

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN COUNCIL 40, AFSCME,
AFL-CIO, LOCAL UNION 560**

and

EAU CLAIRE AREA SCHOOL DISTRICT

Case 56
No. 58080
MA-10836

(Robert Gehl Grievance)

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Ms. Victoria L. Seltun** and **Mr. Stephen L. Weld**, 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 Eau Claire, Wisconsin, on January 11, 2000. There, the parties agreed I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and both parties filed briefs that were received by February 29, 2000.

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

ISSUE

The parties have jointly agreed to the following issue:

Did the District discharge grievant Robert Gehl for just cause under Article 1, Section 4, of the contract and, if not, what is the appropriate remedy?

BACKGROUND

Custodian Gehl began his employment in 1988. He received a written warning on March 11, 1999 (unless otherwise stated, all dates herein refer to 1999), for “Negative Interactions with Students” which accused him of telling one high school student, “Would you like it if I shoved that map up your ass?” and which also asserted that he referred to another student by asking others whether they had noticed “our little nigger bitch standing on the corner again yesterday?” He received a second written warning on April 26 for telling a student he had accessed his confidential student file and that “Any employe can get into student files.” Gehl did not grieve either written warning. They were the only two instances of discipline in Gehl’s tenure of employment.

Gehl was suspended on July 14 and was terminated via an October 13 letter from Attorney Stephen L. Weld which stated in pertinent part:

...

Pursuant to Article I, Section 4, of the collective bargaining agreement, please be advised that the Eau Claire Area School District has determined that your employment should be terminated. The termination is effective immediately. Because you have been on an unpaid leave of absence, this action does not affect your pay status. The determination is based on the fact that, in a search of your home conducted by the Altoona and Eau Claire Police Departments as authorized by a search warrant, several items of School District property were found which had not been authorized for removal. These items include a cordless telephone, a flag, a surge protector, a stool, assorted toiletries, and other items. You did not follow District procedures (as set out in a memorandum dated July 15, 1998), which established that no School District equipment could be removed from School District facilities for personal use without a supervisor’s permission. Your immediate supervisor, Tim Woodford, advises that you were not given permission by him or other supervisors to take the items home.

It is the District’s understanding that, following the search, criminal charges were filed and you subsequently pled guilty to disorderly conduct.

Theft from an employer ordinarily is grounds for discharge in and of itself but, in the context of the series of disciplinary actions taken against you during the second semester of the 1998-99 school year, discharge is the only viable discipline option available to the District.

. . .

The facts leading up to Gehl's suspension and termination are as follows:

Technology Assistant Jake Schoeder, who is in charge of the District's network and audio/video equipment, testified that when he came to work Monday, July 12, he discovered that the Lucent telephone in his room was missing; that it had been replaced with a telephone taken from Dr. O'Connell's adjacent classroom; and that Dr. O'Connell's telephone had been replaced with a Panasonic telephone that did not belong to the District. The battery pack in the Panasonic telephone, said Schoeder, was dead and could not be recharged, but it was nevertheless able to display three speed-dialed telephone numbers which he dialed and which subsequently revealed that the telephone belonged to Gehl.

Schoeder that day reported the missing phone and told Gehl on the loading dock that some equipment had been missing over the weekend from the A/V department. Schoeder did not specifically mention the phone and Gehl at that time never volunteered that he had taken a phone home. Schoeder subsequently met with Head Custodian Tim Woodford and Gehl where he again said that certain equipment was missing from the A/V room. Gehl again did not volunteer that he had taken the phone home.

Biology teacher John Phelps testified that Schoeder told him about the missing phone on Monday, July 12; that he then told Gehl and custodians Jim Studley and Gale Helwig in the hallway that a phone was missing from the A/V room and that Gehl never volunteered that he took the phone home. Phelps added that he had a subsequent conversation with Woodford in Woodford's office and that he then told Woodford, in Gehl and Studley's close presence, about the missing phone, at which time Gehl again did not volunteer that he had taken a phone home. Phelps said that he also discussed the missing phone with Gehl on the next day.

On cross-examination, Phelps stated that Schoeder was not present during his July 12 hallway conversation with Gehl, Studley, and Helwig; that he was not "a hundred percent sure" whether he then mentioned the missing phone; and that he was not sure whether Helwig was present; and that Gehl was not directly involved in the conversation that Phelps had with Woodford later that day when he mentioned the missing phone.

Terry Downen, the principal at North High School, testified that former Director of Buildings and Grounds Dave Nilssen “retired under a great deal of duress of public scrutiny. . .” in June after it was discovered in that he had misappropriated District property, i.e., scaffolding. Downen explained that in response to the Nilssen situation, the following July 15, 1998, memorandum (Joint Exhibit 10), was issued:

TO: Charles Kramer, Director of Buildings and Grounds
And All Head Custodians
FROM: Dr. Craig Vogt, Deputy Superintendent

This fall we will be drafting new and revised board policies regarding personal use of school equipment and property. There are many issues to deal with and I will be involving several people in making suggestions on a policy to be recommended to the Board of Education.

In the interim no school district equipment under the control of maintenance and custodial staff shall be removed from school facilities for personal use.

Additionally, procedures will be set up for the disposal of surplus or salvage materials and equipment. In the interim no material shall be removed for personal use without a supervisor’s permission.

Any questions regarding clarification of these temporary directives can be made to Charles Kramer or Craig Vogt.

. . .

Thereafter, said Downen, the memo was “distributed to the administrative team at that point, but it came directly to Mr. Woodford from the buildings and grounds department, I’m sure”, and that Woodford then shared it with the custodians. He added that some custodians, including possibly Gehl, spoke to him about the memo because they did not believe it was fair to “leave them holding the bag” because of what Nilssen had done. He added that the District has specific forms (Employer Exhibit 3), to be used if employes want to borrow District property; that Gehl never asked permission to take the phone home; that he on Wednesday, July 14, told the Eau Claire Police Department that Gehl had taken the phone home; that he and Associate Principal Earl Garrison later that day went to Gehl’s home when the police went there; and that the police then found that Gehl had taken the missing telephone, along with other District property, i.e., “assorted toiletries”, a stool, an American flag, and a surge protector. He also said that he subsequently recommended Gehl’s discharge because he no longer can be trusted.

On cross-examination, Downen stated that he did not personally see the July 15, 1998, memo posted on the bulletin board; that the memo only applied to custodians and that no finalized policy has yet been promulgated on that subject; that District administrators held a retirement party for Nilssen in May, 1998, before the District learned he had taken District property and before Nilssen pleaded guilty to "theft-false representation", a misdemeanor; that he never asked Gehl for his side of the story relating to the telephone and other District goods found in his home; and that he suggested to Gehl on July 14 that he resign even before he asked Gehl for his side of the story. He also said that the District's Board could have decided not to bestow certain benefits on Nilssen upon his retirement but, that if it did so, Nilssen then could have sued the District.

Head Custodian Woodford testified that he "just laid" the July 15, 1998, memo on the break table for them all the custodians "to look at"; that custodians then complained about the memo; that he met with Gehl and Phelps on July 12, at which time the missing telephone was specifically discussed; that he was "not really too sure" about a subsequent meeting; that because broken surge protectors are easily fixed, they are never discarded; and that the stool found in Gehl's home was useable and not normally thrown away.

For his part, Gehl testified that he received a lot of telephone calls at home because of his officiating; that he regularly took his phone with him when he went across the street to visit his neighbor, Chris Helmareich; that when visiting there, he often experienced great difficulty with his Panasonic phone, which is why he decided to buy a new 900 megahertz phone; that he took the District's Lucent phone, a 900 megahertz phone, on Friday, July 9, because he wanted to test it across the street before he bought a new phone; that he did not tell anyone he had done so; that he replaced the District's Lucent phone with his own Panasonic phone which was working at that time, "so that they had a phone to use in the A/V. . ."; and that the Lucent phone was in the A/V room at that time and not in Dr. O'Connell's office. He also stated that he tested the Lucent phone at Helmareich's house that Friday afternoon; that he intended to do further testing because "I didn't have any calls that came in"; that he intended to return the phone "after a week or two weeks, after testing it to see. . . if it works or not"; that he previously had borrowed District tools without incident; and that he never had seen the July 15, 1998, memo because it was never posted.

He also said that neither Phelps nor Schoeder ever told him on July 12 or 13 that the phone was missing and that he never told them he had taken the phone because, "When they said they were missing A/V equipment. . . I'm thinking of TV's, camcorders, computers, but not the phone." He added that he told both Downen and the police on Wednesday, July 14 that he had "screwed up"; that Downen on July 14 asked him to resign, to which he replied, "No, I not gonna resign over something like this"; that he picked up the toiletries in a slop sink room because he thought they were garbage; that he took home an American flag because it had started to shred and because it was going to be discarded; and that he retrieved a stool

without

Page 6
MA-10836

a top from the garbage. He denied ever telling the police he had stolen the phone and said that he pleaded guilty to the theft, a misdemeanor charge, only because he lacked the \$2,000 - \$3,000 in legal fees needed for a court proceeding. He also said: "I screwed up by not asking the superintendent after what had come down with Dave Nilssen's job."

On cross-examination, he stated that he did not overhear Phelps' conversation with Woodford on Monday, July 12, wherein they discussed the missing phone; that he never had any conversation with Phelps on Tuesday, July 13; that the custodians knew in July, 1998, that because of Nilssen's situation, "there was a rumor that [the rules on taking home District property] were gonna change"; and that the custodians believed that Nilssen "got the goods" and that the custodians "got the shaft" because they heard in early July, 1998, that custodians would no longer be able to take home District equipment.

Helmreich, Gehl's neighbor, testified that Gehl's Panasonic telephone was out of range on his property; that Gehl told him he was borrowing the District's phone because he "wanted to see how far it would actually reach"; and that he told the police on July 14 what Gehl had told him about borrowing the phone.

Custodian Studley testified that he over the years retrieved light fixtures from the garbage; that he had never seen the July 15, 1998, memo at work; that he and custodian Mike Omodth spoke to Phelps on Monday, July 12, at which time Phelps mentioned the missing telephone; that Schoeder, who did not speak, also was present at that time and that Gehl was not present during that conversation; and that when he and Gehl later that day passed by Woodford's office, he did not hear Woodford or Schoeder say anything about a missing telephone.

On cross-examination, he acknowledged hearing rumors about not being able to borrow District tools for personal use.

Custodian Bruce Remington testified that he over the years retrieved trash out of the school garbage can or dumpster, including stools; that it was "standard policy" to do so without getting permission; that he saw the July 15, 1998, memo posted in the maintenance shop in either the summer of 1999 or 1998; that the memo is somewhat misleading; and that he has thrown away surge protectors.

He also said that the District was "setting up new rules. . ." relating to the use of District property; that he would not take tools home under those rules; and that he would not have taken home a working telephone home under those rules.

Custodian Helwig testified that he was not present at North High School in July, 1999, and that Phelps therefore erred when he said he in July spoke to Helwig, Gehl and Studley about the missing phone. Helwig also said that he had taken home discarded garbage cans, chairs, old cabinets and A/V carts and that prior to January, 2000, he had never seen the July 15, 1998, memo.

On cross-examination, he stated that he and other custodians were “upset” and that they had complained to Associate Principal Earl Garrison about the District’s new rules that prevented them from taking home District tools; that the custodians basically felt that administrator Nilssen “got the goods” and that the custodians “got the shaft”; and that he had taken home a broken phone he had found in the garbage.

He also said that he would never take home a working phone without permission, “Because I can go to the store and get one and take it back.”

The parties stipulated that custodians Dave Schleppenbach, Dave Ketels, and Bill VanFleet also took home materials before June, 1999, without asking for permission to do so.

Maintenance man Bob Bennett, who is also the President of Local 560, testified that employees now feel they need to ask permission to borrow tools pursuant to the July 15, 1998, memo; that the memo does not pertain to whether items can be retrieved from the garbage; and that he in the past has taken home discarded football helmets and a broken Tonka truck. He also said that employee Eugene Plante was suspended for five days for sick leave abuse (Union Exhibit 6), the second time he had been disciplined for that infraction, and that custodian Steve Paulson received a letter of reprimand in March, 1999, for eating \$73.60 worth of cafeteria meals without paying for them, which he subsequently repaid (Union Exhibit 7).

He added that because of the July 15, 1998, memo and the Nilssen situation, “things were gonna get tighter”, but that things got back to normal because “we didn’t see anything come, we didn’t see anything come in the summer of ’99.” He also said that he would not have taken home a phone in June-July, 1999, without permission because: “I just ask permission – that’s the way – that’s the way I am, I guess.”

Custodian Chuck Gunness testified that he saw several school principals borrow a District canoe. On cross-examination, he acknowledged that he did not know whether they had received permission to take the canoe.

Maintenance man Terry Henricks testified that metal shop area instructor Earl Gregory told him that he had taken home several large District fans and that he, Henricks, then retrieved the fans from Gregory’s home and brought them back to the maintenance facility. He

added that he was “led to believe” that Gregory did not ask permission to take the fans home.

Page 8
MA-10836

Associate Principal Earl Garrison testified that the July 15, 1998, memo was posted on the bulletin board in the custodians’ room at North High School; that custodians complained to him about the District’s new rules on taking home District property, and that he is unsure whether Gehl was present during any of those discussions.

POSITIONS OF THE PARTIES

The Union asserts that the District lacked just cause to terminate Gehl because he was not guilty of theft or of violating the July 15, 1998, memo and that, moreover, the District failed to meet any of the “seven tests” spelled out in *Just Cause: The Seven Tests* (Kovin & Smith, 1985). As a remedy, the Union seeks a traditional make-whole order that includes Gehl’s reinstatement and a backpay award.

The District maintains that the grievance should be dismissed because Gehl has admitted to taking home District property without permission; because “where the facts are in dispute, the grievant’s testimony is not credible”; and because it had just cause to terminate him for “theft of School District property”.

DISCUSSION

This case mainly turns on whether Gehl’s testimony should be credited. If it is credited, the discharge will be overturned for many of the reasons advanced by the Union. If it is not credited and if the District has met its burden of proving that Gehl in fact intended to steal the District’s Lucent phone, his discharge will be sustained. (There is no need to address his taking of other District property if the theft charge has been proven.)

On this score, I credit Schoeder’s testimony that except for the three speed-dialed telephone numbers stored in the phone’s memory, the Panasonic phone left behind by Gehl was totally dead and could not be recharged. This is a critical issue because Gehl testified that his Panasonic telephone was not dead and that he left it at school so that others could use it. Since it was dead, and since Gehl must have known that it was dead, there was no plausible reason for Gehl to have switched phones except to cover his tracks by leaving a dead telephone in a room that was not used during the summer. This switch would have worked except for the three speed-dialed telephone numbers stored in the Panasonic phone in spite of its dead battery – a fact that Gehl apparently did not know.

Moreover, I do not accept Gehl’s claim that he took the Lucent phone home to “test” it since he easily could have purchased a phone and then returned it if it did not work properly. Indeed, that is exactly what fellow custodian Helwig testified that he would do if he needed to buy a new phone. In addition, while neighbor Helmreith testified that Gehl told him he had

taken home the District's phone to test it, Helmreith's testimony was directly challenged by

Page 9
MA-10836

police officer Sean Lester who wrote that Helmreith told him that he did not know where the phone came from. Hence, I am unable to credit Helmreith's testimony.

In addition, if Gehl really wanted to "test" the phone, he easily could have telephoned someone from his home and told that person to telephone him in a few minutes while he walked over to Helmuth's property. In that way, he could have returned the phone back to school on Monday, July 12. His failure to perform that elementary "test" shows that he intended to keep the District's Lucent phone.

Furthermore, while Gehl claimed that he was entitled to borrow the phone under the District's lax rules, no other custodians testified that they would ever borrow a working phone without permission. To the contrary, custodians Remington and Bennett both said that they would not take home a phone without first asking for and receiving permission.

Given all this, I find that Gehl was guilty of theft – which is normally a dischargeable offense.

Here, though, the Union claims that Gehl is the victim of disparate treatment because the District never terminated former Director of Buildings and Grounds Nilssen even though he misappropriated over \$1,000 worth of District property. The Union therefore quotes How Arbitration Works, Elkouri and Elkouri, p. 934 (BNA, Fifth Edition, 1997), for the proposition:

“Absolute consistency in the handling of rule violations is, of course, an impossibility, but that fact should not excuse random and completely inconsistent disciplinary practices.”

The Nilssen situation is troubling because it indicates that the District has dual standards: one for its administrators who steal, but who then are not terminated, and another standard for rank and file workers who steal a much smaller amount (such as a phone), but who then are terminated.

But having said that, one other fact looms large: here, Gehl knew he was not free to steal since he tried to cover his tracks by leaving his dead Panasonic phone and since he also denied what actually happened throughout this proceeding. As a result, he cannot claim that he thought he was free to steal merely because Nilssen was not fired over his stealing and because he was allowed to retire shortly thereafter.

The Union also points out that the District did not fire Plante for committing his second act of sick leave abuse and that it did not fire Paulson for eating \$73.60 worth of cafeteria

meals without paying for them. Both of these offenses can constitute dischargeable offenses

Page 10
MA-10836

under many circumstances because they both involve theft: the first, theft of time; the second, theft of food.

This record does not reveal all of the circumstances surrounding those prior incidents. However, it appears that both Plante and Paulson at some point admitted to their wrongdoing. That counts for something because the District did not have to go through the time and trouble of proving at an arbitration hearing that they had engaged in wrongdoing. Here, by contrast, Gehl has never admitted to stealing the Lucent phone and he therefore has forced the District to expend considerable resources in proving its case. As a result, he is not entitled to the same treatment accorded Plante and Paulson – particularly since he received two written warnings before his discharge.

The Union also asserts that Gehl's termination should be overturned because the District has failed to meet all of the "seven tests". I find that the only meaningful violation of those tests centered on the District's failure to get Gehl's side of the story before he was suspended and then terminated. Under certain circumstances, a disciplinary action can be overturned on this basis alone. But here, Gehl was not prejudiced by the District's action because he steadfastly has maintained that he never intended to steal the Lucent phone. That being so, Gehl certainly would have made that same false claim before his suspension and termination had he been asked for his side of the story. He therefore would not have offered any extenuating information regarding his situation, which is why he suffered no adverse effect from the District's failure to comply with this important procedural safeguard. Absent any such prejudice, his discharge cannot be overturned on this basis alone.

In this connection, it is certainly true that the District has yet to clearly delineate under what circumstances District property and equipment can be taken home, as different employees gave different responses to this question. There is simply no excuse for this confusion to exist given the District's right to promulgate rules that are clearly set out and openly posted for all to see (the posting requirement can be easily met by having all employees sign a receipt acknowledging that they have received the rules). If the District does not fulfill this responsibility, it is possible that misunderstandings will continue.

If Gehl honestly misunderstood the District's policy on taking home the Lucent phone, his termination would be overturned. But since this case involves stealing and not an honest misunderstanding about taking home discarded school property, it is my

AWARD

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

Dated at Madison, Wisconsin this 15th day of May, 2000.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

