BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, LOCAL 150 and MUSKEGO-NORWAY SCHOOL DISTRICT	Case 55 No. 54010 MA-9516

Appearances:

Mr. Steven J. Cupery, Union Representative, Service Employees International Union, AFL-CIO, Local 150, 6427 West Capitol Drive, Milwaukee, WI 53216-2198, appearing on behalf of the Union.

Quarles & Brady, Attorneys at Law, by Mr. Robert H. Duffy and Ms. Heidi B. Retzlaff, 411 East Wisconsin Avenue, Milwaukee, WI 53202, appearing on behalf of the District.

ARBITRATION AWARD

Service Employees International Union, AFL-CIO, Local 150, hereafter the Union, and the Muskego-Norway School District, hereafter the District or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the District, has requested the Wisconsin Employment Relations Commission to designate a member of its staff to act as arbitrator to hear and decide a grievance. The undersigned was so designated. Hearing was held in Muskego, Wisconsin, on July 23 and September 23, 1996. The hearing was transcribed. The record was closed on December 3, 1996, upon receipt of post-hearing written argument.

ISSUE:

Did the District have proper cause to discharge Mr. McCurdy?

If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE II
Management Rights

2.01 Rights

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reasons, including the option of subcontracting provided that no present employee will have a reduction in regular work hours, be laid off or demoted, is vested in the Employer.

2.02 Rules

The Employer may adopt reasonable rules and amend the same from time to time.

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ARTICLE XIX
Sick Leave

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19.06 Medical Leave

Any employee who exhausts his/her sick leave credits shall be granted a leave of absence upon request. A physician's statement may be required to substantiate such request. Leaves granted under this clause shall not exceed ninety (90) work days, unless an extension is mutually agreed upon by both parties.

After five (5) consecutive work day absences, the employee shall provide a written medical statement of projected length of absence or a medical release to return to work.

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ARTICLE XXVIII
Disciplinary Procedure

28.01 Progressive Discipline

No employee shall be disciplined or discharged except for a proper cause. The Employer agrees to apply progressive discipline with the intent of correcting employee performance. The normal sequence of disciplinary measures shall be as follows:

28.011 Oral reprimand
28.012 Written reprimand
28.013 Suspension without pay (not to exceed ten [10] days)
28.014 Discharge

It is understood that the above sequence of disciplinary measures is intended to apply to routine infractions, and that serious cases of employee misconduct may result in more severe disciplinary actions, as outlined in published School Board Policy 658.2

28.02 Written Reprimands
Any written reprimand not contested or sustained in the grievance procedure shall be considered a valid warning. An employee or employee and Union representative together, has the right to inspect the personnel file and formally append clarifying or mitigating statements to any critical item found therein.

28.03 Union Access
Copies of all written reprimands, notices of suspension, and notices of discharge shall be promptly forwarded to the President of the Union. The Union shall, also, be granted access to all records and information having a bearing on the case that will assist in the defense of the employee.

28.04 Discharge Grievances
Any employee who is discharged may initiate a grievance at Step 2 of the grievance procedure.

BACKGROUND:

William B. McCurdy, hereafter Grievant, commenced employment with the District as a Food Service Courier in October of 1991. On September 28, 1995, the Grievant handed Director of Human Resources Jean Henneberry a form entitled "Return to Work Capabilities Evaluation Physician Statement," hereafter "Return to Work" form, signed by Dr. John Shobe. At the time that the Grievant provided the "Return to Work" form to Henneberry, the Grievant requested a medical leave of absence because he had broken his hand.

After consulting the collective bargaining agreement, Henneberry advised the Grievant that he was required to submit a written request for the leave of absence. Thereafter, one of the secretary's in the District's office typed the following:

> To: Jean Henneberry
>
> From: Bill McCurdy
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> Re: Medical Leave of Absence
>
> I am requesting a medical leave as of September 25, 1995. The attached doctor's staement (sic) indicates eight to fourteen weeks may be needed for this leave.

The Grievant signed the above statement in Henneberry's presence. Attached to this statement was the "Return to Work Capabilities Evaluation Physician Statement" signed by Dr. John Shobe.

Suspecting that Item 3 of the "Return to Work" form had been altered, Henneberry contacted Dr. Shobe's office and received a copy of the "Return to Work" form which was in Dr. Shobe's files. Item 3 of the "Return to Work" form provided by the Grievant differed from the Item 3 of the "Return to Work" form provided by Dr. Shobe's office.

On October 26, 1995, Henneberry met with the Grievant and his Union Representative. At that time, Henneberry provided the Grievant with a copy of the "Return to Work" form provided by Dr. Shobe's office. The Grievant then acknowledged that he had altered Item 3 of the form.

Item 3 of the form which had been completed by Dr. Shobe indicated that the Grievant had a restriction of right handed work only. Item 3 of this form also contained the following:

> 3. SPECIFY HOW LONG THESE RESTRICTIONS MAY LAST OR WHEN THEY WILL NEXT BE REVIEWED ~~WITH THE PATIENT:~~ 4 wks

Item 3 of the form which the Grievant had provided to Henneberry contained the same indication that the Grievant had a restriction of right handed work only. However, Item 3 of this form was altered by the Grievant to read as follows:

3. SPECIFY HOW LONG THESE RESTRICTIONS MAY LAST ~~OR WHEN THEY WILL BE REVIEWED WITH THE PATIENT:~~ 8 to 14 wks

On October 31, 1995, Charles R. Brenden, Interim Superintendent of Schools, issued the following letter:

Dear Mr. McCurdy;

A conference was held at the Educational Services Center at 8:30a.m. (sic) on Thursday, October 26, 1995. You; Mr. Steve Cupery, Local 150, Service Employees International Union, AFL-CIO Union Representative; Mrs. Jean Henneberry, Director of Human Resources; and I were present at this conference.

Mrs. Henneberry presented the documents you submitted in request of a medical leave of absence related to your broken left hand. Mrs. Henneberry questioned you about the length of the requested leave of absence as related to work restrictions as written on the doctor's medical evaluation. She then presented the form gotten directly from the doctor's office, revealing changes had been made to the original form. When you were asked about the difference in the two forms, you admitted to changing the restriction identified by the doctor as four (4) weeks, to eight (8) - fourteen (14) weeks. You indicated that you changed the form from the doctor based on what the doctor said to you during your visit and examination.

Mr. Cupery asked the district to consider two facts on your behalf. First that the district has not been prevented from modifying the job so that you might be able to work, and secondly, that after four (4) weeks there are still lifting restrictions for your left hand.

After hearing all of the information from Mrs. Henneberry and Mr. Cupery, and after hearing you admit that you knowingly changed documents which were prepared by your physician, I believe that you did engage in misconduct by falsifying documents which the district needed to make decisions on a leave of absence request. I believe that the district has every right to expect original,

unaltered documents when requiring medical records. Because of the severity of this incident, and in view of previous warnings and suspensions which have been issued to you, I am recommending that you be terminated from your employment with the Muskego-Norway Schools effective October 31, 1995.

As specified in the master contract, you have a right to appeal this decision to the Muskego-Norway School Board within ten (10) work days.

On or about November 1, 1995, the District received a letter signed by Dr. Shobe and dated October 30, 1995, which states as follows:

TO WHOM IT MAY CONCERN

RE: MC CURDY, William

Dear Sir/Madam:

Mr. McCurdy is under my care for a fracture of the 4th metacarpal of his left hand. This injury occurred 9-21-95. He was treated with a splint over the forearm and hand and had been given restrictions limiting him from any lifting with the left hand. I advised him that this should go on to heal within six to eight weeks such that he could return to full duties at that time. There seems to have been some misunderstanding, as he was under the impression that the healing time would be around 8 to 14 weeks.

I had advised him at him (sic) at his last visit on 10-20-95 that he should be able to return full duty work within two weeks or so pending my re-evaluation at that time. Should his healing appear to be satisfactory he would be released to full duties with both hands at that time.

Should any further information be needed in this matter, please feel free to contact me.

On November 14, 1995, Jean K. Henneberry, Director of Personnel, issued the following letter:

Dear Mr. McCurdy:

On Monday, November 13, 1995, the School Board voted to accept the recommendation of your termination of employment with the Muskego-Norway School District, effective October 31, 1995.

If you have any questions, please feel free to contact me.

The Union filed a grievance alleging that the discharge of the Grievant was without just cause and requesting that the disciplinary letter be removed and the Grievant be made whole for any and all losses. The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

Employer

The Grievant admitted falsifying the physician's statement that he gave to the District regarding his need for, and the length of, his medical leave. Arbitrators consistently hold that falsification of employment/medical records constitutes just cause for discharge.

The Grievant's application for employment, which was filed not less than four years previously, stated: "I understand that any false statements or misrepresentations of fact are grounds for dismissal." The Grievant, who signed this acknowledgment, was placed on notice that the District would not tolerate any type of employment record falsification. Moreover, both common sense and public policy demand honesty in the work place.

The contract states that a physician's statement is required for medical leaves. It cannot be seriously maintained that a document signed by the physician, which the patient later falsified, meets the contractual requirement.

The Grievant's testimony that he altered the record to provide the information that he believed the contract required and that the information reflected his doctor's opinion is not credible. It is credible that Grievant altered the record because he wished to extend his paid leave of absence, as well as his work restrictions, beyond those authorized by his doctor. The Grievant's act of falsification was well planned, done solely in self interest, and was intended to deceive.

Even without the Grievant's prior disciplinary history, the District had grounds to discharge the Grievant. Given the nature of the Grievant's conduct, the fact that such behavior has always resulted in discharge, and the fact that the District followed previous progressive discipline, the District had proper cause to discharge Grievant.

Union

The Grievant did not falsify documents as alleged, but rather, altered a form with the good faith intention of providing the Employer with accurate information as he understood it from his doctor. The Employer has contributed to this unfortunate occurrence by not providing employes with an appropriate form and by not providing employes with adequate information or training concerning the Employer's expectations with respect to medical leave requests.

The Employer has no clear rule on altering documents. The Employer's reliance on the employment application form to argue that the Grievant has been placed on notice that the Grievant's alteration of the form is grounds for dismissal is misplaced.

When the Employer received the form, the Employer suspected that the form had been altered. Why didn't the Employer communicate openly with the Grievant? There is little evidence to suggest that the Grievant would have been untruthful. The Grievant's own physician characterizes the difference between his own recollection and that of the Grievant's as being a misunderstanding.

The Employer has not presented persuasive evidence to establish that the Grievant changed the date on the bottom right corner of the form or that the Grievant withheld information from the Employer about his ability to return to limited duty. In fact, the evidence on limited duty indicates that the October 20th medical slip continued the prohibition of left-handed work.

The Grievant did not state that eight to fourteen weeks will be needed. Rather, the form was modified to what "may" be needed. In her testimony, Henneberry acknowledged the difference between "may" and "will."

Prior enforcement of the so-called "falsification policy" involved only one bargaining unit employe. This prior case involved lying on an employment application about serious criminal convictions. As Henneberry testified at hearing, the nature of the criminal convictions was part of the consideration to terminate the employe.

The Grievant acted in good faith. There has been no demonstrable harm to the Employer. The termination should be found to be without proper cause. The Grievant should be issued a reprimand for altering documents and be made whole for the improper discharge.

DISCUSSION:

The Grievant has acknowledged that he altered the "Return to Work" form which he provided to the District at the time that he requested a medical leave of absence. The issue becomes, therefore, whether the Grievant's conduct in altering this form constitutes proper cause

for discharge. 1/

The District argues that the Grievant has falsified a medical record that he gave to the District regarding his need for, and the length of, a medical leave of absence. The Union argues

1/ At hearing, the parties stipulated that for the purposes of this hearing and on a non-precedential basis, "proper cause" is to be given the same meaning as "just cause."

that the Grievant did not falsify a medical record, but rather, altered the form with the good faith intention of providing the District with accurate information as the Grievant understood it from his doctor.

If the Grievant believed that the physician's statement was inaccurate, then "good faith" conduct would have been to contact the physician and have the physician determine the accuracy of the "Return to Work" form. It was the physician, and not the Grievant, who had the right to amend the physician's statement contained on the "Return to Work" form. 2/ Regardless of motive, however, the Grievant's alteration of the physician's statement constitutes a falsification of a physician's statement concerning the Grievant's medical condition. 3/

As stated in Morton Thiokol, Inc., 85 LA 834, 837 (Williams, 1985), "arbitrators generally agree that discipline is warranted whenever an employe falsifies employment applications and records." Employment records include notes from doctors or nurses regarding medical treatment of the employe. 4/

By providing the falsified physician's statement to the District, without advising the District that he had altered the statement, the Grievant provided the District with a reasonable basis to conclude that Dr. Shobe had determined that work restrictions would be in effect for a minimum of eight weeks. Since Dr. Shobe, in fact, had indicated that the restrictions could last, or would be reviewed in four weeks, the effect of the falsification of the physician's statement was to extend the Grievant's work restriction from a maximum of four weeks to a minimum of eight weeks.

By altering the "Return to Work" form, the Grievant falsified a physician's statement which the Grievant knew would be relied upon by the District in evaluating the Grievant's request for a medical leave of absence. In essence, the Grievant made a fraudulent claim for a contractual

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2/ The Grievant's appointment with Dr. Shobe was on September 25, 1995. The Grievant provided the "Return to Work" form to Henneberry on September 28, 1995. If the Grievant believed that there was an inconsistency between what he understood the physician to have said and the physician's statement on the "Return to Work" form, then the Grievant would have had ample opportunity to seek clarification from the physician and to have the physician make any amendments which the physician deemed appropriate.

3/ The fact that Dr. Shobe considers the Grievant to have misunderstood Dr. Shobe's comments does not provide an excuse for the Grievant's misconduct. Avoidance of such "misunderstandings" is but one reason why an employe is not entitled to alter a physician's statement concerning the employe's medical condition.

4/ Bornstein and Gosline, Labor and Employment Arbitration, Volume 1, (Matthew Bender, 1996), Sec. 20.07 at 20-44.

benefit, i.e., a medical leave of absence. 5/ Contrary to the argument of the Union, such a fraudulent claim is harmful to the District and constitutes misconduct for which the District has proper cause to discipline the Grievant.

Having concluded that the Grievant engaged in misconduct, the undersigned turns to the issue of appropriate discipline. The Union argues that, at most, the Grievant's conduct warrants a written reprimand. The District maintains that the Grievant's conduct either alone, or in conjunction with the Grievant's prior disciplines, 6/ warrants discharge.

As mitigating factors, the Union argues that the District failed to provide adequate information and training regarding the District's expectations with respect to medical leave

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5/ It is not evident that the leave would have been with pay. Thus, theft is not an issue.

6/ During his approximately four years of employment with the District, the Grievant has received numerous disciplines. Prior written warnings include the following: May 1, 1992 - unreported absences; May 12, 1992 - failure to comply with directives; November 24, 1992 - driving school vehicle over the speed limit; January 13, 1994 - tardiness and unauthorized overtime; May 3, 1994 - tardiness; and March 27, 1995 - taking District vehicle out of the District without authorization. On September 14, 1995, the Grievant received five warning letters, one for each of the following incidents: failing to report an August 21, 1995 absence in a timely manner; failing to return time card for pay period ending on September 7, 1995 in a timely manner; insubordination and poor job performance on September 6, 1995; and two incidents of insubordination on September 8, 1995. On March 31, 1995, the Grievant also received a suspension of one-day without pay for traveling outside the District without permission.

requests and that the District did not have a clear work rule prohibiting alteration of medical documents. The District, however, does not need to clarify procedures, or promulgate work rules, "where the nature of the prohibited activity is such that employees should know it is improper." 7/

The Grievant knew, or should have known, that it was dishonest to alter a physician's statement which is presented to the District in support of a request for a medical leave of absence. Thus, it is immaterial that the District does not have a work rule, or medical leave of absence policy, which clearly prohibits such conduct.

The Union claims that the District's failure to provide a medical leave request form contributed to the Grievant's misconduct. The undersigned disagrees. The District's failure to have a medical leave request form exempts the Grievant from submitting a prescribed form, but it does not provide the Grievant with any right to submit a falsified form.

7/ Elkouri and Elkouri, How Arbitration Works, (BNA, 5th Ed.), p. 768.

As Henneberry testified at hearing, she was immediately suspicious of the "Return to Work" form. Henneberry, however, was under no obligation to immediately confront the Grievant with her suspicions, but rather, was entitled to investigate the matter prior to reaching any conclusion. Henneberry's conduct on September 28, 1995, did not entrap the Grievant, but rather, confirmed that the Grievant had requested a medical leave of absence based upon the altered "Return to Work" form.

Section 28.01 of the parties' collective bargaining agreement provides for the following progressive discipline: oral reprimand, written reprimand, suspension without pay (not to exceed ten (10) days, and discharge. This Section also recognizes that this sequence of disciplinary measures applies to routine infractions and that more serious cases of employe misconduct may result in more severe disciplinary actions.

The undersigned considers the Grievant's conduct in falsifying a physician's statement which the Grievant knew would be relied upon by the District in evaluating the Grievant's request for a medical leave of absence to be serious misconduct which warrants summary discharge. Thus, it is immaterial that the District has also imposed progressive discipline upon the Grievant.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The District has proper cause to discharge Mr. McCurdy.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 24th day of June, 1997.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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