LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF ARBITRATION BETWEEN

BOYERTOWN EA/PSEA/NEA	**:**	
	:	**Grievance:**
and	**:**	**(Robin Glembocki Suspension)**
	:	
BOYERTOWN SCHOOL DISTRICT	**:**	

GRIEVANCE:	The grievance protests the suspension of Robin Glembocki as being without just cause.
HEARING:	August 20, 2020 Video Hearing (Zoom Platform)
ARBITRATOR:	John M. Skonier, Esq.

APPEARANCES

FOR THE ASSOCIATION:	**FOR THE DISTRICT:**
Matthew R. Cravitz, Esquire	Bonnie A. Young, Esquire

Procedural History

The undersigned was notified by letter of his selection by the Boyertown Education Association, PSEA/NEA (Association) and the Boyertown School District (District or Employer) to hear and decide a matter then in dispute. Pursuant to due notice, an arbitration hearing was conducted virtually using the Zoom Video Platform on August 20, 2020, at which time both parties were afforded a full opportunity to present testimony, examine and cross-examine witnesses, and introduce documentary evidence in support of their respective positions. Following the receipt of the transcribed Notes of Testimony[1], the parties filed post-hearing briefs and the matter is now ready for final disposition.

Background Facts

In September 2019, Ms. Robin Glembocki (hereinafter the Grievant) received a 15-day suspension (September 9, 2019 through September 27, 2019) for allegedly making culturally and racially insensitive comments to a student in her class.

Article XVII, Just Cause, of the parties' collective bargaining agreement reads, in pertinent part, as follows:

> No Employee in the Bargaining Unit shall be discharged or suspended without pay for disciplinary reasons in excess of twelve (12) working days without just cause.

(Exhibit A)

[1] References to the transcribed Notes of Testimony will be by "NT" followed by the relevant page number(s).

On September 18, 2019, the Association filed the instant grievance (No. 2019-2) alleging the following: "The Grievant was suspended for 15 days without pay based on accusations that she made racially insensitive comments to a student, accusations that Grievant categorically denies." (Exhibit C)

On October 30, 2019, after hearing the Grievant's side of the story regarding the incident in question and reviewing information from witnesses regarding the incident, then Superintendent Dana Bedden sent a letter to the Association President Chad Roth which reads, in pertinent part, as follows:

> Based on the information I have reviewed, witnesses have substantiated the complainant's allegations against Ms. Glembocki. However, I am offering to return 5 days of pay to Ms. Glembocki with the expectation she also completes the cultural awareness/sensitivity training and performance improvement plan as a final resolution to this grievance matter. Please let me know of Ms. Glembocki's decision to my offer at your earliest convenience.

(Exhibit D-8)

By email dated January 3, 2020, District Labor Counsel Jeffrey Sultanik sent a memorandum to in-house PSEA Counsel Jesika Steuerwalt and PSEA UniServ Representative John McKiernan which reads, in pertinent part, as follows:

> I am writing to you in this office's capacity as Solicitor for the Boyertown Area School District. This is to advise you that the District, consistent with discussions that have already taken place between the District Administration and Chad Roth, President of the Boyertown Area Education Association, is unilaterally reducing the fifteen (15) day suspension in this matter to a ten (10) day suspension. Ms. Glembocki will be given a check in the amount of the five (5) days of suspension so that the net extent of the suspension would be for ten (10) days versus fifteen (15) days. This was the intent of the District Administration and the District all along the way, but it was never processed.

(Exhibit D-10)

The matter was processed to the instant arbitration for resolution. The parties agreed to bifurcate the grievance so that the threshold question of procedural arbitrability could be resolved before, if necessary, any argument on the merits might be considered. The parties agreed that the issue in dispute is "whether the just cause provision of Article XVII of the Collective Bargaining Agreement between the District and the Association applies to a disciplinary suspension that does not exceed 12 days, and, if so, what shall be the remedy?" (NT - 18)

Position of the Association

The Association argues that the District has interpreted the relevant language of the collective bargaining agreement in a manner that impermissibly denies the Grievant due process as her suspension is less than twelve days in duration. It points out that Pennsylvania labor law encourages the use of arbitration and that the Courts have recognized a presumption of arbitrability. Any uncertainty should be resolved in favor or arbitration. It notes that Courts have held that "[t]he best evidence that the parties intended not to arbitrate concerning a class or classes of disputes or grievances is an express provision in the collective bargaining agreement excluding certain questions from the arbitration process." *East Pennsboro Area Sch. Dist. v. PLRB*, 467 A.2d 1356, 1358 (Pa. Cmwlth. 1982). See also, *Hanover Sch. District v. Hanover Education Ass'n*, 814 A.2d 292 (Pa. Cmwlth 2003). (Association's Brief, p. 6)

The Association argues that the fact that there is no definition of just cause in the contract does not mean that just cause is inapplicable in the instant matter. An arbitrator must use his/her judgement and the entirety of the contract to discern what the parties meant by the term "just cause." It argues that the general standards for just cause

must be applied to all disciplinary matters and not be limited to only those suspensions that exceed 12 days duration.

The Association points out that, as testified to by UniServ Representative McKiernan, the interpretation of Article XVII, Just Cause, has never been tested because the parties have always been able to resolve disciplinary issues without a case moving forward to arbitration. Therefore, without similar instances of disciplinary suspension there is no past practice of not arbitrating similar cases to support the District's position.

If the District's interpretation of Article XVII is accepted, the Association is left at the mercy of the District for those disciplinary suspensions of less than 12 days. The District is improperly denying the Grievant a meaningful mechanism to contest an adverse personnel action that results in a suspension of less than 12 days. It further notes that the District unilaterally reduced the initial 15 day suspension to a 10 day suspension.

The Association recognizes that the language of Article XVII, Just Cause, is unique. As Mr. Sultanik testified, in his long history of negotiating school district contracts he has never seen such language in a just cause provision. Mr. McKiernan maintains that the language is not meant to deprive bargaining unit members of their ability to arbitrate employment actions and the concept of implied just cause should apply to all cases including the instant case. As the Grievant has denied any wrongdoing in the instant matter, the Association maintains that the Grievant should not be denied the use of the grievance process and the requirements of just cause. The Association asks that the just cause provision be found applicable to the instant matter.

Position of the District

The District argues that the relevant language of Article XVII, Just Cause, expressly excludes the instant matter from the contractual grievance process. In this circumstance, there is no presumption of arbitrability of this grievance.

While the Pennsylvania Public Employe Relations Act (PERA) provides that "[a]rbitration of disputes or grievances arising out of the interpretations of the provisions of a collective bargaining agreement is mandatory" 43 P.S. §1101.903, only those provisions arising out of the parties' contractual language are subject to arbitration. An arbitrator has no jurisdiction to proceed if the parties' language precludes arbitration of the issue before him/her.

The District points out that the relevant language at issue is clear and unambiguous. It has been a part of the parties' collective bargaining agreement for decades. Disputes arising from a disciplinary suspension of 12 days (previously 30 days in prior contracts) or less are expressly excluded from the application of the just cause provision and, therefore, are not subject to the contractual arbitration process established by the parties.

The District points out that the Pennsylvania Commonwealth Court in *East Pennsboro Area School District v. Pennsylvania Labor Relations Bd.*, 467 A.2d 1356 (Pa. Cmwlth. 1983) held in pertinent part, as follows:

> The best evidence that the parties intended not to arbitrate concerning a class or classes of disputes or grievances is an express provision in the collective bargaining agreement excluding certain questions from the arbitration process.

(*Id.* at 1358.)

The District points out that the Court recognized that the parties may contract to not arbitrate certain issues. In the instant matter, the parties expressly contracted not to arbitrate disciplinary suspensions of 12 days or less. While PERA speaks to a presumption of arbitrability, it recognizes that a provision must exist which arguably supports arbitration of the relevant issue. In this matter, the District is simply asking the arbitrator to enforce the intent of the parties as set forth in the relevant language at issue.

The District notes that the essence of the Association's argument is that it's simply not fair that a grievance be foreclosed from the requirements of just cause. The District argues that the Association seeks to gain that for which it did not bargain. Ultimately, the parties, in negotiating the entirety of their collective bargaining agreement, agreed on the specific language of Article XVII, Just Cause. As such, the arbitrator has no ability to alter the parties' "bargained for language".

While the language at issue had contained a 30 day limitation since 1994, in the 2019-2023 contract negotiations, the parties negotiated the 30 days down to 12 days, as part of the current collective bargaining agreement. The evidence demonstrates that the language at issue was fairly bargained by the parties, as demonstrated by the communications by Chief Negotiator McKiernan and Chief Negotiator Sultanik. The clear and unambiguous intent of the language was to determine the application of the just cause provision to disciplinary suspensions. The result is the language of Article XVII, Just Cause. The language was agreed to as part of an arm's-length bargain, and should be acknowledged as such by the arbitrator. As such, the District asks that the just cause provision be found not to be applicable to the matter at issue.

Discussion and Opinion

As stated above, the parties agreed that the only issue before the undersigned is "whether the just cause provision of Article XVII of the Collective Bargaining Agreement between the District and the Association applies to a disciplinary suspension that does not exceed 12 days".

In preparation for the instant arbitration, the parties agreed to 14 Stipulations, which read, in pertinent part, as follows:

1. Boyertown Area School District, (herein 'District') and the Boyertown Area Education Association, (herein 'Association') were parties to a Collective Bargaining Agreement for the school year 2018-2019.

2. The District and Association negotiated a successor Collective Bargaining Agreement for the school years 2019-20 through 2022-2023. A true and correct copy of the Collective Bargaining Agreement between the District and the Association is attached hereto, made a part hereof, and marked 'Exhibit B. '

3. In September 2019, Robin Glembocki (herein 'Glembocki'), a Member of the Association was suspended for 15 days, (September 9, 2019 through September 27, 2019), as a result of allegedly making culturally and racially insensitive comments Glembocki to a student in her class.

4. On September 18, 2019, the Association filed a Grievance Report Form, Number 2019-02 on behalf of Glembocki stating: 'Grievant was suspended for 15 days without pay based on accusations that she made racially insensitive comments to a student, accusations that Grievant categorically denies. Since this grievance is the result of a suspension decision made by Central Administration, both parties agreed by phone to start this grievance process at Step II, submitting the grievance directly to Dr. Kim, [the then HR Director]. A true and correct copy of the Grievance Report Form Number 2019-02 is attached hereto, made a part hereof and marked Exhibit 'C.'

5. The matter proceeded through the grievance process and the Association appealed the grievance to the Bureau of Mediation for arbitration.

6. On January 3rd, 2020, counsel for the District advised counsel for the Association that consistent with the discussions between the District Administration and the Association President, the District unilaterally reduced the 15-day suspension to a ten (10) day suspension.

7. Article XVII, Just Cause of the 2018-2019 Collective Bargaining Agreement between District and Association provides, No employee in the bargaining unit shall be discharged or suspended without pay for disciplinary reasons in excess of thirty (30) working days without just cause.

8. Article XVII, Just Cause of the 2019-2023 Collective Bargaining Agreement between District and Association provides, No employee in the bargaining unit shall be discharged or suspended without pay for disciplinary reasons in excess of twelve (12) working days without just cause.

9. The Association challenges the 10-day suspension under the just cause standard.

10. The District asserts that, pursuant to Article XVII, it reserved the right to exercise discretion where a disciplinary suspension does not exceed twelve (12) days and may discipline employees without triggering the just cause provision.

11. As a threshold matter, the parties seek a ruling on whether the just cause standard established in Article XVII, will apply in disciplinary cases where the suspension does not exceed 12 days.

12. The parties agree to bifurcate the proceeding into two parts: A. The first hearing will address whether the just cause provision in Article XVII, applies to a disciplinary suspension that does not exceed 12 days; and B. The second hearing will only occur if the District does not prevail in the first hearing and will address whether there was just cause for the 10-day suspension based on "accusations that [Grievant] made racially insensitive comments to a student.

13. The District agrees to pay all costs for the arbitrator for the first day of hearing, which is estimated to be $2,300.00.

14. The parties agree to submit briefs in lieu of closing argument. The briefing schedule will be established by the parties and the arbitrator at the close of the first day of hearing.

Mr. Sultanik has been the labor counsel and employment counsel for the District from the late 1970's to the present. He testified that during that time period, he has been involved, either at the bargaining table or behind the scenes, in the negotiations of every collective bargaining agreement for the District. (NT- 23-24) He explained that he was familiar with the initial language which precluded the use of just cause for disciplinary suspension under 30 days in duration. He testified that the School Board wanted to limit the right of the Association to grieve disciplinary suspensions. He explained as follows:

> So it was the clear intent as the result of that and it was expressed at the bargaining table when this language was introduced. So there was no mystery as to why it was being proposed, that the intention was that this language would preclude the Association from filing grievances for suspensions of less than 30 days in duration.

(NT-32-33)

He further explained that, if a suspension was 31 days or more, it could be arbitrated and that this fact was clearly discussed with every UniServ Representative of the bargaining unit from 1994 up to the negotiation of the current collective bargaining agreement. During the most recent contract negotiations for the 2019-2023 collective bargaining agreement in which the threshold number was ultimately reduced to its present 12 days, he had numerous discussions with UniServ Representative McKiernan regarding the history and applicability of this specific language to grievances of this nature. (NT-33-34)

Mr. Sultanik acknowledged that the specific provision at issue, with its 30-day, then 12-day time limitation, is unique among the thousands of school district contracts he has negotiated. However, the District intentionally bargained it into the contract in 1994 and it has remained unchanged for decades until the current contract negotiations. Mr. Sultanik acknowledged that Mr. McKiernan was the first UniServ Representative in the history of the District who had been able to negotiate a change to this provision since its inception. During the most recent contract negotiations, the parties went through offers and counter offers on this provision and subsequently agreed on the current language which contains the 12-day limitation.

Mr. Sultanik testified that during the negotiations at the bargaining table, at one point the Association countered with an offer that a suspension of 5 days or less would not be subject to the grievance or labor arbitration process, and that was based upon

discussions at the table. (NT-44) He testified that the change from 30 to 12 working days was duly bargained across the table between the parties. (NT-45)

Mr. McKiernan has been involved with the bargaining unit since 2008. During that time, he did not recall more than 10 suspensions until recent years. He explained that recently, the District HR has issued lengthy suspensions which made negotiating a change in the Just Cause language more important to the Association. (NT-64-65) Mr. McKiernan acknowledged that Mr. Sultanik's explanation of how the Just Cause provision was negotiated in the current contract was accurate. (Id.) Mr. McKiernan testified in pertinent part, as follows:

> And, yes, we tried to get it eliminated and everything the District presented about their position in all of our times, and discussions Attorney Sultanik and I had about trying to eliminate this language, are correct. But I still don't feel that it leaves someone without a remedy for inappropriately being suspended for doing absolutely nothing and that's what, you know, our position is in this case, that it was not proper suspension.

(NT-66-67)

When asked on cross-examination, "What does the 12 days mean if it doesn't mean what we're saying it does?", Mr. McKiernan responded, "The 12 days means that if someone -- I understand the difficulty with it, but I don't know how to answer because we feel -- we would like it eliminated and have everything treated fairly like it is in other districts. We accepted making it 12 because it's better than 30, it gives our Members some protection, but we still don't feel like it gives the District the ability to discipline people up to 12 days for no reason." (NT-83-84)

An arbitrator is often referred to as a "creature of the contract" because it is not his or her prerogative to simply dispense their own form of labor justice. An arbitrator is to determine what was the intent of the parties in an area of dispute with regard to their

contract. In the instant matter, this determination is not difficult. The parties, both experienced labor negotiators, have, through bargaining, modified a somewhat unique constraint on when a disciplinary suspension can be adjudicated in arbitration. Only when the suspension is 12 days or longer have the parties required a showing of just cause. Further, this somewhat unique provision is clearly not new to the parties. It has existed in their contract since the mid-1990's. Originally, the relevant language required that just cause only need be shown for disciplinary suspensions that were over 30 days. Just recently, in their current collective bargaining agreement, the parties agreed to reduce this threshold of 30 days down to 12 days, where it presently stands. Not only is the provision "permissible", it is a bargained for and agreed upon provision.

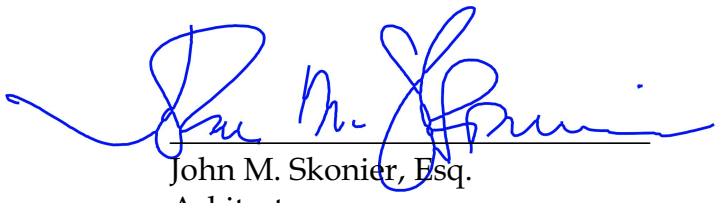
While it is true that Pennsylvania law supports a presumption of arbitrability. As recognized by the Association, this is when doubt exists as to whether the parties intended the matter to be subject to a just cause standard. The instant matter is not a situation where the contract is silent. Here, there is no doubt, the parties have decades of experience with this "bargained for language". The record reveals that it can be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." This was not new language to the parties' contract, this is long-standing language that the parties have lived with and only recently modified.

The "Daugherty Seven Tests of Just Cause" formula has no application where the parties explicitly determined that in these circumstances, where the disciplinary suspension is 12 days or less, just cause does not enter the equation. Further, it is not necessary to look to past practice in the face of clear and unambiguous language.

If clear and unambiguous language does not mean what its says, then collective bargaining agreements would be meaningless. Clear, unambiguous language that has been bargained for and that has existed in the parties' contract for decades must be followed. If one wishes to change the clear meaning of the language, this must be done through negotiation at the bargaining table. As every labor practitioner knows, a collective bargaining agreement is a product of "give and take" in which the parties negotiate until they have come to a conclusion - a collective bargaining agreement that they can live by for the term of that contract. In this case, the parties apparently could live with their "Just Cause" provision for approximately 30 years. In this matter, there was no unilateral attempt to remove the protection of just cause under these limited circumstances. This was a long standing, bargained contractual provision.

Award

On the basis of the record as a whole and for the reasons discussed, it is found that the just cause provision of Article XVII does not apply to a disciplinary suspension that does not exceed 12 days.



John M. Skonier, Esq.
Arbitrator

June 16, 2021