BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between LOCAL 3055A, AFSCME, AFL-CIO and GREEN BAY AREA PUBLIC SCHOOLS	Case 187 No. 53930 MA-9491 Lori Dombroski Discharge

Appearances:

Mr. James Miller, Staff Representative, AFSCME Council 40, 639 West Scott Street, #205, Fond du Lac, Wisconsin 54937, appearing on behalf of the Union.

Mr. J.D. McKay, Attorney at Law, Law Offices of J.D. McKay, 414 East Walnut Street, Suite 240, Green Bay, Wisconsin 54301, appearing on the brief, and Ms. Christine Perrigoue, Senior Personnel Analyst, Green Bay Area Public Schools, 200 South Broadway, Green Bay, Wisconsin 54303, appearing on the brief for the District.

ARBITRATION AWARD

The Green Bay Board of Education Employees Union, Local 3055A, AFSCME, AFL-CIO (hereinafter referred to as the Union) and the Green Bay Area Public Schools (hereinafter referred to as either the District or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the discharge of Lori Dombroski. The undersigned was so designated. A hearing was held on July 31, 1996 at the District offices in Green Bay, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A stenographic record was made, and a transcript was received on August 8, 1996. The parties submitted post-hearing briefs and reply briefs, the last of which were exchanged through the undersigned on October 4, 1996, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Award.

I. Issue

The parties stipulated that the following issue should be determined herein:

> Did the Employer have just cause to terminate the grievant, Lori Dombroski? If not, what is the appropriate remedy?

II. Contract Language

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ARTICLE VIII - SUSPENSION - DISCHARGE

Suspension: Suspension is defined as the temporary removal without pay of an employee from h/er designated position.

a. Suspension For Cause: The Employer may for just cause suspend an employee. Any employee who is suspended, except probationary and temporary employees, shall be given a written notice of the reasons for the action and a copy of such notice shall be made a part of the employee's personal history record and a copy shall be sent to the Union. No suspension for cause shall exceed thirty (30) calendar days.

No employee who has completed probation shall be discharged or suspended except for just cause. An employee may be discharged immediately for dishonesty, drunkenness, reckless conduct endangering others, drinking alcoholic beverages while on duty, use of controlled substances or unauthorized absence. An employee who is discharged or suspended, except probationary and temporary employees, 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 sent to the Union. An employee who has been suspended or discharged may use the grievance procedure by giving written notice to h/er steward and h/er immediate supervisor within ten (10) workdays after such discharge or suspension. Such appeal will go directly to the appropriate step of the grievance procedure.

Usual Disciplinary Procedure: The progression of disciplinary action shall be oral reprimand, written reprimand, suspension, and discharge. The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge. The Union shall also be furnished a copy of any written notice of reprimand, suspension or discharge.

ARTICLE XII - AUTHORIZED ABSENCE

Sick Leave:

. . .

Upon the expiration of an employee's accumulated sick leave, the Employer shall pay an extended benefit of eighty-two and one-half

percent (82.5%) of such employee's salary for a period not to exceed a combined total of one hundred ninety (190) days of sick leave and extended benefit for any one (1) disability. Employees having exhausted their regular sick leave accumulations shall be paid extended benefits only of illnesses of more than ten (10) consecutive days duration. Illnesses of greater than ten (10) consecutive days shall be compensated from the first day of such illness. An illness resulting in periods of interrupted employment will be considered the same illness for the purpose of this section. All other employment benefits shall continue during the one hundred and ninety (190) day period.

However, employees on sick leave benefits under this section shall be required to apply for social security disability benefits during the fifth month of such disability and for Wisconsin Retirement System (WRS) disability benefits as soon as accumulated sick leave is exhausted. Employees qualifying for such benefits shall have their sick leave benefits reduced by the amount of their Social Security benefits and WRS benefits. Affected employees failing to make social security application and WRS application shall have all benefits under this section withheld until such time that application is made. . . .

ARTICLE XVI - GRIEVANCE PROCEDURE

All grievances which may arise shall be processed in the following manner:

Step 1. The aggrieved employee shall present the grievance orally to h/er immediate supervisor within fifteen (1 5) workdays of the time in which the employee knows of or should have known of the suspected improper application. The aggrieved employee, with the representation of h/er steward if s/he so elects, shall attempt to resolve the grievance with the immediate supervisor, who may call higher level supervisors into the discussion. If it is no resolved at this level within ten (1 0) workdays of its initial presentation, the grievance may be processed further by the employee as outlined in Step 2.

Step 2. The grievance shall be presented in writing to the immediate supervisor within ten (10) workdays of the supervisor's answer at Step 1; and if not resolved within ten (10) workdays at this level, it may be processed further by the employee as outlined in Step 3.

Step 3. The grievance shall be presented in writing to the Superintendent of Schools or h/er representative within ten (10) workdays of the supervisor's answer at Step 2; and if not resolved within ten (10) workdays at this level, it may be processed further by the employee as outlined in Step 4.

Step 4. The grievance shall be presented by letter to the Human Resources Committee within ten (10) workdays of the Superintendent's or h/er representative's answer at Step 3. If it is not resolved at this level within ten (10) workdays, it may be moved by the employee to an Arbitration Board as provided in Step 5.

Step 5. Within ten (10) workdays of the Human resources Committee's answer at Step 4, the grievance may be submitted by the employee to the Wisconsin Employment Relations Commission for arbitration by one of its members. The Arbitrator, after hearing both sides of the controversy, shall hand down h/er decision in writing and such decision shall be final and binding on both parties to this Agreement. The Arbitrator shall have no power to add to or subtract from or modify any term(s) of this Agreement. The cost, if any, of the Arbitrator shall be divided equally between the Employer and the Union.

Time Limits: Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been resolved on the basis of the last preceding answer of the Employer. Grievances not responded to by the Employer within the designated time limits in any step of the grievance procedure shall be considered denied by the Employer and appeals taken from such a denial to further steps of the procedure must be within the time limits set for appeal after an answer to the grievance. The parties may mutually agree in writing to extend the time limits in any step of the grievance procedure.

General: Any employee may process h/er grievances as above outlined, but the Union shall have the right to be present and act in support of its position in the matter of the grievance.

Any employee shall have the right of the presence of a steward when h/er work performance or conduct or other matter affecting h/er status as an employee are subjects of discussion for the record.

The Union shall determine the composition of the Grievance

Committee of the Union. Such committee shall not exceed four (4) employees.

If, in the judgement of the Union, a grievance affects a group or class of employees, the Union may submit such a grievance in writing to the Superintendent or h/er representative directly; and the processing of such grievance will be commended at Step 3 of the grievance procedure. The Union shall designate the individuals for whom the grievance is being processed at the time of filing.

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III. Background

There is relatively little dispute of fact in this case. The grievant was employed as a Food Service employee in the bargaining unit, working 5.25 hours per day, from 5:15 a.m. to 10:30 a.m. on the kitchen packing line at Preble High School. She had held the job as a regular employee from the 1986-87 school year through her discharge in early 1996. Her normal duties included packing lunches, moving food carts and totes, and other duties as assigned. Beginning in the 1995-96 school year, she took a second job from 11:15 a.m. to 12:45 p.m., working in the kitchen serving line in the nearby Howard Suamico School District.

In mid-December of 1995, the grievant fell at home and broke her foot. She was off work at both jobs for four work days and the Christmas break. When school resumed in January, she returned to both jobs. After a time, the pain in her foot caused her to go back to her doctor. On January 19th, she saw Dr. James Grace, an orthopedic surgeon. She discussed her work duties at both districts with him. She told Grace that there was a ledge on the line at Howard Suamico on which she could rest her foot, and that this reduced the discomfort. Grace told her that she should not be doing the heavier lifting and longer standing connected with the Green Bay job, but that she could try to perform the job at Howard Suamico until her next appointment. He provided her with a release from work form for the Green Bay schools, running through the date of her next appointment on February 9th. He did not note any restrictions nor note any possibility of light duty.

The grievant contacted her lead worker, Barb Van Gheem, and told her she would be off work for at least six to eight weeks. Van Gheem was the person workers were to inform if they were going to be absent. Van Gheem asked her if she was going to continue working at Howard Suamico, and the grievant told her she was going to try it and see if she could. The grievant gave the doctor's slip to Nancy Helgerson in the Human Resources office, and began receiving short term disability benefits under the collective bargaining agreement. These benefits amounted to 82.5% of her normal salary. She continued to work at Howard Suamico for an hour and a half per day, although she put in three and a half hours on January 19th.

At the end of January, the grievant went to the Human Resources office to get help from

Helgerson in completing some income insurance forms on some loans she had outstanding. The forms she gave to Helgerson listed the job at Howard Suamico, and showed that she was still working it, even while she was off work at Green Bay. Helgerson brought this to the attention of her boss, Dr. John Wilson, the Assistant to the Superintendent for Human Resources. Wilson assigned personnel analyst Christine Perrigoue to investigate.

Perrigoue asked the District's nurse, Christine Townsend to contact the grievant. In addition to her public health nursing in the schools, Townsend was responsible for the District's light duty program for injured employees. Townsend called the grievant at her home and asked her about her condition. The grievant explained that she had a fractured foot and that her doctor thought she might need to have pins inserted, which would keep her off work until the summer. Townsend told her that her primary concern was that she was apparently both receiving disability and working at the same time. The grievant told her that the job at Howard Suamico was less lifting than the Green Bay job, and that she stood for a considerably shorter period of time on that job. The grievant said that her doctor had wanted her to try the Howard Suamico job until her appointment on February 9th, although she found that her foot was swelling and she was afraid that the doctor might make her give up the second job. Townsend told her that the District had a light duty program, and they discussed possible assignments that would reduce the lifting and standing she would have to do. The grievant said she would be interested in light duty if it was available, and Townsend said that she would contact the doctor and discuss the possibility of having her return to work at Green Bay with some limitations or accommodation.

Townsend contacted Dr. Grace's office on January 30th and again on February 1st. She spoke with a woman named Kelly in his medical records department, and asked if it was possible that the doctor would have written an off work slip for the Green Bay Schools and a return to work slip for the Howard Suamico Schools for the same patient. Kelly told her that she would have to check the records, but that it seemed unlikely. They spoke again on February 5th, and Kelly informed Townsend that there was no mention of a slip of any kind for Howard Suamico Schools in the charts or case notes. On that same day, Townsend contacted Sue Baier, the District Director of Food Service and Barb Boerschinger, the District Food Service Manager. They both told her that they had spoken with the grievant when she went off work, and told her that she needed a return to work slip in order to come back to her job. Both said that they knew there was a program of accommodations for injured workers, but neither said they had discussed it with the grievant. Townsend reported back to Perrigoue, but contrary to what she had told the grievant, she never spoke with Doctor Grace about light duty assignments.

Perrigoue spoke with the grievant and the grievant confirmed what she had told Townsend about working at Howard Suamico. Perrigoue had the District's attorney obtain copies of the grievant's time sheets from Howard Suamico, and then reported her findings to Wilson. On February 29th, Wilson sent a letter to the grievant, discharging her for dishonesty:

The District has conducted an investigation into your claim for short

> term disability. On January 19, 1996, Dr. Grace of Green Bay Orthopedics, provided documentation that you would be off work from January 19, 1996 through February 9, 1996. Dr. Grace did not indicate that you could work under a reduced schedule or with restricted duties. Based on Dr. Grace's "no
>
> work" order, the District provided you with short term disability benefits due to a temporary disability which precluded you from working.
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> On January 30, 1996, the District learned that you were working in the Food Service Department at the Howard-Suamico School District while collecting short term disability benefits from the Green Bay School District. In discussions you had with Karen Townsend, District Nurse, and Christine Perrigoue, Senior Personnel Analyst, you confirmed that you have been and continue to work for the Howard-Suamico School District for 1 1/2 hours per day serving food and washing tables.
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> Based on your continued employment at Howard-Suamico School District, it is clear that you misrepresented the extent of your disability to the Board of Education in order to receive short term disability benefits. If you were able to perform work on a reduced schedule or with particular restrictions, it was your obligation to inform the Human Resources Department, Sue Baier or your immediate supervisor. The misrepresentation of your physical ability to perform work constitutes a dishonest act, therefore, the Board of Education is terminating your employment effective as of today's date.

The instant grievance was thereafter filed. It was not settled in the grievance procedure and was referred to arbitration. At the hearing, in addition to the facts set forth above, the grievant testified that she had discussed her job at Howard Suamico with either Sue Baier or Barb Boerschinger, because they wanted information on a taco bar she had helped set up at in the other district. This took place while she was on disability pay from the Green Bay Schools, and the grievant stated that she had told whichever one she spoke with that she was still working at the other job. The grievant also testified that Doctor Grace was out of town on the day of the hearing, but produced a letter from him dated July 18th, saying in part:

> It was my recommendation to Lori that if her symptoms would allow, then she could continue working at Howard Suamico School District but should stay off her Green Bay job. Again, the reason

> for allowing her to work a sedentary position for only 1-1/2 hours per day while the Green Bay School district job was much more physical and not in her best interest from a medical standpoint.
>
> I do not feel that Lori was trying in any way to hide the fact that she was not working in the Green Bay School District, and I do not feel that she was trying to mislead the Green Bay School.
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> She legitimately was off of work from the Green Bay Schools at my directive. I also would like to point out that at no time was my office contacted to ask about limited work activities. I do note that if limited work was available in the Green Bay School District similar to what she was doing in the Howard-Suamico School district, then this would have been taken under consideration.

Additional facts, as necessary, will be set forth below.

IV. Arguments of the Parties

A. The Position of the District

The District takes the position that the grievant is guilty of falsely obtaining disability benefits from the District by misrepresenting her physical condition. She presented the District with a release from work which made no mention of her availability for light or limited duty, and then continued to work in an almost identical position at another school district. The only real difference between the jobs was that the Green Bay District provided disability benefits, while Howard Suamico did not. By providing incomplete and misleading information, she collected nearly $1300 in disability benefits under false pretenses. This constitutes dishonesty, which is cause for summary discharge.

The District dismisses the Union's attempt to suggest that the grievant acted in good faith. Whether she actually discussed her job at Howard Suamico with her lead worker is irrelevant. She was well aware of the fact that the Human Resources office was the proper venue for information regarding disabilities, and she never gave that office, or any other appropriate management representative, any information to suggest that she was capable of working. Had she done so, the District would have had an opportunity to provide an accommodation or light duty, thus gaining productive work and saving disability benefits. By withholding material facts from the District, the grievant committed insurance fraud and abused the protective purpose of the negotiated disability benefit. The District also urges that the arbitrator give no weight to the letter provided by the grievant's doctor. This letter was generated well after the fact, and the doctor was not available to provide testimony supporting the assertions in his letter. The doctor wrote the

letter based solely upon the grievant's statements to him, without any input from the District. Thus his opinion that the grievant was not trying to mislead the District is completely unreliable and irrelevant.

The arbitrator must not allow this misconduct to stand, nor should he substitute his judgment for that of the employer on the subject of the appropriate penalty. The parties have negotiated over the proper response to dishonesty, and have agreed that immediate discharge is the penalty. Inasmuch as the evidence amply demonstrates that the grievant acted dishonestly, the only recourse is for the arbitrator to deny the grievance.

B. The Position of the Union

The Union takes the position that the grievant is innocent of any dishonesty and should be reinstated. There is a difference between dishonesty and a misunderstanding, and only if the grievant intentionally deceived the employer can she be summarily discharged. There is no evidence that she intended to mislead the District in order to obtain disability benefits. She never hid the fact that she had a second job, either before or after her injury. She discussed the second job with her lead worker while she was off work from the District. Her doctor released her to work at that job, but declined to release her for a return to the District. That decision was the doctor's, not the grievant's, and it was based on the differences between the two jobs. He did not inform her that she could perform a light duty assignment for Green Bay, and thus there is nothing at all deceptive about her failure to ask the District to create one for her. Had the District followed up on its efforts to contact Dr. Grace, perhaps a light duty assignment could have been agreed upon. However, the District failure to actually contact the doctor cannot be laid at the grievant's feet.

The fact is that the grievant fully informed her doctor about the content of both jobs, and she followed her doctor's instructions. He did not allow her to work at the District, and she was therefore entitled to receive disability benefits under the contract. She never took any steps to mislead the District, and she cannot be said to have acted in a dishonest fashion. Thus she must be reinstated and made whole for her losses.

V. Discussion

The grievant was discharged for dishonesty, on the theory that she defrauded the District by claiming disability benefits when she knew full well that she was able to work. Indeed, the District claims in its brief that she is guilty of a Class E Felony under the criminal statutes of the State of Wisconsin. Without going on at undue length, the evidence does not support the allegation of dishonesty under a just cause standard, much less guilt beyond a reasonable doubt under the criminal laws.

The District's theory simply cannot be reconciled with the undisputed facts. The District first assumes that the grievant was actively dishonest in attempting to disguise her employment at Howard Suamico. The grievant applied for short term disability benefits in the same office that she went to for help with the insurance forms showing that she was working at Howard Suamico. She did this at most six work days after submitting the doctor's slip. 1/ If she was trying to conceal her other job, she either would have gone elsewhere for help, or at least would not have filled in that portion of the form until after Helgerson had finished with it. When she

1/ She got the slip late on Friday, January 19th, and Townsend began investigating on Tuesday, January 30th.

was contacted by Townsend, she readily admitted the other job. When she was contacted by Perrigoue, she repeated what she had said to Townsend. According to her unrefuted testimony, she told her lead worker she was working the other job while she was off work, and also told either Baier or Boerschinger, both supervisory employees. Short of sending a registered letter to the School Board, she could not have been more open and obvious about the second job.

The District's theory argues, in the alternative, that the grievant's conduct is inherently dishonest, in that she must have known that if she could do work for Howard Suamico, she could do at least light duty for Green Bay. Baier and Boerschinger both told Townsend that they had told the grievant she had to provide a return to work form from her doctor before she could come back, and Townsend made particular note of the fact that both of them "admitted to me that they are well aware that we will make accommodations for employees if there is work available." What is completely absent from the record is any indication that the grievant was made aware of the possibility of light duty before Townsend called her. While the District suggests that she had an obligation to pursue the possibility of a light duty assignment on her own initiative, Townsend freely conceded in her testimony that it was standard operating procedure for the District to raise the possibility of light duty work with doctors because employees rarely did so. When Townsend mentioned light duty as an option, the grievant expressed interest, and Townsend said she would speak with the doctor and get back to her. Townsend made no effort to actually speak with Doctor Grace, and aside from another investigative call from Perrigoue, no one from the District got back to the grievant until a month later, when she was fired. In the course of the investigative calls by Townsend and Perrigoue, no one told the grievant she should not be receiving disability benefits, and no one told her to return to work in Green Bay in any capacity. After the calls, no one made an effort to stop the disability payments, 80 percent of which were received after the grievant had confirmed her second job in the phone conversation with Townsend.

Perhaps the grievant was not qualified for the disability benefits. The grievant was told by her doctor that she was not to work at her Green Bay job, but that she could continue on a trial basis at Howard Suamico. The directive was based on reasonable distinctions between the duties and the time involved in the two jobs. It may be that the grievant could have worked in Green Bay with an accommodation or a change in duties. She expressed a willingness to do so when the subject was first raised, but the option was not actually presented to her. While the District asserts that such work could have been made available, in the hearing it did not identify what light duty jobs would have met her restrictions. In any event, this is not a grievance over eligibility for benefits. The District discharged the grievant for dishonesty, and it bears the burden of proving that charge. There is no evidence that she actively misled the District, and her conduct is not inherently dishonest. The record evidence simply does not support the allegation of dishonesty. Indeed, the preponderance of the evidence indicates that the grievant acted in good faith. Accordingly, I have concluded that there was not just cause for discipline.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Employer did not have just cause to terminate the grievant, Lori Dombroski. The appropriate remedy is to immediately reinstate her to her former position, remove any reference to the discipline from the District's files, and to make her whole for any wages and benefits lost by virtue of the discharge. The arbitrator will retain jurisdiction for a period of thirty days from the date of this Award, for the sole purpose of clarifying or resolving disputes over the remedy ordered.

Dated at Racine, Wisconsin this 7th day of November, 1996.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator