

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**HAMILTON SCHOOL DISTRICT EMPLOYEES UNION,
LOCAL 3086, AFFILIATED WITH DISTRICT COUNCIL 40, AFL-CIO**

and

HAMILTON SCHOOL DISTRICT

Case 41
No. 57104
MA-10518

(Robert Wiczynski Discharge Grievance)

Appearances:

Mr. Sam Froiland, Staff Representative, AFSCME Council 40, on behalf of the Union.

Quarles & Brady, S.C., by **Mr. David B. Kern**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "District", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Sussex, Wisconsin, on August 9, 1999. The hearing was not transcribed. Both parties filed briefs and the District filed a reply brief that was received on October 1, 1999.

Based upon the entire record, and the arguments of the parties, I issue the following Award.

ISSUE

The parties agreed to the following issue:

Did the District have just cause to terminate grievant Robert Wiczynski and, if not, what is the appropriate remedy?

BACKGROUND

Grievant Wiczynski, a Custodian, was employed by the District since August, 1988. But for one major exception, Wiczynski has been a good employe, as his various evaluations and several letters of commendation all attest to his ability and dedication. (Union Exhibits 1-10).

The one major exception relates to when he worked at the District's High School at night and when he left work early 30 minutes on October 7, 1994, and 60 minutes on February 23, 1995. Custodians Jim Moran and Les Nettesheim, who then worked at the High School with Wiczynski, also left work early on repeated occasions. The District ultimately agreed to suspend all three for 15 working days and entered into a May 5, 1995, Memorandum of Understanding (Joint Exhibit 3), with Wiczynski, Moran, Nettesheim, and the Union which stated in pertinent part:

. . .

The Hamilton School District (District), Hamilton School District Employees' Union Local 3086 (Union), Jim Moran, Les Nettesheim, and Bob Wiczynski (Employees) hereby agree as follows:

- (1) The District has determined that Jim Moran, Les Nettesheim, and Bob Wiczynski have falsified their time cards by over reporting their work on the following days by the following amounts:

. . .

- (2) All three employees have admitted to the facts set forth in paragraph one (1) above.
- (3) In lieu of termination of these Employees, and in full settlement of the matters relating to this situation, the District, the Union, and the Employees agree as follows:
 - a. Each employee will be suspended without pay for a period of fifteen (15) work days. The District has the option to stagger the suspensions for work coverage purposes.

- b. Each Employee will serve a two-year probationary period commencing on May 8, 1995 and ending on May 7, 1997.
 - c. During the course of the probationary period, each Employee will not be eligible to apply for any type of job advancement position.
 - d. Any dollars received by the Employees as a result of the falsification of time cards will be returned to the District by each Employee no later than June 30, 1995.
 - e. The District retains the option of transferring any of the Employees to a different building.
 - f. Mr. Nettessheim will lose his position as night foreman and revert to the position of custodian.
 - g. The District will temporarily fill the night foreman position at Templeton Middle School.
 - h. In accordance with the negotiated agreement, the District will post the position of night foreman at Templeton Middle School.
 - i. This Memorandum of Understanding will become a permanent item in each Employee's District personnel file.
- (4) Any further misconduct by the employees during the probationary period described in paragraph 3. (b) above, or any breach of the Employees' obligations described in paragraph 3. (d) above, will result in their immediate termination, without recourse to the grievance procedure.
- (5) The Union and the above named Employees agree not to grieve or in any other way challenge the foregoing discipline or other terms of this Memorandum, and this Memorandum of Understanding is in full settlement of all of these matters.

...

Wiczynski for several years thereafter worked at the High School. He subsequently was transferred to the District's Maple Avenue School where he worked the 3:00 p.m. - 11:30 p.m. shift with fellow Custodian Fred Krull. There are no time clocks in the Maple

Avenue School and there are no supervisors on the third shift. Hence, Custodians on the third shift operate under an honor system wherein they must handwrite their own starting and quitting times on time cards. On the dates related below, Wiczynski and Krull both wrote they left work at 11:30 p.m. when, in fact, they did not.

Bryan Ruud, the Manager of Buildings and Grounds, testified that the District in October, 1998, received a tip that night Custodians were leaving work early. To determine whether that was true, he and other management personnel audited when Custodians were leaving work by going out to the District's various schools and timing when the Custodians left. He said that he saw Wiczynski and Krull leave the Maple Street School at 11:24 p.m. on October 27, 1998 (unless otherwise stated, all dates refer to 1998); 11:22 p.m. on November 3; and 11:23 p.m. on November 9. Ruud made sure his wristwatch was correct by checking it with the telephone and the Maple Street School's office clock.

He and other management personnel interviewed Wiczynski on November 3, at which time Wiczynski denied ever leaving work early. Ruud explained that the District initially fired, but then subsequently agreed to suspend, the two other Custodians who left early because it was their first offense and because, unlike Wiczynski, they admitted to leaving early during the District's investigation. He also said that Wiczynski then never claimed there was a practice of leaving early at the High School.

On cross-examination, Ruud acknowledged that Wiczynski was "a good Custodian" and that there was a practice at the High School of where Custodians went to the boiler room about five minutes before quitting time so that the school alarm could be set. There are no alarms or motion detectors at the Maple Street School. Hence, there is no need for the Custodians there to gather together before closing the school.

Alex K. Dittrich, Assistant Superintendent for Business, testified that he on November 6 saw Wiczynski pull up his car to the front of the school at about 11:14 p.m.; that he returned to the building; and that Wiczynski and Krull left the Maple Street School at 11:22 p.m. Dittrich added that he checked the time with his car radio and wrist watch.

Director of Educational Services/Human Services Dean Schultz testified that he on November 5 saw Wiczynski and Krull leave the Maple Street School at 11:23 p.m. and that he checked the time on his wrist watch with the car radio. He said that when he on November 11 met with the three Custodians who had been caught leaving early, Custodians Ernie Jaekl, who also left early at another school, and Krull admitted to leaving work early, but that Wiczynski claimed he left at 11:30 p.m. He explained that Wiczynski was terminated, rather than suspended, because of his earlier time card falsifications and that Wiczynski asserted at his unemployment compensation hearing for the first time that he left work early at the Maple Street School because there was a practice to that effect at the High School.

On cross-examination, Schultz said the standard for time card falsification had not changed since 1997 and that he did not participate in drawing up the earlier Memo of Understanding (Joint Exhibit 3), which was a permanent part of Wiczynski's file.

In his defense, Wiczynski testified that he often reported to work early and that he was never paid for it; that he has been repeatedly praised for his past work; and that he felt justified in leaving early in 1994 and 1995 because he and the other Custodians at the High School finished their work early. He said that he initially denied leaving early at the Maple Street School in November, 1998 because he used the stage clock to determine when he should leave; because the office clock at the Maple Street School is not correct; and because he knew he could be fired for again leaving work early. He added that he knew he had left early on some of the days in question; that his work was always done on those occasions and that was why he felt justified in leaving early; that he believed there was a custom of leaving early at the Maple Avenue School; and that he and other Custodians had regularly quit working early at the High School.

On cross-examination, he said he knew he was on "thin ice" when he was caught leaving early again in 1998; that he was aware fellow Custodian Krull said during the course of the District's investigation that he used the office clock and that he and Wiczynski had left together at the same time; that he never mentioned leaving early at the High School during the District's investigation; that he "automatically assumed" the same practice was followed at the Maple Street School; and that he never asked about the practice at the Maple Street School when he worked there.

Wiczynski was terminated via a November 17 letter from Schultz that stated:

...

This letter will confirm your termination of employment from the Hamilton School District for falsifying your time sheets on repeated occasions. You were observed leaving your workplace early on five different occasions from October 27 through November 9, 1998. Your time sheets indicated that you had remained at work and fulfilled your entire work shift, which was not the case.

You were previously issued a 15 day disciplinary suspension for falsifying your time sheets in 1995. You were clearly aware of the District's prohibition against such actions and the District therefore has no choice but to terminate your employment.

...

Wiczynski grieved his termination on November 23 (Joint Exhibit 2), hence leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union maintains that the District lacked just cause to discharge Wiczynski because the “degree of discipline” levied against Wiczynski “far outweighed the offense, as well as the employe’s work record”; because unlike 1995, Wiczynski in 1998 “believed his actions were condoned”; because Wiczynski in 1998 left early only after his work was completed; because he never intended to defraud the District; because Wiczynski by October-November, 1998, was “no longer on probation”; and because the terms of the earlier 1995 Memorandum of Understanding (Joint Exhibit 3), “were not intended to reach as far as the District would stretch in this instance.” The Union thus cites CARBIDE CORP., 100 LA 763 (Felice, 1993), in support of the claim that Wiczynski never intended to defraud the District. As a remedy, the Union seeks a make-whole order which includes Wiczynski’s reinstatement and a backpay award.

The District, in turn, submits that the grievance is without merit because Wiczynski “violated a reasonable and well-known policy against falsifying time cards”; because it was “within its rights in imposing the penalty of discharge”; and because there are “no mitigating factors justifying leniency.”

DISCUSSION

Life seldom gives us a second chance to rectify our major errors. That is why arbitral case law is replete with countless cases sustaining the discharges and other disciplinary penalties of employes who committed only one major error involving their employment.

But, this is not such a case. Here, Wiczynski was given a second chance when the District converted his original discharge to a suspension after he was caught leaving work early in 1994 and 1995. That suspension should have put him on express notice that the District would not tolerate having its Custodians leave work early and that he therefore could lose his job if he ever again left work early.

That message however, for whatever reason, went unheeded since Wiczynski claims here that he is entitled to a third chance because he is a long-term employe with an otherwise good work record and because he really did not intend to cheat the District by leaving early.

If this marked the first time he left work early, this argument might prevail. But, it is not since he also punched out early in 1994 and 1995. That being so, he has used up all of his “chits” in his mitigation bank. Moreover, I do not credit Wiczynski’s claim that he honestly

thought there was a past practice of leaving early at the Maple Avenue School and that it was all right for him to do so. For even if there was such a practice, Wiczynski surely must have known as a result of his earlier suspension that the District would not tolerate such early departures irrespective of how prevelant any such practice might be. In addition, Wiczynski's failure to tell the truth during the District's investigation renders suspect all of his testimony here.

All these factors distinguish this case from CARBIDE CORP. SUPRA, where Arbitrator John M. Felice ruled that the Company lacked just cause to terminate an employe charged with deliberately falsifying his time sheet because, in his words, "the Grievant was never previously warned by supervision regarding any inconsistencies in his recording of time. . ."; because the company did not "conduct a fair and objective investigation. . ."; and because the company several years earlier had suspended, rather than fired, another employe for falsifying his time card. 100 LA 766-767. Here, by contrast, Wiczynski was warned by the District in 1995 that he could be fired for leaving early; the District did conduct a fair investigation; and the District rightly treated Wiczynski differently from the other two employes who left early given his prior suspenson and his failure to tell the truth during the District's investigation. For all these reasons, CARBIDE CORP. is inapposite.

Given all of these latter factors, it is my

AWARD

That the District had just cause to terminate grievant Robert Wiczynski. His grievance is therefore denied.

Dated at Madison, Wisconsin this 29th day of October, 1999.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

AAG/gjc
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