BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 150, SERVICE EMPLOYEEES INTERNATIONAL UNION, AFL-CIO, CLC

and

MARQUETTE UNIVERSITY

Case 14
No. 56230
A-5655

Appearances:

Mr. Darryl Evans, Union Representative, 6427 West Capitol Drive, Milwaukee, Wisconsin 53216-2198, appearing on behalf of Local 150, Service Employees International Union, AFL-CIO, CLC, referred to below as the Union.

Mr. Jeff Kipfmueller, Assistant General Counsel, East Hall, 185, P.O. Box 1881, Milwaukee Wisconsin 53201-1881, appearing on behalf of Marquette University, referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Charles McKnight, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 19, 1998, in Milwaukee, Wisconsin. The hearing was not transcribed. The parties entered their positions at the hearing, and chose not to file written briefs.

ISSUES

The parties were not able to agree on the issues for decision. I have determined the record poses the following issues:

Did the Employer have just cause to discharge the Grievant?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – MANAGEMENT RIGHTS

Section 1. The Management of the Facilities Services operation by the Employer and the direction of the working force, including the right to hire, assign, discharge for just cause, and the right to reduce the work force because of lack of work or budgetary constraints is vested exclusively in management.

. . .

ARTICLE III – NO DISCRIMINATION

Neither Marquette University nor the Union shall discriminate against any applicant or employee on the basis of sex, race, color, religion, age, marital status, veteran's status, national origin, or disability as defined in any Federal or State law, statute or administrative rule.

ARTICLE IV – PROBATIONARY EMPLOYEES

Section 1. New employees shall remain probationary and shall not become regular employees until the completion of ninety (90) calendar days of service from the date of the last hiring. Upon completion of ninety (90) calendar days of probationary service, employees shall enjoy seniority from the last date of hiring.

Probationary employees shall have no seniority rights during the probationary period and their employment may be terminated at any time in the sole discretion of the Employer. If discharged during the probationary period, such discharge shall not be subject to the grievance procedure. A probationary period may be extended, based upon the employee's work performance not to exceed sixty (60) days. . . .

ARTICLE V – SENIORITY

. . .

Section 3. Seniority is defined as the period starting from the first (1st) day the employee is hired by the Employer and continuing until the employee: (a) quits, (b) is discharged for just cause . . .

ARTICLE VI – GRIEVANCE PROCEDURE

Section 3. AUTHORITY AND SCOPE OF ARBITRATOR: The decision of the arbitrator shall be in writing and shall be final and binding upon the Employer, the Union, the employee or employees involved and all other affected employees. The arbitrator may consider and decide only the particular grievance presented in the written stipulation and the decision shall be based solely upon the application or interpretation of the provisions of this Agreement. The arbitrator shall not have the right to alter, modify or change this Agreement, nor shall render an award retroactive to a date earlier than the date of the grievance submitted in writing to the Employer . . . The arbitrator shall not have the right to consider, rule or enter any award with respect to disciplinary action imposed upon an employee for refusal or failure to perform assigned job tasks, except where the employee can positively establish that the performance of such task would have created a serious health hazard to him/her. . . .

ARTICLE XVIII – DISCIPLINARY ACTIONS

. . .

Any and all written reprimands and/or memos of reprimands for disciplinary action shall be effectively removed from the employee's personnel file eighteen (18) months after the date of each reprimand. Suspensions of five (5) or more days shall be removed from the employees (sic) personnel file twenty-four (24) months after the date of the reprimand(s). Once removed, past disciplines shall not be raised or referenced in any future discipline(s) or arbitration hearings.

BACKGROUND

The grievance form, dated January 6, 1998, states the background of the grievance thus:

> Mrs. Welch violated my probationary period. She let me work 92 calendar days, then she gave me a letter telling me I didn't make my probationary period. I worked from Oct. 6, 1997 to January 6, 1998. I do believe I have the right to file a grievance under the Union contract.

The grievance form cites Employer violations of Articles III, IV and "any other applicable article," and seeks that the Grievant be "reinstated with back pay."

The Grievant punched in for his first day of work at 11:59 p.m. on October 6, 1997. His first scheduled shift was October 7, 1997. Judy Welch is a Service Manager of Facilities Services, and was the Grievant's immediate supervisor. She issued the Grievant a letter of termination dated January 6, 1998, which states:

> You have come to the end of your 90 day probationary period. I regret to inform you that you have failed to meet the requirements of a Custodian I at the University and that I am not recommending your continued employment. I have reached this decision based on the following observations.
>
> 1. While you have demonstrated the ability to perform the basic custodial tasks assigned, you continue to have difficulty in your judgement and flexibility.
>
> This has resulted in areas of your assignment being neglected or done poorly.
>
> 2. You have difficulty in following instructions when it is necessary for you to cover areas for absences or vacations of co-workers. This has also resulted in areas not being covered or done poorly.
>
> 3. You have had one occasion of tardiness and two absences in an eight week period. This is considered to be frequent to excessive.
>
> At this point in time, you should be able to determine and adapt to the changing use of your assigned area by University students. You have not demonstrated an ability to do so. Because of this inflexibility, resulting poor work quality, and frequent occurrences of absence and tardiness, I am terminating your employment with the University. . . .

Prior to issuing this letter, Welch discussed the matter with her immediate supervisor, Jerry Kohn. Welch documented her concerns to Kohn in a memo dated January 5, 1997, which treated the Grievant as a probationary employe and which recommended terminating him as a function of "his probationary review."

The Grievant did not testify. Welch, Kohn, Melanie Lontkowski, Jackie Roob, and Stephen Duffy did. The remaining background is best set forth as an overview of their testimony.

Judy Welch's Testimony

Welch walked the Grievant through his duties on his first day of work. She worked with him for his first three days of employment and oversaw his orientation as a new employe. Among other things, this orientation included a review of his job description and a review of Employer work rules. For a brief period during his initial training the Grievant worked day shift hours. He then moved to a shift ending at 6:00 a.m. Throughout his first few weeks of employment, Welch would see the Grievant roughly three times a week, typically at the end of his shift.

Welch testified that she observed problems in the Grievant's work performance soon after he was hired. She discussed those problems with him. She also put those concerns into writing in a memo dated November 17, 1997, headed "PROBATIONARY EMPLOYEE; SIX WEEK REVIEW." That memo states:

. . .

JOB KNOWLEDGE:

> As a Custodian I, you are expected to know and effectively utilize basic custodial techniques. You have demonstrated such knowledge in your job assignment to date. In this area, you have met the requirements of your position to date.

PRODUCTIVITY:

> I am concerned about your ability to complete your job assignment in the allotted time. A review of your time card shows that you frequently take longer than six hours to complete your assigned duties during the routine work day. Improvement is needed in this area. I suggest that you be more aware of how much time you devote to each task during your routine and determine if you are using your time effectively.

QUALITY OF WORK:

> The quality of your work is effected (sic) by your use of time. The cleaning of your classrooms is very good. However, you have needed to be reminded to do your stairs and hallways at Cudahy. You have made improvement in those two areas in the past two weeks and I would like to see this continue. The area in which you need to improve is in balancing quality with quantity in your assignment. You focus on the cleaning of classrooms, which is important, but you do not allow enough time to complete your other tasks.

ATTENDANCE AND PUNCTUALITY:

With one absence and one tardiness, you have two occasions of time lost from work since your start date. If this pattern continues, this would be a cause for termination of employment for failure to meet attendance requirements. Reliability, as demonstrated by good attendance and punctuality is critical to your position.

Your job description, which you have been given a copy of, states that standing for prolonged periods of time, climbing of stairs, bending, etc. are requirements of this position. I have observed that at the end of your shift, you frequently massage and/or favor your right knee/leg. You have not indicated that you require any accommodations to meet the requirements of this position. Nor have you indicated that the required standing, climbing of stairs, etc. would adversely effect (sic) any medical condition you may have. Your action, however, would indicate that your are having difficulty with your knee and/or leg. If there is a problem, and accommodations must be considered, I ask that you discuss this with me and/or the Human Resource Department prior to the end of your probationary period.

Your goals in the next six weeks . . . are as follows.

1. Complete your assigned duties within the allotted six hours. To do this, you will need to develop a routine that incorporates alternate or rotation cleaning.

2. Monitor your attendance and punctuality.

I will review your work in another three weeks. At that time, I will evaluate your success in meeting these goals. Please be aware that should you fail to meet the above two goals that I do have the option of terminating your employment with the University.

At this time, please consider what additional training or assistance would help you meet the requirements of your position. I am available to you for any additional training and will work one on one if you so request.

In a handwritten memo to the Grievant dated November 24, Welch stated the following concerns:

No classes Wed. Tues. pm & Wed use time to get dusting done in classrooms.
Also do upper level stairs more frequently – dust balls!

> Give Varsity a good cleaning tonight – if you sweep leaves away from front doors of Var. you'll have less problem with them blowing inside.
> Cudahy – Reminder @ trash/recycle in hallway – pick up & wipe off cabinet also – inside of cabinet "smelly"

Welch stated she had observed these problems more than once prior to issuing the memo.

In a handwritten memo dated December 1, Welch stated:

> What's happening @ Varsity – Last 2 wks
> Leaves entry/lobby have not been cleaned up. This should be done for classes next Wed (the 3rd). Next week Varsity used Mon 8-10 Wed 1-3 & Thur. 8-10 for exams – Be sure it is cleaned for these three days.

Welch stated she attached this memo, as all of her handwritten memos, to the Grievant's time card.

Sometime after this memo, Welch wrote the Grievant another handwritten memo, which states:

> Improvement is needed in the following areas:
>
> - Steps – check all stairs – not just from 2 down!
> - 101 & 108 – these are also classrooms – do daily!!
> - Trash bins – check inside & damp wipe off tops
>
> Reminder bathroom floors are mopped daily – not just swept – check by urinals & toilets!
>
> Varsity – when did . . . last dust mop stage – vacuum steps up & down – check upstairs – mop floors in entry on women's bathroom ?? Mirrors & door glass need work!
>
> Classrooms should not take as much time during exam week & there are no classes the following week – I expect problems taken care of!
>
> Questions ?? – See me!

She noted her reference to "Classrooms" was a response to the Grievant's assertion that the presence of students made it hard for him to keep classrooms cleaned within his schedule, and that students dirtied his area after he had cleaned it.

In a handwritten memo dated December 13, Welch informed the Grievant of his holiday work schedule and concluded with the following reminders:

> One more thing – Rooms 101 & 108 (Computer Rooms on 1st Flr) & Varsity Theater – These areas need to be vacuumed better than they have been. Please look them over. Computer Rooms tonight –
>
> Varsity leave till Sunday Night. Be sure to check upstairs @ Theatre.

Welch issued the Grievant another handwritten memo, dated December 18, which states:

> Now that classes are no longer in schedule – You should be using this time to attend to such cleaning . . .
>
> Dusting Mini-blinds – window sills – radiator tops in classrooms (get gum out of radiators) also chair rail
> Wipe down desks – chairs – tables
> Sweep & vacuum corners & edges
> Dust lights – stall tops – pipes etc. in restrooms
> Wash out trash (inside & out) containers/recycle containers.
>
> I went thru your area & it does not appear you have started on this as yet.

The Grievant did not report for work on December 18. Welch inspected the Cudahy facility on December 20, and determined the Grievant had not complied with her instructions. She stated she had determined, by December 23, that she would terminate his employment. She was, however, reluctant to advise the Grievant of her decision during the holidays.

On December 23, Welch broke her ankle. The break precluded her reporting for work until January 5, 1998. In her absence, two of her fellow supervisors, Jackie Roob and Melanie Lontkowski, assumed oversight of the Grievant. Each of these supervisors reported difficulty with the Grievant. Welch determined that she would discharge the Grievant as soon as she returned to work.

Welch acknowledged that she did not give the Grievant the formal, three week review noted in her November 17 evaluation. She stated that her periodic discussions with the Grievant and her handwritten memos served the same purpose. She noted she did not want to fire him, and kept him on past the end of classes to determine if his performance would improve. She also noted that prior to the Grievant, she had never discharged an employe for poor work performance. She acknowledged that those employes she has discharged for poor attendance received a verbal and a written warning prior to the discharge.

Melanie Lontkowski

Lontkowski filled in for Welch on December 30. She testified that she relayed instructions for the Grievant which Welch had previously given her. Specifically, Welch wanted the Grievant to remove trash from all office areas and clean the restrooms in the Cudahy facility. The Grievant asked Lontkowski for extra hours to perform this duty and Lontkowski agreed.

Because of a then upcoming children's play, Lontkowski informed the Grievant he did not need to cover his assignment at Varsity Theatre, because her crew would. She stated that her crew found Varsity Theatre to be "pretty well trashed," and documented her assessment of the facility in a memo to Welch dated January 5, 1998, which states:

> (W)hile we were covering Varsity Theatre, we discovered the poor condition of the area. The balcony area had not been attended to in quite some time. We also had to vacuum both sets of stairs in addition to providing regular cleaning. It was evident, that (the Grievant) is "skipping" a lot of his responsibilities there.

Jackie Roob

Roob filled in for Welch on December 31, 1998. She documented her experience with the Grievant in a memo dated December 31, which states:

> (The Grievant) did not show up at timeclock to punch out at 4:30 a.m. Being concerned, I took Stan Clayton with me to find (the Grievant). I knew Joe had done Varsity so we went to Cudahy. We started on west side of 2nd fl., I found trash in hallway cans and trash in offices that leave their cans in hallway. Next we went into Lab 240, lights were all out, did not hear anyone. We must have

> been too loud, out of the far south east office (the Grievant) appeared. I introduced myself and asked him if he knew what time it was. He replied 5:00 it was 4:35. I inquired how long he was working. He replied until 6 because he was covering entire building. I then asked if he had completed the other side of 2 (West). He replied he had finished. I then notified him that I had just gone thru area and saw lots of trash. He then changed his answer and said he was not done and was going there next. . . .

Roob advised Welch of her concerns by voice mail on December 31.

Jerry Kohn

Kohn reviewed Welch's January 5 memo, then discussed it with his immediate supervisor and with Stephen Duffy, the Employer's Director of Human Resources. That discussion resulted in a consensus decision to accept Welch's recommendation. Kohn acknowledged that Welch's injury added an unusual element to the discipline, but he stated that the decision to discharge stood whether or not the Grievant was considered a probationary employe.

Kohn was unaware of Welch's adverse opinion of the Grievant's performance until he received the January 5 memo. He acknowledged that the Employer attempted to precede a discharge with a verbal and a written warning. He could not recall any prior instance of discipline in which the Employer imposed discipline on a unit employe based on conduct during the employe's probation period. He could not recall any prior instance in which the Employer felt compelled to do so.

Stephen Duffy

Duffy noted that although the grievance form cites Article III, he was aware of no allegation of discrimination by the Grievant prior to his discharge. The Grievant, as all other employes, is informed, at or shortly after their hire, of the procedure to file a complaint of discrimination.

Duffy stated that the Employer has historically attempted to issue a verbal and a written warning prior to the discharge of an employe. He added, however, that the Employer reserved the right to accelerate or decelerate this process based on the behavior at issue and on the employe involved. He acknowledged he could not recall any prior instance of the Employer seeking to use, or using, employe conduct during a probation period to justify discipline of a unit employe.

Further facts will be set forth in the **DISCUSSION** section below.

THE EMPLOYER'S POSITION

The Employer contends that the only reason the grievance reached this stage is the unlikely coincidence of the close of the Grievant's probation period with an injury to his immediate supervisor. Had Welch not been injured, the Grievant would never have passed his probation period.

That the Grievant survived his probation period has, however, no interpretive significance in this case. The Employer rigorously and consistently applied standards to the Grievant which must be considered to satisfy the requirements of just cause. The Employer reserves the right to apply discipline based on the facts of each case, but does attempt to offer an employe a verbal warning and a written warning before imposing the sanction of discharge. The Grievant received several warnings during his probation period, and cannot assert otherwise unless it is assumed that by passing the probation period, his disciplinary slate was wiped clean.

No clause of the contract will support the cleansing of the Grievant's performance record. No unit employe could expect to retain a position by working as the Grievant did. His supervisors rated him as a "1" or a "2" on a "10" point scale, if "10" is considered the highest work standard. That Welch was injured, and did not wish to terminate the Grievant during the Christmas holiday cannot lead to the result sought by the Union without eviscerating contractual standards governing discipline.

THE UNION'S POSITION

The Union contends that the application of the contract, in light of past practice, cannot be considered in doubt. The Employer could have terminated the Grievant for any reason or no reason at all during his probation period. If he was as poor a worker as the Employer asserts, it is not clear why the Employer elected to retain him throughout and beyond his probation period. That the Employer did this has, however, significant contractual implications.

At the close of his probation period, the Grievant acquired all of the rights and privileges of the collective bargaining agreement. Consistent practice developed under the just cause provision of the contract requires the Employer to precede a discharge with progressive discipline. The Grievant was discharged as a unit employe, but received no discipline as a unit employe. The Employer's attempt to refer to events falling within the probation period must be rejected. A failure to do so renders an employe's completion of the probation period meaningless, and reads the protection of just cause out of the contract. The Grievant, no less than any other unit employe, is entitled to the benefit of the contract.

To remedy the Employer's violation of the agreement, the Grievant should be reinstated to his former position and made whole for lost wages and benefits.

DISCUSSION

The parties did not stipulate the issues for decision, and the issues I have adopted focus on the issue of the just cause standard stated in Article I, Section 1 and in Article V, Section 3. Before applying that standard, however, it is necessary to touch on certain prefatory issues to establish what is not in dispute.

There is no persuasive evidence of discrimination under Article III. None of the testimony indicates the Grievant made any claim of discrimination at any point in his employment. The sole evidence on the point is in Welch's November 17, 1997 evaluation of the Grievant. There is no evidence that he has asserted a medical disability. The testimony establishes a consistent focus on work performance issues by his supervisors.

During witness testimony, the Employer asserted that the final sentence of Article VI, Section 3 may bar arbitral consideration of the grievance. To read that sentence to apply to the alleged incompetence and negligence at issue here would, however, read the just cause provision out of existence. The "refusal or failure to perform assigned job tasks" covered by that section should be restricted to willful or insubordinate conduct. That the sentence limits its bar of arbitral review to cases which do not create "a serious health hazard" underscores this. The final sentence establishes a "work now, grieve later" rule. An employe refusing a direct order to perform a task can thus rely on arbitral review only if the dispute poses "a serious health hazard." The "refusal" posed here is not of that type. The Grievant may have failed to completely or competently carry out orders. There is, however, no allegation he deliberately refused to obey a direct order.

Article IV, Section 1 is the contractual basis of the Union's assertion of the just cause standard. Section 1 establishes that "the completion of ninety (90) calendar days of service" defines the probationary period. There is no dispute that the Grievant's January 6, 1998 discharge fell beyond ninety calendar days from his date of hire. He was, with one potential exception, entitled to the benefits of the contract as of the date of his discharge.

The exception is stated in the final sentence of Article IV, Section 1. That sentence permits an extension of the probationary period "based upon the employee's work performance" for not more than sixty days. The parties have not extensively argued how, if at all, this sentence should be applied to the grievance. They have extensively argued the application of the cause standard. Against this background, it is unpersuasive to conclude that the Employer extended the Grievant's probationary period.

This focuses the parties' dispute on the determination of just cause. This is not, however, a typical just cause case. In my opinion, the determination of just cause typically requires that two elements be addressed. First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed reasonably reflects that interest.

Here, the dispute does not turn on whether the Employer could, with just cause, discharge the Grievant for the type and frequency of misconduct alleged against him. Rather, the issue is whether the contract will permit the Employer to base discipline on misconduct occurring during the probationary period.

This issue primarily poses a contractual, not a factual issue. The Union did challenge the Employer's factual allegations, but that challenge cannot obscure the fundamental strength of the Employer's case. That Welch did not repeat her formal review of the Grievant's performance as stated in her November 17, 1997 evaluation can be noted, but does little to undercut the force of her concerns with the Grievant's performance. She testified, without rebuttal, that she regularly spoke with the Grievant regarding the deficiencies of his performance. Her issuance of all but one of the handwritten memos is undisputed. That she did not discharge the Grievant prior to her injury establishes no more than that she gave him the opportunity to prove he was worthy of passing the probationary period. This cannot be faulted under the labor agreement. The final sentence of Article IV, Section 1 underscores that the parties have mutually agreed that an employe should be given as long as reasonably possible to prove their abilities.

A review of the testimony establishes that the Grievant received the verbal and written warnings which are afforded unit employes prior to discharge. Thus, the interpretive issue is whether those warnings must be given to the unit employe after the probationary period to be considered valid under the application of the just cause standard.

The Union's assertion that the Grievant's prior warnings cannot be considered in the application of the just cause standard is the strongest argument which could be made on the Grievant's behalf. That argument is, however, insufficient to undercut the conclusion that the Employer had just cause to discharge the Grievant.

Initially, it must be noted that the Union's argument rests on the assumption that passing the probationary period voided the Grievant's disciplinary history. This assumption has no clear contractual basis. That the contract afforded the Grievant its benefits upon his completion of ninety calendar days of service establishes that he acquired the rights of any unit employe. This falls short of establishing that he acquired any right beyond that granted any other unit employe. The Union's assertion presumes he acquired a right beyond those granted other unit employes and is, for that reason, unpersuasive.

Seniority, under Article V, is a valuable benefit and is dated not to the point of entrance into the unit but to the date of hire. This undercuts the assertion that time spent in the

probationary period has no contractual significance. Beyond this, Article XVIII establishes how unit employes can cleanse their disciplinary records. The second paragraph of that article does not distinguish between probationary and non-probationary service. Standing alone, this cannot undercut the Union's argument. However, it does indicate that the Union must contend that the Grievant, unlike any other unit employe, can remove reprimands from his file without putting in "eighteen months" of service. This puts the Union in the difficult position of arguing that a probationary employe acquires rights not otherwise granted unit employes.

The Union's contention that this undercuts the application of the just cause provision is forcefully argued, but cannot change the conclusion stated above. Permitting the Employer to base discipline on conduct occurring within the probationary period does not eliminate the protection of just cause. Article IV, Section 1 permits the Employer "the sole discretion" to terminate the employment of a probationary employe. Its action cannot be challenged through the grievance procedure. What the Grievant gained by passing the probationary period was not a "free pass," but the ability to challenge the Employer's conduct. This is a valuable right granted only to unit employes. Because the Union has no right to grieve Employer actions within the probationary period, it acquires the ability to challenge all of the probationary period conduct the Employer asserts to establish just cause. More significantly, the Union acquires the right to challenge the basis of the Employer's conduct. If the Employer had chosen not to employ progressive discipline; if it had chosen not to document its conduct; or if it had chosen to discharge for reasons not based on work performance, then its actions could be overturned through the application of the just cause standard in arbitration.

Thus, the Grievant's completion of the probationary period secured for him the ability to challenge, in arbitration, the exercise of Employer discretion in exercising its authority to discharge. This is what any other unit employe acquires through the just cause standard. Thus, the Union's attempt to assert the contract as a defense to the Employer's action cannot be accepted. That the Grievant has no factual defense to the Employer's proven allegations of poor attendance and poor work performance establishes that the Employer acted with just cause in discharging him.

AWARD

The Employer did have just cause to discharge the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 16th day of September, 1998.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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