

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 53
 THE SCHOOL DISTRICT OF БЕЛОIT : No. 49353
 : MA-7913
 and :
 LOCAL UNION 1475, AFSCME, AFL-CIO :
 :

Appearances:

Davis & Kuelthau, S.C., by Mr. Robert H. Buikema, Attorney at Law, on
Mr. Thomas E. Larsen, Staff Representative, Wisconsin Council 40, AFSCME,
 AFL-CIO, on behalf of the Union.

behalf

ARBITRATION AWARD

The above-entitled parties, herein "District" and "Union", are privy to a collective bargaining agreement providing for final and binding arbitration. Hearing was held in Beloit, Wisconsin, on December 2, 1993. The hearing was transcribed and the parties thereafter filed briefs, with the District filing a reply brief which was received by January 14, 1994.

Based upon the entire record, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Did the District have just cause to terminate grievant General Johnson and, if not, what is the appropriate remedy?

DISCUSSION

Johnson has been employed by the District as a Custodian for about five years. At the time of his discharge, he worked the 3:30 p.m. - 12:00 a.m. swing shift at Wright Elementary School where, but for the half an hour he worked with the day shift person, he worked alone. Johnson had full access to all parts of the school because he had keys to every room.

On December 17, 1992, Johnson and his Union representative met with Executive Director of Human Services Ernest Blanden regarding a rumor that Johnson was using and selling drugs. Blanden then asked Johnson whether he had ever used a controlled substance - a charge Johnson denied. At that time, Johnson admitted that he was on probation for damaging property.

Johnson again met with Blanden on January 25, 1993, 1/ after Blanden learned from Johnson's parole officer that Johnson had admitted that he had "smoked a joint." Thereafter, Blanden by memo dated February 1, 1993, informed Johnson that "Any performance concerns will result in your being subjected immediately upon command to a drug screen."

On March 4, Johnson was orally warned over his failure to properly report his absences when he was sick.

On Sunday, March 14, Johnson was arrested and jailed over his failure to

1/ Unless otherwise stated, all dates hereinafter refer to 1993.

pay a traffic ticket. On March 15, Johnson telephoned supervisor Gene McMillan to tell him that he was in jail and that he could not work that day. Johnson was able to work on March 16 because he had Huber law privileges. Johnson was released from jail on March 17 and he worked on March 17 and 18. On March 19, Johnson was caught stealing a screwdriver at a ShopKo store for which he received a municipal citation and he was rearrested for violating his parole. He therefore missed work that day.

This is a testimonial conflict between Johnson and Blanden over whether Johnson telephoned Blanden on Tuesday, March 16, with Blanden asserting, and Johnson denying, that he did. 2/ In any event, both Blanden and Johnson agree that Johnson telephoned Blanden on the afternoon of Friday, March 19, when Johnson was in jail.

It is undisputed that Johnson during this telephone call asked for a two week leave of absence for "marital counseling" which Blanden denied because he knew that Johnson was not married. Johnson then asked for leave to attend to personal matters, which Blanden also denied. Finally, Johnson said he needed leave to attend to his seriously sick grandfather in Tennessee, but he was unaware at that time that he could receive paid sick leave to do so. Blanden agreed that he could use sick leave, provided that he supplied a doctor's note attesting to the fact that his grandfather was ill. Blanden reiterated this after Johnson again questioned him about it. At that point, Johnson said that he had to be honest with Blanden and that he, in fact, was in the Rock County Jail because he had stolen a screwdriver. Johnson testified here that he initially did not tell Blanden the truth because he was "nervous and scared" and because he did not know how long he would remain in jail. Johnson thereafter was suspended with pay on March 22, 23 and 24.

Johnson met with Blanden on March 25, at which time Blanden told Johnson that he was being suspended pending further investigation. By letter dated the same date, Blanden informed Johnson:

You are hereby suspended without pay effective Friday, March 26, 1993, 12:30 p.m. through Thursday, April 1, 1993, 3:30 p.m. pending complete review of your admitted removal of merchandise from Shopko Plaza, Janesville, Wisconsin. This act was a violation of City of Janesville Ordinances.

On March 25, 1993, in the presence of Jack Tinder, Local 1475 President; James McMillan, Supervisor of Building and Grounds; and Ernest Blanden, Executive Director of Human Services, you admitted to the removal of a "Craftsman" flat head screwdriver on March 19, 1993, 1:00 p.m.

This administrative review is independent of any criminal proceeding in a court of law.

You are hereby directed to report to the Office of Human Services on Thursday, April 1, 1993, 2:00 p.m., Room 208, RAC, 1633 Keeler Avenue, Beloit, WI 53511, for a conference relative to this matter. You have the right to representation.

By memo dated April 1, Interim Superintendent Richard Peterson informed Johnson:

2/ Given its relative lack of importance, it is unnecessary to resolve whether such a telephone call happened on March 16.

You are hereby suspended without pay effective Friday, [sic] April 1, 1993 at 3:30 p.m. through Wednesday, April 14, 1993, 12:00 a.m. for a theft committed at Shopko Plaza, Janesville, WI, on March 19, 1993 at approximately 1:00 p.m. and dishonesty relative to your leave requests on March 19, 1993.

On March 25, 1993, in the presence of Jack Tinder, Local 1475 President; James McMillan, Supervisor of Building and Grounds; and Ernest Blanden, Executive Director of Human Services; and on Thursday, April 1, 1993 in the presence of Thomas Larsen, Staff Rep., Wisconsin Council #40, AFSCME, AFL-CIO; Jack Tinder, Local 1475 President; Jack Tinder, Local 1475 President; James McMillan, Supervisor of Building and Grounds; and Ernest Blanden, Executive Director of Human Services, you admitted the theft of a "Craftsman" flat head screwdriver on March 19, 1993, 1:00 p.m. and you admitted dishonesty on March 19, 1993 relative to leave requests.

See the exhibits attached hereto and made a part hereof.

On the same day, Johnson and Union Representative Thomas Larsen met with Blanden and other District representatives to discuss Johnson's status.

On May 4, the District's Board of Education voted to terminate Johnson and by letter dated May 17 informed him of that fact. The instant grievance was filed on May 21 protesting the termination.

In support therein, the Union argues that the District did not have just cause to fire Johnson because while Johnson initially may have exercised "poor judgment" in telling Blanden on March 19 that he needed time off for marital problems, personal problems, and/or to visit his sick grandfather, it is readily understandable why he was reluctant to tell Blanden he had been again confined to jail. Saying that Johnson "had no intent" to defraud the District, the Union also asserts that there was "no nexus between the shoplifting of a screwdriver . . ." and Johnson's employment and that, moreover, the District discriminated against him by firing him because of his arrest. The Union further claims that the District has failed to show that Johnson violated any of its work rules and that the District was not prejudiced by the delay in scheduling this matter for hearing because of Johnson's unavailability. The Union therefore asks for Johnson's immediate reinstatement and a backpay award.

The District, in turn, argues that it had just cause to discharge Johnson because of his "unlimited and unsupervised access to the District's equipment, supplies and tools" and because of his dishonesty in falsifying the reasons he needed for leave. It also maintains that Johnson was not discharged for his arrest or conviction record, but rather, because he admitted to Blanden on March 19 that he had stolen a screwdriver. Furthermore, the District maintains that if the grievance is sustained and backpay awarded, it is entitled to a set-off caused by the delay in scheduling this matter for hearing because of Johnson's unavailability which was caused by his incarceration.

The resolution of this issue basically turns on whether the District has met its burden of proof in establishing that Johnson no longer can be trusted to perform his job duties with little, or no, direct supervision.

In this connection, it is certainly true that Johnson did tell Blanden in December, 1992, that he had not used drugs and that, furthermore, he initially

failed to tell the truth as to why he needed leave when he spoke to Blanden on March 19. But, it may be possible that Johnson did not understand the use of the term "controlled substance" when Blanden used it in their December, 1992, meeting and, moreover, it is clear that Johnson did not mean to defraud the District by asking for paid sick leave when he spoke to Blanden on March 19.

Nevertheless, the fact remains that Johnson failed to initially tell Blanden the truth as to why he needed time off. In addition, no similar benefit of the doubt can be given to Johnson's admission that he stole a screwdriver. For that theft, irrespective of how small the monetary amount involved, shows that Johnson cannot be trusted to always respect other people's property. Such respect is an integral part of Johnson's job since he works alone for long periods of time, while having full access to all of the District's property at the Wright Elementary School where he worked.

Furthermore, the record establishes that the District has a policy of always terminating any employe caught stealing either its own property or other people's property away from school. Thus, it was prepared to fire Assistant Principal Dan Christensen over his alleged off-duty theft and credit card fraud before he voluntarily resigned and it also was prepared to fire Gary Froeber and Steve Mason over their alleged theft of school and other property away from school. Mason resigned and Froeber was terminated. As the District points out, this shows that it "has a consistent practice of terminating employees for theft, regardless of whether the theft occurs on or off duty or on or off the District's premises."

This concern with honesty is certainly understandable since the District represents to the public that it can be trusted with their children and with protecting whatever tax dollars have been spent on the Districts' equipment and supplies. That honesty has a direct relationship with the situation here because Johnson works alone for almost all of his shift, during which time he is not directly supervised.

The District's policy, however, apparently has never been challenged in an arbitration. It therefore is an unsettled issue as to whether the District can fire someone in part because of his off-duty conduct in stealing something with as little monetary value as a screwdriver.

This is a difficult issue to resolve because there is some merit to the Union's claim that Johnson deserves another chance - particularly since the City of Beloit only suspended one of its employes who was caught stealing while she was off duty.

That is why the District here had just cause to impose some form of discipline on Johnson and why this case turns on the severity of the penalty imposed.

In support of its claim that discharge is appropriate, the District cites three arbitration cases: Lakeside Jubilee Foods, 95 LA 358 (Berquist, 1990); Fairmont General Hospital, 91 LA 930 (Hunter, 1988); Genessee County, 90 LA 48 (House, 1987).

But those cases hardly help the District since all of the grievants therein were ultimately reinstated to their jobs. Thus, in Lakeside Foods, Arbitrator Berquist refused to sustain the discharge of an assistant store manager who was caught shoplifting twice while off duty. Arbitrator Berquist therefore reduced the discharge to a lengthy unpaid suspension. In Fairmont General Hospital, Arbitrator Hunter reduced a nurse's discharge for shoplifting off duty to a lengthy unpaid suspension. In Genessee County, Arbitrator House sustained a two-week suspension of a nurse who was caught shoplifting in a drug store.

The reasoning in those cases is fairly persuasive as to why discharge in

some circumstances is too harsh a penalty to impose for off duty shoplifting. Much the same could be said here except for one thing: Johnson works alone. For it is one thing to reinstate a shoplifter to a job where his/her actions can be watched by others to insure that there is no stealing of the employer's equipment or any other materials. But it is something else altogether when an employe works without any direct supervision and when that person has keys to an entire building - which is the situation here when Johnson worked at the Wright Elementary School.

When the latter situation occurs, an employer has the absolute right to insist that its employes be totally honest when they act alone. Johnson has breached that trust by shoplifting and by being less than candid when he first spoke to Blanden on March 19, 1993, as to why he wanted time off. Accordingly, I find that the District had just cause to terminate him.

In light of the above, it is my

AWARD

That the District had just cause to terminate Grievant General Johnson; his grievance is therefore denied.

Dated at Madison, Wisconsin this 21st day of February, 1994.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator