

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
GRANT COUNTY EMPLOYEES UNION LOCAL 918

and

GRANT COUNTY

Case 64
No. 54655
MA-9749

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Jon E. Anderson, Godfrey & Kahn, Attorneys at Law, appearing on behalf of the County.

ARBITRATION AWARD

Grant County Employees Union Local 918, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Grant County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Lancaster, Wisconsin on May 8, 1997. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on October 7, 1997.

BACKGROUND

The grievant was employed by the County since 1977 until her termination on April 4, 1996. At the time of her termination, the grievant was employed as an Office Assistant which position was previously titled as a Clerk II. The grievant was terminated for failure to timely complete her work. This was an ongoing problem since 1993 and the grievant was given a verbal reprimand on November 2, 1993, a written reprimand on April 5, 1994, a one-day suspension on March 6, 1995 and a three-day suspension on May 9, 1995. The suspensions were grieved and upheld by Arbitrator Karen J.

Mawhinney. The details leading to the suspensions are set out in Arbitrator Mawhinney's award and need not be repeated here. The result was the grievant's suspensions were held appropriate for the grievant's failure to consistently complete her assigned tasks on a timely basis.

After the grievant served her three-day suspension on May 10, 11, and 12, 1995, the grievant did not complete service loose paper filing for the month of May. On June 2, 1995, the grievant's supervisor by memo informed her that the incomplete work (4 inches: 83 files and 31+ fee statements) was not in compliance with the job requirements. The County then met with the Union to discuss ways the grievant could improve her job performance. The grievant completed her assigned work in June, July August and September, 1995. The grievant did not timely complete her work in October, 1995. This was discussed with her by her supervisor on November 1, 1995. On November 2, 1995, the grievant's supervisor sent her a memo informing her that continued incomplete work may result in further disciplinary action including discharge. The grievant did not complete her work in November, 1995 which prompted another meeting with her supervisor on December 4, 1995 and a memo dated December 11, 1995 with the warning that failure to complete her work by December 31, 1995 could result in discipline up to and including dismissal. The grievant's work in December, 1995 was not completed until January 5, 1996. The grievant timely completed her work in January and February, 1996. The grievant did not timely complete her work in March, 1996. The grievant's supervisor met with the grievant on March 29, 1996 and again on April 1, 1996. On April 4, 1996, the grievant was discharged because her continued inability to timely complete work was not acceptable. The grievant grieved her discharge which was appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the Employer violate the collective bargaining agreement when it discharged the grievant?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

21It is agreed that the management of the County and the direction of employees are vested exclusively in the County, and that this includes, but is not limited to the following: to direct and supervise the work of employees; to hire, promote, demote, transfer or lay-off employees; to suspend, discharge or otherwise discipline employees for just cause; to plan, direct and control operations; to determine the amount

and quality of work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activities of any nature whatsoever shall be added or modified; to change any existing service practices, methods and facilities; to schedule the hours of work and assignment of duties; and to make and enforce reasonable rules.

ARTICLE 6 - DISCIPLINE

61The Employer shall not suspend, discharge or otherwise discipline any employee without just cause. When such action is taken against an employee, the employee will receive written notice of such action at the time it is taken, and a copy will be mailed to the Union within two (2) calendar days, except that written notice of oral discipline shall be given to the employee and the Union as soon as possible after the action is taken. Such notice shall include the reasons on which the Employer's action is based.

POSITIONS OF THE PARTIES

County's Position

The County contends that it had just cause to discharge the grievant. It submits that the work standards are reasonable and were developed in accordance with the Management Rights clause. It submits that the grievant assisted in developing the daily tasks that were her responsibility as well as the weekly, monthly, quarterly and on-going work assignments. It observes that there were continued progress meetings with her supervisor and her job expectations were reasonable.

The County asserts that the grievant continually failed to meet the job expectations despite all the attempts to accommodate her and to correct her deficiencies. It points out that the grievant was able to perform all the necessary duties such as June through September, 1995 but then she again failed to meet job performance standards. It notes that the grievant was warned that her inconsistent pattern of performance would lead to discharge. It argues that the continued failure to comply with job performance standards was sufficient cause for her termination. The County contends that the just cause standard has been met based on the following:

1. The failure of the grievant to meet the work production standards established by the County.
2. The grievant knew or should have known of the work production standards and the consequences for not meeting them.
3. The grievant's failure to follow the procedures and otherwise act in compliance with legitimate standards imposed by management.
4. The progressive discipline imposed by the County.

The County alleges that the record establishes that despite its efforts, the grievant

failed to meet the level of performance expected of her and a verbal and a written reprimand plus two suspensions failed to produce a positive change, so discharge was warranted.

The County argues that the arbitrator should not substitute his discretion for that of the County in determining the appropriate penalty. It insists that nothing in the record suggests that the County acted arbitrarily and capriciously or in a discriminatory manner towards the grievant but acted patiently and fairly with the grievant. It claims that the same rationale that Arbitrator Mawhinney applied to the suspensions also applies to this case. It asks that the grievance be denied.

Union's Position

The Union contends that there are two components to just cause, the first of which is whether the grievant is guilty of the alleged offense as charged. It states that on its face the County's claim is true: the grievant has not performed at a level satisfactory to her supervisor. It questions whether this means that she is "guilty" of something for which discharge is appropriate. It claims that there is a difference between incompetence and a conscious neglect or refusal to perform her duties. It believes that the evidence fails to prove that the grievant was willfully neglecting or refusing to complete her duties. It concludes that the grievant is not "guilty" of culpable misconduct, which is the usual trigger for discipline and discharge.

The Union asserts that the discipline in this case should be corrective and not punitive. It takes the position that the failure to improve work performance typically calls for action aimed at correction. It submits that the only action the County was willing to take was punishment in the form of reprimands and suspensions. It argues that more helpful actions would be additional, job specific, training. It points out that the County did not even attempt to provide some informal job specific retraining to help the grievant develop a better work routine. The Union maintains that the County's actions were essentially punitive in nature and inappropriate to the circumstances and discharge was therefore not called for.

The Union notes that the second component of just cause is that the discipline imposed must be in proportion to the seriousness of the proven offense. It insists that discharge is an excessive penalty. It admits that the grievant has had difficulty in completing her assigned tasks on time but after each discipline she made some improvement and after the three-day suspension she caught up on her work and, more importantly, kept up. It points out that from June 1995 to her termination in April 1996, she was caught up each month except for three and had never had such a successful period in years. It observes that it appeared that she had finally turned the corner only to be fired when a relatively short list of work remained unfinished at the end of March, 1996. It alleges that the grievant was working diligently and successfully at improving her performance and certainly did not chose to "ignore" previous warnings. The Union

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feels that the County must take into consideration the long service (19 years) of the grievant and the remarkable improvement she has demonstrated in the last year. It asks that she be reinstated to her former position and be made whole.

DISCUSSION

The basic facts underlying the grievant's discharge are not in dispute. The grievant did not testify and no evidence was presented on her behalf. The County made its expectations known to the grievant and there is really no question that those expectations were reasonable. The County has met with the grievant frequently and discussed the problem as the County's documents clearly demonstrate.

The Union has argued that the grievant did not willfully or purposefully neglect or refuse to timely complete her assignments and infers that her failure to perform her assigned tasks in a timely manner was due to incompetence and the County should have given her more training rather than discharge her. This argument is simply not persuasive. The grievant was able to perform her duties in a timely fashion as, for example, in June through September, 1995. Additionally, she was in essentially the same job for 19 years and as Arbitrator Mawhinney observed, "there was no need for additional training." The grievant completed her tasks during some months and then could not in others. There was no explanation or excuse for not completing her work in the months she reported not completing it. The evidence does not support a conclusion that the grievant was incompetent, rather the record shows the grievant, for reasons not clear, simply didn't get the work done. This may be a case of nonfeasance rather than malfeasance but the result is the same. The grievant is competent to perform the work in a timely manner but fails to do so. The grievant was not doing her job and thus she was subject to discipline for her lack of performance.

The Union argues that discipline should be corrective and not punitive. This is a basic principle of corrective or progressive discipline that has been widely accepted. The County has attempted to help the grievant in upgrading equipment to save time and by assigning other employees to assist the grievant. Additionally, the supervisor has made many suggestions to free up time for the grievant and has given her a generous 2.5 factor on the time to complete her tasks. The grievant was given a verbal reprimand, a written reprimand, a one-day suspension and a three-day suspension. It appears that the County has tried a number of approaches including progressive discipline and while the grievant occasionally shows improvement, it proves fleeting and she has failed to maintain satisfactory performance. It must be concluded that the County's approach in this case has been corrective and not punitive.

The Union suggests that discharge is an excessive penalty. Certainly, the County could not discharge an employee for a first offense of unsatisfactory performance but here the grievant had a progressive stream of discipline starting in 1993. After two suspensions for the same problem, a continuing problem is no longer treated as a first offense. The grievant received a three-day suspension in May, 1995. The grievant was

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again untimely in her work completion in May, 1995. The grievant then had four consecutive months of timely performance. This was followed by three months, October, November and December, 1995 where she was untimely. She received two warnings during this period, on November 2 and December 11, 1995, that dismissal could result from her continued failure to perform. In January and February, 1996, the grievant timely completed

her work. In March, 1996, the grievant did not timely complete her work and in April, 1996, she was discharged. This record shows that the County did not discharge her after her first failure in October rather it delayed discharging her after giving her additional warnings. The grievant's pattern of conduct simply was returning to the unsatisfactory performance that resulted in the prior disciplines. The evidence shows considerable attempts at rehabilitation by the County and a return to unsatisfactory performance by the grievant. Why the grievant couldn't perform in a consistently satisfactory manner is a mystery but the County cannot be faulted for doing more than it did to get the grievant to perform satisfactorily. It is unfortunate, given the grievant's 19 years of service, that discharge occurred but for some reason she simply will not perform according to expectations. The County followed progressive discipline and the evidence establishes that discharge was not an excessive penalty. It is concluded that the County had just cause to discharge the grievant.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is denied.

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

Lionel L. Crowley /s/

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