BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NICOLET AREA TECHNICAL COLLEGE
FACULTY ASSOCIATION

and

NICOLET AREA TECHNICAL COLLEGE

Case 17
No. 56833
MA-10428

(Lois Gough Grievance)

Appearances:

Mr. Gene Degner, Executive Director, Northern Tier UniServ, on behalf of the Association.

Michael, Best & Friedrich, by **Mr. Robert W. Mulcahy**, on behalf of the College.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "College", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Rhinelander, Wisconsin, on December 1, 1998. There, both parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and both parties subsequently filed briefs and reply briefs that were received by March 1, 1999. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Did the College have just cause under Article VI and Article XIV, Section C, of the contract to suspend grievant Lois Gough for the first semester of the 1998-1999 school year and, if not, what is the appropriate remedy?

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BACKGROUND

Gough has been employed as an English teacher by the College for about 30 years. Prior to the instant dispute, she received a written warning in January, 1996, over her refusal to obtain recertification and to sign and return her individual teacher contract on time.

In the summer of 1998, she taught an American Literature course which included readings on civil disobedience and Henry David Thoreau's book *On Civil Disobedience*. Gough was not required to teach that summer course because it was outside the scope of her regular nine-month teaching contract.

It is undisputed that Gough on July 8, 1998 (unless otherwise stated, all dates herein refer to 1998), spray-painted in very large letters over 12 inches high the Spanish word "OMELAS" on the back of two large bookcases in her third floor office.

Gough testified that her students had lost interest in their readings on transcendentalism; that she concluded that she had to do something to spark their interest; and that she spray painted the word "OMELAS" – which apparently was the name of a mythical town in a short story she intended to discuss with the students (Union Exhibit 3) - to demonstrate the meaning of civil disobedience, which was the main point of the "OMELAS" short story.

Gough added:

. . .

> What I thought I would do is I would use the word Omelas and take the students (past the book cases) up on Thursday. We would have walked upstairs, gone past the word, and I would have asked them before we went up not to comment, not to ask questions, just to follow me, observe, notice things, and come back down.
>
> I chose the spot that I did because in summer it's not highly trafficked. I think Nita mentioned we have about a third of the regular business of the college going on in the summer. I teach individually arranged courses and I had – most of the people coming up were my own students, one of whom on Wednesday morning identified the word for me. He knew what it was. He had read the short story of the ones who walked away from Omelas. And no one called me at home on Thursday. I come in later when I have the night class. I was working coming in about 2 or 2:30, somewhere in there, meeting with some students. When I came in, I had three questions prepared. I was going to take the students past the mural and bring them back to the classroom and then I

was going to start out and ask them, first of all, what did you see. Certainly one or more would say well, we saw this strange word and probably try to pronounce it. I find it to be echoic of the word homeless in my interpretation of the allegory that it comes from so I pronounce it Omelas but that's arguable.

The second question that I planned on asking them would be what does it mean and they might or might not know. Some of them it's perfectly possible and I at least considered the fact that perhaps students would have known the story, would have read the story, and identified it in which case I wouldn't – I would have the student explain what the story was. I wouldn't do it.

Third, before I explained the story to them, I was going to ask them a question about the method of presentation. Again, part of what they had seen. Of course, I didn't get to do any of that because when I came in on Thursday, the word had been removed. One of the reasons that I didn't think it necessary to tell Sam that I would have removed it was that it had already been removed. It was gone.

Director of Human Resources Robert A. Pound suspended Gough via an August 13 letter stating:

. . .

The purpose of this letter is to confirm your disciplinary suspension without pay during the fall semester of the 1998-99 academic year. I had notified you over the telephone on August 11 that you would be suspended for that period of time. Specifically, the dates of your suspension are August 21, 1998, through December 18, 1998 (80 work days). You are to report for work on the inservice day of the winter semester which is January 18, 1999.

On August 5, 1998, an investigatory meeting was held to discuss the incident of spray painting of the word OMELAS on the backs of the bookcases that comprise one wall of your office. The back of these bookcases are located to the immediate left of one of the entrances to the third floor of the University Transfer Center, and comprise part of a public hallway. Present at the investigatory interview were you, Ethan Cummings, Faculty Union President, Gene Degner, Director of Northern Tier UniServ, Nita Fisher, Vice President of Instruction, and me.

During that meeting, I asked you if you had spray painted the word on the back of the bookcase, and you indicated that you did so on July 8, 1998 at approximately 10:00 a.m. in the morning. When I asked you why you did that, you responded that you were preparing to teach a class in civil disobedience and you intended to take your class upstairs to see the painted bookcase as an example of civil disobedience. You also indicated that you did not take your class upstairs because Sam Bass had sanded off the word, prior to the class meeting at 5:00 p.m. on July 9th.

I also asked you if you sought permission to spray paint the back of the bookcase. You indicated that you did not seek permission from anyone because the word would only be there for approximately three days. You further indicated you did not consider that painting the back of the bookcase was defacing or damaging Nicolet property, that you had the right as a taxpayer to do so, and that you did not know why it was prohibited. I asked you if you were trying to convey a message to the college by spray painting, and you indicated that you "might" be making a point. When I asked if you would share that with us, you indicated that you would not do so because I could not do anything about it.

I asked you what you thought would be appropriate discipline for your spray painting the back of the bookcase, and you indicated that we should fire you. I asked you if you were serious and you answered "Yes". When I re-asked you what you thought appropriate discipline might be, you asked me for specific possibilities. I listed the following as possible outcomes; doing nothing, oral reprimand, written reprimand, suspension, and discharge. You indicated that given those options, you thought an appropriate outcome would be to give you a bonus. When I asked which outcome in this list I had just given you might be appropriate, you repeated that you thought you should get a bonus.

Nita Fisher asked you why you did not choose to paint the word on a piece of paper or cardboard, and you indicated that you painted the bookcase because paper or cardboard would not make the impact you wanted. Nita asked how this could serve as an illustration of civil disobedience if you did not believe that you were breaking the rules. Your response was that it was simply a symbolic gesture.

I believe the rationale you offered at the investigatory meeting for spray painting the back of the bookcase was both well thought out on your part and without credibility. There are two reasons why I reached this conclusion. First, on July 29, I spoke to you on the third floor of the University Transfer

Center to inform you about the investigatory meeting that would occur on August 5, 1998. When I informed you of that meeting, you asked if you were going to be fired. I indicated that was one possible outcome; however, we wanted to meet with you and your union representatives to hear your side of the story and that no decision had been made on what, if any, discipline might occur. You also asked if I would give you a list of the questions that I was going to ask you. I responded that I had not formulated all the questions but I knew that I would ask you, 1) Did you spray paint the back of the bookcase, and 2) if so, why? You responded that you did spray paint the back of the bookcase, but when you reflected on why, you indicated you had no idea why you did that. You then offered that possibly you did that because you and your father used to have political discussions when you were a child. If you had spray painted the back of the bookcase for the reasons you indicated in the investigatory meeting, you certainly could have been forthright and told me on July 29. Second, on July 9, 1998, at approximately 3:00 p.m., Sam Bass had a conversation with you concerning the spray painting incident. Sam had just completed trying to clean the word off the back of the bookcase. When Sam asked you why you spray painted, your response to him was that he was trying to impede your right to express yourself and that you believed it was your first amendment right to do that. You were aware that Sam had attempted to remove the word from the back of the bookcase; however at no time did you indicate to Sam why you spray painted the word or that you intended to clean the bookcase yourself. Therefore, I find the explanation of this event that you offered at the investigatory interview to be without credibility.

Nicolet views the spray painting incident as very serious and one that defaced and damaged Nicolet property. When the seriousness of our concerns were conveyed to you during the investigatory meeting, your response was that you thought the appropriate course of action would be to give you a bonus. I find that response to be both flippant and indicative of your disregard for Nicolet College as your employer.

For the reasons set forth above, we decided that a one semester disciplinary suspension without pay was appropriate. When I spoke with you by telephone on August 11, 1998, I indicated that we believed a one semester suspension was appropriate because, in our opinion, to put students in the position of having two instructors for the same class in the same semester would be disadvantageous in terms of their learning process. You indicated to me that you agreed with this analysis.

> Prior to your returning to work on January 18, 1999, we will schedule a meeting with you to discuss your conduct and the ways you believe are permissible to express yourself in the work place.
>
> As mentioned earlier, we believe this incident to be very serious in nature, and if you engage in this, or similar types of behavior in the future, you will be subject to further disciplinary action, up to and including discharge.

Pound testified at the hearing that the contents of his August 13 letter to Gough were correct, as he went into greater detail about what had happened. His testimony was partly coroborrated by Vice-President of Instruction Nita Fisher who testified about her role in this incident and her agreement with Pound that Gough should be suspended for one semester.

Gough testified that she was being facetious when she told Pound she deserved a bonus; that she told him that the spray painting was a symbol because she wanted her students to "accept the word as a symbol of injustice"; and that she became "a bit frustrated with [Pound] at this point and some of my answers do then and later do reflect that".

Gough subsequently served out her suspension for the first semester of the 1998-1999 school year, during which time she had been scheduled to teach about five English classes.

POSITIONS OF THE PARTIES

The Association asserts this case "is about a professor who believes academia arises above all else" and that Gough painted the word "OMELAS" as a "teaching technique"; that the College's suspension was "extremely punitive" because Gough lost about $26,130 in wages when she was suspended for the first semester of the 1998-1999 school year; that the College "had several options of a lesser form of punishment", but chose not to exercise them because the College really wanted Gouugh to take early retirement; that the College's investigation was unfair partly because it was not conducted with an "open mind"; and that the District did not comply with all of the other procedural requirements of the just cause standard. As a remedy, it asks that "a more reasonable penalty" be imposed and that Gough be made whole for all the wages and benefits she lost as a result of her suspension.

The College contends that it had just cause to suspend Gough for the entire first semester because it satisfied the seven "tests" set forth in GRIEF BROS., COOPERAGE CORP., 44 LA 555 (Daugherty, 1964); because the "grievant's admission of guilt and lack of remorse calls for a severe punishment"; because "Discipline is a function of management and must not be reduced if management operated in good faith when reaching its decision"; and because Gough's vandalism did not involve academic freedom.

DISCUSSION

In agreement with the College, I find that Gough engaged in gross misconduct when she defaced school property by spray painting the word "OMELAS" on the two bookcases by her office. I find inexplicable, however, why she did what she did, as I have gone over her testimony over and over again in order to fathom her actions, only to conclude that they are simply unfathomable.

Hence, there is no merit to the Association's assertion – which it initially dropped at the first step of the grievance procedure - that Gough's misconduct was protected by Article VI of the contract, entitled "Academic Freedom", which states:

> A. The spirit and policy of this institution, developed and sponsored under progressive administrative and employee leadership, encourages the teaching, investigating and publishing of findings in an atmosphere of freedom and confidence.
>
> B. This spirit and philosophy is based on the belief that when students have the opportunity to learn and acquire knowledge from a variety of sources and opinions in an atmosphere of honest and open inquiry, they will develop greater knowledge and maturity of judgment.
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> C. Therefore, the freedom of each bargaining unit employee to present within his/her classroom the truth as he/she understands it in relation to his/her area of professional competence is essential to the purposes of our college and society and shall continue to be upheld by the Board and the administration.
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> D. When the bargaining unit employee speaks or writes as a citizen, he/she shall be free from administrative and institutional censorship and discipline. However, the bargaining unit employee has the responsibility to clarify the fact that he/she speaks as an individual and not on behalf of the institution.
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> E. Bargaining unit employees shall be responsible for the relevancy of the lecturer's or guest speaker's subject matter to the course.

For while this language in other contexts may protect even stupid freedom of speech, it most certainly does not protect the kind of stupid defacement of College property found here.

That being so, the only difficult question here is determining what punishment is appropriate under the contractual just cause standard found in Article XIV, Section C, of the contract. Since Gough earlier received a written warning for refusing to obtain recertification

and for refusing to turn in her 1995-1996 individual teacher contract on time (which also was unfathomable), and since her misconduct here is so serious, the College had just cause to progress up the disciplinary chain by suspending her.

Any such suspension, however, must be proportionate to the monetary and any other damage she caused. Here, Pound testified that the two defaced bookcases can be replaced with new bookcases costing about $500 each if they are purchased from outside vendors and that the College itself can build new ones for $350 each. Assuming *arguendo* that new bookcases are needed, Gough therefore lost about $26,130 in salary (because of her first semester suspension) for causing about $600- $1,000 damage to College property. The Association therefore claims that the College "could have ordered her to buy new bookcases."

This is a good point because such a punishment would be directly proportionate to the damage she caused. I therefore conclude that the College can order Gough to pay $600-$1,000 for two new bookcases to replace the ones she defaced and which, in spite of efforts to totally eradicate it, still show faint traces of the word "OMELAS".

A short suspension without pay ordinarily also would be in order because that is the length of time that most suspensions last; because a short suspension is in line with the gravity of what Gough did; and because the College has already issued Gough a written warning over her failure to seek recertification and to return her individual teaching contract.

But here, the College asserts that it was too impractical to suspend Gough for anything less than an entire semester and it also contends in its reply brief, at 7, that it was entitled to impose heavier discipline in part because: "Pound testified that the attitude and the responses of the Grievant were a factor in the decision in the quantum of discipline." This claim also brings into play the Association's charge that the College did not conduct a fair investigation before it disciplined Gough and that it imposed a lengthy suspension in order to force Gough into retirement.

Contrary to the Association's claim, I find that the College conducted a fair investigation and that it did so in spite of Gough's refusal to cooperate and to give straight answers about why she did what she did. She at various times thus told Pound that she did not know why she did what she did; that she had no explanation for her actions; that she did so as a teaching technique tied into a story about "Omelas"; that she should be fired; that she should get a bonus; and that she would be willing to teach without pay during the first semester with another teacher.

The Union claims that Gough reacted the way she did because she was goaded by Pound. I disagree. Pound's investigation was full, fair and objective. The same cannot be said for Gough's actions during the investigation. Indeed, Gough's responses during the

investigation make it easy to understand why her behavior after July 8 only caused the College more consternation.

Nevertheless, her behavior was insufficient to constitute a separate grounds for discipline. Hence, the College's decision to suspend Gough must stand or fall solely on Gough's defacement of the two bookcases.

I conclude that the College lacked just cause to suspend Gough for an entire semester when that suspension caused her to lose about $26,130 in lost wages for defacing $600-$1,000 worth of College property, as the just cause standard requires proportionality between an act of misconduct and the severity of the discipline imposed. For, while the College cites considerable arbitrable authority for the proposition that arbitrators should defer to management's discretion when it comes time to assess the appropriateness of a given penalty, I believe the better view has been expressed by arbitrator Harry H. Platt who stated:

. . .

> In many disciplinary cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide. This is not so under contracts or submission agreements which expressly prohibit an arbitrator from modifying or reducing a penalty if he finds that disciplinary action was justified, but most current labor agreements do not contain such limiting clause. In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him.

. . .

See How Arbitration Works, Elkouri and Elkouri, (5th Edition, BNA, 1997), at 913.

This view is also stated in Labor and Employment Arbitration, Bornstein, Gosline, Greenbaum (2nd Ed., Matthew Bunder, 1998), which states, at 14.03(3), 14-12, 13:

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> **[3]-Just Cause for the Penalty**
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> As noted earlier, the arbitrator's responsibility in discipline cases includes determining whether there was just cause for the quantum of discipline imposed. Some arbitrators, having found that the discipline was justified,

> decline to review the propriety of the penalty because they are unwilling to substitute their judgment for that of the employer, especially where the submission agreement does not authorize the arbitrator to review the amount of discipline. Yet if they are unwilling to substitute their judgment for that of the employer on the issue of whether the grievant acted improperly so as to justify any discipline, they should be willing to review the employer's judgment on the quantum of discipline imposed. The credibility of the whole grievance and arbitration system hinges on review of the penalty to assure that it is in conformity with the guiding precept of progressive or corrective, rather than punitive, discipline. (footnote citations omitted)

. . .

The College asserts it could not impose any suspension lasting less than a full semester because that would have necessitated finding a replacement for Gough during her suspension, thereby destroying the continuity that exists when only one teacher teaches a course during a full semester. The College thus cites VINTON COMMUNITY SCHOOL DISTRICT, 83 LA 632 (Madden, 1984), where Arbitrator Stanford C. Madden ruled that a school district did not violate the contract when it denied a teacher's transfer request to another class because: "The Board was entitled to give great weight, in considering her case, to the advantage enjoyed by the pupils of the District in retaining her in her present assignment." Id., at 635.

That case, though, is materially different than this one because it centered on whether a school district violated the contractual transfer clause which gave it broad discretion in determining whether a transfer request should be granted, whereas this case involves application of the just cause standard, one which places far greater restraints on the College's area of discretion and which therefore carries with it different policy considerations. In addition, the teacher there was already scheduled to miss the beginning of the school year because of her need to take pregnancy leave, thereby establishing that it is possible for a teacher to miss part of a school year without the damaging consequences claimed here.

Moreover, teachers regularly miss work for all kinds of reasons, including the taking of leave under the Family and Medical Leave Act ("FMLA") which can last up to 12 weeks. While Vice-President of Instruction Fisher testified that the situation with the FMLA was different because it is a "legal requirement" and that "there is no choice in the matter but to grant that", the College here also was required under the contractual just cause proviso in Article XIV, Section (C), to follow "legal requirements", which in this case means imposing a penalty that is proportionate to the misconduct involved. This latter "legal requirement" must be followed even if the College finds it distasteful to do so by breaking up the continuity that is otherwise created by only having one teacher throughout the semester.

I therefore conclude that the District lacked just cause to suspend Gough for an entire semester. Instead, it at most was entitled to either: (1), suspend Gough for the remainder of the 1998 summer session; (2), not offer Gough a summer job in 1999; or (3), suspend her for one week during the first semester of the regular 1998-1999 school year. Since the District did not choose any of these options, I find that Gough's semester-long suspension should be converted to a one-week suspension, and that the District is entitled to now deduct one week's salary from her backpay award which is to cover all the wages and benefits she lost as a result of her original suspension, minus any money or benefits she earned during that time period that she ordinarily would not have earned. In addition, the District can deduct from the backpay award the $600-$1,000 it takes to replace the defaced bookcases, depending on whether the College purchases new bookcases from an outside vendor or whether the District's carpenter makes them.

In light of the above, it is my

AWARD

1. That while the College had just cause to impose some form of discipline on grievant Lois Gough for defacing College property, it lacked just cause under Article XIV, Section (C), to suspend her for one semester. Her one-semester suspension is therefore converted to a one-week suspension.

2. That to make her whole, the College shall reimburse grievant Lois Gough in the manner described above.

3. That to resolve any questions that may arise over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 12th day of May, 1999.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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