BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between GREEN BAY BOARD OF EDUCATION EMPLOYEES (CLERICAL) UNION LOCAL 3055B, AFSCME, AFL-CIO and GREEN BAY SCHOOL DISTRICT	Case 189 No. 54100 MA-9550

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker and Ms. Lisa A. Polinske, appearing on behalf of the District.

ARBITRATION AWARD

Pursuant to a request by Green Bay Board of Education Employees (Clerical) Union Local 3055B, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by Green Bay School District, herein the District, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on June 13, 1996, pursuant to the procedure contained in the grievance arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on July 25, 1996, at the Green Bay School District offices, Green Bay, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on October, 14, 1996.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties were unable to stipulate as to the issues. The Union frames the issues as follows:

1. Did the Employer have just cause to discharge the Grievant?

2. If not, what is the appropriate remedy?

The Employer frames the issues in the following manner:

1. Was the Grievant discharged for dishonesty?
   a. Grievant committed perjury.
   b. Grievant's story is not credible.
   c. Grievant violated the "over 10" rule.

2. Alternatively, did the District have just cause to discharge the Grievant?

Having reviewed the entire record, the arbitrator frames the issues as follows:

1. Did the District violate Article VIII, Section a. of the parties' collective bargaining agreement when it discharged the grievant?

2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

Background

Kathryn Resch, hereinafter the grievant, began her employment with the District in 1977. She was assigned to the Payroll Department in November, 1985, as a Level 3 Payroll Clerk. She was temporarily raised to a Level 4 in January, 1995, after Dawn Karman was hired as a Supervisor. This change resulted in the grievant being given greater payroll responsibilities but did not change her responsibilities with respect to the processing of W-4 forms.

One of the grievant's job duties since first being transferred to payroll in 1985 was the processing of W-4 forms. A W-4 form is used by employers to withhold the correct amount of Federal income tax from an employe's pay. The employes are responsible for accurately completing the form, filling in the proper number of withholding allowances and giving the form to their employer. The grievant was specifically trained to fill out a W-4 form herself, and to ensure each employe had a properly filled out W-4 form on file.

Upon receiving a W-4 form from an employe, the grievant ensured it was properly filled out and entered the information from the form into the employe's W-4 screen on the computer. Then the grievant would take the form and check it off after the payroll was run to make sure the

information was entered properly. When these steps were complete, the grievant put the

W-4 form in a basket on her co-worker's desk where it would remain until it was filed. Both the grievant and her co-worker filed the W-4 forms when there was time, with the grievant doing the majority of this filing.

If an employe claimed more than 10 withholding allowances, or exempt status, the grievant was instructed to give a copy of the form to her supervisor, Dawn Karman (the "over 10" rule). Karman testified that she told the grievant about the "over 10" rule around October, 1994. The grievant testified that she was not informed of the "over 10" rule until mid-March, 1995.

Pursuant to the "over 10" rule, the grievant remitted copies of two forms showing 99 withholding allowances and exempt status claimed by a District employe, James Hunt. The first W-4 was signed on February 9, 1995, and provided to Karman in the first quarter of 1995. The second W-4 was signed on March 20, 1996, and provided to Karman sometime between March 20, 1996 and April 30, 1996. The grievant never gave Karman a copy of any W-4 form in which she claimed 99 withholding allowances or informed her verbally of same.

W-4s for employes claiming more than 10 exemptions or exempt from withholding were to be sent in with the District's IRS 941 quarterly report.

The position occupied by the grievant was excluded from the job share provisions of the agreement. Assistant to the Superintendent for Human Resources John Wilson testified regarding the reasons for exclusion which included, in relevant part, "higher levels of responsibility" assigned to the position and so that "consistency in performing the duties would not be compromised."

Facts of This Particular Dispute

Karman testified that she first became aware of the number of exemptions being claimed by the grievant when she was testing a tax modeling program designed to estimate what an employe's tax liability would be at different amounts of withholding. She stated that she was using individuals from the various bargaining units, and chose the grievant as an example of the clerical bargaining unit because she knew the grievant had both a tax sheltered annuity and Section 125 deductions. Karman then stated:

> . . . when I brought her up in the system, it showed she would have no taxes, so I then went to look at what her W-4 screen showed, and it showed she had been in the system as married with 99 deductions. I looked back in her payroll history screens to see if she had, in fact, not paid--had any taxes withheld in certain payrolls and found that she had for several during '95 and '96 and not prior to that. I looked back through '94. I also went to see what W-4

form we had on file for her.

Karman found a W-4 form on file showing "she's claiming married and 5 exemptions for federal and 4 for state."

Thereafter, the District discovered that the grievant had manipulated her personal payroll records so that no federal income taxes were withheld from her paycheck for the following fourteen pay periods in 1995, and two pay periods in 1996:

> February 16, March 16, March 31, April 13, April 28, August 31, September 15, September 29, October 16, October 31, November 16, November 30, December 15, December 22, 1995; March 29, April 16, 1996.

In addition, an arbitrary amount of taxes was deducted from her January 13, 1995 and January 16, 1996 paychecks. The above withholding resulted from the grievant claiming 9 deductions for her February 16, 1995 payroll period, 7 for her January 16, 1996 payroll period, and 99 deductions for the other payroll periods. On the occasions the grievant claimed 99 deductions, this was in her mind the equivalent of claiming exempt status. During at least most of the period in question, the grievant was entitled to claim no more than 4 exemptions.

The grievant testified that the reason she claimed 99 deductions was so that she wouldn't "have any taxes taken out of that payroll." She also testified that she based her manipulations on her husband's withholding and her desire to "break even" with the federal government. She added: "We didn't want to pay in a lot of money and we didn't want a refund from the government."

Shortly after discovering that the grievant had manipulated her personal payroll records on numerous occasions in 1995 and 1996, John Wilson, Assistant to the Superintendent for Human Resources, arranged a meeting with the grievant to discuss her actions. The meeting was held on Wednesday, April 24, 1996, at 1:45 p.m. Wilson informed the grievant that the District had discovered her failure to withhold taxes from her paychecks and her manipulation of her payroll deductions to achieve this effect. Upon being confronted with these facts, she admitted her actions, specifically stating "I don't deny it." She gave as reasons for her actions her desire not to pay in so much during the year and the loss of her son as a dependent. Karman testified that the grievant also stated that she realized she should have filled out W-4 forms if she was going to change her withholding, but did not do so. The grievant testified at hearing that she filled out W-4 forms, and set them aside to be filed later. Wilson informed the grievant that she could be terminated for her actions.

The grievant called a second meeting on April 26, 1996, because, as she testified, she

"found the W-4/99 in my desk that was in question at the April 24th meeting and I wanted to give it to the District." The grievant also explained that she called the second meeting "Because I was being accused at that meeting (the first meeting) of not filling the form out. I knew I filled the form out." and I "wanted to give it to the District to show them that I do file W-4 forms." Wilson testified that at this meeting (the second) he asked the grievant whether there were any earlier W-4s on file and that she responded that "she was not sure that they had been filed. She thought they may have but was not sure."

Two W-4 forms are relevant to this dispute. The grievant testified that she completed and signed the first W-4 form, claiming 99 deductions for the March 29 and April 16, 1996 payroll periods, on March 21, 1996 (the "March W-4"). The grievant testified that she found the March W-4 in her desk while looking for it on the afternoon of Thursday, April 25, 1996. The second W-4 form, changing the grievant's deductions back to 4, was completed and signed on the morning of April 24, 1996, according to the grievant. The grievant stated that she put the April W-4 in the filing basket on April 24, where it remained until the morning of Thursday, April 25, 1996, when she pulled it from the basket, made copies, and gave a copy to Alan Wagner, the District Comptroller and Karman's supervisor. The grievant testified that she gave a copy to Wagner "Because I was being accused the day before of not filling out a W-4 form in March" and I wanted to "show them the payroll report time frame that it was done so it didn't look like I walked out of that meeting, you know, and tried to file another W-4 form" changing my status. The grievant didn't take a copy to Karman because she was upset and angry with Karman and "didn't want to have any type of confrontation with" her.

The grievant did not mention either of the W-4 forms to Wilson or Karman during the first meeting. She chose to wait until Friday, April 26, to tell Wilson and Karman in the second meeting about the existence of the March W-4, even though she "was being accused at (the first) . . . meeting of not filling the form out." The grievant did not mention the existence of the April W-4 at the second meeting.

By letter dated April 29, 1996, the District terminated the grievant as follows:

> You are hereby terminated from your employment with the Green Bay Area Public School District. The cause for your termination is dishonesty, as manifested by the manipulation of your own personal payroll records, contrary to the rules of the school district and the Internal Revenue Service. Your conduct involved a flagrant disregard for those rules and procedures.
>
> As Payroll Secretary for the Green Bay Area Public School District you altered your withholding allowances in the District's payroll system so that no federal tax would be withheld on at least 15

> payrolls in calendar year 1995. In that same period of time you also failed to follow IRS regulations and District procedures to inform your supervisor that ten (10) or more deductions were being claimed. For several payrolls in 1996 you also altered the District's payroll system to claim 99 deductions for Federal and Wisconsin income tax withholding. Again, you did not withhold at a level consistent with the W-4 on file, nor did you notify your supervisor that ten (10) or more deductions were being claimed pursuant to IRS regulations and District procedure.

The grievant testified that she had never been audited or been contacted by the IRS concerning her deduction status or her recent tax returns.

The grievant worked with W-4 forms on a daily basis, processing along with her co-worker approximately 500 per year. She was familiar with the form and had read the instructions on the form. She admitted that by signing a W-4 form an employe is asserting (1) that he or she is aware of the amount of allowances he or she is claiming, (2) that the amount claimed is true, and (3) that if the employe is claiming to be exempt from taxes that must be true as well. She also admitted that if the information claimed on the W-4 form is not true, the employe signing the form is committing an act of perjury.

Civil penalties for giving false information on a W-4 form are summarized in "Federal Employment Tax Penalties" as follows:

> If an employee furnishes a false withholding statement that results in a decrease in the amounts deducted and withheld from the worker's wages, the employee is subject to a penalty of $500 for each such statement if, at the time such statement was made there was no reasonable basis for the statement. This penalty is waived in whole or in part, however, if the employee's tax liability for the year is equal to or less than the sum of the employee's allowable credits and estimated tax payments for the year.

The criminal penalties are summarized as follows:

> An employee who willfully furnishes his or her employer with a false or fraudulent withholding certificate, or willfully fails to furnish the certificate to the employer is subject to a penalty if such

failures would increase the amount of the tax to be withheld by the employer. If convicted, the employee is subject to a fine of not more that (sic) $1,000, imprisonment for not more than one year, or both.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE VIII

SUSPENSION - DISCHARGE

. . .

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 procedures.

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. All reprimands shall be effective for one (1) year from the date of reprimand.

. . .

ARTICLE XVIII

GRIEVANCE PROCEDURE

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

. . .

Step 5. . . . 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. . . .

UNION'S POSITION:

The Union initially argues that the appropriate issue before the Arbitrator is whether the District had just cause to terminate the grievant. The Union adds that the District has the burden of establishing just cause for the termination. The Union concedes that the grievant "may have done some of the things she was accused of," and warrants some form of discipline, i.e. a reprimand, but argues that the District has not proved the grievant's actions were intentional and done dishonestly to deceive the Employer, and, therefore, termination is too severe a penalty. For a remedy, the Union proposes reinstatement of the grievant but not to her former position of Payroll Clerk since there has been "too much of a loss of trust by the District in terms of her ability to do this job." Alternatively, the Union proposes the parties discuss another job within the bargaining unit for the grievant and asks that the Arbitrator retain jurisdiction of the award until the parties agree on a suitable placement for her.

In support of the above, the Union first argues that while the grievant may have been guilty of improper work performance she was not dishonest. In this regard, the Union notes that it was proper for the grievant to enter information into her W-4 screen relating to changes in her own withholding status because that was part of her job responsibilities. The Union also notes that no inference can be drawn from the grievant's failure to provide evidence that she had followed the procedure for filling out W-4 forms during the time in question since old forms were thrown away either in December of 1995 or January of 1996, and she testified that she always would fill out a W-4 form before entering this information in the system for either herself or any other employe. The Union claims that there is a simple explanation for the W-4 file containing a form signed by the grievant which did not match the data that the computer W-4 screen contained -- the grievant had misplaced it because of the press of other payroll work. The Union offers this same explanation for the reason the grievant did not provide Dawn Karman in March, 1996, with a copy of any W-4 forms including her own that contained ten or more exemptions. The Union

acknowledges that the grievant made numerous changes in her deduction status but argues that the changes themselves are not evidence that there was anything fraudulent in how she either changed her deduction status or filed her taxes. The Union adds that there was no direct evidence presented at the hearing that the grievant was under investigation by the Internal Revenue Service (IRS) or that she had ever been audited or been contacted by the IRS concerning her deduction status or her recent tax returns. In conclusion, the Union again argues that while the District can show the grievant changed her own deduction status and entered her own personal information into the District's payroll computer, "they cannot establish that she did this dishonestly, or with a motive to deceive the Green Bay Public Schools."

The Union maintains that there is no evidence of criminal wrongdoing but concedes that District Exhibit 12 indicates the grievant might be subject to civil penalties for not withholding enough taxes. However, the Union argues any harm "is mostly in her misunderstanding of the procedures" because the grievant did not have "a clear idea of the reasons a W-4 form were filed," and did not understand the legal issues surrounding her responsibilities concerning said form. The Union claims the grievant did not receive any training in this area from the District. The Union adds that it does not believe that there are any civil or criminal penalties applicable to the District as a result of the grievant's actions.

The Union further cites United States Postal Service, 62 LA 293 (Killion, 1974) in support of its position. The Union argues that the undersigned, like the arbitrator in United States Postal Service, should reject discharge as the penalty where the grievant was never put on notice as to what was expected of her, or told that her misconduct could warrant immediate discharge or given progressive discipline. The Union adds that it is improper for the District to overreact out of perceived legal concerns where the grievant's misconduct did not rise to the level charged by the District.

In rebuttal to the District's arguments, the Union makes the following arguments. First, the issue in dispute is not simply whether the grievant changed her payroll status in the course of performing her job in the Payroll Department which she admits, but whether she intentionally did this in order to deceive her employer and/or the IRS. The District did not prove this. Secondly, the District should have treated the grievant's actions as a performance issue, and not as one of dishonesty. In this regard, the Union repeats its claim that the grievant's actions in changing the number of deductions on her own payroll checks are not by definition dishonest as alleged by the District but resulted from the grievant's lack of knowledge and training in the area. The Union also rejects the District's claim that the grievant committed perjury by virtue of filling out a W-4 form outside of its instructions, arguing that there is no proof that the IRS believes the grievant and her husband committed perjury by either filling out forms incorrectly or by paying an improper amount of taxes in any given year. The Union adds that the grievant did not admit committing perjury at hearing the District's clever questioning notwithstanding. The District also adds, contrary to the District's assertion, that the grievant did not lie about not having known about the "over 10 rule" until March, 1996.

The Union further objects to the District's allegation that the grievant wrote up her March W-4 form after meeting with management stating "there was no evidence or testimony to that effect during the hearing." The Union adds that there wasn't anything suspicious about the grievant attempting to talk to another supervisor about the sequence of information entered into the computer since "she was under a lot of stress that may have led her to seek help from another source." Furthermore, the Union asserts the grievant is a credible witness, the District's characterization of her testimony notwithstanding. Finally, the Union asserts that the District failed to give the grievant due process because the decision to terminate the grievant had been made prior to holding two investigatory meetings with her and because said meetings were used improperly to determine whether the grievant was telling the truth. The Union also asserts that it was improper for the District to rely on an outsider with no independent knowledge of the facts to validate their decision to terminate.

DISTRICT'S POSITION:

The District initially argues that it has the contractual right to immediately discharge any employe for dishonesty, and that the Arbitrator need not apply the traditional seven part "just cause" test herein citing Scioto County Engineer, 105 LA 876 (1995) in support thereof. Thus, according to the District, if the arbitrator finds that the grievant acted dishonestly, he must uphold its decision to discharge and deny the grievance.

The District maintains the grievant was discharged for dishonesty. In this regard, the District claims that the grievant, deliberately and with conscious knowledge of the intended result, manipulated her personal payroll records, in violation of federal tax law and District rules, to provide for no, or an improper amount of, federal income tax withholding for a total of 18 payrolls. The District adds that although the grievant later disputed it at hearing, she knew or should have known that her actions were improper.

The District also claims that the grievant committed perjury each time she filled out a W-4 form and claimed more withholding allowances than she was allowed to claim. The District adds that the grievant committed at least one act of perjury when she signed the March W-4 claiming 99 tax deductions for two payroll periods. The District notes that if the grievant "did not fill out a W-4 before manipulating the records, she violated federal tax law and District procedures." The District also notes that the grievant violated a District rule by failing to provide her supervisor with a copy of a W-4 form showing more than 10 withholding allowances or exempt status for herself. Under any or all of the circumstances noted above, the District feels the grievant was dishonest and, therefore, discharge is proper and should be upheld.

The District concedes the grievant's point that she and her husband could decide amongst themselves the manner in which they wanted to divide their withholding allowances but argues that the total allowances they claim still cannot exceed that to which they are entitled. The District adds that not only was it improper for the grievant to ignore the W-4 form when doing her

manipulations but that her desire to "break even" with the government was an improper basis for doing so.

The District maintains that while it is not necessary to determine the grievant's credibility as a witness in order to sustain the discharge, her story is not credible. In this regard, the District argues that the Arbitrator should conclude the grievant's failure to mention the two 1996 W-4s during the first due process interview shows they were created after the fact. The District claims that such a conclusion is apparent on its face for several reasons. One, the grievant thought both the March and April W-4s were so critical to her case that she gave the April W-4 to her supervisor's supervisor on Thursday and called a special meeting on Friday to give her supervisor and Wilson the March W-4, yet did not mention either W-4 at the first meeting. The grievant's explanation for not disclosing the existence of the forms during the first meeting, however, was that she forgot about the March W-4 and did not think either one was relevant. Two, the grievant cannot plausibly claim that she forgot about the W-4s because the very

morning of the first due process interview, "she filled out the April W-4, because it was crystal clear in her mind (so she said at trial) that the 99 W-4 had to be changed back." (Emphasis supplied.) And, three, the grievant tried an end run to save her job. The District explains:

> She can't change the 99 which was on the computer, so, she cooks up a new W-4 and disingeniously presents it to her only hope. She did not come clean to him, either, of course, but tried to cover the other track by creating the March W-4 claiming 99 exemptions, and giving it to her inquisitors on Friday.

Finally, the District argues that the grievant violated the "over 10" District rule by not giving her supervisor copies of her W-4s claiming 99 withholding allowances. The District claims, contrary to the grievant's assertions, she was informed by her supervisor as early as October of 1994 about the "over 10" rule. The District also claims that the grievant demonstrated her knowledge of the "over 10" rule in early 1995 when she gave Karman a copy of Hunt's W-4 form dated February 9, 1995, sometime in the first quarter of 1995 but "failed to give her supervisor a copy of any W-4s allegedly prepared starting on January 13, 1995, in which she claimed 99 withholding allowances." Finally, the District claims that even if it is true, as the grievant asserts, that she did not know about the "over 10" rule until mid-March, she still admits to violating the rule by not providing Karman with a copy of the alleged March W-4. The District asserts that the grievant's excuse for this failure that she was too busy with payrolls does not hold up to close examination. In this regard, the District points out that the grievant's March W-4, claiming 99 withholding allowances, is dated March 21, one day after Hunt prepared his new W-4 for 1996 yet she was able to supply Karman with a copy of Hunt's W-4 but not her own W-4. Second, the District notes although the grievant testified that she did not have time to check off her March W-4, put it in her filing basket and then give a copy to Karman, she also testified that she had time to check off her April W-4 and put it in the basket for filing. The District states that it is hard to believe the grievant would check her April W-4 against the payroll report before she checked the earlier March W-4 against the payroll and that it is even harder to believe that she would process the March 31 payroll without checking the payroll report to ensure that her withholding information had been entered accurately.

In the alternative, the District asserts that the discharge should be sustained even if just cause analysis is applied. In support thereof, the District argues that there is no serious argument that the grievant did not know either proper IRS rules or proper District rules for handling W-4s despite her claims otherwise. The District also argues that the grievant had all the due process in the world (two due process interviews), and failed to tell the truth in all her meetings with supervision. The District further argues that her inquisitors were impartial in their investigation, that an independent person agreed that the grievant's actions were very serious and were terminable offenses, and that the District considered the balance of the grievant's work record in reaching the decision to terminate her. The District adds that there has been no showing any other

person has been treated differently in similar circumstances or that there have been similar circumstances.

The District also maintains that applying a "punishment fits the crime" standard herein reduces "that concept to an absurdity worthy of Gilbert and Sullivan's Mikado." (Emphasis supplied.) The District states the misconduct involved in the instant case is the antithesis of the trust which it placed in the grievant and provides a proper basis for her discharge citing State of Minnesota, 97 LA 1107 (1991) in support thereof. The District adds that the grievant's years of service do not suggest mitigation of penalty, and must be considered in context with the type of position she held in the District. The District points out that the grievant held a position of trust and her acts destroyed that trust, and that it has a vital interest in ensuring that its payroll clerks can be entrusted to act honestly with respect to all their job duties, especially those involving their own payroll information. Wholesale Produce Supply Co., 101 LA 1101, 1106 (1993). The District further argues that the grievant's lies defeat any argument she may have had for reinstatement even if the undersigned determined she should not have been discharged for her manipulation of her employment records. Wholesale Produce Supply Co., supra at 1106. Finally, the District claims the grievant shows no remorse, and because she is incapable of understanding wrongdoing, she is not qualified to be a payroll clerk for the District, and thus should be denied reinstatement.

In its reply brief, the District argues the grievant was dishonest even by the Union's own admission. In this regard, the District notes that the Union relied upon a dictionary definition of dishonesty as that which is "unworthy of trust or belief" in arguing that the grievant was not dishonest but then admitted the grievant is unworthy of trust when it acknowledged that it would be improper to reinstate her to her former position in the Payroll Department. The District adds that it is not relevant whether the grievant intended to deceive the District or not (although the District believes she did so intend), since she dishonestly changed her own payroll deductions to have an improper amount of tax is withheld, and this dishonesty affected the District' substantial interests.

The District also argues that it is irrelevant to the issue of the grievant's dishonesty whether the grievant violated any federal tax law. Nonetheless, the District feels the grievant violated several tax laws in addition to various rules of the IRS. The District further argues that the consequences of the grievant's actions under federal law are also irrelevant. What is important, according to the District, is that its payroll clerks, who are entrusted with the responsibility of performing the District's duties under the tax laws, do not use their position of trust to get around the very laws they are supposed to uphold with respect to their own taxes. Finally, the District argues that it is absurd to assert, like the Union, that an employer cannot expect its employes to uphold the law, particularly those laws which it hires the employe to uphold, merely because the employer may not itself be exposed to legal liability. In any event, the District argues that it was exposed to potential liability under the tax laws for the grievant's conduct.

Lastly, the District argues that the arbitrator does not have the authority to order the parties

to enter into discussions to find the grievant another job with the District citing Milwaukee Teachers' Education Ass'n v. Milwaukee Board of School Directors, 147 Wis.2d 791, 796, 433 N.W.2d 660, 671 (CtApp 1988) and Articles II and XVIII, Step 5 of the parties' collective bargaining agreement in support thereof.

Based on all of the above, the District requests that the Arbitrator deny the grievance and dismiss the matter.

DISCUSSION:

The parties stipulated that there are no procedural issues and that the instant dispute is properly before the arbitrator for a decision on its merits.

At issue is whether the District acted properly, pursuant to Article VIII, Section a of the agreement, when it discharged the grievant for her conduct on April 29, 1996.

The parties do not agree with respect to a standard to be applied herein. The District, in its brief, rejects the seven part "just cause" test 1/ and argues that if the Arbitrator finds that the grievant acted dishonestly, he must uphold the decision to discharge and deny the grievance. The Union, on the other hand, raises several due process and fairness questions, and basically argues that the grievant did not act dishonestly because she did not intentionally misuse her position in the Payroll Department to deceive the District for her own personal gain. The Union also argues for a basic just cause standard but concedes that the grievant had some performance problems warranting some form of discipline short of termination.

In the absence of an agreement by the parties as to a standard to be applied herein, the undersigned will apply his own standard. This arbitrator believes there are two basic and fundamental questions in any case involving just cause. One is whether the employe is guilty of the actions complained of, which the District has the duty herein of so proving by a clear and satisfactory preponderance of the evidence. If the answer to the first question is affirmative, the second basic question is whether the punishment is contractually appropriate given the offense.

In addition, any application of the above standard for discharge must be undertaken within the context of Article VIII. Just cause is an integral part of said Article. That Article provides that

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1/ This is an analytical framework devised by the late Carroll R. Daugherty, a Professor of Labor Economics and Labor Relations at Northwestern University and well-established arbitrator. It was his attempt at defining just cause. His approach has its critics and its shortcomings. (See, for example, John E. Dunsford, "Arbitral Discretion: The Tests of Just Cause," Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington, D.C.: BNA Books, 1990), 23.)

no employe who has completed probation shall be discharged except for just cause. It also recognizes progressive discipline as the "Usual disciplinary procedure." However, it also provides that progressive discipline "shall not apply in cases which are cause for immediate suspension or discharge." (Emphasis added.) In particular, Article VIII states that "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." (Emphasis added.) In other words, Article VIII provides for immediate discharge without progressive discipline in the aforesaid specified instances.

The evidence is undisputed that the grievant manipulated her personal payroll records to provide for no withholding of federal income taxes for a large number of payrolls during 1995 and early 1996. In addition, she withheld an arbitrary amount of taxes on two payrolls during the same period. It is also clear that she accomplished all of this by claiming an improper amount of withholding allowances for the affected payroll periods. The grievant specifically admitted taking these actions. 2/

The Union concedes that the grievant made numerous changes in her deduction status during the period of time in question but argues that the changes themselves are not evidence that there was anything fraudulent in how she either changed her deduction status or filed her income taxes. The record, however, does not support a finding regarding same. In this regard, the Arbitrator notes that the grievant herself acknowledged that her actions were improper when she stated at the first meeting held on April 24 that she was "just playing around with her taxes and meant to change it back after a couple of payrolls, but she didn't." 3/ She stated that she manipulated her records so that she had more money during the year since she paid at the end of the year anyway. 4/

The record also indicates, contrary to the Union's assertions, that the grievant knew, or should have known, that her actions were improper. As noted above, the grievant manipulated her payroll information to achieve a very specific purpose -- to pay less money in taxes during the course of the year. The Union argues that the grievant did not have a clear understanding of the reasons a W-4 form was filed or the legal consequences attached to same. However, her many manipulations for the reasons discussed above demonstrate otherwise in the opinion of the arbitrator. In addition, assuming arguendo that the grievant did not know her actions were improper, she should have known. She processed W-4 forms for 10 years before manipulating her payroll information, working with them on a daily basis. The grievant testified that she processed, along with a co-worker, approximately 500 forms per year. Thus, according to her

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2/ Tr. 39.

3/ District Exhibit No. 11.

4/ Unrefuted testimony of Karman and Wilson.

own testimony, the grievant processed thousands of W-4 forms by 1995, the year she began altering her records. The grievant also admitted that upon receiving a W-4 form from an employe, she went over it to make sure it was properly filled out before entering the information from the form into the employe's W-4 screen on the computer. She further admitted that she had been trained in this respect. Finally, she testified that she had read the form and was familiar with it.

Having read the W-4 form the grievant knew that the purpose of the form was so that the District could "withhold the *correct* amount of Federal income tax" from her pay. 5/ As pointed out by the District in its brief:

> Employees are not left without any direction when completing a W-4. The form contains instructions and worksheets for employees' use. It also tells employees that they may claim fewer allowances than they are entitled to. Notably absent from the form W-4 is a direction to employees that they can claim more allowances than they are entitled to claim.

The District also points out that employes are alerted to the serious nature of signing a W-4 which contains incorrect information. Directly above the signature line is the following sentence:

> Under penalties of perjury, I certify that I am entitled to the number of withholding allowances claimed on this certificate or entitled to claim exempt status.

The grievant admitted that an employe who enters false information on a W-4 is committing an act of perjury. 6/

The grievant testified that she filed a W-4 before each manipulation. The record indicates that the grievant filed a number of W-4s showing that she was entitled to 99 withholding allowances. 7/ In her mind this was the equivalent of claiming exempt status. 8/ Only individuals

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5/ District Exhibit No. 1.

6/ Tr. 17-18.

7/ Tr. 33, 46; District Exhibit Nos. 2 and 3.

8/ Tr. 37-38.

who had no tax liability for the prior year and are not expecting to have tax liability for the current year are entitled to claim exempt status. 9/ Grievant was not entitled to claim exempt status for either 1995 or 1996 because she had tax liability in both 1994 and 1995. 10/ Thus, according to grievant's own testimony she committed perjury at least several times, once for each time she filled out a W-4 claiming 99 deductions. She expected her employer to act based upon her acts of perjury. In fact, due to her position, she was the person who did act, for the District, in accepting her own false statements.

9/ District Exhibit No. 1, line 7.

10/ Tr. 25; Union Exhibit No. 4.

The above actions, in the opinion of the arbitrator, are dishonest; and, according to the aforesaid contract language, the grievant is subject to immediate discharge without progressive discipline. 11/

The Union argues, however, that the grievant was not dishonest because she did not act intentionally to deceive the District. The arbitrator does not agree. The record indicates the grievant had every intention of doing what she did. The dishonesty of the grievant is particularly egregious in these circumstances because it related to a topic - payroll - which was of serious and legitimate concern to the District, and one of the main responsibilities of the grievant's job.

The Union also argues that discharge is inappropriate citing United States Postal Service, 62 LA 293 (Killion, 1974) in support thereof. In that case the arbitrator rejected discharge as the penalty where the employe was not given certain procedural protections as well as progressive discipline. However, the collective bargaining agreement in that case, unlike the instant dispute, did not expressly provide for immediate discharge, without progressive discipline or prior warning notice in certain specified instances including dishonesty. Therefore, that case is distinguishable from the instant dispute.

Likewise, the arbitrator rejects the Union's argument that the District did not conduct a proper investigation. The grievant's immediate supervisor initially discovered the irregularity which led to the grievant's termination. 12/ She then did an investigation which formed the basis for the District's allegations against the grievant, 13/ and brought this information to the attention of Wilson. Two due process interviews were then held with the grievant, one called by the District and one held at the grievant's request. The Union objects to additional information gathered as a result of these meetings. However, the Union offered no persuasive argument or evidence in support of this position. In addition, the record is clear that the grievant had every opportunity to tell her side of the story in said meetings. Therefore, the arbitrator rejects this contention of the Union.

The Union also objects to Wilson making his decision to terminate the grievant in part on the basis of a conversation with a colleague of a former employer, in which the colleague expressed his view that the grievant's actions were very serious infractions and were terminable offenses. 14/ However, Wilson consulted a number of people in the District, 15/ as well as the

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11/ Dishonest is defined as "Disposed to lie, cheat, defraud or deceive. 2. Arising from, gained by, or showing falseness or improbity." The American Heritage Dictionary of the English Language, New College Edition, (10th Ed. 1981) p. 405.

12/ Tr. 70-71.

13/ Tr. 71-75; District Exhibit No. 8.

14/ Tr. 98.

grievant's work record in reaching the decision to terminate her. 16/ The arbitrator can find nothing in the grievant's investigation which was improper as alleged by the Union.

Based on all of the above and foregoing, the record as a whole and the arguments of the parties, the arbitrator finds that the answer to the issue as framed by the arbitrator is NO, the District did not violate Article VIII, Section a, of the collective bargaining agreement when it discharged the grievant. Having reached this decision, it is unnecessary to consider the other allegations raised by the District and the parties' arguments over same. In light of all of the foregoing, it is my

AWARD

That the grievance of Kathryn Resch is hereby denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 6th day of January, 1997.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

15/ Id.

16/ Tr. 98-99.