

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 56
No. 54011
MA-9517

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 suspend Mr. McCurdy for ten days without pay?

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.

. . .

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 14, 1995, the Grievant received five letters which were issued by Brian R. Farley, the District's Food Service Director. Letter number one is dated August 31, 1995, and states as follows:

RE: Absence Notification

Dear Bill:

This is a warning letter regarding your failure to report your absence from work in a timely manner.

On August 21, 1995, you called in your absence at 8:26 a.m. Your starting time is 6:00 a.m. I have spoken to you on several occasions regarding your schedule and the importance of notifying me at home, prior to your starting time, when you will be absent.

If you continue to disregard my instructions regarding absence call-

in procedure, you may be subject to further disciplinary action up to and including termination.

Letter number two is dated September 7, 1995, and states as follows:

RE: Time Card

Dear Bill:

This letter is a warning about your failure to turn in your time card in a timely manner.

On September 5, 1995, Nancy Niemann called my office because she did not receive your time card. When I looked for your card in the time clock area, I found that it was missing.

Your time card is the property of the Muskego-Norway School District, and is not to leave the time clock area until the last day of the pay period.

This time card was finally received by Nancy on September 7 for the pay period ending September 1. In the future, if you do not forward your time card on the day following the end of the pay period, your check may be delayed.

Letter number three is dated September 7, 1995, and states as follows:

Dear Bill:

This letter is a warning about your job performance and insubordination relative to events that occurred on September 6, 1995.

1. Green beans were listed on your delivery slip for that day. You did not fill the order, claiming we were out of the product. I went downstairs with you and pointed out the beans in our storeroom. You then had to double-back to reload them on truck and deliver to the kitchens.

2. Country Time juice was also listed on your delivery slip for that day. Again, you crossed this item off your list and said we were out of the product. After checking our our (sic) storeroom, I found 7 cases of the product available for delivery.
3. Early in the morning of September 6, you were instructed to leave the high school to begin your route at 8:00 a.m. You failed to follow my instructions and left instead at 8:20 a.m.

These incidents have caused double work, a loss of valuable time, and the disruption of the district food service and mail delivery schedule.

This letter will serve as a warning that further insubordination and poor job performance may result in additional disciplinary action, up to and including termination.

Letter number four is dated September 12, 1995, and states as follows:

Dear Bill:

On May 31, 1995 you were given a letter instructing you to punch out during your lunch break, and to not to use the food service vehicle for transportation to area restaurants.

On September 8, 1995 at 12:45 p.m., you and the food service truck were sighted at the Pizza Hut in Muskego. As a result of this action, this letter will serve as a written warning that further insubordination may result in disciplinary action, up to and including termination.

Letter number five is dated September 12, 1995, and states as follows:

Dear Bill:

On September 6, 1995, I instructed you to leave the high school to start your delivery route by 8:00 a.m., and to return to the high

school by 10:30 a.m. You were also instructed to let me know if you were unable to stay on schedule so that I could make other arrangements for transporting food to Mill Valley.

On September 8, 1995, you were in the high school receiving area checking in a food order. I approached you about not being on your route per my instructions. Your response to me was "that's the way it goes." I said I would check in the order myself, and instructed you to proceed with your route immediately. Shortly after, I went to the high school bakery and observed you talking to the bakers instead of proceeding with your delivery route as instructed.

As a result of you starting your route one-half hour late, the cook-manager from Muskego Elementary had to deliver the food to Mill Valley, and I had to start serving the food at that school because of your absence. Your failure to follow verbal instruction and procedures has caused serious disruption of our food service operation.

This letter will serve as a warning that further insubordination may result in disciplinary action up to and including termination.

Each of these letters indicated that a copy of the letter was being sent to Jean Henneberry and Personnel File. Jean Henneberry is the District's Director of Human Resources.

At approximately 2:15 p.m. on September 18, 1995, Farley approached the Grievant as the Grievant was checking in an order and attempted to hand the Grievant an envelope. When the Grievant would not take the envelope, Farley left the envelope on the cart which the Grievant was using. The envelope was not addressed to the Grievant. Approximately ten minutes later, Farley returned to his office and found the envelope under his door.

The following morning Farley and Henneberry met the Grievant at the time clock and handed the Grievant the letter which had been in the envelope. This letter states as follows:

RE: Disciplinary Suspension

Dear Bill:

During the past three weeks you have engaged in a series of events

which are completely inconsistent with the District's expectations for your work. Specifically, over that time period the following incidents have occurred:

<u>Date</u>	<u>Incident</u>
9/12/95	Insubordination: You failed to follow instructions about beginning your route promptly at 8:00 a.m.

After being told again to leave on route, you continued to disregard instructions and spent time in the high school bakery instead.

9/12/95 Used district vehicle for personal reasons

9/7/95 Removed district property, your time card, from the premises and failed to return it until six days after the end of the pay period.

9/7/95 Poor job performance: Twice on the same day you failed to properly fill school orders by claiming that inventory was depleted of products ordered. Both times the products in question were pointed out to you in storeroom as being available for delivery.

Insubordination: You were told to leave on route by 8:00 a.m. You did not leave until 8:20 a.m., disrupting the food service delivery schedule.

8/31/95 Failed to report to work or notify District of your absence until 2 1/2 hours after the start of your shift.

Each of the above events are serious and warrant discipline. Further, given your previous history of disciplinary warnings for failing to follow reasonable instructions of your supervisor or poor work performance (see attached), your recent conduct is extremely serious. It demonstrates that you have little, if any, intention to follow the reasonable instructions of your supervisor or to perform your job in a manner consistent with the District's expectations.

In light of your conduct as noted above, including your repeated failure to follow the instructions of your supervisor, you are receiving a 10 day disciplinary suspension without pay. The suspension will begin on Tuesday, September 19, 1995.

You need to understand that this suspension is being provided to you as a last chance to retain your employment. If you fail to demonstrate sustained and immediate improvement in this regard, or if at any time in the future you are insubordinate or fail to perform your job to the District's satisfaction, you will be released from your employment.

Attached to this letter was the following:

PREVIOUS DISCIPLINARY WARNINGS - BILL MCCURDY

<u>Date</u>	<u>Event</u>	<u>Disciplinary Action</u>
1/13/94	Tardiness and scheduling	Written warning
1/14/94	Failure to wear pager as directed	Verbal warning
5/3/94	Tardiness	Written warning
11/10/94	Speeding in district vehicle	Written warning from superintendent
12/14/94	Setting own schedule to meet personal needs	Written warning
3/27/95	Sighted out of District on 124th and Layton during work time without permission	Written warning
4/5/95	Unexcused absence from job site	One-day suspension without pay
5/31/95	Using District vehicle for personal (sic)	Written warning
7/5/95	Time clock procedure reasons	Written warning

On or about September 28, 1995, a grievance was filed which alleges the following:

On September 18, 1995 the District suspended truck driver Bill

McCurdy. The Union believes the grievant McCurdy was disciplined without just cause in violation of Article 28.

Section 28.01. We ask that the warning letter and suspension be removed from his file and the grievant be made whole for any losses suffered therefrom.

The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

District

During the three-week period at the beginning of the 1995 school year, the Grievant repeatedly disregarded his supervisor's instructions and District policies. The Grievant's repeated failures to follow Farley's instructions and District policies required discipline under the contract.

Previously imposed discipline, including a one-day suspension, failed to persuade the Grievant to conform his behavior to expected standards. In light of this failure and the serious nature of the Grievant's misconduct, the District has just cause to suspend the Grievant for ten days without pay.

As Henneberry explained to the Board of Education at the Board hearing, the letters which were provided to the Grievant on September 14, 1994, are not discipline, but rather, are intended to document the behavior which served as a basis for the District's decision to discipline the Grievant. The conclusion that the letters were documentary, not disciplinary, is supported by Farley's conduct in the Grievant's prior one-day suspension.

Union

Each of the five events relied upon by the District in suspending the Grievant were the subject of a prior disciplinary warning. As the Union contended in Step 3 of the grievance meeting, the suspension constitutes double jeopardy and, thus, is without just cause. The Grievant's claim that the prior letters are documentary, not disciplinary, is without merit.

Mitigating circumstances undermine claims made in Joint Exhibit 2, 4 and 6. The suspension should be set aside and the Grievant should be made whole.

DISCUSSION:

Each of the letters provided to the Grievant on September 14, 1995, states that it is a warning letter. Each of these letters also indicates that further disciplinary action could be taken if the Grievant engages in future misconduct. The most reasonable construction of the plain language of these letters is that the letters are discipline.

Article 28, Disciplinary Procedure, expressly recognizes that a written reprimand is discipline. 1/ The evidence of the Grievant's prior disciplines persuades the undersigned that the District considers a warning letter to be a written reprimand. 2/

It is not evident that, at the time that the District provided the Grievant with the letters of September 14, 1995, any District representative advised the Grievant that the letters were not discipline. Nor is it evident that any District representative made any other representation to the Grievant concerning these letters.

At the Board hearing on the grievance and in response to the Union's claim that the suspension constituted double jeopardy, the District's Director of Human Resources stated that the letters provided to the Grievant on September 14, 1995, were not discipline. Such a claim, however, is not supported by the record evidence.

Double jeopardy principles have been applied in arbitration. 3/ The underlying rationale being that it is not "just" for an employee to be disciplined twice for the same act of misconduct. 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."

The suspension letter of September 18, 1995, expressly states that the Grievant is being suspended for engaging in five "incidents." As the Union argues, each of the five "incidents" was also the subject of one of the written reprimands provided to the Grievant on September 14, 1995.

1/ The term "written warning" is used in Sec. 12.041 to denote the discipline imposed for a Second Offense of an infraction of the time clock procedure.

2/ See: Employer Exhibits 3, 4, 6, 7, and 9.

3/ Elkouri & Elkouri, How Arbitration Works, (BNA, 5th Ed., 1997) at 923-25.

By suspending the Grievant for misconduct for which the Grievant had received a written reprimand, the District has punished the Grievant twice for the same offense. Applying the principles of double jeopardy, the undersigned has concluded that the District does not have proper cause to suspend the Grievant for ten days without pay.

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

AWARD

1. The District did not have proper cause to suspend Mr. McCurdy for ten days without pay.

2. The District is to immediately remove the suspension letter of September 18, 1995, from Mr. McCurdy's personnel file and make Mr. McCurdy whole for all wages and fringe benefits lost as a result of the improper ten-day suspension.

3. Since the Grievant requested a medical leave of absence without pay to be effective September 25, 1995, the make-whole remedy is limited to restoring wages and benefits lost from September 19, 1995 until September 25, 1995.

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

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