

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

MARINETTE COUNTY

and

MARINETTE COUNTY COURTHOUSE  
EMPLOYEES UNION, LOCAL 1752, AFSCME,  
AFL-CIO

Case 141  
No. 50829  
MA-8395

Appearances:

Mr. Chester C. Stauffacher, Esq., Corporation Counsel, Marinette County, Marinette County Courthouse, 1926 Hall Avenue, P.O. Box 320, Marinette, Wisconsin 54143-0320, and Mr. Charles Carlson, Senior Manager, Griffith and Associates, appeared on behalf of the County.

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appeared on behalf of the Union.

ARBITRATION AWARD

On April 11, 1994, the Wisconsin Employment Relations Commission received a request from the Marinette County Courthouse Employees Union, Local 1752, AFSCME, AFL-CIO, to appoint an arbitrator to hear and decide a grievance pending between the Union and Marinette County. Following jurisdictional concurrence from the County, the Commission, on July 14, 1994, appointed William C. Houlihan, a member of its staff, to hear and decide the dispute. An evidentiary hearing was conducted on August 24, 1994, in the Marinette County Courthouse. A transcript was prepared and distributed by September 22, 1994. Post-hearing briefs were submitted and exchanged, with the parties waiving their right to submit reply briefs as of October 31, 1994.

This arbitration addresses the discharge of Jeff Gray.

BACKGROUND AND FACTS

Jeff Gray, the grievant, began employment with Marinette County on May 15, 1991. Gray was initially employed in the Sheriff's Department, serving as a Corrections Officer. While working in the Sheriff's Department, Gray was given a written warning on March 8, 1993 for unacceptable work performance, and displaying a general lack of concentration and attention to detail. At some subsequent point, Mr. Gray's hours of work were reduced, which led to his filing

a lawsuit against the County and the Union. The specifics of that lawsuit were not made a part of this record. Gray was advised to bid for any full-time openings that were posted, and did so.

On July 8, 1993, Gray transferred to the Parks Department, where he secured full-time employment. On November 11, 1993, Mr. Gray was given a written warning for "failure to carry out the valid orders of a supervisor". Mr. Gray had failed to secure and wear the required safety shoes. On November 17, 1993, Mr. Gray was given a one-day suspension for failure to call in upon use of sick leave.

In the fall of 1993, Mr. Gray went to the Courthouse to discuss the possibility of filing a grievance with Union steward Patty Chmela. Ms. Chmela is the Union's Chief Steward, and processes and handles grievances. She keeps Union-related documents in a large looseleaf binder. According to Mr. Gray, at the time of their meeting, Ms. Chmela showed him the looseleaf binder.

Mr. Gray was later laid off by the Parks Department. A janitor position in the Maintenance Department opened up and on or about January 11, 1994, Gray took that position. His assignment included general cleaning of the Human Services Building. James Dzurick, Gray's supervisor, is the Maintenance Engineer. Dzurick showed Gray his work area, familiarized him with his work assignment, provided him keys to the building, and stressed to Gray the importance of confidentiality with respect to papers and documents within the Human Services Department.

On the morning of March 1, a Monday, Ms. Chmela was advised that there were several copies of grievance materials involving Mr. Gray laying on a copy machine, situated approximately 75 feet down a corridor from her office. Chmela went to the photocopy machine and retrieved the documents, which included some of her personal notes relative to grievances involving Mr. Gray. As she reviewed the documents, she believed that they were copies of documents that she kept in her Union binder, which she kept in the rear of a file drawer. The front sections of the file drawer contained confidential records relative to AFDC, medical assistance, and food stamp recipients. Chmela was concerned that someone had broken into her file cabinet and removed some of its contents, including her Union binder. She went to her direct supervisor, Ken Marineau, and informed him that someone had entered one of the confidential drawers in her file cabinet, removed the Union binder, copied documents, and then placed the ring binder back in the file drawer.

It was Ms. Chmela's testimony that she believed that the office security had been breached, and she was uncomfortable leaving documents and materials out thereafter. She indicated that she never left the Union binder out in the open, but rather always stored it in the back of this closed file drawer. Ms. Chmela testified that Mr. Gray had never asked to see copies of materials that she had in her file.

At Marineau's suggestion, Chmela took her concern to Orville Gauthier, the Welfare Fraud Investigator. On March 1, Chmela approached Gauthier, recounted the events as she understood them, and expressed her concerns. Gauthier initiated an investigation to determine

whether someone had broken into the files. He interviewed a number of people working that day, none of whom could shed light on the matter. Later in the afternoon, 1/ he called, and awakened, Mr. Gray. Gray denied copying anything, and denied knowledge of who might be removing materials from files and/or copying that material. The conversation concluded with Gauthier informing Gray that there was no need for him to come in early that day (Mr. Gray's work day begins at 4:00 p.m.) and that Gauthier was going to take the retrieved materials and book and have them dusted and examined for fingerprints.

That afternoon, at approximately 3:30 p.m., Mr. Gray came into work early, came into Mr. Gauthier's office, and indicated that he wanted to talk. According to Gauthier, Gray indicated that he had not made copies at that time, but that he did know where the books were because Ms. Chmela had shown him the books on prior occasions. The investigation continued without results.

Later, on approximately March 7, the matter was turned over to the Marinette Police Department, and assigned to Lieutenant Inspector Harold Techmeier. On March 18, Techmeier interviewed Jeff Gray in connection with this matter. Prior to the interview, Techmeier, Gauthier and Gray met in Techmeier's office. According to Techmeier and Gauthier, Gray then indicated that he had gone through the Union binder and made a copy of one document. That document, a communication between Captain Waugus of the Marinette Sheriff's Department and Pat Chmela was a document that he did not previously have. Gray indicated that he had come across the binder laying open on top of a file cabinet sometime in January, and had seen the document. He removed the document, photocopied it, and returned it to the binder. Gray advised the men that that was the only document that he had removed and that he had done so in January. During the course of the transcribed interview, upon questioning, Gray indicated that the documents found sitting on the copy machine were documents he had left behind the preceding Friday. Mr. Gray indicated that he had brought a number of documents from home to be photocopied on the Friday preceding March 1; that he had made copies of those documents and must have inadvertently left some of those copies on the machine. Gray indicated that he had not removed any documents from any binder on that Friday.

Mr. Gray testified that he had never seen a copy of the reprimand originating in the Sheriff's Department. It was his testimony that in late January he saw the Union binder lying open on top of a small filing cabinet. Materials pertaining to him were on top. He saw documents in that binder that he had never seen before. He testified that he copied some handwritten chronologically-maintained notes of Ms. Chmela's relating to his grievance. There are four pages of those notes. Gray testified that he never went into a cabinet to remove the binder. Gray testified that in late February or early March he did not remove documents from a binder but rather brought them from home, photocopied them, and inadvertently left some behind. It was

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1/ Or possibly March 3. The record is somewhat ambiguous as to the precise day of this call.

Mr. Gray's testimony that when Gauthier called him he was asleep, groggy and did not understand what documents Gauthier was making reference to, believing the man was making reference to some form of welfare type documents. Gray did not understand this reference since he had never been a welfare recipient. Gray indicated that when he met with Gauthier on the afternoon of March 1, (or possibly March 3), he (Gray) asked Gauthier what file he was talking about. Gauthier indicated that it was the Union file. Gray testified that he then advised Gauthier that he copied material from the Union binder back in January.

Mr. Gray was discharged on March 23, 1994 for failure to carry out the valid orders of a supervisor and for dishonesty. Mr. Gray's initial application for Unemployment Compensation was denied on the grounds that he engaged in misconduct. Mr. Gray appealed that initial determination and it was overturned. In overturning the initial determination, the tribunal made the following findings. . .

After the employee was transferred to the Maintenance Department, he was assigned cleaning duties in the building where the Union vice-president had her office. In January of 1994, he found the grievance binder sitting on top of a filing cabinet. He looked through the documents pertaining to his grievance to see if there were items that he did not have at home. He found one document, and photocopied it. On or about February 28, 1994, he brought documents pertaining to his grievance and lawsuit to work and photocopied them. He inadvertently left the documents by the photocopy machine. . .

The tribunal essentially credited Mr. Gray's testimony as to the facts. The tribunal concluded that there was no misconduct in photocopying documents that were not documents pertaining to any employer interest.

The matter was appealed to the Labor and Industry Review Commission. The Commission, in reviewing the tribunal, accepted the Examiner's version of the facts. The Commission, reversed the Examiner, with the following:

The Commission, in particular, is troubled by the employee's decision to peruse the grievance binder without permission or prior approval from the Union representative. Even though the Union representative testified that the employee would have had access to all the documents in that binder that pertained to him, it was the manner in which the employee obtained the documents that violated the Employer's standard of conduct that it had a right to expect of the employee. During his orientation, the employee was instructed not to examine confidential paperwork, disturb records lying on

desks or tablespots or go through file cabinets. Nothing prevented the employee from obtaining copies of the Union records pertaining to him during normal business hours and through proper channels. The employee was represented by an attorney regarding the Union grievance and lawsuit, and could have requested that his attorney obtain the file for him. Moreover, the employee and the Union were adversaries in a lawsuit. While examining the binder, the employee could have seen confidential papers that pertained to other Union members or the lawsuit he was involved in. Thus, while the binder may not have been confidential in that it reflected Union business affecting the employee, he may have had access to documents he was not legally permitted to have access to. The Commission is persuaded that the employee intentionally and deliberately disregarded the Employer's interest by perusing, during his work shift, the Union representative's binder without permission or prior approval and that he violated the standard of conduct the Employer has a right to expect of the employee as a member of its maintenance crew.

## ISSUE

The parties stipulated the issue as follows:

Did the County violate the collective bargaining agreement when it discharged Jeff Gray?

If so, what is the appropriate relief?

## RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

### ARTICLE 24

#### DISCIPLINARY ACTION

**24.01 Disciplinary Action.** No Employee shall be reprimanded, suspended or discharged except for just cause.

**24.02 Dismissal.** An Employee may be discharged for the following offenses without warning or notice:

- A) Failure to carry out the valid orders of a supervisor;

- B) Use of abusive language toward another person while on Courthouse premises.
- C) Intoxication while on duty;
- D) Unauthorized possession or use of narcotics;
- E) Dishonesty;
- F) While on duty, deliberate misconduct which results in damage to any person or property;
- G) Failure to notify supervisor of absence from work on three (3) separate occasions during any one (1) year period.

Any Employee who is discharged, except probationary, shall be given a written notice of the reasons for the action, and a copy of the notice shall be made a part of the Employee's personal history record, and a copy shall be sent to the Union secretary. Any Employee who has been discharged may appeal by giving written notice to h/er supervisor within fourteen (14) days after dismissal. Such appeal shall go directly to arbitration.

**24.03 Disciplinary Progression.** For all other offenses, the progression of disciplinary action will be:

- A) Written reprimand;
- B) Suspension, not to exceed five (5) working days.
- C) Dismissal.

An Employee shall not be subject to disciplinary suspension unless s/he had been given a written reprimand on a prior occasion, and no Employee shall be subject to discharge under this paragraph from employment unless s/he had previously been suspended for cause. The Employee shall have the right to have any matter under this paragraph arbitrated as set forth in 23.02. Any disciplinary action taken by the County against an individual Employee shall be reduced to writing, stating therein the reason for the disciplinary action. The individual Employee and the Union shall be given copies of said writing and a copy shall be placed in the Employee's

personal [sic] file. All disciplinary action taken under this paragraph shall be removed from the individual Employee's record after passage of two (2) years.

**24.02 Grievance Procedure.** Any dispute as to whether an Employee was disciplined for just cause will be subject to the grievance procedure, provided it is presented within five (5) working days from the date of the disciplinary action. If it is determined that the Employee was not disciplined for just cause, the County will reinstate the Employee with seniority credit and back pay for actual time lost.

**24.05 Union Representative.** An Employee, if s/he so requests, may have a Union representative present during any conference regarding disciplinary action. The County will advise the Employee of h/er right to have a Union steward present during any conference regarding disciplinary action.

. . .

#### POSITIONS OF THE PARTIES

The County contends that Jeff Gray was specifically advised of the need for confidentiality while performing his janitorial duties. It should be axiomatic that janitorial duties do not include copying things out of a Union steward's files or bringing things from home to copy. The Employer contends that the need for confidentiality is inherently related to its operations. It points to the testimony of numerous witnesses, drawn from the County Human Services Department, each of whom testified as to the presence of confidential information in their respective jobs, and indicated that their need for confidentiality was breached by Mr. Gray's conduct. The County contends that it did a thorough, methodical investigation. The investigation was ongoing for one month before the discipline was executed. Every effort was made to conduct the investigation as professionally and objectively as possible. The investigation took as long as it did because Mr. Gray frustrated the investigation with his deliberate failure to provide truthful answers when questioned.

The Employer contends that there has been a consistent pattern of problems with Mr. Gray during his entire period of employment with Marinette County. He has been the recipient of discipline in several unrelated departments. Three different supervisors in three different departments with three different functions have had experiences with Jeff Gray that required disciplinary action. All of the problems arose from Mr. Gray's failure to follow orders and procedures established by supervision. One of the previous reprimands involved unauthorized use of the photocopy machine in the jail. Mr. Gray's actions created a general atmosphere of

insecurity, mistrust and betrayal.

The County expresses concern over its liability should it permit Mr. Gray, in his capacity as a janitor in its Human Services Department to browse through the Union vice-president's files and make copies. The County contends that it fears that it is arguably accountable for a potential violation of the Union's right to organize and function. The County argues that once it became aware of Mr. Gray's conduct, it had a legal, contractual obligation to the Union local to take corrective action. In summary, the Employer contends that it has a reasonable right to expect that the employe will not go browsing through office materials contrary to the instructions of his supervisor, will not make copies of material brought from home and material obtained in the browsing process, and will not then lie to cover it up.

The Union points to the findings of fact as set forth by the Unemployment Compensation Administrative Law Judge relative to what occurred. The Union notes that the ALJ found that there had been no breach of confidentiality of any County documents. The Union acknowledges that the ALJ's determination was overturned by the Labor and Industry Review Commission, but points out that the standard of misconduct applicable to Unemployment Compensation differs historically and substantively from case law surrounding just cause relative to the propriety of a discharge.

The Union contends that the County failed to show with clear and convincing evidence that Gray ever violated Section 24.02(A), "Failure to Carry Out the Valid Orders of a Supervisor;". The Union contends that Dzurick never gave Gray any such directive relative to the confidentiality of materials. It takes issue with the County's characterization of Dzurick's testimony in this regard.

Insubordination is not present in this matter. Gray's actions, characterized as problematic, do not rise to the level of a direct disregard for a supervisory order. There is no compelling Employer interest here. Ironically, it is only the Union that supports the grievant in this matter, even though it potentially is affected adversely. There is no evidence in the record, direct or circumstantial, that Gray violated the confidentiality of any of the Employer's ESS files. Mr. Gray testified that his search only involved looking into Local 1752's grievance book. Indeed, his search within that grievance book was limited to his own pending Duty of Fair Representation case. Gray did not believe he was doing anything wrong by looking into his own file. Mr. Gray's actions in no way injured the interests of Marinette County. The Union contends that Mr. Gray lied to no one. When he understood that Gauthier was asking about Union files, he promptly acknowledged that he had taken a document previously, and had brought his own documents in to be copied. Gray's testimony in this regard was found credible by the Unemployment Compensation Administrative Law Judge.

The Union believes that the County overreacted, and did so because of Mr. Gray's lawsuit. The County's response to an incident in which copies of Mr. Gray's grievance file were found by



a copy machine is extreme. The Union asks: Why interview Gray in a criminal context here? Why discharge Gray for copying his own file? Why accuse Gray of dishonesty when no direct or circumstantial evidence of wrongdoing exists? The Union contends that the County, in its haste to fire Mr. Gray overlooked its basic responsibility to provide sufficient evidence to sustain its actions. The County's action reeks of retaliation. The Union contends that the wronged party is AFSCME Local 1752. It notes that the AFSCME International Constitution provides an internal procedure for addressing claims against its members. The Union contends the discharge is inappropriate.

## DISCUSSION

There are several facts in dispute, and significant conflicting testimony. Among the documents found on the copy machine on March 1 were photocopies of Ms. Chmela's notes. Mr. Gray's testimony in this proceeding is that he found those notes in the open binder in January and copied them. This explains how they came to be on the machine on March 1. This is inconsistent with the finding of the Administrative Law Judge serving as the appeal tribunal. Mr. Gauthier testified that on March 18 Gray told him that he had previously found one document, "a communication between Captain Waugus of the Marinette Sheriff's Department and Pat Chmela". That was the sole document copied. The March 18 transcript of Mr. Gray's interview with Lieutenant Techmeier also indicates that in January Mr. Gray photocopied but a single document in January, that being the Waugus letter.

Mr. Gray testified that some date in January he found the Union binder open on top of a file cabinet. Ms. Chmela testified that the binder was never left out. Other witnesses testified that the binder was never left out. The County introduced a photograph of the clutter on top of the file drawer where Mr. Gray contends he discovered the notebook. It appears that it would be very difficult to leave a notebook on top of those cluttered materials.

On the afternoon of March 1, Gauthier telephoned Gray to advise him that documents pertaining to him had been found on top of a photocopy machine. Gray denied knowledge of any such document, and denied making any such copies. Gray explains that he was asleep at the time of the call. This would have been the Monday (or possibly Wednesday) following the Friday that Mr. Gray, according to his testimony, took a substantial number of personal documents in and copied them. Later that day, Gray came to work early to meet with Gauthier. According to Gauthier, Gray indicated that he had not made any copies, but did know where the Union notebook was kept. According to Gray, once Gauthier explained that the documents were Union documents, he advised Gauthier that he had copied a single document in January, and that he had brought his own documents in the preceding Friday and copied them.

Gray testified that he never asked for copies of Ms. Chmela's files, because neither she nor the Union were ever very helpful. He further testified that his hours and hers were different. Mr. Gray's shift overlaps Ms. Chmela's shift by 30 minutes.

These areas of difference are critical. The police were brought into this matter because of the Employer's concern that a breaking-and-entering and/or a burglary had been committed. The question of whether the binder was found in a confidential cabinet or left out in plain view is of no small significance. To credit Mr. Gray requires that I discredit a number of other witnesses on this matter. Mr. Gray advised Techmeier and Gauthier that in January he had copied a single letter authored by Waugus. That leaves unexplained how the photocopies of Ms. Chmela's personal notes chronicling Mr. Gray's grievance came to be in Mr. Gray's possession. At the grievance arbitration hearing, Mr. Gray testified that her notes were the documents that he had previously copied.

Gauthier testified that he had two conversations with Gray on March 1. According to Gauthier, Gray denied any knowledge or any involvement in removing and/or copying documents during the course of both of those conversations. Gray contends that when he became aware during the afternoon of March 1 that Gauthier was referring to Union documents, he advised the latter man of what had occurred. Gauthier contends that he continued to investigate the matter, and in fact, turned it over to the police who scheduled an interview on March 18. If Gray had advised Gauthier precisely what had occurred, it strikes me as odd that Gauthier would have felt compelled to maintain an investigation. If Gauthier's testimony, that Gray never acknowledged copying documents on March 1 is correct, I find it difficult to understand how it could take Mr. Gray in excess of two weeks to realize that the pile of documents he had copied the workday prior to March 1 were the subject of this ongoing investigation.

The Unemployment Compensation Administrative Law Judge essentially found the facts to be as testified by Mr. Gray. The Judge's conclusion in that regard is far more deferential to Mr. Gray than the factual record in the matter before me suggests is appropriate.

Even given the findings of the Unemployment Compensation tribunal, and Mr. Gray's testimony in the arbitration hearing, i.e., a combination most favorable to Mr. Gray, the result is that he went through the Union's notebook, removed personal documents authored by Ms. Chmela without permission, and did so immediately after he began employment in the Social Services Building. I credit Mr. Dzurick as having at least minimally advised Gray to respect the confidentiality of matters found in work offices. While it may be that he was never specifically told not to look through notebooks, or not specifically advised not to remove materials found open on desks, I believe he was given sufficient instruction to understand that he was working with confidential documents and ought to respect that. I further believe there are certain things workers know intuitively. Mr. Gray worked alone, at night, and with a full set of building keys. He should reasonably be held to the knowledge that he was not free to use his favored position to pry through the papers and documents of others.

The fact that the documents taken were not official County departmental papers is a distinction without a meaning. These documents obviously were not public documents. They

were not documents available to the County, and its agents. They were not documents available to the general public. Under the circumstances of Mr. Gray's employment, I believe the County is entitled to a reasonable expectation that its custodial employees will not invade the privacy zones of other employees, nor will they copy materials they find of interest.

The documents copied are business-related. This union is recognized as the exclusive collective bargaining representative of employees in the collective bargaining unit. There exists an ongoing bargaining relationship with the County. The entire relationship is statutorily created, sanctioned, and regulated. The notebook consisted of the records of the Union relative to grievances and other matters pending between the Union and the County. Those records are owned by the Union, and as such, are private property. Mr. Gray was in the midst of a lawsuit with the County and the Union. The documents he testified he took, Ms. Chmela's handwritten notes, in his self-help discovery adventure, chronicled the handling of a grievance on his behalf. I do not believe there is anything innocent about this occurrence. Mr. Gray was in search of documentation that would support his lawsuit. It was neither casual nor innocent.

The Employer has disciplined Mr. Gray for taking the documents, copying them, and lying to cover up his actions. This is a case where an employee used opportunity afforded by his work assignment to go through union documents potentially applicable to an ongoing lawsuit, and was caught. Had the Employer subsequently defended such actions with a hands-off approach, I suspect its actions would be met with howls of outrage by the wounded union. The employees who testified in this proceeding obviously enjoyed expectations that their privacy would be respected. It is equally clear that this Employer has committed to respect that privacy. I find nothing unusual or peculiar about those expectations. Mr. Gray has breached that confidentiality and that privacy in a conscious and willful manner. I believe the Employer was free to discharge him under Article 24.

#### AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 20th day of April, 1995.

By William C. Houlihan /s/  
William C. Houlihan, Arbitrator