

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	
COLUMBIA COUNTY COURTHOUSE EMPLOYEES,	:	Case 147
LOCAL 2698-B, WCCME, AFSCME, AFL-CIO	:	No. 49428
	:	MA-7948
and	:	
	:	
COLUMBIA COUNTY	:	
	:	

Appearances:

Mr. Donald J. Peterson, Corporation Counsel, on behalf of
Columbia County.

Mr. David White, Staff Representative, Wisconsin Council 40,
AFSCME, AFL-CIO, on behalf of Local 2698-B.

ARBITRATION AWARD

According to the terms of the 1992-93 collective bargaining agreement (in effect at all times relevant to this proceeding) between Columbia County (hereafter County) and Columbia County Courthouse Employees, Local 2698-B, WCCME, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to resolve a dispute between them regarding the discharge of Russell Krakow. The Commission appointed Sharon A. Gallagher as impartial arbitrator. Hearing was held at Portage, Wisconsin on February 28, 1994. No stenographic transcript of the proceedings was made. The parties submitted written briefs to the Arbitrator for her exchange by May 10, 1994 and the record was thereupon closed, the parties having waived the right to file reply briefs at the hearing.

ISSUES:

The parties stipulated that the following issues should be determined in this case:

Did the Employer have just cause to terminate the
Grievant on or about March 16, 1993?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE XV - MANAGEMENT RIGHTS

15.1 The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

. . . .

D) To suspend, demote, discharge, and take other disciplinary action against employees for cause

BACKGROUND:

Russell Krakow was hired as a County janitor in July, 1988. On October 9, 1992, Krakow and another employee agreed upon and executed a Settlement Agreement with the County to avoid litigation over two grievances filed regarding prior disciplinary actions taken against them. That agreement read in relevant part as follows:

. . . .

- 1.The written reprimands placed in the grievants' files dated October 23, 1991 shall be removed from the grievant's files;
- 2.The letter of one (1) day suspension imposed on grievant Russ Krakow dated March 9, 1992 shall be reduced to a written reprimand;
- 3.The letters of three (3) day suspensions imposed on the grievants dated May 29, 1992, shall be reduced to a one (1) day suspension for each grievant;
- 4.Grievant Krakow shall be reimbursed for three (3) days' lost pay; Grievant Carney shall be reimbursed for two (2) days' lost pay;
- 5.All grievances involving Mr. Krakow and Mr. Carney as of October 1, 1992, shall be withdrawn by the Union and the Grievants;
- 6.The grievants, with Union representation, shall meet with appropriate representatives of the Employer to define rules and work expectations;

7. The grievants will enter into written statements of work rules, consistent with the terms of the collective bargaining agreement, addressing: breaks; hours of work; contracts with other employees; and avoidance of harassment, sexual or otherwise, by any county employee;
8. The discipline referred to in item 3, above, was imposed for alleged failure to properly complete cleaning tasks; the parties were unable to agree on the validity of those allegations.

. . .

The County and the Union then met regarding the work rules referred to in Paragraph 7 of the October 9th Settlement Agreement. The County promulgated "RULES FOR JANITORS," consisting of 21 numbered rules. The Grievant reviewed and signed those rules. Relevant Work Rules read as follows:

2. You are not to stand around talking to other employees or friends during working hours. A greeting such as hi or good night is not what we mean.

. . .

8. When cleaning you are to do day to day (sic) cleaning (as described in your job description) in each office then leave. .

. .

The County thereafter suspended Krakow for three days in November, 1992, for violating the above-quoted Work Rule 2 on two occasions. Krakow grieved this suspension and on October 18, 1993 WERC Arbitrator McLaughlin ruled that Krakow had been suspended for just cause and he denied and dismissed the grievance.

FACTS:

Health Department employe and Union member Julie LaRose stated that on February 23, 1993 at the John Roche Building where Krakow worked as night shift custodian, Krakow came into the Health Department office where she was working overtime after 4:30 p.m. and talked to her for 15 to 25 minutes. LaRose stated that Krakow did no work while in her office; that he tried to get her to gossip about other people and to "choose sides;" that this made her uncomfortable and that she told Krakow that she had work to do and asked him to leave. LaRose stated that Krakow left

shortly after she asked him to do so that day.

On February 24th, LaRose again worked overtime in the Health Department. Krakow came into her office, after 4:30 p.m., performed no work and again tried to engage LaRose in gossiping about others. After 15 to 20 minutes, LaRose asked Krakow to leave and he did so shortly thereafter. LaRose reported these incidents to one of her supervisors and later described the incidents in a memo to Building and Grounds Supervisor Martin at Martin's request.

Krakow's testimony regarding these incidents is in conflict with LaRose's. Krakow stated that he talked to LaRose on February 23 but that he merely asked her how long she would be working there. Krakow stated that Jo Ann Prichard 1/ (another employe) was present during this exchange and that he emptied the wastebaskets while he was in LaRose's office. Krakow also stated that LaRose must have been wrong about the time of day because he would not normally get to the Health Department by 4:30 p.m. due to his cleaning routines at the Roche Building. Krakow also stated he did not hear LaRose ask him to leave on February 23rd. On February 24th, Krakow stated he thought he talked to LaRose at 9:00 p.m. in the Roche Building lunch room where LaRose was having a meeting. Krakow stated that LaRose asked him how to turn the lights off while he was on break and that he (Krakow) assisted her.

Krakow specifically denied having any conversations with LaRose in her office for 15 to 25 minutes involving gossip. Krakow stated he thought LaRose made these allegations up. Krakow also stated that he felt there was a conspiracy in the County to bring false accusations against him, to harass him and to terminate his employment. Krakow admitted, however, that if he had had conversations of a 15 to 25 minute length with LaRose, this would violate Work Rule 2, to which he was subject.

Also during this period of time, the Building and Grounds Supervisor Larry Martin received three written complaints on or about January 26, February 16 and March 1, 1993 from the Health Services Supervisor regarding Krakow's cleaning work. These complaints were investigated at the time of receipt by Day Supervisor Bill Mootz and Martin accompanied Mootz in investigating the February 16th complaint. In regard to the January 26 complaint, Mootz testified that he found there were toe nails (from a previous clinic thereon) on the clinic room floor where children were likely to crawl. Regarding the February 16th complaint, Martin stated that he inspected and found childrens' handprints left on the clinic window ledge and that there was

1/ LaRose stated that JoAnn Prichard was not present during these conversations, contrary to Krakow's assertions. Jo Ann Prichard did not testify in this case.

paper and dust on the floor where children would be present. Regarding the March 1st complaint, the Health Department Supervisor complained in writing about dust balls ("fuzzies") in the coffee supply room and that the whole floor needed a good cleaning. This cleaning work was undisputedly Krakow's responsibility.

Krakow stated however, that no one brought these deficiencies to his attention at the time they occurred, although he admitted on cross-examination that apparently there were some oversights in his cleaning work. Mootz stated that he had tried to talk to Krakow about these and other problems and that Krakow had told him that he (Mootz) was not his (Krakow's) boss.

On March 11, 1993, Krakow received a "Notice of Pre-Termination Hearing" to be held on March 16th, which read in relevant part as follows:

. . .

The Columbia County Property Committee will meet in closed session pursuant to Wis. Stat. 19.85 (1)(b) to consider evidence and determine whether disciplinary action including possible discharge is warranted for the following reasons:

Chronic, continued harassment of other employees during work hours. Letter dated March 2, 1993 from employee that works in community health service office complaining that Mr. Krakow was disrupting her on two occasions from doing her work. Once on February 23, 1993 when she advised Mr. Krakow "she had to get to work" and once on February 24, 1993 and again was told that "she had work to do". Also complaints from community health services supervisory staff on January 26, 1993, February 16, 1993 and March 1, 1993 in reference to poor vacuuming or no vacuuming and uncleaned floors.

You have the opportunity and right to respond in writing to the above charges and to appear at the above referenced hearing to respond orally concerning the charges to the Columbia County Property Committee. Written responses should be directed to Supervisor Edward Riley, Chairman of the Columbia County Property Committee, P.O. Box 177, Portage, WI 53901. You also have the right to be represented by counsel, union representative or other such party if you so desire.

You or your counsel will be accorded the right to hear and cross-examine those who testify against you and you may provide witnesses or evidence in your own behalf.

You have the right to demand that the evidentiary hearing and decision by the committee be held in open session pursuant to sec. 19.85(1)(b) Wis. Stats.

. . .

Neither Krakow nor any representative for him attended this hearing. In addition, there is some dispute on the point, whether certain memos received from Health Department employees Ruth Holden and Mitzie Hansen regarding Krakow's treatment of them were

considered or discussed at this hearing. In this regard, Personnel Director Jim Aiello testified he did not recall that the memos (previously received from Ruth Holden and Mitzie Hansen) were discussed at the hearing; that in the County's minutes of the hearing there was no reference to these allegations; and that in May, 1993, when the Union asked the County for a copy of Krakow's complete personnel file, although nothing was withheld, these memos made by Holden and Hansen were not contained in the packet sent to the Union. In contrast, Supervisor Martin stated that although he had not acted on the information from Holden and Hansen in reaching his decision to recommend Krakow be terminated, he believed that the issues raised by these women were discussed at the March 16th hearing in terms of Krakow's harassment of employes and Krakow's incompatibility with other employes. 2/

Following the pre-termination hearing, Mr. Aiello issued a letter dated March 16th which read in relevant part as follows:

. . .

The committee, after a review of the recent complaints filed and your employment record for the previous twelve (12) months, made the following findings and decision. The progressive disciplinary steps that have been taken in an attempt to salvage your employment have been unsuccessful. Furthermore, no improvements have been noticed, and, to this day, your problems continue to be chronic and acute.

Therefore, I have been directed by the Property Committee to notify you of your termination of employment with Columbia County to be effective immediately.

. . .

Krakow then filed the instant grievance which was held in abeyance until Arbitrator McLaughlin rendered his decision (October 18, 1993) on Krakow's 3-day suspension grievance.

Positions of the Parties:

County:

2/ For the reasons stated infra, the evidence given by Holden and Hansen has not been recounted in this Award and it has not been considered in reaching the decision herein.

The County asserted that it followed progressive discipline when it discharged Krakow for the same kind of conduct for which he received a 3-day suspension, upheld by Arbitrator McLaughlin. It asserted therefore that it has submitted ample evidence to support a discharge decision.

Although the County admitted there was some confusion regarding the evidence given by employes Holden and Hansen, it asserted that Krakow and the Union could not contest whether this evidence was considered at the March 16th pre-termination hearing because they had chosen not to attend that hearing. The County urged that even without consideration of this evidence, there was sufficient proof that Krakow had violated Work Rules 2 and 8 by his poor cleaning work and his continued disruption of other employes' work by his repeated (unwelcome) conversations during work hours.

The County contended that Krakow's case amounted to his self-serving denials of other witnesses' corroborated testimony, and of Krakow's unsubstantiated claims that the County and its agents have conspired to terminate him. The County urged that it had afforded Krakow due process in terminating him and that that termination should stand.

Union:

The Union asserted that the allegations (dating back to November, 1992) and testimony given by County witnesses Holden and Hansen are irrelevant and should be given no weight in this decision. The Union noted in this regard, that these allegations were never raised with Grievant Krakow prior to the instant hearing; that they were not considered by the County in its Pre-Termination Hearing. Nor were there references to these allegations in the Grievant's personnel file or among the official reasons for his discharge. By withholding this "evidence" until this hearing, the Union urged, the County has denied the Grievant a reasonable opportunity to defend himself and the County failed to grant Krakow even minimal due process rights. The Union sought, therefore, that Holden and Hanson's allegations and testimony thereon must be given no weight in reaching this decision.

In regard to the two conversations Krakow allegedly had with Ms. Julie LaRose in February, 1993, the Union asserted that even assuming those conversations occurred as LaRose stated, Krakow was not thereby guilty of "harassment" as the County asserted. The Union observed that Krakow was entitled to two 15-minute breaks pursuant to the labor agreement and it implied that he took these breaks while talking with LaRose. Thus, the discharge penalty is excessive in this case and it should be mitigated, in the Union's view.

In regard to allegations that the Grievant failed to properly complete cleaning tasks on these occasions, the Union urged that the County failed to prove that Krakow was actually working on these occasions. The Union asserted that the County's investigation of these instances was incomplete and slipshod, at best, and that the evidence given was unreliable and second-hand.

Thus, the Union contended that the County entirely failed to meet its burden of proof in this case. The Union sought an award setting aside Krakow's discharge and reinstating Krakow with full backpay and benefits.

Discussion:

The initial question presented in this case is what value should be placed on the evidence proffered by the County regarding incidents which allegedly occurred between Krakow and Ms. Hansen and Ms. Holden. The answer to this question must be that this evidence is neither relevant nor material to this case. On this point, I note that the County failed to prove that it relied upon this evidence in reaching its decision to discharge Krakow: No mention of these incidents was made to Krakow or the Union prior to the instant hearing. There was also no reference to these incidents in any Pre-termination or termination documents. County agent Aiello admitted that the memos from Holden and Hansen were not given to the Union during its investigation of this case, and that he could not recall if these incidents were specifically raised at Krakow's pre-termination hearing. Aiello also admitted that these incidents were not referred to in the County's minutes of Krakow's pre-termination hearing. Supervisor Martin stated that he had not relied on evidence from Holden and Hanson in reaching his decision to recommend Krakow's discharge. In these circumstances, this evidence must be and has been entirely disregarded in reaching this Award.

However, in contrast, the remainder of the evidence -- the LaRose harassment and three incidents of inadequate cleaning -- which the County in fact relied upon in deciding to discharge Krakow, I find is sufficient to support his discharge for just cause, given the prior progressive discipline imposed upon Krakow.

In regard to Ms. LaRose's testimony, I note that Ms. LaRose was a witness with no interest in the outcome of this case. On the other hand, Krakow had a personal interest in this case. LaRose's credibility was not called into question in any way by the Union in this case and the facts she recounted regarding Krakow's conversations with her demonstrated that by engaging in this conduct, Krakow had violated Work Rules 2 and 8. 3/

3/ Krakow admitted on cross-examination herein that had he engaged in the conduct described by Ms. LaRose, that he would have thereby violated the Work Rules to which he

In contrast, I note that although Krakow denied gossiping with LaRose for 15 to 20 minutes on the dates in question, he also stated that he thought LaRose must have been wrong about the time of day and that she made up the allegations against him. 4/ I see nothing in this record that would indicate that LaRose would perjure herself in this way. Furthermore, Krakow's assertions under oath in this case that there was a conspiracy to discredit and terminate him also undercut his testimony, as they remained wholly uncorroborated by the record evidence. Therefore, in these circumstances, I credit Ms. LaRose and I find Krakow's testimony incredible regarding the events of February 23 and 24, 1993.

I find, on this record, that the County's assertions that it followed progressive discipline before reaching its decision to terminate Krakow is clearly supported by the evidence. One wonders what further assistance to Krakow, or additional notice or warnings would be necessary to satisfy the Union before the County could properly discharge Krakow. I note in this regard, that it was for similar conduct that the County disciplined Krakow on several occasions in 1991 and 1992; that Krakow agreed to subject himself to specific Work Rules from 1992 forward; that in November, 1992, Krakow received a 3-day suspension for violating these Rules, later upheld by Arbitrator McLaughlin.

was subject.

4/ Even a cursory reading of the McLaughlin award demonstrates that Arbitrator McLaughlin found Krakow's testimony in that case to be incredible.

In addition, in the instant case, the County properly found that Krakow had violated Rules 2 and 8 by his conversations with LaRose. Based on LaRose's written statement to the County dated March 2, 1993, that Krakow had spoken to her for approximately 30 to 45 minutes on February 23 and 24, that he had no "immediate duty to perform" in her office and that he simply wanted to gossip (which LaRose stated she did not "care to engage in."), 5/ the County could properly conclude that Krakow had violated Work Rules 2 and 8.

Beyond the above Work Rule violations committed by Krakow, the County also investigated three written cleaning work complaints which it received between the end of January and early March, 1993 from a departmental supervisor. The County properly found that the work areas were ones that Krakow was responsible for, and its timely investigations showed that Krakow had been responsible for the poor cleaning on the dates in question.

The fact that the County failed to prove that Krakow was actually working on the dates in question does not require a different conclusion. On this point, I note that Krakow did not deny he was working on the dates in question. In addition, Krakow admitted on cross-examination that he had apparently failed to clean properly -- that there may have been some oversights -- but that the County had not notified him of any problems with his cleaning at the time they occurred.

In regard to whether Krakow received notification of cleaning problems, I credit Mr. Mootz' testimony over Krakow's, that Mootz attempted to talk to Krakow about these three "oversights" but that Krakow had refused to do so claiming Mootz was not his (Krakow's) supervisor. In my opinion, Mootz' testimony not only comports with Krakow's personality as displayed on the witness stand, but Mootz' testimony also stands unimpeached by the Union on this record. Thus, I find that by his poor cleaning work on or about January 26, February 16 and March 1, 1993, Krakow clearly violated Work Rule 8.

Therefore, based on the relevant evidence and argument herein, I issue the following

AWARD

The Employer had just cause to terminate the Grievant, Russell Krakow, on or about March 16, 1993.

The grievance is therefore denied and dismissed in its entirety.

5/ The Union's implications in its brief that Krakow was properly on break on February 23rd and 24th when he spoke to LaRose are simply not supported by this record: Krakow did not assert that he was actually taking his break when he spoke to LaRose on February 23rd or 24th.

Dated at Oshkosh, Wisconsin this 9th day of June, 1994.

By Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator