FEDERAL MEDIATION & CONCILIATION SERVICE

#9

In the Matter of the Arbitration between:	)	
	)	FMCS Case No. 13-00265
	)	Grievant: Kendell Lee Stauffer, Jr.
OFFICE OF THE TRUMBULL COUNTY ENGINEER	)	
-and-	)	JONATHAN I. KLEIN, ARBITRATOR
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION AFSCME LOCAL 11/AFL-CIO	)	

OPINION AND AWARD

RECEIVED / REVIEWED
AUG - 5 2013
OCSEA OFFICE OF GENERAL COUNSEL

Date of Issuance: August 2, 2013

APPEARANCES

For the Employer:

Robin L. Bell, Esq.	Regional Manager, Clemans, Nelson & Associates, Inc.
Randy L. Smith	Trumbull County Engineer
Ken Kubala	Safety and Compliance Manager
Herbert Laukhart	Director of Finance and Personnel

For the Union:

George L. Yerkes	Staff Representative, OCSEA
Kendell Lee Stauffer, Jr.	Grievant, Labor 2
James E. Spain	Labor 1
James R. Ford	Foreman 2
Jason Loomis	Labor 2
Mike Freeman	Labor 2
Anthony Johnson	Chief Steward & Equipment Operator

I. STATEMENT OF THE CASE

This dispute is properly before the arbitrator pursuant to Article 8 of the collective bargaining agreement dated April 20, 2010 through April 19, 2013, between the Office of the Trumbull County Engineer ("Employer") and the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("Union"), representing bargaining unit employees as set forth in Article 2 of the collective bargaining agreement. (Joint Ex. 1).

The grievant, Kendell Lee Stauffer, Jr., was hired by the Employer on January 22, 2007, and he is currently assigned to a Labor 2 classification. On May 23, 2012, the grievant and a

number of his co-workers attended a safety training session regarding the proper operation of several pieces of equipment. A segment of the training session consisted of a video presentation conducted by two non-employees. During the video presentation the grievant and his co-workers were seated in chairs placed around a conference table in a meeting room. The grievant was seated to the right of his co-worker, Jim Spain, who had turned to his left towards the video screen in order to view the presentation. (Joint Ex. 5, at 127). At some point during the presentation, the chair upon which Mr. Spain was seated suddenly dropped to a lower level. Mr. Spain, who was startled by this sudden movement of his chair, yelled and threw his arms into the air. The grievant made a remark about the incident and smiled in the direction of Mr. Spain. Following the lunch break, Ken Kubala, the Employer's Safety and Compliance Manager, discussed the matter with Mr. Spain. Randy L. Smith, the Trumbull County Engineer, subsequently contacted Mr. Spain and inquired if the grievant was the individual who caused his chair to drop.

On May 24, 2012, the Employer issued a pre-disciplinary hearing notice to the grievant which provides, in pertinent part, as follows:

* * *

> You are charged with violating the following work rules:
>
> 1. Neglect of Duty-Category #1; second offense:
> - Failure to follow workplace safety rules
>
> 9. Misfeasance, Malfeasance or Nonfeasance-Category #2; Second offense:
> - Any act indicating an irresponsible attitude that affects the smooth operation of the Engineer's office.

The basis of the charges is as follows:

> On May 23, 2012 you attended a training class in the conference room at the office of the Trumbull County Engineer. It was reported by the Safety Manager, Ken Kubala, that an employee's chair unexpectantly dropped down as the result of an adjustment that you made to the chair. This adjustment cause the chair to drop down while the coworker was sitting in the chair. This action startled the worker, caused an unsafe condition, and the potential for an accident and/or bodily harm.
>
> (Joint Ex. 4, at 108).

A pre-disciplinary hearing was subsequently conducted with the grievant on May 30 and 31, 2012. (Joint Ex. 4, 109-122). On June 4, 2012, Herb Laukhart, the Director of Finance and Personnel. issued the following pre-disciplinary hearing officer report:

* * *

> The charges arose from information provided by Safety Manager, Ken Kubala, that Mr. Stauffer appeared to cause a fellow co-workers chair (Jim Spain) to drop down during a training seminar in the second floor conference room and cause an unsafe condition.
>
> Mr. Stauffer has stated he did not intentionally cause his co-workers chair to drop down and did not touch it with his hand. There were no reported eye witnesses that viewed Mr. Stauffer tampering with the chair.
> Mr. Spain, through questioning by the union, admitted he was the victim of a practical joke - implicating Mr. Stauffer as the individual perpetrating the practical joke.
> Mr. Kubala testified the class was disrupted by the incident and it was apparent that Mr. Stauffer caused the incident when he said: 'Mr. Spain needed to wake up".
>
> After listening to the testimony and reviewing the facts, I have arrived at the following conclusion:

> Although there were no eye witnesses to the incident, through testimony from a supervisor and answers provided by the union from Mr. Spain, there is enough sufficient evidence to conclude that Mr. Stauffer knowingly acted in some way to cause his coworker's chair to drop down - placing him in an unsafe condition. Fortunately no one was injured as a result of this action.
>
> As Hearing Officer I recommend that the employee, Lee Stauffer, be given a total of four days off without pay as disciplinary action for the above named charges of Neglect of Duty and Malfeasance, etc. This violation is the second offense for a "Category #2 Offense" according to the Trumbull Count[y] Engineer's Employee Policy Manual.
>
> (Joint Ex. 4, 123-123.1).

On June 8, 2012, the Employer issued the grievant a four-day suspension without pay. (Joint Ex. 4, at 124). The Union filed the following grievance to protest the discipline assessed the grievant:

* * *

> The union feels Lee was not neglect of duty or was not mis, mal or nonfeasance. The union requests Jim Spain to attend the step 1, to tell his side of the story. This was nonintentional, Lee did not knowingly cause the chair to drop. Also Lee should not be disciplined until his grievance is finalized. Lee was never given a verbal for the first incident.
>
> * * *
>
> (Joint Ex. 3, at 99).

A Step 1 grievance meeting was held and the Employer subsequently denied the grievance on June 15, 2012. (Joint Ex. 3, 100-101). A Step 2 grievance meeting was held on July 11, 2012, and the Employer issued the following Step 2 Answer, dated July 17, 2012:

* * *

> During the hearing you denied adjusting the chair which dropped down. You did admit sitting next to the victim, James Spain, and that he was startled when the chair suddenly dropped down. You also admitted that you said, 'That will keep him awake,' or words to that effect. Despite your denial, the facts by those present shows that you did in fact adjust the chair causing it to drop and creating a potentially dangerous situation.
>
> Your grievance is hereby denied.
>
> (Joint Ex. 3, at 104).

The parties subsequently proceeded to arbitration and a hearing was held on June 3, 2013, at which time the parties were afforded full opportunity to present documentary evidence, direct and cross-examine witnesses, and offer rebuttal testimony. At the hearing, the parties submitted the following stipulations:

1. There are no procedural defects, and the matter is properly before the arbitrator.
2. The Grievant's date of hire with the Trumbull County Engineers Office is January 22, 2007.
3. Grievant is employed full time with the Trumbull County Engineers Office.
4. The Grievant was suspended for four days for violations of Neglect of Duty. *Category #1 Failure to follow work place safety rules and Any other act of misfeasance, malfeasance, or nonfeasance, Category #2, Any act indicating an irresponsible attitude that effects the smooth operation of the Engineer's Office.*

5. The Grievant holds the position of Labor 2.
6. At the time of the four day suspension, the Grievant had a written reprimand on his active discipline record.
7. The grievant was scheduled to work May 23, 2012.

(Employer's Presentation at Hearing, Joint Stipulations Tab).

Each party submitted post-hearing briefs in support of their respective positions. The Union also provided the arbitrator with several arbitration awards for review and consideration in support of its case.

II. ISSUE PRESENTED

The stipulated issue in this case is as follows:

> Was the Grievant disciplined for just cause, and if not, what should the remedy be?

III. APPLICABLE CONTRACT PROVISIONS

Article 3 of the collective bargaining agreement entitled "Employer Rights," provides, in part, as follows:

> Section 1. Nothing contained in this Agreement shall be interpreted to restrict any constitutional, statutory, or inherent rights of the County Engineer with respect to matters of Managerial Policy. The County Engineer has the right and the authority to administer the business of the Office and, in addition to other functions and responsibilities; the County Engineer has and will retain the full right and responsibility to direct the operations of the Departments of the Employer, to make rules and regulations and to otherwise exercise the rights of Management.
>
> This includes, but is not limited to, the right to:

* * *

E) Suspend, discipline, demote, or discharge for just cause or layoff, transfer, assign, schedule, promote or retain employees;

* * *

The exercise of these powers, rights, authority, duties and responsibilities by the Employer and the adoption of such policies, regulations and rules as it may deem necessary shall be limited only by the specific and express terms of the Agreement.

* * *

Article 6 of the collective bargaining agreement entitled "Corrective Action and Personnel File," provides, in pertinent part, as follows:

Section 1. Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden to establish just cause for any disciplinary action.

Section 2. Disciplinary action shall generally be applied in a progressive manner commencing with a verbal reprimand, written reprimand, suspension(s) without pay and discharge from employment. However, the severity of discipline may be increased or decreased on a case by case basis depending upon the nature and seriousness of the offense and the employee's past record of discipline and performance. It is also recognized and understood that certain offenses are serious enough to warrant discharge without regard to previous reprimands or discipline.

* * *

IV. CONTENTIONS OF THE PARTIES

Employer's Position

The Employer asserts that it had just cause to issue a four-day suspension to the grievant. Furthermore, the penalty imposed was appropriate and reasonable under the circumstances. It maintains that the Union failed to present sufficient evidence to mitigate the suspension.

"Throughout the disciplinary process, Grievant has denied responsibility for the incident but the evidence, although some is circumstantial, supports the Employer's reasonable conclusion that Grievant caused Spain's chair to drop." (Employer Post-Hearing Brief, 8). According to the Employer, Mr. Spain acknowledged to both Mr. Kubala and Mr. Smith that the grievant had caused his chair to drop. The Employer points out that Mr. Spain was startled by the incident and the training class was interrupted. Additionally, "Mr. Kubala was present during the training session and heard Grievant's response to the question of what happened." (Employer Post-Hearing Brief, 8).

The Employer acknowledges that Mr. Spain was a reluctant witness in this case. However, it is important to note that Mr. Spain never testified that the grievant did not lower his chair, nor did he state that he did not know how it happened. Mr. Spain testified that the grievant did not say anything and just smiled when he looked back at him. "In other words, he knew that Grievant did it, just as Mike Freeman testified he knew that Greg Alberini, Jr. did the same thing to him five or ten minutes later." (Employer Post-Hearing Brief, 9).

Although the incident at issue may seem relatively minor, the Employer views it as a potential safety hazard for an employee to make another employee's chair drop. It points out that

horseplay has the potential for physical injury. The Employer's safety rules specifically include a prohibition of horseplay. As such, violation of this rule justifies discipline. It notes that Mr. Spain told Mr. Kubala that he "was startled by what Lee had done because he thought that he may have fallen backwards from the chair." According to the Employer, Mr. Spain never disavowed this statement and only stated that his conversation with Mr. Kubala was informal.

The grievant most likely adjusted Mr. Spain's chair in order to get a laugh out of his co-workers in the conference room. The Employer maintains that the grievant's actions disturbed and interrupted the safety training class. Additionally, ". . . it was a continuation of Grievant's disregard of the seriousness of safety issues in the workplace based upon his desire to get a laugh out of his fellow employees." (Employer Post-Hearing Brief, 9). The Employer points out that the grievant has previously displayed an irresponsible and cavalier attitude toward safety matters. Specifically, he was issued a written reprimand as a result of wearing a dress tie to work on the day following a meeting conducted by the superintendent regarding proper work attire. The incident at issue in this case occurred only nine days after the tie incident. "The Employer's issuance of the four-day suspension was intended to stop Grievant's cavalier attitude toward safety and his attitude that affects the smooth operation of the Engineer's office." (Employer Post-Hearing Brief, 10).

The Employer maintains that the suspension assessed the grievant was well within the guidelines set forth in the discipline policy. In the instant case, the grievant committed a second offense of neglect of duty, a category #1 offense, and a second offense of any other act of misfeasance, malfeasance or nonfeasance, a category #2 offense. It points out that a second

category #1 offense warrants a one to three day suspension, and a second category #2 offense calls for a three to ten day suspension. The Employer reiterates that its safety policy clearly indicates that an employee is to avoid horseplay.

The Employer asserts that the Union has the burden of establishing any mitigating factors, and it has presented no such factors in this case. The Union's attempt to present mitigating evidence appears to be two-pronged. "First, Greg Alberini, Jr.., dropped Mike Freeman's chair in the same training session and was not disciplined. Second, the Union appears to be alleging that the Employer did not adequately investigate before issuing discipline." (Employer's Post-Hearing Brief, 11). As it concerns the other chair dropping incident, the Union offered no evidence that Mr. Kubala or any other member of management was actually aware that Alberini, Jr. had dropped Freeman's chair. The Employer points out that the Union was reluctant to provide any details of this other chair dropping incident in response to Engineer Smith's inquiry. The Union has failed to prove that the grievant was treated differently than another similarly situated employee.

Additionally, there is no evidence that the incident was not fairly investigated by the Employer. "The Union has never alleged any unfair or biased conduct on behalf of the employer regarding the investigation." (Employer Post-Hearing Brief, 11). It appears that the Union is arguing that the investigation should have been more formal. "It is true that the Employer did not ask the other attendees at the training for statements or written statements, but there was no need or requirement to do so. Mr. Kubala came to the logical conclusion that Grievant tampered with Mr. Spain's chair." (Employer Post-Hearing Brief, 12). The Employer notes that the Union's

own witnesses did not testify that the grievant did not tamper with Mr. Spain's chair. The evidence in this case establishes that the grievant was afforded his full due process rights. The discipline assessed the grievant was neither arbitrary nor unreasonable. For each of the aforementioned reasons, the Employer requests that the grievance be denied.

Union's Position

According to the Union, management did not present a scintilla of evidence in support of its case. The Union asserts that management's case is based on sheer conjecture, and "[t]he only evidence that management presented was Ken Kubala's belief that Mr. Stauffer's statement, 'That will teach him . . .' was in some way indicative of Mr. Stauffer's guilt." (Union Post-Hearing Brief, 1). The Union maintains that the facts of this case are not complicated. Specifically, during a training session held on May 23, 2012, the chair that Jim Spain was sitting in unexpectedly dropped, and the grievant was sitting next to Mr. Spain.

The Union points out that Kubala's written statement of the incident indicates that he witnessed the grievant "pull the adjust lever on the bottom of the chair." However, at the pre-disciplinary hearing it turned out that Kubala's statement was a misrepresentation because he admitted that he ". . . did not witness anything." The Union asserts that consistent with the opinion of the pre-disciplinary hearing officer regarding the circumstances of the incident, ". . . we still don't really know [what caused Mr. Spain's chair to drop]." (Union Post-Hearing Brief, 1). The pre-disciplinary hearing officer's report provides, in part, that ". . . there is enough sufficient evidence to conclude that Mr. Stauffer knowingly acted in some way to cause his

coworker's chair to drop down - placing hin in an unsafe condition." The Union contends that "[t]his lack of specificity is the fatal error in management's case. They have no relevant evidence to support their claims. And they have no evidence as they failed to investigate." (Union Post-Hearing Brief, 2).

The Union notes that management never questioned any of the thirteen witnesses who were present during the incident in question. Nor was the grievant questioned by management regarding this matter. "How can they draw the conclusion that there were no eye witnesses when they did not bother to investigate?" (Union Post-Hearing Brief, 2). Management's interpretation of any comments ". . . by no means trumps eyewitness evidence." (Union Post-Hearing Brief, 2). In the instant case, management clearly failed to conduct a complete and fair investigation. The Union maintains that a fair and complete investigation is an essential element of the just cause analysis. According to the Union, without a fair and complete investigation there can be no substantial and credible evidence. The record establishes that management relied on the anecdotal conversations that Jim Spain had with Ken Kubala and Randy Smith. However, both Kubala and Smith acknowledged that they never informed Spain that they were conducting an investigation. The fact that the pre-disciplinary hearing notice was issued on the day following the incident is evidence that management had no intention of further investigating the matter.

The Employer failed to satisfy its burden of proof that the grievant was guilty of neglect, misfeasance, malfeasance or nonfeasance. There is no direct or circumstantial evidence that the grievant caused Spain's chair to drop. "Management wants to take a random incident, an out of context comment from the grievant, and offer it as proof. The only evidence that management

can offer is the fact that Lee Stauffer was sitting next to Jim Spain, and that Jim Spain's chair fell." (Union Post-Hearing Brief, 3). There is no evidence to support the charges against the grievant based upon the totality of the circumstances.

The Union also points out that the testimony presented at the hearing establishes that management chose to ignore another chair dropping incident. Mr. Ford specifically testified that his chair was dropped in full view of Mr. Kubala. Although Mr. Ford identified Greg Alberini, Jr., as the culprit, "[t]he Union is not arguing that Mr. Alberini caused the chair to drop." (Union Post-Hearing Brief, 14). To do so would be speculation. However, "[w]hat the Union does question is why Mr. Stauffer was so vigorously persecuted, and the son of the Highway Superintendent was not." (Union Post-Hearing Brief, 4). The Union asserts that disparate treatment due to nepotism, and the fact that there is no evidence to support the Employer's case, should result in the total exoneration of the grievant.

The Union further asserts that although the written reprimand previously assessed the grievant in connection with the tie incident arguably provides a basis for progressive discipline, it is not proof that he engaged in misconduct in the instant case. Management has presented no evidence to establish that it had just cause to render discipline in this matter. Therefore, the Union requests that the grievance be sustained.

V. OPINION AND ANALYSIS

The incident at issue in this case centers around a chair upon which was seated James Spain, a co-worker of the grievant, that suddenly dropped to a lower level. At the time of the

incident, the grievant just happened to be seated in the chair next to Mr. Spain. According to the Employer, the grievant somehow caused the chair upon which Mr. Spain was seated to drop to a lower level. The grievant adamantly denied this allegation. For the following reasons, the arbitrator concludes that the Employer presented insufficient evidence that the grievant engaged in neglect of duty, misfeasance, malfeasance, or nonfeasance as charged.

At the arbitration hearing, Safety and Compliance Manager Ken Kubala acknowledged that he did not observe the grievant touch the adjustment lever on the chair that Spain was seated in. This testimony stands in stark contrast to the conclusory written statement by Kubala that the grievant pulled the adjust lever on the bottom of the chair. (Joint Ex. 5, p. 127). However, he indicated that based upon his conversation with Spain, who purportedly told him that the grievant caused his chair to drop to a lower level; the fact that Spain yelled when his chair dropped; and the grievant's alleged statement that Spain "was dozing off and he wanted to make him stay awake," Kubala concluded that the grievant caused Spain's chair to drop. As discussed herein, Kubala's basis for concluding that the grievant caused Spain's chair to drop to a lower level is insufficient to support a finding that the grievant engaged in such horseplay in contradiction of the clear language contained in the Trumbull County Engineer's Employee Work Rules, Policies & Procedures Manual.

Spain testified that he did not observe the grievant touch his chair, and he indicated that the grievant did not say a word to him immediately after his chair dropped to a lower level. According to Spain, the grievant just smiled at him. Spain also stated that the grievant never admitted to him that he manipulated his chair in some manner so that it would suddenly drop.

The arbitrator also notes that in addition to his testimony, a written statement submitted by the Union containing Spain's answers to various questions regarding the incident contradicts the testimony of Kubala that Spain informed him the grievant caused his chair to drop. The aforementioned statement provides, in part, as follows:

> Ques: Jimmy did you report it to anybody that Lee Stauffer made your chair fall down.
> Spain: No.
>
> (Joint Ex. 6).

Spain confirmed the substance of his written statement at the hearing. Accordingly, the arbitrator determines that the testimony of Spain does not support the Employer's assertion that the grievant engaged in some act that caused Spain's chair to suddenly drop to a lower level. Moreover, the simple fact that Spain was startled by his chair dropping and that he yelled and/or threw his hands up in the air does not lend support for a finding that the grievant caused the chair to drop.

As indicated above, the grievant denies that he caused Spain's chair to drop. Additionally, the grievant acknowledged that in response to the safety trainer's question regarding what had just happened he replied, "I guess that will keep him awake." The grievant's testimony regarding his response to the safety trainer's question is in conflict with Kubala's version of events regarding this matter. The arbitrator notes that no other witnesses at the hearing corroborated Kubala's testimony regarding the precise statement uttered by the grievant in response to the question posed by the trainer immediately following the dropping of Spain's

chair. The arbitrator determines that the Employer presented insufficient evidence that the grievant made any statements constituting an admission that he was the individual who caused Spain's chair to drop.

The record establishes that in addition to manager Kubala, Spain and the grievant, there were *eight other employees* present at the time of the incident seated around the conference table. Additionally, two non-employee trainers were also present in the conference room during the period in question. However, the Employer failed to either question or obtain any statements from these individuals during the course of its investigation. The arbitrator notes that several of the employees present during the incident testified at the hearing and each indicated that they did not observe the grievant engage in any act that resulted in Spain's chair suddenly dropping to a lower level. The evidence also reveals that the Employer did not inspect Spain's chair during the course of its investigation in order to rule out any mechanical defects or other cause for the sudden drop. Based upon the evidence of record, the arbitrator determines that the Employer failed to conduct a complete and thorough investigation in this matter prior to assessing discipline. Additionally, there is also some evidence that the Employer failed to investigate another "chair dropping" incident that occurred during the same safety training, session thereby subjecting the grievant to potentially disparate treatment.

The grievant may very well have taken some action to cause Spain's chair to drop to a lower level as alleged by the Employer. However, it is equally plausible that Spain's chair may have dropped for some other reason, such as a mechanical failure or a bump of the lever by Spain himself as he moved his chair to position it for viewing the safety video. The fact remains that

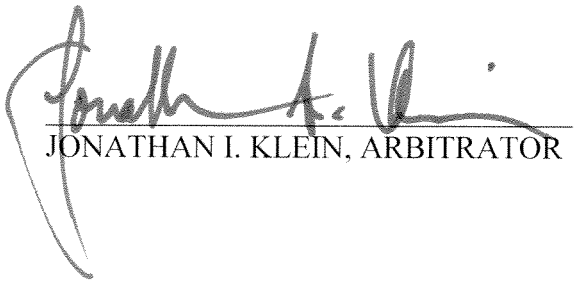
no eyewitnesses to the incident testified that the grievant caused the chair to drop. It would simply be speculation on the part of the arbitrator to conclude that the grievant caused the chair to drop based upon the evidentiary record presented in this case. The arbitrator notes that Herb Laukhart, Director of Finance and Personnel, made the following statement upon the conclusion of the pre-disciplinary hearing:

> Ok, you guys have anything else? Alright, I'd just like to wrap it up. Based on what I've heard the last two days, ***all I can say for sure is Jim Spain's chair went down, the class was interrupted, Lee's statement is that he did not cause the chair to fall down, doesn't appear that there's any proof otherwise. No eye witnesses to verify that so we don't really know*** and I'll look over the evidence and make a recommendation to Randy based on what I heard the last two days and we'll give you a written response . . .
>
> (Joint Ex. 4, at 122)(emphasis supplied).

It is clear that the Employer produced insufficient evidence to support its position that the grievant caused Spain's chair to drop. The above statement by Laukhart crystalizes the arbitrator's determination regarding the Employer's lack of sufficient evidence that the grievant engaged in misconduct as charged. The fact remains that nobody knows the cause of Spain's chair dropping as it did on May 23, 2012. Accordingly, the arbitrator concludes that the Employer did not have just cause to discipline the grievant, and the grievance shall be sustained as set forth in the Award.

AWARD

The grievance is sustained as follows. The grievant shall receive full back pay and restoration of all other benefits which would have otherwise accrued to him during the four-day suspension. The four-day suspension shall be removed from the grievant's personnel record.



JONATHAN I. KLEIN, ARBITRATOR

Dated: August 2, 2013