BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FREEDOM AREA SCHOOL DISTRICT AUXILIARY PERSONNEL ASSOCIATION

and

FREEDOM AREA SCHOOL DISTRICT

Case 14
No. 57674
MA-10718

Appearances:

Mr. David Brooks Kundin, Bayland Teachers United, 1136 North Military Avenue, Green Bay, WI 54303, appearing on behalf of the Union.

Godfrey & Kahn, Attorneys at Law, by **Attorney Dennis W. Rader**, 333 Main Street, P.O. Box 13067, Green Bay, WI 54307-3067, appearing on behalf of the District.

ARBITRATION AWARD

The Freedom Area School District and the Freedom Area School District Auxiliary Personnel 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 selected the undersigned from a panel of arbitrators provided by the Wisconsin Employment Relations Commission to resolve the grievance. Hearing in the matter was held on September 1, 1999, in Freedom, Wisconsin. The parties filed post-hearing briefs on November 9, 1999.

ISSUE

The parties stipulated to the following statement of issues:

1. Was the written notice of the employe request for arbitration filed with the Clerk of the Board within ten working days of receipt of the District's answer in Step 3?

2. Was there just cause for the verbal reprimand given to Lois Kortz on April 1st?

PERTINENT CONTRACT LANGUAGE

ARTICLE XVIII. Just Cause

No employee shall be terminated, disciplined, or demoted without just cause and subject to due process.

ARTICLE XXII. Grievance Procedure

B. PROCEDURE

. . .

5. STEP 5 – Arbitration. If the employee/s presenting the grievance is not satisfied with the action taken by the District in Step 4, the grievance may be appealed to arbitration provided that written notice of the employee's request for such arbitration is filed with the Clerk of the Board within ten (10) working days of receipt of the School District's answer in Step 3. When a request has been made for arbitration, the parties shall jointly petition the Wisconsin Employment Relations Commission to supply a panel of five (5) arbitrators. As soon as the list has been received, the Association and the District shall determine by lot, the order of elimination and thereafter each shall, in that order, alternatively strike a name from the list and the fifth and remaining name shall act as the arbitrator. The arbitrator's decision will be in writing and will set forth the findings of fact, reasoning and conclusions of the grievance. The arbitrator will be without power or authority to make any decision which required the commission of any act prohibited by law or which is in violation of the terms of this agreement. The decision of the arbitrator within the scope of his authority shall be final and binding upon the parties. All costs of the arbitration shall be shared by the parties equally.

C. FAILURE TO MEET TIME LIMITS–If the District or its representative fail to respond to the grievance within the time limits set by these steps, the grievance shall automatically be moved to the next step. If the grievance is not processed by the grievant/s within the time limits at any level of the grievance, the grievance shall automatically be considered dropped without prejudice to the rights of others.

BACKGROUND

The grievant, Lois Kortz, has been employed by the District for at least ten years as a custodian. At the time of incident that gave rise to her discipline, her work shift ran from 10:00 a.m. to 6:30 p.m. For many years it had been one of her daily duties to wash and dry

the dirty towels from the High School kitchen. Her immediate supervisor in February, 1999, was John Jacobson, and he had been hired by the District in January, 1999. His position was responsible for the custodial staff at both the Elementary and High Schools, including Kortz. After assuming his position, Jacobson received complaints from kitchen staff about the condition of the towels, and he had noticed that many times the towels were not always washed or not always dry. He testified that as a consequence of these complaints, he decided to remedy the problem by having the person responsible for washing and drying the towels also fold them. He thought the employe when folding the towels would notice if they were damp because each towel would be touched. Jacobson also testified that prior to February 8, 1999, he had spoken with Kortz on more than one occasion about doing the towels correctly. Again, these discussions were prompted by having received complaints from the kitchen staff. Then, according to Jacobson's testimony, on February 8, 1999, at approximately 6:30 p.m., at the end of Kortz' work shift, he again talked to Kortz about doing the towels. He told her that he was "going to document on a go-forward basis," and that she should make sure the towels were done right. At that time, he did not know if she had already done the towels for that day, and he did not give her a specific direction her to do the towels before she left work. Kortz left work after the conversation with Jacobson.

Jacobson testified that the next morning, when he arrived at work, he found the towels from the day before had not been washed or dried. He then washed and dried the towels himself and took them to the kitchen. On February 26th, Jacobson issued a written warning to Kortz stating:

> On February 8, 1999, at approximately 7:15 p.m. you were directed by me to fold the towels for the High School kitchen after you completed laundering them. . . . The following day I discovered that the High School kitchen towels had been neither laundered nor folded as directed. I view your failure to comply with my directives as an act of insubordination. . . .

Thereafter, Pahl, Association grievance representative, grieved Kortz' written warning. The parties met on at least two occasions to discuss the grievance in accordance with the contractual grievance procedures, and on April 1, 1999, District Administrator Scheuerell rescinded Jacobson's February 26, 1999 written reprimand and issued a "written record of verbal warning" to Kortz "for not following the directives of your supervisor on 2-8-99 with respect to folding the towels, etc." However, the Union continued with the grievance up to and including this arbitration proceeding believing the discipline given to Kortz was unwarranted.

Pahl testified that in order to advance the grievance to arbitration, after receiving the April 22, 1999, District Board of Education written denial of the grievance, on April 28, 1999, she prepared a letter to Tiedt, Board of Education Clerk, advising him that the Association would be petitioning for arbitration inasmuch as it did not believe Kortz was insubordinate. Kortz testified she signed the letter, posted the envelope, affixed a return address, addressed it to Tiedt's home address and placed it in her "home mail box with the flag up and assumed it was going in the mail." Tiedt testified he never received Pahl's April 28th letter.

The District argues that the grievance should be denied because the required written notice of the request for arbitration was never received by the District and Article XXII, C, provides that any grievance not processed within the time limits at any level shall be considered dropped. It believes the arbitrator would exceed his authority if he were to ignore the clear language of Article XXII, C. The Union, on the other hand, contends the its grievance representative, Pahl, mailed the notice to the District's representative in a timely fashion, and that putting the notice in the U.S. mail was reasonable under the circumstances. The Union argues that the District by raising the affirmative defense of failure to receive the written notice assumes the burden to prove it was unreasonable for the Union to treat the notice as having been filed when it put it in the regular U.S. mail. It concludes the District did not sustain its burden of proof.

Regarding the merits of the grievance, the District believes just cause existed for District Administrator Scheuerell to issue a verbal warning for failure to follow directions and rescind Jacobson's earlier written warning for insubordination. The District contends the evidence established Kortz had not been adequately performing her job of washing, drying and folding kitchen towels and her supervisor had spoken with her about it prior to February 8, 1999. Further, the District believes the grievant is not credible in denying Jacobson spoke to her on the 8th as he alleged. Thus, it concludes that because she failed to wash, dry and fold the towels on February 8, 1999, after being directed to so do, there was just cause to discipline her. The Union, on the other hand, argues that District did not have just cause to discipline Kortz for insubordination. It contends that just cause requires the District to establish the order or instruction to Kortz was clearly expressed and understood and that she was made aware of the possible consequences of her refusal to comply. In this case, the Union claims that a meeting between Kortz and Jacobson never took place, and consequently there was no direct order to disobey. Further, the Union argues that if Jacobson did talk with Kortz at 6:30 p.m. on February 8th, it was at the end of her shift and she would have had to stay overtime to complete the task and Jacobson did not authorize her to do that. The Union concludes the District's investigation into Jacobson's allegations that Kortz was insubordinate was flawed, and that the just cause standard, as defined by the often quoted Daugherty's seven tests, was not established.

DISCUSSION

The threshold issue for the undersigned's determination is whether consideration of the merits of the grievance is barred because the District Board of Education Clerk never received a copy of the Union's April 28, 1999 letter advising the Board it would be petitioning for arbitration. The contract, at Article XXII, states that a grievance may be "appealed to arbitration provided written notice of the employee's request for such arbitration is filed with the Clerk of the Board within ten (10) working days of receipt of the School District's answer in Step 3." Tiedt credibly testified that he never received Pahl's notice of intent to arbitrate, dated April 28, 1999, that she prepared after receiving the District's written Step 3 denial of the grievance dated April 22, 1999. Pahl also credibly testified that she placed her April 28th

letter in her mail box for pick-up by U.S. regular mail. The contract is silent regarding when or how the written notice of the employe's request is timely filed with the Clerk in order to preclude operation of the forfeiture language of Article XXII, C. Also, the contract does not require the written notice to be filed in person, by certified mail or in any number of other possible ways that afford evidence of timely receipt by the District. The Union believes where, as here, reasonable efforts were made to comply with the contract's procedural requirement the forfeiture clause cannot be used to defeat consideration of the grievance on its merits.

The Union's brief quoted from a decision by Arbitrator Teple wherein he stated:

> Setting time limits for the various steps of the grievance procedure, are not normally designed to defeat the consideration of grievances, but are simply adopted to assure prompt handling so that matters in dispute can be settled as soon as possible. So long as a reasonable effort has been made to meet the time limits specified, any legitimate doubt concerning compliance . . . should be resolved in favor of arbitrability.
>
> BELKNOP, INC., 69 LA 601 (TEPLE, 1977).

The undersigned is similarly persuaded that the procedural requirements are negotiated with the intent of precluding stale claims from being advanced. However, when compliance is not obtained because of circumstances outside of a party's control and reasonable steps were taken by that party to be in compliance with the procedural requirements, compliance should be deemed to have occurred. Any number of possible circumstances can be envisioned that would frustrate a reasonable and good faith effort to comply with the contract's procedural requirements. Consequently, while each case of non-compliance will necessarily turn on its own unique facts, the facts of this case persuade the undersigned that the Union's notice of intent to arbitrate the grievance would have been timely filed with the Clerk of the District but for circumstances beyond the control of Pahl—the U.S. mail service never delivered the letter to Tiedt. The District's written denial of the grievance at Step 3 was dated April 22, 1999. Assuming it was received by the Union the next day, Friday, April 23, 1999, the Union had until Friday, May 7, 1999, (10 work days after receipt of the Step 3 answer) to file its notice of intent to arbitrate the grievance. Pahl's notice was dated Wednesday, April 28, seven work days in advance of the filing deadline of May 7, 1999. Thus, even though the District never received Pahl's April 28 letter, under the circumstances present in this case, that will not serve to bar the undersigned's consideration of the merits of the grievance. The undersigned believes that by timely placing the notice in the mail the notice of appeal is deemed to have been timely filed with the District.

The merits of the grievance present a serious credibility issue. Jacobson testified he told Kortz on February 8th that he was "going to document on a go-forward basis" her performance regarding washing, drying and folding the High School kitchen towels. Kortz denies Jacobson ever spoke to her about the towels on February 8th. Rather, she insists the

conversation about towels took place in the cafeteria on February 17th. Kortz also denied there were any problems with the towels while she was doing them, and that the problems with towels didn't occur until Ken was hired. If I credit Kortz' testimony then I must conclude Jacobson's written warning to Kortz is footed in a lie, and that Jacobson and Romenesko were lying when they testified the cooks had complained about the towels prior to February 17th. I'm persuaded that Jacobson and Romenesko's testimony relative to the cooks complaining about the towels while Kortz was responsible for cleaning them was credible. Kortz' testimony that the problem didn't occur until Ken started doing them was not credible. If the problems were with Ken, then the conversation Kortz admits having with Jacobson on February 17th and witnessed by Romenesko would not have been necessary. Furthermore, the evidence is that Ken was not hired until a month later. Also, even though Kortz admitted she had a conversation with Jacobson on February 17th, she denied talking to the cooks after that conversation and stated her meeting occurred the following day. Romenesko, however, credibly testified he observed Kortz, after the conversation with Jacobson, go into where the cooks were working. In view of these findings, I have not credited Kortz' testimony relating to any matter in dispute unless it was corroborated by another's credible testimony.

After carefully reviewing all of the testimony, I believe Kortz did not wash, dry and fold the towels, as she was supposed to as part of her daily job duties, on the day Jacobson spoke to her at the end of her shift. Kortz does not contend she washed, dried and folded the towels that day. The Union argues she was not given a direct order to do so, or in the alternative that the conversation took place after she was done with her shift, Jacobson had not authorized her to work overtime, and consequently, she couldn't have done them.

District Administrator Scheuerell reduced Jacobson's written warning for insubordinate conduct to a verbal warning for failing to follow supervisory directives. The District contends the verbal warning also was for her conduct in going directly to the kitchen staff after her conversation with Jacobson on the 17th and complaining to them. While it may be that Scheuerell was not pleased with Kortz complaining to kitchen staff about Jacobson's concerns over the towels, it is not clear from Scheuerell's April 1st verbal warning that Kortz was also being disciplined for going directly to kitchen staff and complaining to them about Jacobson's concern over towels. Rather, that portion of the April 1st "written record" was an admonition that in the future she is to follow her supervisor's directives, regardless of the feelings of her fellow bargaining unit employes, and to consult with her supervisor about any concerns she has regarding his directives. That, in the undersigned opinion, was not disciplinary action for prior misconduct.

I'm also persuaded from the record evidence that Kortz, prior to February 8th, had not always satisfactorily performed her job assignment of washing and drying the towels. When Jacobson, in response to cooks complaints, directed Kortz that the towels be folded in order to make sure they were dried before being returned to the kitchen, Kortz took offense to his directive. Her displeasure manifested itself in her making excuses for why she couldn't get the towels done during her shift, rather than giving them priority. Clearly, that is what prompted Jacobson to tell her he was going to begin documenting those instances when she failed to

satisfactorily do the job. Obviously, this is not the first case of an employe disagreeing with supervision over the priority that should be given to performing certain job duties. It was, however, incumbent on Kortz, like any other employe, to faithfully carry out Jacobson's directive regardless of her opinion of him or his determination of priorities as they pertained to her job duties. Failure to do so put her, like any other employe, at risk of being disciplined. To permit an employe to flagrantly ignore such instructions invites chaos in the workplace, and is exactly why employes must "work now and grieve later."

Kortz knew she was to wash and dry the kitchen towels on a daily basis. It had been her responsibility for some time prior to February 8th. It is also clear from the testimony that she had not been doing so every day and that the cooks had complained about it. On these facts, Jacobson did not need to give her a daily direct order while at the same time advising her of the potential consequences of her failure to complete the task. In the undersigned's opinion, Jacobson had just cause to discipline Kortz for not washing, drying and folding the towels on the 8th even if he had not spoken to her. His conversation with her on that day was merely to the affect that he would in the future be documenting her failure to complete the task, which was an oblique reference to future discipline. Coincidentally, that day she had not completed the task and that led to her discipline. Thus, I believe there was just cause for the verbal reprimand given to Lois Kortz on April 1st.

Based upon the foregoing and the record as a whole, I enter the following

AWARD

By placing the written notice of the employe's request for arbitration in the U.S. mail seven work days in advance of the filing deadline, the Union is deemed to have filed with the Clerk of the Board within ten working days of the District's answer in Step 3. Further, there was just cause for the verbal reprimand given to Lois Kortz on April 1st, and therefore the grievance is denied.

Dated at Madison, Wisconsin, this 18th day of April, 2000.

Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator

TLY/ans
6049.doc