment history...didn’t

matter...falsification is a serious offense regardless of how stellar you are. ...We agreed that the 30 day suspension with intent to dismiss was the appropriate consequence."

On cross examination, Ms. Weston acknowledged that Ms. King never alleged Ms. B [REDACTED] altered the form, reiterating that Ms. King said she did not know who did it, and denied doing it herself. When asked why the Panel disciplined Ms. King, Ms. Weston said that the Panel did not believe her, notwithstanding her good employee record and having no record of being dishonest in the past. Ms. Weston also recalled Ms. B [REDACTED] admitting that her office had not been able to get to the FMLA certification requests "right away," and that there are multiple people in Ms. B [REDACTED]' office who handle the requests.

Vongvilay Monneslesay is the Deputy Commissioner for Administration and Management Services at DHS. She explained that, in the disciplinary process, after a Panel makes a recommendation, the recommendation comes to the Deputy Commissioner and/or the Commissioner for review. "Discipline is not something we take lightly. The hearing documents are reviewed. The supporting documents are reviewed. I make a recommendation to the Commissioner based on my review for disposition." Ms. Monneslesay did review the Disciplinary Hearing for Ms. King. (Union Exhibit #1). She highlighted the fact that there was "conducted a thorough investigation by HR...the Panel sought to

get information from both sides at the hearing...Ms. King was given the opportunity to provide an explanation...I had sufficient information to make a recommendation. ...There was no compelling reason for how the documents were altered. For her to say she had no idea how it was changed was not enough...no reason the HR office would alter the document. I read in the transcript it was submitted to D [REDACTED] and she would've made sure it went to J [REDACTED] or F [REDACTED].” While noting that J [REDACTED], F [REDACTED] and D [REDACTED] had no issue in the past with falsification of documents, Ms. Monneslesay also noted that Ms. King had a good employment record. However, “this was a case of honesty and integrity. Taking into account our mission and social worker responsibilities to make sound decisions...we provide services to vulnerable children...rely on their integrity for what they do on behalf of the children and to be honest and true..” Ms. Monneslesay agreed with the decision of the Panel and recommended it to the Commissioner, who “for any falsification cases...has been consistent...it is not something she tolerated.” (City Exhibit #5).

On cross examination, Ms. Monneslesay acknowledged that, although she had reviewed certain Exhibits from the Disciplinary Panel, she had not contacted any witnesses, had not spoken to D [REDACTED] or F [REDACTED], and had not spoken to Ms. King, despite determining that Ms. King lacked credibility. She was aware that neither D [REDACTED] nor F [REDACTED] had

testified, but did not know if either had ever been questioned. Ms. Monneslesay acknowledged that there had never been any issue with Ms. King falsifying anything relative to her duties as a social worker.

Ms. King testified on her own behalf. She explained her duties as a social worker and added that she works in the office, not in the field, as part of an ADA accommodation. She submitted for FMLA Intermittent Leave in 2017 and was approved. (Union Exhibit #4). She requested a change in work hours, which was approved, for the specific purpose of being able to attend medical appointments without missing work time. Her hours were changed from 8:30-5:00 to 8:00-4:00. (Unin Exhibit #5).

She submitted the 2018 Intermittent Leave request. "I went to my doctor to get him to fill it out since the 2017 was ending...came back to work...tried to give it to Ms. B█████...D█████ said you can leave it with me...she took a sticky, wrote my name down, and my extension, and I left." After not hearing anything for some time, "I started sending emails and following up. They said 'we have it...we're gonna get back to you...I'll reach out to you and let you know....'"

Ms. King denied altering the form at any time. She insisted that, if she had concerns about the frequency or duration, she would have returned to her doctor to discuss it. She does not know how the form got changed, only that she did not do it, nor did she accuse Ms. B█████ of doing it.

Michael Bonetti is a Union Agent of Local 2187. He participated in the entirety of the disciplinary process involving Ms. King and asserted that Ms. King did not accuse Ms. B [REDACTED] of altering the form.

POSITIONS OF THE PARTIES

The City:

The City maintains that it had just cause to discipline and to discharge Ms. King for "inconsistencies between the form the Department received from her and what they got from her doctor. It is a material falsification of Federal documents to protect and provide employees with time off of work when deserved." The City went into detail explaining the law as it pertains to FMLA, to individuals applying for and being approved for FMLA, and what the benefits are to the employee who is approved.

The City points to the investigation conducted by Ms. B [REDACTED] and Ms. B [REDACTED]. It highlighted the fact that Ms. King gave her document to D [REDACTED], that Ms. B [REDACTED] got it from D [REDACTED] and noted the inconsistency with confusion, that she handed it off to Ms. B [REDACTED] for further investigation, and that the information ultimately returned to Ms. B [REDACTED] by the doctor did not match the initial form. Searching for a rationale as to why Ms. King falsified the documents, the City alleges that she had "run out of paid time off to use at the time the form was submitted.... But for the FMLA time, she could not take time off without a sick note or being marked

AWOL. The repercussions are that she is subject to discipline...the sick abuse list...with many ramifications. The form Ms. King turned in is confusing but unambiguous...it would allow a person more flexibility...more days and time and more time...it establishes a clear benefit. Ms. King could have received it if the Department was not following up.”

The City highlights the due process afforded Ms. King during the investigation. It notes Ms. King's response when asked how the form got changed, when she said “how do I know you didn't do it,” and strengthens its argument by asserting that no other explanation was given by Ms. King as to how it happened. And, the City avers that there has never been any issue of any forms being lost or falsified, or with anyone in the Department being accused of losing or falsifying forms. Additionally, the City notes that no one seemed to have a personal “vendetta” against Ms. King.

The City dismissed the Union's contention that it would not matter whether the form was changed or not; an employee only gets twelve (12) weeks FMLA and that employee will run out of the time faster if it is used more extensively or with more frequency. While that may be true, the City notes that Ms. King would still be able to take time off for the duration of the FMLA, time that had not been prescribed by her doctor.

“The City does not deny that Ms. King had a good record. The Department is finding out for the first time that there is an integrity issue. Average or above average ratings does not mean that this is forgiven. And, any other time individuals had falsified documents, they were also discharged. The issue is whether or not the City had sufficient evidence to find Ms. King fraudulently altered her FMLA forms and whether it warranted dismissal. There is no evidence others did it; there is plenty of evidence of why she did what she did. The City has grave concerns about whether it can trust Ms. King. ... It is clear cut what happened. It is clear cut why. There is no explanation as to what happened or why.”

Therefore, the City asserts that the suspension is warranted, that the dismissal is warranted, and the City demands that the grievance be denied.

The Union:

The Union avers that the burden of proof is on the City and that the City did not meet its burden to suspend and to discharge Ms. King for just cause. “The theory the City put forth is that Ms. King intentionally falsified and altered the FMLA form to benefit herself. It doesn’t make sense.” As an initial matter, the City notes that Ms. King had her FMLA Intermittent Leave approved for 2017. “The 2018 certification has an addition of 3 days...so the issue is not frequency so much as duration. All the City

witnesses...say the addition of the 3...makes the form confusion and contradictory. The City asks me to believe that Ms. King falsified the FMLA Certification in a way that is patently confusing and contradictory."

The Union concurs that the City followed proper protocol when it called the doctor for clarification, noting that it would make no sense to alter a document to create more questions than answers. "It wouldn't make any sense to change a form to make it more confusing. If you're trying to pull one over then erase, white out.... Why would she risk discipline by altering the form. Why would she risk discipline when she could have just gone back to her doctor and asked the doctor to make the change. Everything about this Grievant is inconsistent with someone trying to avoid working....good performance evaluations...she requested in 2017 to come to work earlier and leave earlier so she would not have to use FMLA...this is consistent with someone who is not trying to burn FMLA and not trying to avoid work."

The Union queries who actually did change the form. The Union queries why the City is attempting to shift the blame to the Union, why the City is insisting that the Union determine who changed the form. Without casting blame, the Union highlights the high volume of paperwork in the department, the fact that things and people were in transition, the fact of the delay, the fact that the FMLA Intermittent Leave request was not reviewed right away. "Nobody could provide an explanation of who

had the form when, who had access. Among that team are individuals who never were questioned, never brought in at the September 21 hearing. Instead, the City said they've never been accused of falsifying, so we assume they didn't do it. But, Ms. King hadn't either. Why is her credibility in question but theirs is not. The form went through many hands, sat through many weeks, could've been changed by someone else...we do not know."

The Union argues that the discipline imposed is not supported by just cause. The Union demands reinstatement and a make-whole remedy, including full back pay and benefits.

OPINION

After a complete review of all the evidence and testimony, I find that the City did not have just cause to either discipline or to discharge Ms. Shanda King. My reasoning follows.

Without minimizing the severity of the issue, the severity of the fact that a federal form was altered by someone, this case is best described as a series of unfortunate events. And, it is supremely unfortunate that too many people jumped to too many conclusions too quickly and held Ms. King to an unreasonable standard, that of proving a negative, of proving that she did not alter the form. There were too many people who could have come in contact with the form after Ms. King handed it in, including

the person to whom she gave it. These are people who not only did not testify but were, for all intents and purposes, not even questioned during the course of the alleged investigation. The form was handed in and date stamped in June. It took almost one month to get any information from the doctor's office. Any purported chain of custody is truly broken and it is impossible to determine which link was the first to break.

Ms. B [REDACTED], by her own admission, was thrown into handling FMLA because another person went out on leave. She took the helm in February 2018 and in March 2018 she signed a letter approving a 2017 FMLA leave for Ms. King, which leave Ms. King was already taking, without incident. Ms. B [REDACTED] acknowledged that did so without examining the documents and without investigating, according to her testimony. Ms. King filed for 2018 leave when the 2017 leave was about to expire. Having asked for and received permission to alter her work hours so that she would not negatively impact the City or herself by leaving work with so much time left in the work day to go to the doctor, having received approval for her 2017 FMLA, having already been given an ADA accommodation, I must concur with the Union when it vigorously asserts that it makes no sense for the City to contend Ms. King would have altered the form for some purported benefit. However, I do not believe this was some nefarious plot to be rid of Ms. King. As stated by the City's witnesses and as borne out by Ms. King's performance evaluation, she was

a good employee and this incident had nothing to do with that. I do concur with the City that there is no place in the workplace for any employee who engages in falsification and/or fraudulence. However, the City has failed to prove that Ms. King perpetrated that.

Without casting aspersions on the credibility of the City's witnesses or Ms. King, I find all the testimony credible. That said, the burden of proof in any just cause, and specifically in this case, is that the City must prove it had just cause to discipline. The burden falls to the City. It attempted to shift the burden in this instance; but it retains the burden. It did not reach the threshold of proving just cause to discipline or to discharge Ms. King.

In view of the foregoing, I issue the following

AWARD

1. There was no just cause to suspend Ms. King.
2. There was no just cause to terminate Ms. King.
3. Ms. King shall be returned to work, to her same job in the same location at the same work hours, within thirty (30) days of this Opinion & Award.
4. Ms. King shall be paid full back pay and shall be "made whole" with regard to her other benefits and seniority.
5. The Arbitrator shall retain jurisdiction for the implementation of this Award for one (1) year from its issuance.



Randi E. Lowitt
Arbitrator

Dated: December 7, 2019

State of New Jersey)
) ss.:
County of Morris)

I, Randi E. Lowitt, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.



Randi E. Lowitt
Arbitrator

Dated: December 7, 2019