

Before the FMCS
IN THE MATTER OF ARBITRATION BETWEEN

Cincinnati State Technical and Community
College
Employer

And

Case No. 171011-50242-6
Rochell Prater
Discharge/Termination

Service Employees International Union, District 1199
AFL-CIO
Union

Decision and Award

For the Employer:
Christopher Hogan, Esq.

For the Union:
Joshua Norris
Public Division Director, SEIU

Before
Sandra Mendel Furman, Esq.
Arbitrator

Applicable Collective Bargaining Provisions:

Article 24 The Disciplinary Procedure

Section 1

- A. The College agrees that an allegation of arbitrary or capricious application of its rules and regulations shall be subject to the grievance procedure. The College shall not discipline or discharge any post-probationary employee without just cause.
- B. The College agrees to the tenets of progressive and corrective discipline. It is desirable and encouraged that all disciplinary issues be resolved at the lowest administrative level consistent with the scope of the problem.

...

Issues: Is the grievance arbitrable? If the grievance is arbitrable was Grievant wrongfully determined to have resigned her position? If so, what should the remedy be?

Procedural Posture:

The arbitrator was jointly appointed by the parties in December 2016.¹ The hearing was set for April 5, 2017 by agreement. The hearing was held at the College campus in Cincinnati, Oh. All persons present who testified were sworn in by oath or affirmation. There was no transcript. Closing arguments were presented by both parties on April 28, 2017 and exchanged by the arbitrator. The hearing was closed at that time.

The decision issued within contractual deadlines.

Statement of Facts:

Grievant was employed as an Educational Specialist at the College in the TRIO program where she worked with veterans attempting to transition into a career and/or seek educational opportunities. At the date of her separation she had approximately seventeen (17) years of employment in a fulltime position.² There was no evidence of any prior discipline in her file. She worked under the supervision of Bari Ewing, the then

¹ The length of time between Prater's last date of work and the arbitration was not explained at the hearing. The arbitrator received notice of appointment in December 2016 and scheduling efforts began immediately thereafter. There is a contractually required mediation step pre-arbitration. The matter did not resolve there and the matter was appealed to arbitration. There is no contention regarding procedural arbitrability.

² No direct evidence was introduced showing Prater's full seniority. Regardless, she was a long tenured employee with somewhere over 17 years of full-time service. She had an unspecified period of temporary or part-time service.

Director of College Access Programs known as TRIO.³ TRIO include the Upward Bound, Veterans and GED programs.

Grievant worked most of her week outside of the college building, leaving Fridays for her in office work day. This had been the pattern for many years. She was assigned a work space and office furniture for her to perform her office functions and also to meet with clients and students.

On November 13, 2015 Grievant found out that there were imminent changes in the office layout and assigned furniture. The office was getting an Assistant Director and arrangements were in process of being made to accommodate that person. Grievant had previously requested in writing use of the office with a door and Ewing was aware of this. Union Ex. 1. On the date at issue Ewing had offered Grievant another desk, other than the one she had sought, and Grievant refused the offer. Grievant felt that she had to have a desk that had locking drawers for the privacy of her clients. She was also upset about the lack of privacy of her office area for client interviews.

Prater was most definitely not happy with the impending changes. As noted above, she had two weeks earlier asked for certain arrangements regarding the office space and furniture. It is not clear when or if Grievant was told that these requests would not be honored. It was clear that her request was not honored on November 13, 2015 when the moving was occurring. Prater expressed her unhappiness loudly and was heard by office staff, her supervisor and maintenance personnel assisting in the moving process.

Grievant stated words to all present with the specifics being “I quit”, “I’ve had it”, “I can’t take it” and/or “I’m done” depending on the witnesses testifying. Grievant specifically denied saying “I quit.”⁴ Rather she testified that she stated: “I’m done. I’ve been the perfect employee. I’m gonna (sic) tell. I cannot work under these conditions.” Witnesses present at that time included two College maintenance personnel, Arlene Brown and Regina Macklin.

³ At the date of hearing, Ewing had retired.

⁴ The Employer sought to introduce an unsigned nonnotarized statement putatively prepared by the two maintenance workers who did not testify. The date of preparation was not in evidence. The Union objected. The arbitrator sustained the objection. The statement is part of the record as Employer Proffer Ex. 1. Interestingly the statement does not state Grievant said “I quit.”

Brown, Ewing's Executive Assistant testified that Grievant went into Ewing's office and stated "Thank you Bari. Thank you very much." Neither Ewing nor Grievant corroborated this.

Grievant's version of what she said while in Ewing's office was: "Thank you for showing me this is how much you appreciate me and now I'm gonna (sic) tell."

Ewing testified that she had no doubt that Grievant had quit.

Brown stated that one of the maintenance men said to her: "She just quit over a desk?" Brown responded: "I guess she did."⁵

Prater made no attempt or effort to collect any personal belongings other than her coat, lunchbox and purse.⁶ She had many personal items in her work area. Brown at some unspecified later date assisted in boxing up items to send to Human Resources (HR) for presumptive return to Grievant. Some items apparently remained uncollected for some unspecified period post November 13, 2015. Union Ex. 4.

Ewing soon after Grievant's outburst called the HR Department and spoke with Betty Young, the then head. Young did not testify at the hearing. Young told Ewing that "This is a resignation."

Acting on that premise, Young prepared a document under Ewing's name accepting Prater's resignation. Employer Ex.1. C. It is dated incorrectly (later corrected in a subsequent communication). It states: "This letter constitutes [the] College's irrevocable acceptance of your resignation on this date...."

After Grievant made her statements in her immediate work area, she directly went to speak directly with Soni Hill. Hill is Ewing's direct supervisor. Hill was not then present in her office but her assistant Lana Teetor was. Prater stated the reason she went to see Hill was to discuss the office/furniture situation and claimed issues involved serving veterans. Prater stated that as she was there looking for Hill, Brown came in and stated to Teetor that Ewing needed to talk to Hill as soon as possible. Grievant left her personal phone number with Teetor for Hill to call her.

⁵ Brown's contemporaneous unsworn written statement is Exhibit B to Employer Ex. 1. It confirms that Grievant took none of her personal office items with her. It erroneously states that Grievant left the building. No one other than Brown stated Grievant then left the building.

⁶ Ewing had no further contact with Grievant after she left the work area.

Ewing communicated with Hill at some indeterminate point on November 13, 2015 and told her that Prater had quit. According to Ewing Hill stated "Thank you for letting me know."

Grievant testified that she did connect with Hill and stated that she needed to talk to her, and Hill's response was that she needed to talk to her Union steward. Grievant said: "Why do I need a Union steward?" It was not clear from the testimony when/where this conversation occurred in the day's chronology.

Brown testified that Grievant had not stated aloud her intention to speak to Hill when she left her work area.

Hill is the interim Vice President for Enrollment and Student Development. She had been alerted by Young that date that there were issues in the College Access Program area. She was advised by Young and Steven Brooks the then Labor Relations (LR) Head that HR had accepted Grievant's resignation. They told her what had happened that morning.

Hill knew Grievant and was surprised that she had resigned. Hill had been told by Teetor that Grievant had stopped into see her and that Grievant stated that "it was important." Hill did not act upon this information. She did not know what time Grievant had stopped by her office to see her.

Mark Wiley Director of Public Safety testified but he had no personal involvement in the day's events.

Norbert Thomas testified on Grievant's behalf. He is a union steward. He saw Grievant sitting in the lunchroom along with Macklin. He stated that Grievant described what had happened in her work area. He stated that Grievant said she was frustrated about the furniture and had left her work area. The three employees were soon approached by Brooks and a Public Safety officer. He ordered Macklin and Thomas to leave. Brooks gave Grievant some papers and Grievant left with Brooks and the officer from Public Safety.

Macklin testified. She was employed as an Academic Specialist for Upward Bound.⁷ She was not more than five feet away when the incident occurred in the work

⁷ Macklin was subsequently terminated at an unknown date for a reason unstated at the hearing. Her case was pending arbitration at date of Prater's arbitration hearing.

area. She stated that she heard Grievant say “Why not?” “I’m done” “I’m going to tell.” Macklin stated that she saw how upset Prater was. She stated that she didn’t believe that Grievant was quitting from what she witnessed.

When Grievant came back to the office [from where wasn’t stated but likely from her visit to Hill’s office] Macklin stated: “Let’s go to lunch.” They went to the cafeteria together. Grievant stated a few times that Grievant was going to report the incident to someone but Macklin was not sure to whom.

Macklin emphasized more than once that Grievant never said that she had quit or resigned while in her presence.

Per Macklin in the cafeteria she, Grievant and Thomas were discussing the situation regarding Grievant when they were approached by Brooks and a campus Security Officer. Brooks told Thomas and Macklin to leave the table. Macklin offered to give a statement about what had happened. Brooks told her “This has nothing to do with you.” Macklin was never asked to provide a statement.

Prater stated when Brooks said, “I have a letter for you” her response was “I did not quit and I didn’t tell anyone that I quit.” It is clear from the record that the letter referenced was Employer Ex. 1.C. Brooks had her escorted back to her work area by Security to retrieve her business cell phone, computer, surge card and keys which were College property.

A grievance was filed the next day: November 16, 2015. Jt. Ex. 2.

Decision

The grievance is arbitrable

The College did not conduct any investigation whatsoever prior to sending Brooks to the cafeteria with the resignation acceptance letter prepared by Young. The College did not interview Prater, the maintenance men, Macklin, Ewing or Brown. The College acted with untoward haste and without just cause on November 13, 2015. Much more needed to happen on that date. To deny Grievant a hearing merely because the College deliberately chose to force a separation from service by its own actions and its unilateral preparation of a self-serving document under these facts and circumstances perverts the cba obligations to not act in an arbitrary or capricious manner.

This is not a constructive discharge case; this is a de facto termination of an employee without cause, due process or any procedural safeguards being observed.

The arbitrator is stating there are facts or circumstances where a formal letter of resignation may not need to exist for a resignation to be effective. Under many sets of facts and circumstances a verbal resignation would be sufficient to sever an employment relationship. This is not that case. Instead this is a case where the College failed to follow even the most basic steps to assure the cba was being followed, that due process existed and that a long-term employee had an opportunity to be heard and explain before being led off campus by its police.

The grievance is arbitrable.

Merits

The College acted without following any established or known process or procedure regarding Prater. Although the College did not call the principals involved in the decision to prepare the resignation letter [Young and Brooks] it was established that no written policy existed regarding an exit for a *purportedly* resigning employee.

The current HR Director Lawra Baumann stated it was established and best practice to *immediately* accept a resignation. Perhaps-but in the context of a collective bargaining agreement more is required to adhere to cba language and established labor relations and public employee governing principles. As a state entity there are personnel policies and procedures that exist to deal with personnel matters. None were introduced. Even more importantly, as a party to the collective bargaining agreement and as a public entity Grievant had rights which were ignored by the College.⁸

Even if there was some ambiguity and confusion as to Prater's intent when she left her work area, all doubt was erased when she stated to Brooks "I did not quit; I did

⁸ Bauman was called as a Union witness. She stated that she instituted a process for creating a document to memorialize a verbal resignation. This was not introduced. There were references made to a pre-existing policy that would have been in place prior to Prater's "resignation" but nothing was introduced. Baumann stated she instituted a policy in August 2016 as interim HR director regarding resignation. This was not introduced. Although most of the documentation alleged would have been "after the fact" and therefore subject to objection, the absolute conclusion in the record as it stands is that no reference was made to any policy, cba, procedure or protocol by HR on November 13, 2015. The Union also attempted at various points in the hearing to point out that Young and Brooks were terminated in their respective positions. See Union Proffer Ex. 1. Assuming the truth, these are facts without relevance and formed no part of the decision making of the arbitrator.

not resign.” This testimony is un rebutted. Yet she was escorted by police off campus despite her protestations and despite the lack of any solid, reliable information as to her intentions from management.

There was not as stated in the grievance response an “unequivocal resignation”. Quite the opposite. The facts were disputed as to Prater’s intention. The College would not know this because it made no inquiry. Clearly by the time management reached the cafeteria Prater had no intention to resign if she had that intention beforehand-an intention hotly disputed by her. No one listened to her on November 13, 2015; only through the filing of a grievance did Prater receive a chance to explain her intentions and deny that resignation was her intent and resolve.

Prater did not act like someone who had quit on the date in question. She did not pack up her things. She did not discuss arrangements for getting her things. She did not leave the building but went to lunch in the cafeteria with a work friend. She did not take her keys. She did not leave by the nearest door.

She left her work area and went directly to talk to Soni Hill and left a message with her assistant that she had something important to discuss with her. Hill is not the person she would logically discuss her resignation with; it is a safe and reasonable inference that she intended to discuss the furniture issue with Hill and Ewing’s response to it. This is what Prater stated her intention was at the arbitration.

There is testimony in the record that after she went to Hill’s office she again returned to her work area, where she and Macklin agreed to go eat lunch in the cafeteria.

She did not check out with Personnel regarding her benefits and final paycheck.

It was obvious at the hearing that she was acting “in the moment” with her verbal outburst without any intention to leave her long tenured position. If it was not obvious to Young or Brooks or Ewing, someone should have had a conversation with Prater asking her intent and decision regarding her job-at a minimum.⁹

⁹ Ewing’s affidavit was admitted as Employer Ex. 1. It was taken in July 2016 a full eight months after the incident. There was also a contemporaneous statement of events prepared by Ewing. The arbitrator noted discrepancies between the affidavit filed with the OCRC, the contemporaneous statement (Employer Ex. A to Exhibit 1) which was not sworn, and the sworn testimony provided by Ewing at hearing.

In no manner was it a fair and reasonable conclusion that Prater resigned on November 13, 2015. Instead it was an arbitrary and capricious decision to prepare the resignation letter in the context presented. The matter occurring in the work area required at a minimum an investigation and collection of witness statements from all persons involved. The fact that Prater herself and Macklin were not asked to provide statements at/near the day Prater was escorted off campus is telling. Even the police report was not prepared contemporaneously. Union Ex. 2. The College decided precipitously and unilaterally to assume Prater's comments and outburst in the department represented a resignation. This is poor judgment and inconsistent with due process and basic fairness as well.

Young pointed out in her after the fact email to various persons that Grievant when she left her work area stated, "that is it", I quit", she did not ask for permission nor tell anyone where she was going or if she would return. Union Ex.3. Most of that was true; the part in dispute is if the words I quit were used. But even with all those circumstances the College had direct almost simultaneous information from the Grievant in the presence of witnesses that she did not quit; she had not left the grounds, she had not collected her belongings and that she instead after the outburst went to talk to Hill. She was eating lunch peaceably with co-workers when she was confronted by Brooks.

This case is not an instance of a constructive discharge in the classic meaning. But it is a discharge just the same. There was no just cause for the College's actions vis a vis Prater on November 13, 2015. This was not a situation where Prater had "second thoughts" about a resignation and tried to rescind it later. This was not a situation where Grievant waited days and days to file a grievance after a post mortem.¹⁰

Grievant clearly and unequivocally told Brooks that she had not resigned-on November 13, 2015 –just scant moments after Ewing had called the HR office and the rushed-out memorandum "irrevocably" accepting her alleged resignation was

¹⁰ Nor did the College claim it detrimentally relied upon the resignation. It could not make that claim in good faith as the "resignation" was instantly accepted. But no job vacancy was posted, no interviewing scheduled- the College knew unequivocally the day after the incident formally that there was no resignation. This was not a scenario where second thoughts were had and the employer made moves to fill a vacancy.

presented to her. Prater refused to validate the memo; said she didn't resign and promptly grieved. She was hustled out of the building within an hour of the incident in her work area.

The arbitrator finds that the College acted in an arbitrary and capricious manner towards Prater under all the facts and circumstances. Here are the reasons why the separation from employment cannot stand. Prater was a long-term employee. She had no discipline in her file and none pending. She loved her job and her enthusiasm was clear to the arbitrator. The College had a duty and responsibility to investigate and make sure that Prater-a very long term employee- was in fact resigning. It did nothing of the sort.

Prater's conduct regarding management's decision vis a vis her work desk/work space was less than helpful. She acted out, said confusing things and demonstrated a lack of respect for process and procedure. She needed to "chill" and wait until she could calmly discuss her needs and concerns. She did not. Her frustration cost her job as the College made its decision to accept her at her impulsive and heat of the moment words. Regardless, she did not resign and the College cannot claim to the contrary based upon the record as a whole.

Conclusion

Whether Prater said "I quit" or "I'm done" is not as important as what her actions and statements immediately following the events show. She did not gather up all her things and/or ask someone to help her gather all her office paraphernalia. She didn't leave by the nearest exit and go to her car and leave campus. She didn't take her keys. Nor did she turn in any work items that may have been issued to her. She went to speak to Hill about "something important". She did not go to Personnel/HR to find out about health insurance, cash out of sick leave/benefits or final pay or any other rights or obligations. She took her lunch box and went and sat in the school cafeteria area and had her lunch with two co-workers-one a Union steward. When confronted with the presence of campus police and Brooks she repeatedly stated that she didn't quit. With all that behavior directly signaling no intent to quit the College acted in undue haste, without cause and improperly issued the memo stating a conclusion that was not desired or intended by Grievant. Her rejection of the prepared memo and her repeated

statements regarding a lack of intention to quit at the barest minimum should have set in motion an investigation by the College. The rush to judgment will not stand.

Remedy

The arbitrator finds that Grievant is entitled to reinstatement with back pay and benefits, less unemployment received and less interim earnings.

The arbitrator is not persuaded by the College's arguments that reinstatement to her prior position is inappropriate. Grievant did state at the hearing that she wanted a transfer. It was unclear to the arbitrator if that statement was meant to respond to the November 2015 date assuming all conditions then extant would be present- or when and if she were to return to work through the arbitration process-i.e. the present. Her "wishes" were unclear and were not stated as such on the face of the grievance. Her grievance relief plainly seeks reinstatement to her position, along with lost pay and benefits.

Regardless, the arbitrator finds no authority to order a negotiation process for the position Grievant will resume upon reinstatement. The order is reinstatement to her prior position, with back pay, seniority and all benefits restored, less unemployment received and interim earnings. If the parties work out a different arrangement that is beyond the scope of the submission.

IT IS SO HEREBY ORDERED:

s/Sandra Mendel Furman

Sandra Mendel Furman, Esq.

A true copy of the foregoing was sent by email to the parties by and through their representatives on May 6, 2017.

s/Sandra Mendel Furman