BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SOUTHERN DOOR EDUCATIONAL SUPPORT PERSONNEL	Case 18 No. 42532 MA-5715
and	
SOUTHERN DOOR SCHOOL DISTRICT	

Appearances:

Mr. Charles Garnier, Regional Director, Wisconsin Education Association Council, 550 East Shady Lane, Neenah, Wisconsin 54956, for the Association.

Mr. Joseph Innis, Superintendent, Southern Door County School District, 8240 Highway 57, Brussels, Wisconsin 54204, for the District.

ARBITRATION AWARD

The above-captioned parties, herein the Association and the District, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Brussels, Wisconsin, on October 4, 1989. The hearing was not transcribed. The parties submitted briefs and reply briefs, the last of which was received December 11, 1989.

ISSUE

The arbitrator frames the issue as follows:

> Did the District violate the collective bargaining agreement when it issued a two-day suspension to Grievant Sheila Bohling for the incident of May 10, 1989? If so, what is the appropriate remedy?

BACKGROUND

The District's administrative offices are housed in a small building separated from other District buildings. At the time of the incidents involved in this grievance, District Administrator Joseph Innis, Bookkeeper Kim Nowikowski, Payroll Clerk Michelle Johnson, Grievant Sheila Bohling, another secretary Jane Jennerjohn, Don Luzerne, who is in charge of bus drivers, and Director of Special Education Pat Fliegert worked in this building. Not all of these employes worked there full time, but nevertheless, these seven persons frequently worked in close proximity to one another. Grievant and Nowikowski shared an office during the mornings. (In the afternoon, Grievant worked at the elementary school.)

For the last several years, relationships between the four clerical employes, Nowikowski, Johnson, Bohling and Jennerjohn have been strained. The level of tension has varied over the years, but at its worst, these employes did not speak to each other and, even though they remained in the building, they would not even eat lunch together.

Grievant has been employed by the District ten years. She prepares orders for the District, counts lunch money from the schools, helps Luzerne with calling the bus drivers, and performs other various duties. During these ten years, she has never been disciplined.

The incident which resulted in the disputed two-day suspension occurred on May 10, 1989. Johnson described the office atmosphere at this time as "ready to blow up." Johnson testified that when she spoke to Innis about the situation, he told her the employes would have to work out their problems among themselves. Innis did not recall making that statement, but it is clear that Johnson had a good faith belief that the employes were on their own in resolving their conflicts. There is no evidence whether Johnson communicated her belief to Grievant, or whether Grievant shared this belief, but neither is there any evidence of any recent efforts to resolve these conflicts by Innis or any other management employe. 1/

On the morning of May 10, 1989, Innis was not in the office. Johnson and Grievant talked together about the tension in the office and decided to talk directly to Nowikowski at the 10:00 A.M. break time. At that time Johnson and Grievant went in to the office shared by Nowikowski and Grievant. The testimony reflects the following encounter:

> Grievant: (To Nowikowski) Do you have time to talk?
>
> Nowikowski: Yes, anytime.
>
> Grievant: (Grievant and Johnson entered the room, shutting the door behind them.) Who do you think you are, writing statements like that on an invoice?
>
> Grievant showed Nowikowski the invoice in question upon which Nowikowski had made the following hand-written notation:
>
> > 2-14-89 I called to question labor charge. We were billed because this was (an) unnecessary service call. The employe (Grievant) could have corrected the problem alone. They also said too many service calls (were) being made here.
>
> Grievant: Who the hell do you think you are - getting this raise? Going to Innis and the Board?
>
> Nowikowski: You should go to Innis. I don't think we should be having this discussion.
>
> (Nowikowski attempted to leave the room. Grievant did not block the door or touch Nowikowski, but stood at the bookcase next to the door. Nowikowski returned to her desk.)
>
> Grievant: You're not going anywhere. We have things to clear up. You're going to answer.

The encounter continued, lasting approximately an hour. Grievant and Nowikowski argued about some receipts and purchase orders Grievant had completed. Grievant had heard that her hours were being changed and believed that Nowikowski had played a part in the change. Grievant angrily asked Nowikowski about the hours. Johnson angrily asked Nowikowski about her raise.

Although this was a highly- charged, emotional argument, the record does not show that there was any profanity (other than the use of "hell," noted above), name-calling, or physical contact. No one denies, however, that all three employes were shouting, and eventually, crying.

Afterwards, Nowikowski went home for one-and-a-half hours to compose herself. When she returned, she lashed out at Johnson. The next day, Nowikowski phoned Innis to report the incident and say she did not know when during the day she would be able to come to work. Innis suggested she stay out the entire day while he investigated the incident. On May 16, 1989, Innis issued Grievant a written reprimand and a two-day suspension for gross negligence and willful dereliction of duty. Grievant challenged the suspension and that grievance is the subject of this award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

> ARTICLE VIII Warnings for Unsatisfactory Work
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> The supervisor retains the right to informally express disapproval of an employee's job performance. In the event that an employee is performing unsatisfactory work, that is, not fulfilling the need or

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1/ At an earlier time, approximately 1985-1987, Innis' predecessor had assigned Johnson to be Office Manager in order to clarify office roles and minimize conflicts.

conditions of the job as described, the supervisor may once informally express disapproval of the employee's performance. If the job performance does not improve, the following disciplinary procedure shall be followed:

1. Oral reprimand (with notice to the employee and the Union.)
2. Written reprimand (with copy to the Union.)
3. Two-day suspension (copy to the Union.)
4. Discharge (copy to the Union.)

Any employee called in for conference with manage-ment, in regard to their work performance which will become a part of his/her personnel file, except annual evaluations, shall be offered Union Representation, if the employee so desires. Only those files located at the central administration office and maintained in accordance with Article VI, Employee Rights of this agreement, shall be considered for taking any disciplinary action on employees.

The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge; theft of personal or public property, drinking on the job, use of illegal drugs, release of confidential information involving students or staff obtained as a part of an employee's work, shall be cause for immediate discharge. Gross negligence or willful dereliction of duty are hereby defined to be immediate causes for suspension. Any discharged employee may appeal such action through the grievance procedure as set forth elsewhere in this agreement, and shall initiate grievance action within fifteen (15) working days of notice of such discharge.

POSITIONS OF THE PARTIES

The Association

In the Association's view, the collective bargaining agreement requires that the District follow a progressive discipline procedure in cases such as this which did not involve either gross negligence or dereliction of duty. While it acknowledges that the meeting degenerated into a loud and heated argument, it insists that Grievant did not intend such a result and sincerely regretted it. The Association disputes any contention that Grievant prevented Nowikowski from leaving the room although it admits that Grievant wanted Nowikowski to remain in the room. The Association believes the District Administrator sanctioned the meeting by telling the employes they would have to work out their difficulties. It claims Grievant's conduct was not the cause of Nowikowski's not working on the following day because she was prepared to come to work but the District Administrator told her to stay home while he investigated the matter. Finally the Association argues that even if the arbitrator should find some discipline proper, a suspension is not justified under these circumstances.

The District

The District argues Grievant committed an act of gross negligence or willful dereliction of duty justifying immediate suspension under the provisions of the collective bargaining agreement. It asserts Grievant locked another employe in a room for an hour while she badgered and harassed her. As theft, drinking on the job and violation of confidentiality are grounds for immediate suspension, intentional intimidation and harassment should also justify such a penalty. The District insists Grievant's action in closing the door and saying "You're not going anywhere" constituted felony false imprisonment, for which the District, as employer could be sued. Noting an employer's responsibility to provide a worksite which is nonthreatening, conducive to productivity and free from genuine fear of assault or abuse, the District cites awards of other parties in which the arbitrator has upheld discipline for the making of threats and other disruptive behavior.

The District quotes from an arbitration award stating the proposition that an arbitrator should not substitute his or her own judgment for the management's judgment regarding the appropriate penalty for misconduct.

Reply Briefs

The Association, after reading the District's brief, protested that an allegation of false imprisonment was raised for the first time in the District brief and requested opportunity to respond. The Arbitrator granted opportunity to submit a reply brief limited solely to the issue of false imprisonment, and also granted the District opportunity to submit a response brief.

The Association insisted the charge of false imprisonment was not supported by the evidence because Nowikowski was not physically restrained from leaving, the door was not locked, and Nowikowski was not entrapped. Because the District has raised the issue of misconduct punishable by criminal law, it has, according to the District, obligated itself to prove that misconduct beyond a reasonable doubt. Finally, the Association argues that since the District now claims that its original discipline was based on the false imprisonment charge and that the District did not conduct a fair and impartial investigation of that question, no discipline of any kind should be sustained.

The District objected to the Arbitrator's decision to grant the Association opportunity to respond to the issue of false imprisonment. It argued that it was not making any "charges," but merely identifying the elements of the grievant's misconduct that were also elements of tort or crime. It asserts the imposition of discipline was not based on the belief that grievant had committed a crime. It further argues that the Association's citation regarding the standard of proof the District must meet is inapplicable because the cited authority concerned discharge, and not a discipline such as a two-day suspension.

FACTS AND DISCUSSION

The sequence of events recited in the Background section, above, is largely undisputed. It is clear that a loud argument took place for nearly an hour in a closed room. (Notwithstanding the District's claim in its brief, no witness testified that the door was locked or blocked.) Indeed, there was conflicting testimony as to whether Grievant said, "You're not going anywhere," and whether she said, "Who the hell do you think you are?" Those statements, however, are not critical to this award, for, even if it is assumed that were not spoken, the encounter still included anger and intimidation on Grievant's part. Since there is no question as to the essence of what Grievant said and did on May 10, 1989, the parties' arguments in their reply briefs regarding the

standard of proof is irrelevant. The question to be decided by the undersigned arbitrator is not what Grievant did, but whether the District had justification to impose the penalty as it did.

This was not a pretty sight. Whereas there might have been a need for reasonably-posed questions, Grievant indulged herself in angry accusations. Instead of an honest discussion that might have opened up lines of communication, there was shouting. In place of an invitation to participate in efforts to clear the air, there was intimidation of a person who did not want to engage in that talk.

Undeniably, there is a long history of troubled relationships. Although there is no evidence Grievant, unlike Johnson, had reason to believe Innis wanted the employes to resolve the conflict among themselves, there is also no evidence from which Grievant could conclude that the management was going to take any initiative in handling the matter. In this context, Grievant's and Johnson's decision to talk to Nowikowski directly, especially to ask for information about such things as Nowikowski's notation on the A.B. Dick bill, is not in itself a matter of misconduct. The problem is that the stored-up tension ignited and the situation exploded out of control. What might have been initiated as a discussion, intended to take only the break time, escalated into nearly an hour of shouting, shouting to which Nowikowski was subjected against her will. Grievant may not have physically restrained Nowikowski from leaving the closed room in which two co-workers were verbally attacking and shouting at her, but she exerted pressure on Nowikowski to stay in the room. Despite the fact that Nowikowski may have provoked Grievant by not talking directly to her about such things as the purchase orders, the receipts, and the AB Dick bill, and despite the fact that Nowikowski herself ended up shouting, and all three employes eventually cried, and despite the fact that Nowikowski herself returned after lunch to make angry accusations, Grievant should have terminated the encounter when it became abusive. After all, Grievant, as the employe who initiated the encounter, who had a second employe on her side, and who pressured Nowikowski to remain in the room, had a position of dominance in the encounter, and, consequently, one of responsibility for limiting the harm. Grievant did not meet this responsibility and the District had the right to censure and discipline Grievant's persistence in this verbal attack. 2/

Having concluded that discipline was justified for the misconduct in question, the undersigned now turns to a consideration of the appropriateness of the penalty imposed. At the outset it must be noted that the collective bargaining agreement, in Article VIII, limits the District's discretion in levying penalties. The primary disciplinary procedure is one of progressive discipline. The contract provides that for unsatisfactory work (defined as not fulfilling the needs or conditions of the job) the employer must follow progressive discipline in four steps. Consequently, if the District imposes a first disciplinary penalty for unsatisfactory work, it must follow the progressive discipline scheme and impose an oral reprimand as an initial discipline.

The contract does, however, provide for a second and different disciplinary procedure for certain specific infractions. The District does not have to follow progressive discipline for infractions that fall within another category: theft, drinking, use of illegal drugs, release of confidential information obtained as a part of the employe's work, and gross negligence or dereliction of duty. The District argues that Grievant's conduct on May 10 constituted gross negligence or dereliction of duty, thereby entitling it to impose a two-day suspension on this ten-year employe who had no disciplinary record or negative evaluations. Determination of the appropriateness of the discipline imposed, then, depends upon whether the District has properly characterized Grievant's misconduct as falling within the second category of infractions rather than the first.

Gross negligence and dereliction of duty are general terms, and as such their meaning can be understood by consideration of the more specific terms listed immediately before them: theft, drinking, use of illegal drugs and release of confidential information. These are serious and grave infractions. This observation leads to the conclusion that the parties intended only serious misconduct could be characterized as gross negligence and dereliction of duty, a conclusion that is consistent with the commonplace use of these two terms. Gross negligence is extreme carelessness in matters for which a person has a duty of care. Dereliction of duty is the willful failure to perform assigned tasks. Both terms refer to the flagrant omission of a responsibility. In contrast, Grievant's misconduct reflected poor judgment in an interpersonal matter which led to verbal abuse of a fellow employe. Regrettable though this incident may be, it cannot be characterized as a flagrant omission.

2/ In granting the Association's request to submit a reply brief, the arbitrator specifically limited those briefs to the matter of the false imprisonment allegation. Consequently, the Association's argument, raised for the first time in that brief, that the District did not conduct a fair and impartial investigation will not be considered herein.

Since the infraction involved in this case does not fall within the category of those infractions for which the District has authority to impose immediate suspension and discharge, it necessarily follows that the penalty for this infraction must follow the scheme of progressive discipline set forth in the first paragraph of Article VIII. Since Grievant has never been disciplined before, the appropriate penalty in this matter is an oral reprimand (with notice to the employe and the Union) as noted in item number one in the first paragraph of Article VIII.

REMEDY

Because neither the written reprimand or the two-day suspension are authorized by the collective bargaining agreement, the District must remove the May 16, 1989 written reprimand from Grievant's personnel file and destroy it. Additionally, the District must make Grievant whole for all wages and benefits lost as a result of the suspension. The collective bargaining agreement authorizes the District to issue a written notice of the oral reprimand. Inasmuch as the record does not contain any evidence of any notices used by the District to document written notice of oral reprimands, the undersigned directs that this arbitration award alone shall serve as the written notice of the oral reprimand issued for the infractions committed by Grievant on May 10, 1989.

In the light of the record and the above discussion, the arbitrator issues the following

AWARD

1. The District had just cause to issue grievant an oral warning for the incident of May 10, 1989.

2. The District did not have just cause to issue Grievant a two-day suspension for the incident of May 10, 1989.

3. The District shall remove from Grievant's personnel file the written reprimand issued on May 16, 1989. This arbitration award will serve as notice of an oral reprimand pursuant to a first step discipline as provided by the first paragraph of Article VIII of the collective bargaining agreement.

4. The District shall make grievant whole for all wages and benefits lost as a result of the two-day suspension issued May 16, 1989.

Dated at Madison, Wisconsin this 10th day of January, 1990.

By _____
Jane B. Buffett, Arbitrator