

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
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 LOCAL 1168, COUNCIL 40, AFSCME, AFL-CIO : Case 77
 : No. 49728
 and : MA-8043
 :
 ADAMS COUNTY, WISCONSIN :
 :

Appearances:

Mr. Sam Froiland, AFSCME Council 40 Representative, P.O. Box 944,
 Waukesha, Wisconsin 53187, appearing on behalf of the Union.
Mr. Michael J. McKenna, Corporation Counsel, Adams County, P.O. Box 450,
 Friendship, Wisconsin 53934, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission designated the undersigned to resolve the instant grievance filed by the Union. A hearing was held on November 4, 1993, and the parties were given full opportunity to present their evidence and arguments. The hearing was not transcribed. Both parties submitted initial briefs and the Union submitted a reply brief. Briefing was completed on January 21, 1994, at which time the record was closed.

ISSUE:

The Union frames the issue as follows:

Did the County have just cause to issue Archie Hayes a written warning for an alleged theft of a document from his personnel file, and if not, what should the remedy be?

The Employer frames the issue as follows:

Whether the County violated the collective bargaining agreement in issuing the employe discipline in the form of a letter of reprimand for prohibited conduct without just cause?

The parties agreed at the hearing that the Arbitrator would frame the issue in the award. The undersigned frames the issue as follows:

Did the Employer have just cause to issue a written reprimand to the Grievant, Archie Hayes? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

The parties' 1993-94 collective bargaining agreement contains the following pertinent provisions:

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Article 4 - Discipline

4.01 The Employer shall not suspend, discharge or otherwise discipline any employee without just cause. When such action is taken against an employee, the employee will receive written notice of such action. Such notice shall be given to the employee and the Union within five (5) working days after the action is taken. Such notice shall include the reasons on which the Employer's action is based.

RELEVANT PORTIONS OF THE ADAMS COUNTY PERSONNEL POLICY HANDBOOK

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CONDITIONS OF EMPLOYMENT

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Prohibited Conduct. The following are examples of some specific conduct which is prohibited and will result in disciplinary action. This list is not intended to be all inclusive, and other circumstances which may warrant disciplinary action will be treated on a case-by-case.

1. Dishonesty.
2. Falsification or unauthorized altering of records, employment applications, time sheets, time cards, etc.
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15. Theft or destruction of County equipment or property.

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22. Violation of any other commonly accepted, reasonable rule of conduct including departmental rules and procedures which are not in conflict with County policy.

Performance Evaluation.

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The performance evaluation process should be continuous, involving informal day-to-day communication. Periodically, in order to help assure that the informal process is meeting its objective and to reinforce it, a formal evaluation process is used. The performance evaluation process is one of the main responsibilities of supervisors.

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Employee Review. Each completed evaluation report shall be reviewed with the employee. The employee shall be given the opportunity to comment on any aspect of the report and shall receive a copy of the report. The employee shall sign the evaluation report. If the employee refuses to sign, it shall be so noted on the report.

Discipline. Disciplinary procedures will be followed. Supervisory personnel will uniformly enforce rules and regulations and document and date specific instances of misconduct. In all instances, this should be done with the employee's knowledge. In all appropriate disciplinary situations the supervisor should consider the need for a referral to the Employee Assistance Program and make an offer of this service. Documentation of this offer and the employee's response should be made and retained in the employee's personnel file. The degree of disciplinary action may be tailored to the offense and must be consistent with other practices. Nothing in this policy is to be construed as establishing a just cause standard for discipline of employees.

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Written Reprimand. A written reprimand to the employee from the immediate supervisor or Department Head shall contain the specific reasons for the reprimand, the action necessary to correct the problem and the effect of failure to correct the problem. An offer of referral to the Employee Assistance Program may be made and documented.

Employees may insert a response to written reprimands in their personnel file.

Written reprimands shall be signed by the employe and supervisor and placed in the employe's personnel file with a copy given to the employe if so desired. If the employe refuses to sign or accept the reprimand, it should be clearly noted on the face of the document when placed in the personnel file.

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PERSONNEL RECORDS

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Inspection.

1. Employee Inspection. All information contained in an employe's personnel file is available for inspection by the employe pursuant to Section 103.13, Wis. Stats. This can be done by a request in writing addressed to the Department Head. The Department Head shall make any request to review his/her personnel file by a request in writing addressed to the Personnel Committee. No employe personnel records may be removed from the office by the employe.

Employes who question or dispute information contained in their personnel file may submit a written statement of explanation to be included with the file. Such statement shall be signed by the Department Head in acknowledgment of receipt and a copy of the signed statement retained by the employe.

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BACKGROUND

Adams County provides mental health, drug and alcohol therapy to clients through the Department of Community Programs. In April of 1993, Judy Roberts (Igyarto), an AODA Community Support Technician, met with the Director of the Department, Susan Ziegahn. Roberts (Igyarto) expressed her concern about an EEOC complaint that was filed by the Grievant, Archie Hayes. On April 14, 1993, Director Ziegahn summarized the content of the meeting with Roberts (Igyarto) in the following document:

Judy Igyarto, AODA Community Support case manager, came to see me today. Judy is a friend and co-worker of Archie Hayes, an AODA therapist here at the agency. Judy was upset because of an EEOC complaint that Archie was filing against me. Judy said she was upset because she could not understand why Archie was doing this because she feels I am a very good director and she does not see and cannot understand the problem.

Judy discussed at length her concerns about Archie regarding his 'obsession' to file this complaint against me. These concerns included:

1. Archie's statements about "Susan doesn't like me and she wants to get rid of me".
2. Judy stated Archie seems to have 'tunnel vision' on this issue and will not listen to reason though she has tried to talk with him several times.
3. Judy indicated that she has not seen me do anything unfair to Archie stating she simply cannot understand why he would feel that I have.
4. Judy indicated Archie shared his concerns with her about the filing at Social Services. Judy asked Archie if he had shared his concerns with me. Judy indicated Archie said no he had not. Judy indicated she asked Archie if he would just talk to me. Judy indicated he would not.
5. Judy offered that she feels Archie wants disability, and that this complaint is the initial effort toward that.
6. Judy indicated she knows that Archie cannot take criticism from women, or what he perceives as criticism. She reiterated an incident that happened between she (sic) and Archie at her home about him helping on her automobile. She indicated she made a comment. He got angry and left. Judy said 'that's when I first knew he could not take criticism from a woman'.
5. (sic) Judy indicated Archie did not want to do word processing (the professionals here at the agency are beginning to prepare their own reports for hard copy printing). Judy asked Archie if he had shared that information with me. Judy indicated Archie said no he hadn't. Judy offered it was interesting that Archie would not want to do the keying on the computer because he and his wife just purchased a computer, and she knows Archie plays computer games 'all the time' at his home.
6. (sic) Judy indicated she asked Archie if he ever told me what he can or cannot do. Judy indicated Archie said no. Judy shared with me that she has asked Archie how he expects Susan to know if he doesn't communicate with Susan. Judy indicated Archie did not respond.

It is my feeling that Judy must be quite upset over this because Judy and Archie have been close friends for some time. Judy did indicate that this issue has put quite a strain on their friendship. Judy repeatedly told me throughout the conversation that she enjoys me as the director, that I have continually been supportive of her, that I am easy to talk things over

with, and she feels that I am doing a very good job here as the director. She simply cannot understand what is going on with Archie.

This summary was placed in the Grievant's personnel file.

In May of 1993, the Grievant became aware of the document's existence. On or about May 27, 1993, the Grievant entered the Director's office when no one was present and removed the document so that it could be photocopied. Later, the Grievant went to Roberts' (Igyarto) residence with his wife to discuss the content of the document. Roberts (Igyarto) learned that the Grievant had removed the document from his personnel file for copying purposes. Roberts (Igyarto) was told by the Grievant that he had done this when no one was in the office.

Roberts (Igyarto) informed Director Ziegahn that the Grievant had entered her office when no one was present and removed and copied the April 14, 1993 document. The Director checked the Grievant's personnel file and determined that the document was missing. The Director discussed this matter with the Corporation Counsel and began an investigation. The investigation involved double-checking the Grievant's personnel file to verify that the document was in fact missing and an interview with the Grievant. The Grievant understood that he was being charged with theft. Grievant Hayes denied permanently removing any document, but acknowledged that he had entered the office when no one was present. He acknowledged that he removed the documents but maintained that he replaced the document after he had copied it.

In accordance with the County's progressive disciplinary process, the Director issued the following letter of reprimand to the Grievant:

July 6, 1993

LETTER OF REPRIMAND

TO: Archie Hayes
FROM: Susan Ziegahn, Director

By my authority as Department Head of the Adams County Department of Community Programs, this is a formal letter of reprimand for your conduct on or about May 27, 1993. This letter will be placed in your file for a period of two years from this date. It will be removed at that time provided there are no other incidents of misconduct.

I hereby find that you, without authorization, removed a document from your personnel file which was located in my office. Access to the file is permitted per page 41 of the Policy and Procedure manual but in no case may an employee remove a document without authorization. This is Prohibited Conduct as it is dishonest, falsifies or alters official governmental records, and involves theft of the same in violation of numbers 1, 2 and 15 of the manual, pages 32 and 33.

Clearly, this type of behavior is of great concern. You are hereby referred to the Adams County Employee Assistance Program per Adams County Policy and Procedure manual, pages 28 and 35, to deal with any personal or therapeutic needs you may have.

This reprimand is given under authority of Adams County

Personnel Policy, page 35. You will be given a copy of the reprimand and shall sign in accordance with established procedure. You have the right to appeal to the Personnel Committee and to submit a written response for the file.

Susan J. Ziegahn /s/
Susan J. Ziegahn, Director

I have received a copy of the reprimand. I do/do not wish to submit a written response.

Archie Hayes /s/
Archie Hayes

The Grievant was aware of the County's policy regarding the inspection of personnel files. This policy is well-known to employees. Over the last 10 years, employees in the department have never been denied the opportunity to review their personnel files. During this period of time, most requests for file review have been made orally. While personnel files cannot leave the office, employees are allowed to obtain copies of specific documents upon request. The file review is monitored by another employee.

POSITIONS OF THE PARTIES

County

The written reprimand was for just cause and should be upheld. The Grievant admitted that he entered the Director's office without permission while no one was present. He also admitted that he had removed the document in question from his personnel file without permission. These actions are sufficient to warrant the discipline imposed. The County maintains that the Grievant did not replace the document after it was copied. The County also argues that the Grievant had knowledge of the consequences. The Adams County Policy and Procedure Manual describes Prohibited Conduct. These are reasonable work rules that have been applied uniformly to all Adams County employees. These rules do not contradict the collective bargaining agreement and are reasonably related to the orderly and efficient operation of the County. The Director conducted a thorough and objective investigation in this matter. This included an interview with the co-worker who reported the offense and the Grievant. The Grievant had a full and fair opportunity to respond. The letter of reprimand was an appropriate action in light of the seriousness of the misconduct. The Director has a good faith concern about the need to insure confidentiality of the files in her office. The Grievant has not been singled out or treated differently.

Union

The Union asserts that the Grievant was not disciplined for just cause. The memorandum in question dated April 14, 1993, represents hearsay evidence of some alleged discussions between the Director and a co-worker. The Grievant was not provided with a copy of the summary and was not informed that the document was being placed in his personnel file. The Union asserts that the County violated the Adams County Personnel Policy Handbook guidelines for performance evaluations by not reviewing this document with the Grievant. The Union also alleges that the County violated its policy of notifying employees about documents that are placed in personnel files. This notification practice was testified to by an employe with ten years of experience who was in charge of maintaining personnel files for the Department. The Union asserts that the Grievant was disciplined for dishonesty, falsification of records, and theft or

destruction of County property. The statement of the issue proposed by the County identifying prohibited conduct is misleading. The Union argues that the County is attempting to change the charge against the Grievant. The Union asserts that the Grievant did not do anything that was dishonest. They point to the fact that the Grievant acknowledged that he went into the Director's office and reviewed his file without her knowledge. While this action may have been counter to agency policy, it is clear that employees have access to personnel files on a demand basis. The record also supports that employees have been able to receive copies of documents from their personnel file. The Grievant's action in this matter is no more egregious than the Director's placement of the April 1993 document into his file without his knowledge. The Union argues that the County overstates the confidentiality issue. While they acknowledge the importance of client confidentiality and other employees' personnel file confidentiality, the Union asserts that the Grievant did not violate either of these. The Union disputes the testimony of Judy Roberts (Igyarto), which it characterizes as being inconsistent. Even if Roberts' (Igyarto) testimony was held to be credible, it provides no evidence that the Grievant has been dishonest, altered documents or is guilty of theft. The County's charge of theft was an attempt to intimidate the Grievant. The Grievant denies that he permanently removed the April memorandum.

DISCUSSION

The issue before the undersigned is whether the Employer had just cause to issue a written reprimand to the Grievant. The Grievant has acknowledged that he entered the Director's office without permission when no one was present. He has admitted that he removed his personnel file from the file cabinet without authorization. He also acknowledged that he removed a document from his personnel file without authorization. While it is unclear as to what happened to the document after that point, the Grievant's conduct was such that the written reprimand was justified.

Entering the Director's office without permission when no one was present is clearly inappropriate. Aside from violating common courtesy, sensitive material or documents present in the office could have been compromised. The Director should be able to feel comfortable in leaving documents that may relate to management or organizational issues, supervisory concerns or sensitive client information on her desk during the work day.

Opening the file that contains confidential personnel records is also clearly inappropriate. Employee personnel files may contain confidential and sensitive material that should not be available to co-workers. Employees have the right to have this information safeguarded. The Grievant's actions also provided him with the opportunity to review other department files containing sensitive material.

Also, removing a document from one's personnel file without authorization is clearly inappropriate. The Grievant's action amounted to the theft of information because of the manner by which it was obtained. The document could have been easily obtained and copied by following the normal procedures. Helen Mills, former Administrative Assistant, testified that personnel files could not be removed from the office but that documents could be copied at the employee's request. She also testified that she monitored employees when personnel files were reviewed. This oversight procedure maintained the integrity of the files and insured that the documents were not removed. The policy regulating personnel file review, which was well known to the employees, provided easy access. The Grievant did not identify any extenuating circumstances or provide any reasons for his actions. It is my determination that the Grievant's actions qualify as prohibitive conduct as identified in the Personnel Policy handbook.

When the Director became aware of the alleged violation, she conducted an investigation. This included searching the personnel records, interviewing the co-worker who identified the problem and interviewing the Grievant. After the investigation was completed, the Director concluded that prohibited conduct had occurred. The written reprimand was justified given the Grievant's actions, particularly in light of the ease by which employees have legitimate access to their personnel files.

The Union argues that the April 14, 1993 memorandum constituted an evaluation that violated the Personnel Policy handbook because it was not reviewed with the Grievant. This document is not an evaluation within the meaning of the Personnel Policy handbook. Rather it is an anecdotal record of

a conversation between the Director and an employe. Even if the Union was correct that the document was an unreviewed evaluation, it would not justify the Grievant's conduct.

The Union also argues that placement of this document in the Grievant's personnel file is a violation of the Personnel Policy handbook because it was added without his knowledge. The Union asserts that since the document in question was placed in the personnel file in violation of County policy, the Grievant's action, which was counter to the agency policy, in removing the document should be excused. While it may be good policy for employes to have knowledge of documents placed in their personnel files, this does not appear to be a definite requirement in all cases. Failure of the County to notify the Grievant of the document does not justify the Grievant's actions. Also, it is important to note that employes have a specific process in place to review and challenge the appropriateness of documents placed in personnel files.

AWARD

For the foregoing reasons and based on the record as a whole, it is the decision of the undersigned Arbitrator that:

1. The Employer did have just cause to issue a written reprimand to the Grievant, Archie Hayes.
2. The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 24th day of March, 1994.

By William K. Strycker /s/
William K. Strycker, Arbitrator