BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between CHEQUAMEGON UNITED TEACHERS and SCHOOL DISTRICT OF WEBSTER	Case 29 No. 54370 MA-9656

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Ms. Kathryn J. Prenn, appearing on behalf of the District.

ARBITRATION AWARD

Chequamegon United Teachers, hereinafter referred to as the Union, and the School District of Webster, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Union filed a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Webster, Wisconsin, on January 13, 1997. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on April 3, 1997.

BACKGROUND:

The grievant has been employed as a cook by the District since 1986. On April 24, 1996, the grievant and the Head Cook, Kathy Eckstrom, got into a dispute over the preparation of lasagna. Shortly afterwards Eckstrom wrote up her observations as to what occurred in a document which stated the following:

> 4-24-96
>
> Today while preparing the main meal, I was told by Marcy Kasper

that she wasn't going to listen to me and that she wasn't going to follow the recipe. The lasagna recipe I was following was suggested by the DPI to have lower fat content. Marcy was adding cheese to every layer and became belligerent when asked by me to discontinue.

Kathy Eckstrom /s/

From Webster School

The Head Cook is in the bargaining unit and reports directly to the Superintendent. The Head Cook gave what she had written to the Superintendent and told him what had occurred. The Superintendent told the Head Cook to tell the grievant to meet with him at the end of the day. The grievant met with the Superintendent and discussed the incident and he told her that she must follow the Head Cook's directives. The Superintendent wrote the following notation on the document and signed it a gave the grievant a copy: "Talked with Marcy 4-24-96 2:35 p.m."

Within a week, the grievant met again with the Superintendent and was concerned about the document being in her personnel file. The Superintendent explained it was not discipline and the grievant could write a rebuttal which would be attached to it. The Superintendent then added the following to the written document: "This copy is a notice and not a reprimand!"

The Union filed a grievance asserting that the written document was a letter of reprimand which was issued without just cause and should be taken out of the file and destroyed. The grievance was denied by the District on the grounds that it was not a letter of reprimand but was merely a notice. The grievance was processed through the grievance procedure to the instant arbitration.

ISSUE:

The parties were unable to agree on a statement of the issue. The Union stated the issue as follows:

Did the 4-24-96 document written by Kathy Eckstrom violate Article 8, Section A of the collective bargaining agreement?

If so, what is the appropriate remedy?

The District states the issue as follows:

Did the District violate the collective bargaining agreement when, on April 24, 1996, Marcy Kasper, a cook, was placed on notice that she was expected to follow directions given to her by Head Cook, Kathy Eckstrom?

If so, what is the appropriate remedy?

The undersigned frames the issue as follows:

Did the document dated 4-24-96 written by Kathy Eckstrom, with the Superintendent's notations and signature thereon, which was placed in the grievant's personnel file, constitute disciplinary action against the grievant?

If so, did the District have just cause for this disciplinary action?

If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 8 - DISCIPLINE

A. The parties recognize the authority of the Employer to initiate disciplinary action against employees for just cause.

DISTRICT'S POSITION:

The District contends that there was no disciplinary action taken against the grievant. It insists that the Union's case is based on the unfounded premise that the statement dated April 24, 1996, is a "letter of reprimand." It argues that the word "discipline" was never used in discussions between Eckstrom and the Superintendent and the statement is not even a letter, it is simply a written statement. It further notes that when the grievant met with the Superintendent, the words "discipline" and "reprimand" were never used nor were they at the meeting a week later. It points out that the Superintendent was simply putting the grievant on notice that she had to follow the directions of the Head Cook and he added in writing to the statement that this was a notice and not a reprimand. The District alleges that the grievant is seeking absolute control over her personnel file and attempting to find a way to force the District to remove the document from her file. The

District claims that it has always maintained the document was not a disciplinary action or reprimand and it is not going to change its position on that issue. It submits that the document is clear that it is not discipline and the District offered evidence that when discipline is meted out, there is a formal letter that makes it clear that the employe is being disciplined and a copy is given to the Union and this did not occur because there was no discipline. It reiterates that the purpose of the discussion between the grievant and the Superintendent was to put her on notice that she was expected to follow the Head Cook's direction, and a recurrence might lead to discipline because the grievant now knew what was expected of her. It alleges that the grievance is simply that the grievant does not want there to be any record that she was provided such notice.

The District argues that the Arbitrator lacks the authority to compel the District to remove the document from the grievant's file. The District reiterates that the mere fact the document is in the grievant's file does not transform it into a letter of reprimand.

The District observes that it has only one personnel file for each employe and these files contain many non-disciplinary documents. It points out that the collective bargaining agreement contains no provision with respect to personnel files. It argues that this is simply a back door attempt to remove the document from the file. It notes that the grievant has the right to attach a rebuttal to the document but there is no authority to remove it. It asserts that the grievant really wants there to be no record that she was placed on notice to follow the Head Cook's directions but there is no statutory or contractual authority for the Arbitrator to do so. It asks that the grievance be dismissed in its entirety.

UNION'S POSITION:

The Union contends that the April 24, 1996 document is a discipline. It submits that the document states that the grievant did some things wrong, including refusing to follow the Head Cook's directives and becoming belligerent. It asserts that the grievant is not being notified of what she should or should not do but notifies her that she has acted inappropriately by being insubordinate and belligerent. It cites arbitral authority that the act of placing a memo critical of an employe's conduct in a personnel file makes the memo the equivalent of a written reprimand. It submits that the District's argument that the document merely places the grievant on notice is not correct because the document goes beyond that by saying she acted inappropriately and therefore is disciplinary and subject to the "just cause" standard of Article 8, A.

The Union argues that there was no just cause for the April 24, 1996 document. It claims the incident involved the preparation of lasagna and the cooks prepared it four times in 1995-96 with the original recipe calling for three tiers with each tier consisting of a layer of sauce, a double layer of noodles and a layer of cheese. It asserts that contrary to the Head Cook's testimony, the recipe card did not say "single layer of noodles" and "just cheese on top." It claims the Head Cook's testimony and her memo defy common sense because on April 24, 1996, she told the

cooks to use only a single layer of noodles but didn't say anything about the cheese which was put in each tier. It observes that the Head Cook testified that she only said the grievant's name in a loud voice and the grievant responded to this one word that she wasn't going to listen to the Head Cook or follow the recipe when, in fact, she assisted the Head Cook by putting the cheese only on the top. The Union insists this testimony makes no sense. It also points to the testimony of the prior Head Cook that she never had a problem with the grievant, the grievant never got belligerent and she was of the belief that it was not in the grievant's nature to become belligerent or insubordinate. It notes that a fellow employe corroborated this testimony.

The Union claims that the Superintendent took the word of the Head Cook over the grievant's and failed to conduct a full investigation as required by just cause as he never interviewed the other cooks who were present. It insists that the other two cooks' testimony does not support the Head Cook's document. It concludes that the District has not proven just cause for the document and it requests that the District remove it and destroy it.

DISTRICT'S REPLY:

The District contends that the Union misrepresented the testimony in that the other two cooks testified they saw "single layer of noodles" on the recipe card on March 20, 1996, and the grievant admitted she did not study the recipe card on April 23, 1996. The District asserts that the April 24, 1996, document is a statement and not a memo because it is a statement of Eckstrom's recollection of what occurred on April 24, 1996. The District asserts that the Union's reasons for its assertion that Eckstrom's testimony and statement defy common sense fall flat. It submits that Eckstrom did not correct the cooks about the cheese the first time she spoke to them because she did not observe it and had no way of knowing it. The District insists that Eckstrom said more than the grievant's name asking her "what are you doing?" It observes that the grievant's response indicates that she knew she was in the wrong. The District notes that the prior Head Cook was not present in the kitchen on April 24, 1996. The District does not believe that there had to be any speculation on what the grievant would or would not do because the testimony of the witnesses, including the grievant, reveals the grievant engaged in inappropriate conduct on April 24, 1996.

The District maintains the document is not discipline but if the notation "Talked with Marcy" is documentation of an oral reprimand, it was for just cause. It submits that when the Superintendent met with the grievant, she admitted she had not handled the matter properly and this was underscored by her determining that her actions warranted an apology to the Head Cook. It urges that no further investigation was required and there was just cause for an oral reprimand.

The District contends that the grievant's testimony is not credible. It submits the pan shoving incident is not supported and could not have physically occurred. It refers to the grievant's testimony that she had not seen the document with the Superintendent's notation on it until the day of the hearing but later admitted she got a copy of it on May 16, 1996. It also takes

issue with the grievant's denial of knowledge of what a rebuttal is and her testimony that the Superintendent asked her to sign a "slip of paper" whereas the Superintendent denied having any knowledge of any slip of paper.

The District states that it attempted to handle the situation as informally as possible and the grievant cannot make the record of the April 24, 1996 incident go away and the Arbitrator should not do it for her. It seeks denial of the grievance.

UNION'S REPLY:

The Union contends that merely because the word "discipline" was not mentioned does not mean the April 26, 1996 document is not a letter of reprimand because under the District's theory, a two-day suspension that does not use the word "discipline," would not be discipline. It claims such a theory is without merit. It argues that the document is critical of the employe's conduct which makes it a written reprimand and discipline. It asserts that although the grievant at the early meetings did not refer to the April 26, 1996 document as discipline or a letter of reprimand, she did state the document was not true and she was going to grieve it. The mere failure to express the words "discipline" or "letter of reprimand" does not mean it is not discipline.

The Union takes issue with the District's assertion that the document is merely a notice because nowhere in the document does it state what is required of the grievant in the future; rather, it states what she has done wrong. It insists that this is a written reprimand.

With respect to the District's arguments as to the Arbitrator's authority, the Union asserts that Articles 4 and 8, Sections A and B clearly give the Arbitrator the authority to grant the grievant's demand and this is supported by numerous cases.

The Union maintains that just cause put the burden on the District to justify placing the document in the grievant's personnel file. The Union again disputes the testimony of Eckstrom related to the notations on the recipe card and the preparation of lasagna on April 24, 1996. The Union insists that the two cooks present in the kitchen are credible and Eckstrom is not. It insists that the District has not met its burden of proof that the grievant did as alleged in the document and it had no just cause to place it in her personnel file. It seeks removal and destruction of the document.

DISCUSSION:

The first issue in dispute is whether the April 26, 1996 document written by Kathy Eckstrom constitutes discipline. The Union is correct that there are no magic words such as "discipline" or "letter of reprimand" required either in writing or orally for a document to be found to be disciplinary. On the other hand, not all documents are disciplinary and documents

both complimentary and critical can be placed in a personnel file and are not considered discipline. An annual performance review is one such document which may contain both compliments and criticism but it is not discipline.

Arbitrators have held that where various events occurred that were of a nature that the grievant was counseled and told that certain conduct was unacceptable or inappropriate and these were documented and made a part of the personnel file, these were disciplinary documents although not identified as such. This is so because such documents can support further disciplinary action where the employe does not conform his actions to the employer's directives.

In the instant case, the April 26, 1996 document might arguably fall into this category; however, the District has clearly indicated by writing on the document that it is a notice and not a reprimand. The District has waived any right it may have had to use the document as discipline. The document assures the grievant that it will not be used as any discipline to support any further discipline. Inasmuch as it cannot be used as discipline in any matter, it must be concluded that it is merely a notice. The grievant has the right to attach her version of the events to the document, namely, a written rebuttal to the factual assertions of Kathy Eckstrom so the personnel file will be complete.

Having concluded the document is merely a notice and not discipline, there is no need to determine whether just cause exists for it as Article 8, Section A is not applicable. Furthermore, it would be very unfortunate if just cause were found and a document the District insists is not a letter of reprimand is found to be a letter of reprimand supported by just cause. Thus, no just cause determination need be made. As there is no violation of the contract, the document remains in the grievant's file as a notice to which she may attach her statement of what occurred.

On the basis of the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The document dated April 24, 1996, written by Kathy Eckstrom with the Superintendent's notations and signature thereon, which was placed in the grievant's personnel file, is not any disciplinary action against the grievant, and therefore, the grievance is denied in all respects.

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

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator