REVIEW COMMITTEE

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REVIEW COMMITTEE DECISION

☑ DECISION
☐ LETTER DECISION
☐ PRE-REVIEW REFERRAL

East Bay Grievance No. 1-2142-84-97
Review Committee File No. 1609-85-2

Subject of the Grievance

This case concerns the discharge of a Customer Services Utility Clerk effective July 18, 1984, for failure to report for work.

Facts of the Case

The grievant was employed December 15, 1980, as a Utility Clerk in the Fremont Customer Services office. On October 15, 1982, she became disabled due to an allergic reaction to cigarette smoke and was placed on the Compensation Payroll. This disability was brought to Company's attention in reports from Dr. Jerome Stewart, the grievant's personal physician. The initial report was supplied to Company by the grievant. Smoking is allowed in the work areas of the Fremont office.

During the grievant's absence, repairs were made to the air conditioning system, and tests were conducted by the mechanical contractor to ensure that the ventilation system was in conformance with the uniform building code. Air sample tests were also conducted by a Safety, Health and Claims Department Industrial Hygienist. The results of both tests were satisfactory. On November 5, 1982, Company wrote to Dr. Stewart advising him of the modifications to the ventilation system and asked if the grievant could be released to return to work. On November 9, 1982, grievant sent a note to Dr. Stewart, stating that the testing performed at the office was inadequate and was manipulated to achieve the desired results. The note also stated that "we feel the only way we can return (to work) is with smoking removed from the office". However, two other employees who were off for the same reason did return to work on November 16, 1982 and continued to work thereafter.

During the time grievant was absent from work, she was being treated by Dr. Stewart and was also being seen by various doctors in the Otolaryngology and Allergy Departments at Kaiser. Her absence from November 19, 1982 to December 23, 1982, was treated as a personal sick leave of absence as she underwent surgery to correct a deviated septum during this time.

Although the record provided to the Review Committee does not contain a reply from Dr. Stewart to Company's letter of November 5, 1982, he did issue a prescription for a desk top air filter dated December 2, 1982. By letter dated December 15, 1982 the Kaiser physician from the Allergy Department also recommended that if smoking was allowed in the office where the grievant works, an air purifier be used. This opinion was concurred with by another physician from the Otolaryngology Department.

On January 25, 1983, grievant was evaluated by Dr. Hallett Lewis. In his report dated February 9, 1983, he stated, in part, "I would advise that she now be given a trial return to work to see if the changes enumerated above in her working conditions and in her own personal health situation are such that she is now able to better tolerate the work environment at this office since these changes have taken place. In addition, I believe it would be advisable to purchase the air filter suggested by Dr. Stewart for her desk to see if this has any beneficial effect upon her situation."

The record provided also indicates grievant filed an Application for Adjudication of Claim with the Worker's Compensation Appeals Board on February 1, 1983. On February 16, 1983, Company received a letter from Attorney A. Hawes, the grievant's representative in the worker's compensation claim, which stated, in part, "Let me also take this opportunity to put on record the applicant's request that she be afforded a smoke-free environment at her customary work place."

In a letter dated February 23, 1983, Dr. Monson of the Kaiser Otolaryngology Department stated, in part, "I first saw (grievant) on December 13, 1982. She was seen again December 23, 1982 with an allergic-like reaction to tobacco smoke while at work. Each time she was seen in the clinic here, she was quite emotional about the problem and adamant on having something done about the smoke in her environment while at work." The Committee noted that the grievant was not actually at work during the time period of this report, having been on the Compensation Payroll or on a medical leave of absence from October 15, 1982 to February 14, 1983.

On February 11, 1983, grievant was contacted by phone and instructed to return to work on February 14, 1983. The grievant did not return to work. By letter dated February 24, 1983, grievant was notified that if she did not return to work by March 4, 1983, she would be discharged. Grievant was removed from the Compensation Payroll effective February 11, 1983. The grievant actually returned to work on March 1, 1983.

When the grievant returned to work, she was assigned to work at the front counter as a cash receiver. This area is separated from the rest of the office by a solid wall. At the time, there were open doorways on either side of the office behind the counter leading to the rest of the work area. "No smoking" signs were posted in the lobby area; however, some customers ignored the signs. Employees could ask customers to extinguish their cigarettes but were not to insist. The grievant was also provided a portable ionization unit for use at her work station. In addition, to further limit the grievant's exposure to cigarette smoke, special arrangements were made to allow her to balance her cash drawer and process the drop box payments in the Marketing Representative's room. She was also relieved of performing routine work in the main office area, where smoking continued to be allowed. Company claimed that some of these accommodations were disruptive to other employees and customers.

On March 28, 1983, grievant's desk location was moved from one end of the customer counter area to the other end. From the record, it appears this relocation resulted from the complaint of two other non-smoking employees who complained that the air steam from the ionization machine was disturbing them because it was directed at them. On April 1, 1983, grievant was given a letter containing instructions on the recommended proper use of the ionization machine.

She was also informed that thereafter she would be required to do balancing of the cash drawer and the processing of the drop box in the main room in the back of the office rather than in the Marketing Representative room. The stated reason for this change was because of the disruption to Marketing Representatives and the security risks that would result from counting cash in view of customers in the front counter area. Grievant was advised to use the ionization machine when working in the main office area.

On April 4, 1983, the grievant suffered a reaction when another employee began smoking in the rest room. A report from Dr. Monson of the Kaiser Otolarynology Department reported "severe reaction to tobacco smoke, brought here by ambulance, found passed out in rest room." Grievant was again placed on the Compensation Payroll and remained off the active payroll until her termination on July 18, 1984.

Following grievant's return to the Compensation Payroll, a second mechanical contractor was called in to test and evaluate the efficiency of the air conditioning system in the Fremont office. As a result of this testing, the Company decided to initiate further modification in an effort to maximize the operating efficiency of the system. According to Company, these modifications were substantial and required a capital expenditure of approximately $15,000. In addition, the Manager's office was relocated upstairs and another lunch/break room was established so that there was one for smokers and one for non-smokers.

Throughout, the grievant and her attorney maintained that the Company had an obligation to prohibit smoking in the work area and/or provide separate smoking and non-smoking areas with physical barriers between. Following are excerpts from correspondence sent to the Company from the attorney:

> Letter dated February 10, 1983...
>
> "Let me also take this opportunity to put on record the applicant's request that she be afforded a smoke-free environment at her customary work place.
>
> "Since there is no evident business necessity for PGandE to allow unrestricted smoking in (grievant's) work area, we are formally requesting that your client adopt a 'no smoking' policy for the work area and so advise of this action in writing."
>
> Letter dated April 4, 1983...
>
> "The applicant suffered acute symptomatology referable to her exposure to cigarette smoke at PGandE's Fremont facility today... I further reiterate my demand on behalf of (grievant) that PGandE enforce the policy it claims exists at this facility--no smoking."
>
> Letter dated May 12, 1983...
>
> "Pursuant to discussions held Tuesday, May 10, I have spoken with (grievant) re: the possibility that PGandE would offer her employment at the computer center in San Francisco, where

evidently smoking is not permitted. (Grievant) advised that when she accepted employment with PGandE, she specified that she wanted to be placed at the facility in Fremont, her home town, and that remains her position and her desire. Accordingly, we are again presenting you with the demand that PGandE accommodate (grievant) and the many others with whom she works who find cigarette smoke bothersome and irritating. We are specifically demanding that PGandE provide a smoke-free environment at (grievant's) current work area: to wit, that smoking be disallowed on the premises except in the employee coffee break room."

Following are excerpts from various doctors' reports concerning the grievant's condition:

Dr. C. A. Bradley, February 21, 1984...

"I consider it vital that she not be exposed to any cigarette smoke during the workday. This means, she is not to venture into any work area so contaminated, even briefly. A low partitioned space is equivalent to no partition at all, and is not acceptable. A complete wall separation is fine.

"A trial of returning to work in a work atmosphere uncontaminated by cigarette smoke is definitely in order. I think under those circumstance she is fit, ready and able to return to duty."

Dr. C. A. Bradley, June 19, 1984...

"As indicated in my report to you of 21 February 84, (grievant) remains ready, willing and able to return to work, provided that she not be exposed to any cigarette smoke during the workday."

Dr. H. A. Lewis, June 20, 1984...

"I recommend that she be placed at work in areas which can be made as smoke free as possible from the standpoint of exposure to cigarette smoking customers and cigarette smoking fellow employees. I believe that some type of accommodation is going to have to be reached which would enable her to work, eat her lunch and go to be lavatory in designated non-smoking areas in order to resolve the problem of her continuing to work in her present job classification at her work location."

Dr. C. A. Bradley, October 25, 1984...

"Regarding the July 3, 1984 letter to you from PGandE regarding the offer of a Utility Clerk position at the Hayward office: You did not accept that position upon my explicit instructions. You are NOT to be exposed to cigarette smoke. You would have been exposed to smoke in the

lunch and break rooms. The adequacy of the ventilation is an issue touching only on toxic overload. Your issue is allergic-like hypersensitivity. Their request is similar to telling a penicillin-allergic patient they'll only have to be exposed to 'just a little'."

By letter dated July 3, 1984, grievant was told "In an effort to accommodate your allergy to cigarette smoke, we are offering you a Utility Clerk position at our Energy Management office at 3551 Arden Road in Hayward. This office has a no smoking policy in the office area and restrooms. Smoking is only permitted in the lunch room which is equipped with exhaust fans to prevent smoke from entering the office area and restrooms. Your failure to accept this position will be considered by the Company as your resignation from PGandE."

On July 9, 1984, the above letter was rescinded as a result of discussions between the Personnel Department and the Union's Business Representative. On July 12, 1984, a poll was taken of the employees who work in the Fremont office to determine whether or not the employees in the Fremont office wanted to establish a "no smoking policy" similar to that which then existed in the Hayward Energy Management office. By simple majority, this proposal was turned down.

On July 16, 1984, grievant was notified of the results of the poll in the Fremont office and was again offered placement as a Utility Clerk in the Hayward office. She was informed that her failure to report by July 18, 1984 would be viewed as her resignation from PGandE. This letter again stated that the Hayward office had a no smoking policy in the office area and restrooms; that smoking was only permitted in the lunch room which was equipped with exhaust fans to prevent smoke from entering the office area and restrooms.

Grievant did not report to the Hayward office. By letter dated July 24, 1984, she was notified that "...your employment with PGandE has been terminated effective July 18, 1984."

Discussion

The Company's position, with respect to the smoking issue, was that reasonable accommodations were made to alleviate the grievant's problems but that Company was unwilling to ban smoking altogether in deference to the rights and desires of other employees. Company noted that in many offices in the city of San Francisco, smoking is prohibited. This prohibition, however, resulted from an ordinance adopted by the electorate rather than Company policy. Company also noted that a similar ordinance has recently been adopted in the city of San Jose. Company stated that the grievant had contacted members of the City Council in Fremont, urging adoption of a similar ordinance, but that none was adopted. Company also noted that the no-smoking policy adopted at the Hayward office was an employee-adopted voluntary policy, not one dictated by management. Company stated that if Fremont had an ordinance similar to those in effect in San Francisco and San Jose, then the Company would have a legal obligation to prohibit smoking in the work place based on the grievant's complaints.

Company also noted that the Worker's Compensation Appeals Board Rehabilitation Bureau ruled that the grievant is precluded or likely to be precluded from returning to the usual and customary occupation at the time of

injury; that the grievant is qualified injured worker; that she is eligible to receive rehabilitation evaluation to ascertain if she can reasonable be expected to return to suitable gainful employment through the provisions of vocational rehabilitation services and, if so, for development of a plan. On November 8, 1984, grievant's attorney filed an appeal to the above WCAB order and that appeal is still pending. However, during the interim, grievant has refused to participate in any rehabilitation program.

From the outset, Union has attempted to find a solution to the issues in this case that would accommodate the grievant's apparent need for employment in a smoke-free environment and which would not infringe on or alter the working condition of other employees, all of whom the Union is required by law to properly represent. Union noted that in November, 1982, the Company supervisor at the Fremont office issued a memorandum that there would be no smoking in the building and that employees could step outside to smoke only on their breaks or during lunch hour. No time limit on the duration of this policy was stated. The Business Representative was contacted by employees who smoked who were highly upset with the policy. Following discussion, it was determined that the ban was temporary, during which time the mechanical contractor was to install a damper in the air conditioning system, at which time the ban was lifted.

Union was next involved in early July, 1984, when employees in the Fremont office was polled relative to the possible establishment of a no smoking policy in the Fremont office. Then, on July 31, 1984, Union filed a grievance protesting the discharge of the grievant.

Following the investigation of the grievance, Union opined that Company could not utilize the provisions of Section 18.6 of the Clerical Agreement to relocate the grievant from her regular headquarters in Fremont to the Hayward headquarters. However, Union did agree that, because the grievant had been certified as a qualified injured worker entitled to rehabilitation, it was reasonable for Company to search for a position that was within grievant's restrictions. Union pointed out that this issue is within the purview of the Worker's Compensation Appeals Board rather than within the Agreement.

Union also conceded that because the grievant had been off work due to a disability for a cumulative total of more than six months, she was considered to be on Long Term Disability, even though all remuneration received came via the Compensation Payroll in the form of temporary disability payments and supplemental benefits. At the conclusion of eligibility for temporary disability payments, grievant could have applied for and possibly received benefits under the Long Term Disability plan. In the event such had occurred, Company would have had the right to offer her employment within the limits of her reduced work capacity to a job and at a headquarters within a commutable distance (30 miles/45 minutes) of her residence. Such placement, however, would have required a letter agreement between Company and Union. Had such occurred and the grievant declined the placement, Company would have terminated her LTD payments pursuant to the appropriate Section of the Benefit Agreement.

Union continued to argue that Company was obligated to offer the grievant an opportunity to return to her former position as a Utility Clerk at the Fremont Customer Services office rather than force her to relocate. Union did not demand that Company establish a no smoking policy for the Fremont office in order to accommodate the grievant's medically confirmed work restrictions

inasmuch as the majority of the employees at the headquarters objected to such a policy. Union opined that the unilateral establishment of such a policy would be viewed as a change in the conditions of employment and could not be implemented without benefit of bargaining.

Decision

The Company relied upon Section 18.6 of the Clerical Agreement for offering the Hayward Utility Clerk position to the grievant. The Review Committee agreed that this Section is inappropriate, but Section 19.14 of the Agreement would provide the basis for such an offer.

Notwithstanding Union's initial argument that Company was obligated to offer the grievant reemployment at the Fremont office, the record provided to the Review Committee makes it abundantly clear that such an offer would not be commensurate with her reduced capabilities or with her demand for a "smoke-free environment." In discussion, the Committee noted that the grievant and her physician rejected the Hayward office on the basis of smoking being permitted in the break/lunch room area, which is separate from the work and rest room areas. It should be noted that neither the grievant or Dr. Bradley ever visited the Hayward office. As is noted in the February 21, 1984 report from Dr. Bradley, "I consider it vital that she not be exposed to any cigarette smoke during the workday. This means, she is not to venture into any work area so contaminated, even briefly." While smoking was allowed in the lunch room, employees are also allowed to eat in the conference room, the library, at their desks, or on the lawn, as well as go out to restaurants. In light of this and other medical opinion cited above and elsewhere in the record, the Committee agreed that the grievant was precluded from returning to work at the Fremont headquarters and that Company would have been ignoring the existing medical opinion to have made such an offer.

On the basis of this record, the Review Committee is in agreement that the termination of the grievant was for just and sufficient cause. This case is closed without adjustment.

FOR COMPANY:

M. E. Bennett
F. C. Buchholz
R. C. Taylor
D. J. Bergman

By D J Bergman

Date 5-23-85

FOR UNION:

P. Nickeson
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By Roger Stalcup

Date 5/23/85