BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION LOCAL 662

and

SCHOOL DISTRICT OF NEW RICHMOND

Case 42
No. 57561
MA-10675

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen,** 1555 North RiverCenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn,** 4330 Golf Terrace, Suite 205, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the District.

ARBITRATION AWARD

General Teamsters Union Local 662, hereinafter referred to as the Union, and the School District of New Richmond, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the District, 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 suspension. The undersigned was so designated. Hearing was held in New Richmond, Wisconsin on August 11, 1999. The hearing was not transcribed and the parties filed post-hearing briefs. The parties reserved the right to file reply briefs. The Union chose not to file one and the Employer filed a reply brief which was sent to the Union on November 9, 1999.

BACKGROUND

The Grievant has been employed as a custodian by the District for 14 years and prior to the instant case had a clean record. The District has a maintenance shop inside of which is a

wire mesh cage area where tools and supplies are kept. The wire mesh cage was installed to prevent theft of tools and equipment. In December, 1998, the District installed a hidden video camera in the maintenance shop. On Saturday, February 13, 1999, the video camera recorded the grievant entering the shop area with the key he had as a custodian and a short time later, the grievant emerged with a piece of sheet rock. The grievant was not confronted immediately and the video camera continued to be operated. On March 29, 1999, the grievant was directed to meet with management along with a union representative over the removal of the sheet rock. The grievant admitted he removed the piece of sheet rock to make a home repair but insisted that he merely picked up a piece of scrap. The District's Board held a hearing on April 19, 1999 and imposed a 30-day suspension without pay on the grievant for removal of District materials from a secured area without authorization The suspension was grieved and processed to the instant arbitration.

ISSUE

The parties were unable to agree on a statement of the issue. The District frames the issue as follows:

> Did the District have just cause to suspend the grievant, Thomas Larson, for 30 days without pay for the theft of District materials from a secured area within the District's maintenance shop on Saturday, February 13, 1999?
>
> If not, what is the appropriate remedy?

The Union frames the issue as follows:

> Did the District have just cause to suspend the grievant for 30 days? If not, what is the appropriate remedy?

The undersigned adopts the issue as framed by the Union.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 9 – DISCIPLINE AND DISCHARGE

Section 1. The Employer will not discipline, suspend, or discharge an employee without just cause.

Section 2. The normal disciplinary procedure is:

1. Verbal warning
2. Written warning
3. Suspension
4. Discharge

The above procedure need not be followed in cases of serious misconduct.

The number of warnings or length of suspension shall be determined by the Employer in accordance with the gravity of the violation, misconduct, or dereliction involved, taking into consideration that such steps are intended to be corrective measures.

All discipline shall be in writing with a copy to the employee and the Union.

District's Position

The District contends that a majority of the key facts are not in dispute. It asserts that the grievant took sheet rock from a locked/secured area without permission from any manager or supervisor. The grievant measured the sheet rock while in the secured area and never informed any manager he had taken the sheet rock until the investigative interview. The District points out that the grievant looked over his shoulder just before unlocking and entering the shop and only at the arbitration hearing did he indicate he did this because he heard a noise. It notes that the grievant was not aware of anyone removing materials for personal use from the cage and he admitted that the cage is locked to keep people from removing materials from the cage without authorization. The District insists that the grievant knew that the sheet rock he removed was usable material. It submits that the undisputed facts establish that the grievant committed theft of school property.

The District disputes the grievant's claim that the sheet rock he found and took was from a pile on the floor. It observes that Building and Grounds Supervisor Jerry Davis testified that the only sheet rock in the caged area were full sheets or partial sheets not less than four feet by six feet stacked on the side of the cage. It submits that this testimony was confirmed by Steve Eichinger, a bargaining unit member, who testified the caged area was clean and the only sheet rock was stacked along a wall. It refers to the testimony of unit member Dave Johnston who did not recall the sheet rock in the cage. It asserts that the grievant's testimony that there was a pile of sheet rock on the floor is not credible in contrast to the other witnesses' testimony about the sheet rock. It also contends that the grievant's testimony is nonsensical in that he needed an 18 inch by 18 inch piece and there were 2 feet by 3 feet pieces, yet he took a two foot by four foot piece even though he had a tape measure. The District claims that the grievant simply used the tape measure to cut off a piece of sheet rock from the larger sheets stacked against the wall.

The District maintains it had just cause to suspend the grievant. It states that the seriousness of the offense allows a departure from the normal progressive discipline scheme. The District refers to its policies that put the grievant on notice that theft would subject him to discipline and theft is the type of conduct that the grievant should know is improper.

The District argues that a 30-day suspension for theft of the sheet rock is not excessive. It cites a number of arbitral authorities which upheld discharge for theft of property of nominal value. It refers to cases where long term employes with good records were given greater suspensions including suspensions of nine months or more. It asks that the arbitrator not substitute his judgment for the District's as to the amount of discipline unless the discipline is arbitrary, capricious, discriminatory or excessively severe. It insists the suspension should be upheld and the grievance denied.

Union's Position

The Union argues that the District must prove the offense beyond a reasonable doubt because the charge is theft which carries the stigma of general social disapproval. It contends that the District must come forward with such convincing evidence that no reasonable person would doubt the grievant is guilty of theft. It claims that the grievant need not be found innocent but if there is some other credible explanation then the District has not sustained its burden and the grievant must be made whole.

The Union maintains that the District allowed employes to take scrap materials without permission. It claims that because the sheet rock was scrap, the grievant committed no offense by taking it. It refers to the numerous examples where employes take scrap materials for their own use and taking scrap does not constitute stealing. It takes the position that even without such a practice, arbitrators do not recognize taking garbage to be an offense.

The Union insists that the District failed to meet its burden to prove the sheet rock was not scrap. It insists that there was scrap sheet rock in the shop on February 13 and the grievant took a piece that was gouged and had foot marks on the edges. It states that the grievant took larger pieces to the dumpster a few days later and it was his job to put scrap sheet rock in the garbage.

It submits that the District's claims that there was no scrap sheet rock in the shop on February 13, 1999, is not supported because the testimony was inconsistent with Davis testifying there was no scrap sheet rock in the shop on February 13, 1999, yet he passed on the opportunity to inventory the sheet rock or to check that any had been cut. It also notes that Davis was inconsistent on how many sheets and their size and location in the shop. It points out that Eichinger testified that the sheets could be 4x12 or 4x8 and Johnston did not know there was any sheet rock in the shop. It asserts that this inconsistent testimony demonstrates

that no one can say that all the sheet rock was good. The Union notes that the shop generates a significant amount of scrap and on April 19, 1999 had so much it needed a 20-foot by 70-foot dumpster to discard it. It argues that the District tried to prove that it was unlikely that there was any scrap on February 13, 1999 so the grievant probably took good scrap but the theft allegation cannot be proved by creating an inference as to probabilities.

The Union insists that the grievant had the ability and authority to determine whether a piece of sheet rock was scrap. It claims that the District tried to prove that the grievant had no authority to enter the caged area or determine what pieces of sheet rock were scrap; however, the grievant's job is to take out garbage and scrap and he does not have to check with management on every piece of garbage or scrap. It observes that Larson has a key so he can clean the shop and employes use their common sense to determine whether a piece of scrap is usable or not. It maintains that there was nothing unusual or improper about the grievant's concluding that a small piece of sheet rock was scrap.

The Union states that the District demonstrated that it had no use for the sheet rock because it failed to punish him immediately nor did it ask him to return the piece of sheet rock and it later generated more scrap sheet rock than it could even hope to use.

The Union argues that whether the sheet rock was scrap or not, the grievant believed it was and therefore did not commit theft. It argues that theft is composed of action and intent and the grievant had no intent to steal. The Union observes that the grievant asks if he can take items if he has any doubt such as the Carpet shampooer and one of the old modems.

The Union claims that the District has forgiven mistakes by other employes including Spinks mistakenly taking a cabinet and Renspe taking a sewing machine they believed were scrap. It takes the position that the District should have shown the same courtesy and respect to the grievant, given his 14 year unblemished record. It believes that the grievant should have been confronted immediately and told that he was mistaken in thinking the sheet rock was scrap and to bring it back.

The Union contends that the District failed to give notice that it was changing its practice of allowing employes to take scrap. It does not deny that the District can change its policy provided it tells the employes in advance, but here the District maintained the status quo and condoned and encouraged employes to take home anything sitting around in the hallways, without asking permission first.

The Union argues that the District made the grievant a scapegoat for its theft problem rather than successfully addressing the problem. It insists that the District took it for granted that the managers were not the source of the thefts and also eliminated Eichinger because he installed the video camera and monitored it. The Union infers that the video camera was installed to monitor only two people one of whom was the grievant and then avoided

confronting the grievant to see if he "stole" anything else and when he didn't, the camera was removed. It submits that the District went to great lengths to monitor the grievant and ignored management practices that invited thievery such as leaving the maintenance shop garage doors open even after all employes had left. It asserts that the District tacitly acknowledged that the grievant was no thief as it allowed him to carry bags of money from building to building from February 13 to April 1, 1999. It concludes that for these reasons, the suspension should be rescinded and the grievant made whole.

District's Reply

The District contends that the Union's brief contains factual misrepresentations and the majority of cases cited by it actually support the District's position. The District insists there is no practice of allowing employes except maintenance employes to remove materials from the caged area without authorization inasmuch as the reason the cage was built was to protect items within it. It also asserts that the grievant's duties do not include cleaning the caged area unless ordered to do so and the grievant removes scrap that is placed in a 30 gallon garbage can. The District argues that the Union's reliance on the testimony of Roger Breault and Rich Spinks is a reach because Breault has not worked in the shop since 1995, prior to the cage being built, and he admitted never having seen a scrap pile in the caged area. It notes Spinks had no knowledge of the size of pieces of sheet rock in the caged area on February 13, 1999, but testified that even small pieces are usable for patching. The District asserts that the Union's reference to the "dumpster" and sheet rock is misleading because the sheet rock put there was from a demolition project which occurred in April, 1999. It insists that the fact employes can help themselves to material in the dumpsters or mistakenly believe that certain items left in open areas are to be discarded have no application to the instant case as there was no mistake about materials in a locked caged area within a locked building.

Contrary to the Association, the District notes that this is not a criminal matter and the standard of proof for a criminal case and proof of intent are not applicable. The District takes the position that the cases cited by the Union do not support the Union's position on burden of proof. It argues that none required proof beyond a reasonable doubt.

The District argues that there is no dispute that the grievant removed sheet rock from District property without authorization and personally benefit from the taking. It states that the numerous cases cited by the Union fail to support the Union's position. It argues that there is no reasonable basis upon which the grievant can assert that it was okay for him to enter the caged area on a Saturday morning and help himself to a piece of sheet rock. The District insists that the Union's flim-flam argument about lack of intent must be discredited. It insists there was no scrap on the floor of the caged area and even if there were, the grievant knew he was not authorized to remove it.

With respect to the penalty, the District submits that it has not ignored thefts from locked and secured areas and the fact that the value was small is not relevant. It states that the Union's attempt to blame everyone else except the employe is typical in employe disciplinary cases. It states that the grievant was lightly disciplined and his arguing that the suspension is not warranted indicates that the grievant still does not get it and attests to the reasonableness of the suspension. It requests that the grievance be dismissed.

DISCUSSION

The Union has argued that the appropriate burden of proof in this matter is proof beyond a reasonable doubt. This burden of proof is required in criminal cases, but this case involves an arbitration and the record fails to establish that the grievant has been charged with a crime. The consequences of a conviction for a crime, which may include the deprivation of one's liberty, are not present. The undersigned finds that in the instant case the District need only demonstrate by a preponderance of the evidence that the grievant stole the sheet rock and this was sufficient to suspend him for 30 days.

The Union insists that the grievant simply took a piece of sheet rock which he knew was scrap or reasonably believed was scrap. Although the Union made numerous arguments related to scrap, the undersigned finds these to be inapplicable because it is concluded that the sheet rock was not scrap. Three witnesses, Jerry Davis, Steve Eichinger and David Johnston all credibly testified that on February 13, 1999, there was no scrap pile of sheet rock in the maintenance shop. Davis and Eichinger testified that the shop was cleaned up before the arrival of Johnston as a new employe and there were sheets of dry wall in the southeast corner leaning up against the wall. Johnston testified that he never saw any sheet rock and didn't realize the sheets were there. If no sheet rock was seen by Johnston, there could be no pile of sheet rock scrap on the floor.

Contrasted against this testimony is the grievant's. He testified that sheet rock was on a scrap pile on the floor. Both Eichinger and Johnston testified credible and there is no evidence of bias or interest in the case on their part or any other reason for them to fabricate about the scrap pile. On the other hand, the grievant has an interest in the 30 days pay he lost plus his reputation for honesty.

The undersigned finds that there was no scrap pile on the floor which contained pieces of sheet rock. The evidence establishes that there were sheets of sheet rock in the caged area. The only source of sheet rock would be those sheets. Thus, it is concluded that the grievant cut off a piece from a sheet and created his own scrap but this is simply petty theft where the practice related to taking scrap is not applicable. The grievant could take a 4-foot by 12-foot sheet of sheet rock and cut it into many small pieces which would then become scrap but the creation of scrap to use for personal use is theft. Thus, the evidence is clear and convincing

that the grievant stole sheet rock from the District. The fact that the District did not take immediate action does not lesson the misconduct but might lessen the penalty. Also, despite the inference that the camera was installed to capture a bargaining unit member, the undersigned finds the evidence fails to support such an inference. Having concluded that the grievant stole the piece of sheet rock, the next determination is the appropriate penalty.

Arbitrators have held that theft of nominal amounts can result in severe punishment. In STATE OF MINNESOTA, 95 LA 995 (GALLAGHER, 1990) the theft of approximately $10.00 by a twenty-two year employe justified a discharge as the trust of the employe was destroyed. In DEER LAKES SCHOOL DISTRICT, 94 LA 334 (HEWITT, 1989), a custodian's theft of $4.00 resulted in a three month suspension rather than a discharge based on the custodian's seventeen years of service with a clean record. In CSX HOTELS, INC., 107 LA 702 (THORP, 1996), a housekeeper at a hotel who had a clean record was discharged for giving a fellow employe what she thought were two aspirins from a guest's bathroom.

Many other cases could be cited but the grievant as a custodian has access to the areas he cleans and has to be trusted not to steal. Whether this was a one time lapse or not, he must regain the District's trust. In any event, the undersigned cannot conclude that the 30-day suspension meted out by the District was inappropriate.

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

AWARD

The District had just cause to suspend the grievant for 30 days, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 15th day of December, 1999.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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