

In the Matter of the
Arbitration between

**STATE OF OHIO, UNIT 2
ASSOCIATION**

and

**THE STATE OF OHIO (CASINO
CONTROL COMMISSION)**

Grievance #CAC-2023-00374-02

Grievant: Dean Stuart

Arbitrator: Tobie Braverman

OPINION AND AWARD

APPEARANCES:

For the Employer:

Cullen Jackson, Labor Relations Advocate
Amanda Blackford, Director of Operations
& Problem Gambling Services
Gary Fossaceca, Gaming Agent
Miranda Helmick, Gaming Agent
Jacqueline Duthie, Shift Manager, Jack
Entertainment
Matthew T. Schuler, Executive Director
Mark Carpentiere, Gaming Agent Supervisor

For the Union:

Kimberly A. Rutowski, Counsel
Jeffrey D. Gray, Counsel
Dean Stuart, Grievant
Brandon Burch, Unit 2 Representative
George H. Huffman, II, Gaming Agent
Robert Workman, Gaming Agent
Tom Baracskai, Gaming Agent
Timothy Hassing, Sergeant Greater Cleveland
Transit Authority
Michael Cyrus, Cuyahoga County Sheriff
Deputy
Ryan Frankhauser, Sergeant, Greater
Cleveland Transit Authority
Michael Cyrus, Cuyahoga County Sheriff
Deputy

The State of Ohio Casino Control Commission (hereinafter referred to as "Employer") and the State of Ohio, Unit 2 Association (hereinafter referred to as "Union") have submitted the grievance of Dean Stuart (hereinafter referred to as "Grievant") to the Arbitrator for decision. Hearing was held at via Zoom on September 22 and October 2, 2023. The parties submitted post hearing briefs which were received by the Arbitrator on November 3, 2023. The parties stipulated that the grievance is properly before the Arbitrator for decision, and further stipulated that the issue for decision, is as follows:

Was the Grievant removed for just cause, and if not, what shall the remedy be?

FACTS

The Grievant has been employed by the Employer as Gaming Agent since July, 2013 at the Cleveland, Ohio Jack Casino ("Casino"). Prior to the incidents which resulted in the discipline in this case, the Grievant did not have any live disciplinary actions. Gaming Agents are plain clothes peace officers who are primarily responsible for monitoring the four licensed casinos in Ohio. They are the front line officers responsible to insure the integrity of gaming in Ohio. Their duties require that they monitor live security camera feed throughout the casino from the Gaming surveillance office as well as go on periodic walks through the Casino and its grounds to monitor activities. Although there is no set route, and the frequency and length of each agent's walks are different, these walks generally occur eight to ten times per shift and last approximately fifteen to twenty minutes. The Gaming Agents are responsible to enforce gaming laws and monitor potential cheating by both patrons and Casino employees. They are additionally responsible to seal slot machines and process voluntary exclusion requests. Their duties require them to be certified as peace officers and they have authority to conduct investigations and make arrests.

The Casino maintains its own security personnel who are primarily responsible for non-gaming criminal activity. They report any gaming issues or criminal activity to the Gaming Agents.

Additionally, Cleveland Police are hired for off duty security by the casino. The Grievant generally worked the day shift from 6:00 a.m. through 4:00 p.m. Because of the nature of the position of Gaming Agent, the Employer has ethics rules which control the conduct of Gaming Agents. These rules are reinforced through annual training. To the extent relevant here, the rules provide that "employees must refrain from any relationship, including friendship, with any individual within the regulated community, except for a professional relationship to carry out official Commission duties."

The events which ultimately resulted in the Grievant's termination began on October 17, 2022 when a fellow Gaming Agent, Miranda Helmick, reported to Gaming Agent Supervisor, Mark Carpentiere, that she had been advised by two Casino employees, Jacqueline Duthie and Lacey Boone, that the Grievant was frequenting the Casino security office where he sat and discussed his divorce. Additionally, Helmick reported that Duthie advised her that the Grievant had, without Duthie's request, walked her to her car while discussing personal matters. Helmick testified that although she was not told by these employees directly, she believed that the conversations made them feel uncomfortable. Duthie testified that because Agents rarely come to the Casino security office, she assumed that someone was in trouble when the Grievant came on the first occasion. She further testified that while the conversations in the office did not make her feel uncomfortable, she was uncomfortable when the Grievant walked her to her car.

As a result of this information, on October 20, 2022, Carpentiere spoke to the Grievant in a coaching session. According to Carpentiere, he advised the Grievant that he was having too much interaction with Casino employees, that he should not discuss personal matters with Casino employees, that he should stay out of the Casino security offices and he should not walk employees to their cars. The Grievant agreed that Carpentiere told him to avoid going to the Casino offices and to refrain from walking employees to their cars. He testified that Carpentiere did not tell him to refrain from conversation with all Casino employees, but only the regulated staff. An email from Carpentiere dated October 31, 2022 to Amanda Blackford, Director of Operations & Problem

Gambling Services, states that "Talked to Dean on 10/20/22 about socializing with employees; in office, walking to cars etc. Felt uncomfortable, unsafe. Told to stop unless legitimate business reason".

After the coaching session, Carpentiere determined to monitor the Grievant's actions by reviewing video feed for the following weekend and approximately one additional week. In reviewing that video, Carpentiere observed the Grievant sitting at bars in the casino for extended periods of time, both on his phone and conversing with bartenders. These events varied in length from less than five minutes to as long as forty-six minutes. On November 3, the Grievant is observed leaning in at the door to the Casino security office for an interaction that lasted just under one minute. According to the Grievant, he went to the office to introduce himself to a supervisor with whom he had not previously worked at let them know he was on duty despite having been told to stay away from the office.

In addition to these incidents, in reviewing the surveillance video, Carpentiere discovered that on October 23, 2022, the Grievant met a female at the elevators where they spoke for twenty-three minutes. He then walked with her to her car, where he remained in conversation for another fifty-seven minutes. According to the Grievant, the woman was a high school friend who met him at work in order to cheer him up after a bad day. He testified that he had the duty phone with him during the entire period and was available in the event of a need for service. The Grievant additionally testified that the time of the visit with his friend was within his permitted lunch and break times, and that he is frequently unable to take breaks due to the nature of the job. After returning to the casino, the Grievant completed some paper work and clocked out for the day.

The final incident which led to the Grievant's termination occurred on April 13, 2022. During the course of the investigation regarding the Grievant's conversations with Duthie, the Employer interviewed Helmick. During that interview, she raised an April incident wherein the Grievant had been unavailable to assist during an incident which culminated in the arrest of a patron by Cleveland Police. After investigating and reviewing available surveillance video, it was

determined that the Grievant was off site at the time the incident began. It is unclear how long the Grievant was off site, but the evidence demonstrated that Agents are permitted to leave the premises for paid lunches and breaks, but are still on call during those times. Because she was in the vicinity, Helmick and another Agent who had just returned to the facility after executing search warrants, got involved, primarily in a stand-by capacity. A third Agent, Brian O'Connell, who was the Grievant's partner for the shift, was also present, and testified that he did not recall calling the Grievant. There is no allegation that the Grievant was called and did not respond to a call for service. When the Grievant learned of the incident, he did report to the scene, but his involvement was not required.

It is undisputed that Gaming Agents are on call for the entirety of their ten hour shift. They are permitted to leave the premises for lunch and breaks, and it is common for them to do so. Because they remain on call, these breaks are paid, and they do not clock out for lunch and breaks. There was no evidence presented regarding previous enforcement of lunch and break times, and the rules appeared to be somewhat undefined.

The Grievant was placed on paid administrative leave on November 8, 2022. Thereafter an investigation commenced by Amanda Blackford, Director of Operations, and Catharine Abbott, Assistant General Counsel. A report of the investigation was completed and issued on December 1, 2022. A pre-disciplinary hearing was conducted on December 15, 2022. The Grievant was charged with violation of Code of Conduct Rule E-4a regarding fraternization; Rule A-4 regarding time and attendance policy and Rule N-4 regarding failure to follow the instructions of his supervisor and failure to effectuate essential job duties and functions. Subsequently, the Grievant's employment was terminated on February 1, 2023. The stated grounds for his removal in a letter from Executive Director, Matthew Schuler, were fraternization with casino employees, failing to accurately report hours worked, failing to follow coaching instructions and failure to perform essential duties. A timely grievance was filed on February 6, 2023. The grievance proceeded through the grievance procedure without resolution to arbitration.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 19 -DISCIPLINARY PROCEDURE

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause. ...

19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:

1. One or more written reprimand(s);
2. One or more fines in an amount of one (1) to five (5) days pay for any form of discipline ...
3. Suspension;
4. Leave reduction of one or more day(s);
5. Working suspension ...

However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant. ...

Ohio Casino Control Commission Conduct and Discipline Policy ...

1.0 Policy ...

C. Disciplinary Guidelines

1. Disciplinary actions generally should be imposed with the intent of giving the employee the opportunity to correct their behavior. If such correction does not occur, the level of discipline should become more severe. Certain offenses, by their nature, may warrant more severe disciplinary action, up to and including termination, irrespective of issuance of prior discipline. ...

Discipline Grid ... Level 4 variable infractions - Written to Termination

A-4 Violation of Commission of Time and Attendance Policy.

Violations of Commission policies or procedures related to attendance but not otherwise specified here. ...

E-4a Violation of Ethics Policy Violation of Ohio Ethics Laws ... or the Commission Code of Conduct.

N4 Neglect of Duty 1. The employee has a pre-existing duty to do or not do something, either actually or impliedly; and 2. The employee fell below the standard of conduct required by the position,. Examples include, but are not limited to: sleeping on duty; misuse of state property; leaving the work areas without permission; engaging in personal work while on duty or that conflicts with duties as a Commission employee; cowardice, etc.

Ohio Casino Control Commission Code of Conduct ...

9.0 Fraternalization with Regulated Community

Commission members and employees must refrain from any relationship, including friendship, with any individual within the regulated community, except for a professional relationship to carry out official Commission duties. They should contact Legal Division immediately if such a relationship develops. ...

11.0 Time and Attendance

Each Commission employee is required to accurately report and submit their actual hours worked, including start time, end time, and meal period. Employees who leave the office or their alternate workplace during their shift for personal reasons must report the time away on their timesheet. ...

Ohio Casino Control Commission Time and Attendance Policy ...

1.0 Employee Responsibilities ...

B. Each employee is required to accurately report and submit actual hours worked, to include starting and quitting times and meal periods, using the timesheets approved by the Division of Operations. Each employee must update the timesheet daily, unless the employee is on approved leave ...

14.0 Work Schedules ...

C. ... Work hours for gaming agents assigned to casinos will be set in accordance with the applicable bargaining-unit agreement. Casinos must have gaming agent coverage twenty-four hours daily.

1. Gaming Agent coverage means that there will be a minimum of two agents, who shall be available to respond to a call for service in a reasonable amount of time. Failure to respond to calls for service in a reasonable amount of time may result in discipline, up to and including termination. ...

POSITIONS OF THE PARTIES

Employer Position: The Employer contends that it has demonstrated that it had just cause to terminate the Grievant for his misconduct in this case. The evidence demonstrated that the Grievant was aware and fully trained on the work rules and standards of conduct. Despite this training he inappropriately frequented the Jack Casino security offices where he initiated conversation about his personal life. He additionally walked Duthie to her car without her request and further discussed his personal life. Despite being counseled that he should not engage in conversation with Casino staff and should stay away from the security office, the surveillance video clearly demonstrates he engaged in a significant amount of conversation with

bartenders. The length of time spent sitting at bars and conversing clearly indicates that these interactions were personal in nature. The Grievant additionally went back to the Casino security office despite his previous counseling. The evidence further demonstrated that the Grievant left the Casino premises on April 13, 2022 and was unavailable for a service call as a result. Finally, he engaged in personal conversation for an hour with a friend while on duty without recording this time on his timesheet. The Grievant's explanation that he had the duty phone with him and was taking a permissible break does not alter the fact that he was not working. The mere possession of the duty phone does not justify the long time spent away from his work duties. The Grievant chose to brazenly ignore the coaching of his supervisor, has neglected his duties and has indicated that he is neither a trustworthy nor correctable employee. The grievance should be denied in its entirety.

Union Position: The Union argues that the Employer has not demonstrated just cause for the discipline in this case. The Grievant was charged with inappropriate fraternization with Casino staff without any proof that his conversations with bartenders were not work related or were otherwise inappropriate. In fact, conversations with bartenders and other staff often lead to important gaming enforcement tips. The training regarding fraternization emphasizes that relationships outside of work are prohibited. It does not expressly prohibit all conversations of a personal nature. Since there is daily interaction between Gaming Agents and Casino personnel, some level of personal conversation is inevitable. The conversations with Duthie were before his coaching with Carpentiere. Once told to stop, the Grievant went to the Casino security office one time, and then only very briefly and for business purposes. The discipline for the Duthie conversations is effectively double jeopardy since, upon learning of the conduct, the Employer had already determined that coaching was the appropriate action. The Employer may not heap on additional discipline after having already determined that a coaching was sufficient. Insofar as the April arrest incident is concerned, there was no evidence that the Grievant engaged in any misconduct. He was off site at the time, which is clearly permitted. There was

no evidence that anyone called the Grievant to respond even though he was carrying a phone. There is simply no evidence that he failed to respond. Finally, the Grievant is charged with failing to appropriately report his time when he spent time speaking with a friend while on the job. The Grievant was entitled to lunch and a break, which he had not taken that day. Additionally, he was still carrying a phone and was available for calls for service the entire time. The Employer has not demonstrated just cause for the Grievant's discharge, and the grievance should be sustained in its entirety.

DISCUSSION AND ANALYSIS

This being a case of termination from employment, it is clear that the burden of proof to demonstrate just cause for discharge rests with the Employer. Termination from employment carries serious consequences for the employee which go beyond the loss of income and benefits. Re-employment is clearly made difficult by virtue of the stigma associated with termination for cause. This is particularly true in the case of those employed in safety forces. Because of the serious and significant effects of termination, a mere preponderance of the evidence is simply insufficient to establish just cause. In order to balance the interests of the Employer and the Grievant, this Arbitrator has consistently applied a burden of proof which requires that the Employer demonstrate just cause for the discharge by the intermediate standard of clear and convincing evidence. The Employer's burden of proof is to establish both that the Grievant committed the offenses with which he is charged and that the commission of those offenses warrants termination in all of the circumstances of the case.

It is noted that, in this case, the Grievant was not terminated for a single offense but rather, was charged with three separate offenses. Those being inappropriate fraternization with Duthie and Boone, inappropriate fraternization with various bartenders, neglect of duty on April 13, 2022 and violations of the time and attendance policy on October 23, 2022 as well as on

various other dates while conversing with his visiting friend as well as bartenders for extended periods as shown on the surveillance video.

The offenses with which the Grievant is charged fall under three different rule violations. They arise out of incidents which have some overlap, but are also distinct. According to Executive Director Schuler, who ultimately made the decision on termination, all of the charges against the Grievant were considered in making that determination. He testified that the primary factor, however, was that after being admonished by his supervisor to not fraternize with casino employees, he continued to do so. The Employer, having chosen to include all of the charges and incidents on which they are based, it is necessary that the Employer meet its burden of proof to demonstrate either that the Grievant is guilty of commission of all of those offenses or that the commission of any one of the offenses was so severe as to establish just cause. Once that element is proven, the Employer must demonstrate that the commission of these offenses warranted the penalty imposed in the all of the circumstances prevailing at the time.

The Arbitrator is convinced that the Grievant is guilty of commission of the offense of engaging in inappropriate fraternization with Casino staff as it relates to his actions in the Casino security office and in accompanying Duthie to her car in the garage. The Grievant chose to frequent the Casino security office and walk Duthie to her car while discussing personal matters. The Grievant had no business reason to be in the office, but chose to initiate personal discussions, and in fact, the testimony demonstrated that it is unusual for Gaming Agents to have any reason to be in that office. Discussion regarding the Grievant and Duthie's divorces clearly veered into areas of a personal nature, well beyond business purposes or common pleasantries and small talk.

While there was testimony that the Grievant and other Agents understood the fraternization rules to relate solely to off duty and off site activities, the rule was specifically clarified for the Grievant when he was counseled on October 20, 2022. Carpentiere testified that

he told the Grievant that should not frequent the Casino security office, should not walk employees to their cars and should not socialize with employees. While the Grievant testified that he understood this to apply only to employees subject to licensure, Carpentiere testified that he warned the Grievant against personal discussions with all Casino employees. This is substantiated by the October 31, email from Carpentiere to Blackford and Abbott confirming the discussion. That email does not limit the discussion to only licensed Casino employees, and since it was written only eleven days after the counseling, it is likely the most accurate recall of the discussion.

Although it is clear that the Grievant's conversations with Duthie crossed the line into prohibited personal conversation, as the Union argues, the Employer has essentially disciplined the Grievant twice for the same offense. Upon learning of the Grievant's conversations with Duthie, Carpentiere took action. That action was to counsel the Grievant that his conduct was not appropriate, advise him to stay away from the Casino security office and to refrain from personal conversation with Casino employees. It was not until after reviewing the subsequent surveillance video that the Employer determined that additional discipline was warranted.

While the Employer clearly could impose discipline for the activities viewed on the video, the problem here, is that it then determined to backtrack and impose additional discipline for the same conduct for which a counseling had been deemed to be sufficient. This action clearly amounts to duplicate discipline for the same offense. The Employer may not, upon learning of additional misconduct, go back in time to re-impose harsher discipline for a prior event on which it has already acted. Having done so here, the allegation of inappropriate fraternization regarding the Duthie conversations was effectively double jeopardy and therefore inappropriately charged as a basis for the Grievant's termination.

There is no question that almost immediately after the counseling, surveillance video shows the Grievant sitting at Casino bars conversing with bartenders. While the Grievant testified that all of these interactions were part of his duties in monitoring the casino floor, the

length of time spent sitting at the bars speaking with bartenders leads to a strong inference that the conversation went beyond professional necessity. On the other hand, there being no sound in the video, it is unclear if the conversations were of a personal nature or consisted of anything more than what could be called "small talk". While there is a strong inference that the Grievant engaged in inappropriate conversations with bartenders that went beyond what is required by the job, the problem is that the evidence is just that: inference. This is insufficient to demonstrate that the Grievant in fact crossed the line into inappropriate fraternization with the bartenders.

It is similarly true that the video surveillance demonstrates that the Grievant returned to the Casino security office after having been instructed not to do so. This demonstrates an attitude on his part that he may ignore a direct instruction from his superior. The testimony at hearing was that there is rarely a reason for Gaming Agents to go to the Casino security office, and there was no evidence that there was any need for the Grievant to appear at the office in person to announce his presence. The Grievant thus clearly chose to ignore the instruction of his supervisor. On the other hand, the visit is from the doorway only, and is less than one minute long, indicating that there was very little conversation at the time. While this does not absolve the Grievant, it does indicate that the visit to the office was a minor event.

The charge of neglect of duty against the Grievant is two fold. The first allegation is that in October and November, 2022, as documented in the video surveillance, the Grievant sat at bars conversing with bartenders, watching television or on his phone for significant amounts of time while neglecting his duties. The second is that he was unavailable to respond to an incident on the Casino floor that resulted in an arrest in April, 2022.

Insofar as the allegation regarding sitting at bars is concerned, it does appear that the Grievant took advantage of his position and the rather ill defined rules regarding Agent's daily activities to spend far more time than necessary to observe activities on the floor or obtain any job related information from Casino employees. While the testimony demonstrated that there are legitimate reasons to speak to bartenders who see and hear what is happening in the Casino

or to sit at bars while observing the gaming activities, the video demonstrates that the Grievant went beyond what could be considered reasonable legitimate and observation. His extended time spent sitting at bars on multiple occasions conversing with bartenders for up to an hour at a time leads to the conclusion that he was at best minimally fulfilling his job duties while doing so. As the Employer argues, merely having possession of a phone so that contact is possible does not justify what amounts to time wasting. It is important to note that other Agents testified that they do not sit at bars, or that they do so only for a short period of time. The Grievant's time spent sitting at bars was so excessive as to justify a charge of neglect of duty.

The Employer has not, however, demonstrated that the Grievant neglected his duties in the April 13, 2022 arrest incident. The testimony was clear that Agents are permitted to leave the Casino grounds for lunch and breaks. They additionally regularly walk the premises, both in the casino, in the garage and on the perimeter. The Grievant's testimony that he was on a walk of the premises and responded to the incident when he as advised about it when he happened to meet another Agent near the garage, is undisputed. Agents are required to carry their phone and respond within a reasonable period of time when called for service. In this particular instance, while the Grievant was not in the vicinity at the time the incident began, there was no evidence that he was ever called to respond, and the surveillance video indicates that his presence was not necessary. There were Cleveland Police officers present who were primarily responsible for the incident response, as well as three Gaming Agents. The Gaming Agents were standing by and not actively involved. The evidence concerning this incident does not support the charge that the Grievant neglected his duties.

The final charge against the Grievant is that he failed to accurately report his actual hours worked when he spent over an hour speaking with a friend on October 22, 2022. The Union argues that this time was the Grievant's lunch and break time and the Grievant was available via phone during the entire time. The Employer notes that this occurred near the end of the Grievant's shift, and lunch and breaks are to be taken earlier in the shift and not

combined. The Agents are unquestionably given flexibility throughout their work day to both walk the Casino premises and leave the grounds. Because they are always on call, they are paid for lunch and breaks and do not clock in and out for those breaks. That flexibility makes the line between what is an acceptable break during work hours and what is not unclear. As with the time spent sitting at bars, however, it seems clear that the Grievant abused the rather loose regulations regarding how Agents spend their time during the work day. While he remained on call, there can be little doubt that his focus during the hour visit with his friend on October 22 was not on his work. There was additionally no clear evidence that the Grievant had not had any breaks prior to that visit.

Ultimately, the Employer has not met its burden of proof to demonstrate that the Grievant committed all of the offenses with which he is charged here. It has, however, demonstrated that the Grievant neglected his duties by sitting at bars in the Casino for long periods of time without a sufficient business purpose and by socializing with a friend for an extended period of time during his work shift without noting that activity on his timesheets. The Employer has additionally demonstrated that the Grievant disregarded the instructions of his supervisor to stay away from the Casino security office and stop socializing with Casino employees.

Although there is insufficient proof that the Grievant committed all the violations with which he is charged, he has demonstrated an attitude that he can disregard instructions and that mere possession of the work phone permits him to absent himself from work for extended periods of time. The Grievant testified that he did not believe that any of his actions were improper with regard to any of the allegations against him. The Grievant must understand that he is to refrain from extended conversation with employees in the interest of maintaining the integrity of gaming and preserving the separation of Agents from those over whom they have regulatory authority. He must further understand that the flexibility permitted to Agents while on the job does not permit extended absences from active work. While the line between what is

permissible and what is not is somewhat ill defined, the video demonstrates that the Grievant has taken advantage of the working conditions to neglect his duties on multiple occasions by engaging in extended conversations. His actions warrant discipline. Because the Grievant committed serious offenses, but not all of the offenses with which he is charged, the grievance is sustained in part.¹

AWARD

The grievance is sustained in part. The Grievant will be reinstated to employment without back pay. The period from February 1, 2023 to the date of this Award will serve as a disciplinary suspension.

Dated: December 14, 2023



Tobie Braverman, Arbitrator

¹ It is finally noted that the Union contends that there has been disparate treatment for Agents who have engaged in similar misconduct. While there is evidence that others have been given far lighter discipline for similar violations, those incidents do not appear to involve the extent of offenses charged here. The cases are not sufficiently similar to warrant a finding of unequal disciplinary treatment.