BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 150, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC

and

PEWAUKEE SCHOOL DISTRICT

Case 30
No. 58170
MA-10681

Appearances:

Mr. Steven J. Cupery, Union Representative, SEIU Local 150, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorneys Mark L. Olson** and **Gregory B. Ladewski**, appearing on behalf of the District.

ARBITRATION AWARD

Local 150, Service Employees International Union, AFL-CIO, CLC, hereinafter referred to as the Union, and Pewaukee School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The undersigned was selected from a panel of Wisconsin Employment Relations Commission employes to act as an arbitrator to hear and decide a grievance over a discharge. Hearing was held in Pewaukee, Wisconsin, on March 30, 2000. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on July 11, 2000. The parties reserved the right to file reply briefs but only the District filed one, which was sent to the Union on July 31, 2000 and the record was then closed.

BACKGROUND

The facts underlying the grievance are not in dispute. The grievant was employed by the District as a substitute custodian in 1994-1995, was hired as a part-time custodian on August 25, 1995 and became a full-time custodian on November 4, 1996. (Tr. 193, Ex. 5). The grievant was terminated by a letter dated June 21, 1999, which stated, in part, as follows:

1. During your second shift assignment at Pewaukee Elementary School, you removed the evaluation form pertaining to another custodial employee from a desk in the school building office. According to the statement of the secretary from whose desk the evaluation report was taken, the report was located face down on the bottom of a stack of papers on her desk.

2. You further admit to photocopying the custodial evaluation of another employee, Dean Grunau, and sharing the evaluation with another custodial employee.

3. You have admitted to retrieving an absence/attendance printout from the recycling container of the school principal, Joan Marley, and sharing the printout with another custodian.

4. You have admitted to unauthorized retrieval of confidential voice mail messages from the voice mailbox of your Head Custodian, Cheryl Christian. (Ex. 3).

The grievant admitted that during his normal work hours on June 2, 1999, he removed the evaluation of Dean Grunau, a fellow custodian, from the desk of the Principal's secretary, copied parts of it, and put the evaluation back on the desk. The grievant then showed the documents he copied to Nancy Jones, another custodian. The grievant admitted he went into the recycling bin in the Principal's office and took part of an absence/attendance report and discussed this with Jones. The grievant also admitted that he had accessed the confidential voice mailbox of his lead worker, Cheryl Christian, on two occasions. Jones reported these incidents to her lead worker. The grievant testified that his conduct was not appropriate (Tr. 194-195). Investigative meetings were held on June 7 and 8, 1999, and the grievant could not explain his actions, but said he was sorry. By letter of June 21, 1999, the grievant was discharged effective June 25, 1999 (Exs. 3 and 5). The grievant grieved his discharge on June 30, 1999 which was denied at each step of the grievance procedure (Ex. 2). The matter was then appealed to the instant arbitration.

ISSUES

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

1. Is the grievance arbitrable pursuant to the procedure stated in Section 7.1.3 of the collective bargaining agreement?

2. If so, did the District violate Section 2.3.2.3 of the collective bargaining agreement when it terminated the grievant for various admitted acts of misconduct?

3. If not, what shall the remedy be?

The Union frames the issue as follows:

Did the District violate the just cause provisions of the contract when it discharged the grievant?

If so, what should the remedy be?

The undersigned frames the issues as follows:

1. Is the grievance timely?

2. If so, did the District have just cause to discharge the grievant?

3. If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II – RECOGNITION

. . .

2.3.2 The School Board has powers, rights, authority, duties and responsibilities for operation of the school system conferred upon it and vested in it by the laws and constitution of the State of Wisconsin. It is the right of the Board, in accordance with applicable law and in compliance with this agreement, to promulgate and apply reasonable rules and regulations to:

. . .

2.3.2.3 Terminate, suspend, demote, discharge or take other appropriate disciplinary action against an employee for just cause.

. . .

ARTICLE V – WORKING CONDITIONS

5.1 Purpose

5.1.1 The basic purpose of the custodial and maintenance activities of the school shall be to provide conditions most conducive to carrying out the educational program of the school.

. . .

5.2.2 The building principal in each school serves as the administrative officer responsible for the total educational program in the school. Therefore, while school is in session, the building custodians work under immediate direction of the principal of the school or his/her designee.

. . .

ARTICLE VII – TERMINATION OF SERVICES

. . .

7.1.2 In the event an employee is terminated for cause, notice thereof shall be given to the Union and the employee may file a grievance.

7.1.3 As hereinafter provided, the grievance shall be filed within five (5) days after termination and in the event such termination is found to be without cause, the employee shall be reinstated with back pay.

. . .

ARTICLE X – GRIEVANCE PROCEDURE

. . .

10.2 Procedure:

10.2.1 Step 1. Any bargaining unit member or group of employees who feel they have a grievable issue shall attempt to resolve that issue with the Director of Buildings and Grounds within twenty (20) working days after the grievant(s) knew or reasonably should have know (sic) of an incident giving rise to a grievance. A working day is any day on which employees are regularly scheduled to perform work for the District. If the issue cannot be resolved, the matter may be appealed in writing to the Business Manager within ten (10) working days of the date upon which the grievant(s) discussed the problem with the Director of Buildings and Grounds.

POSITIONS OF THE PARTIES

District's Position

The District contends that the grievant's violation of work rules, Board policies and his job duties justifies his termination. It submits that his misconduct in rifling through a confidential secretary's desk for someone's confidential record and his conscious decision to read, copy and share it were in gross violation of Board procedures and are a gross dereliction of his assigned job duties. It argues that this misconduct was uniquely disturbing and no "correction" is possible and a second chance is out of the question. It cites arbitral authority that holds the seeking and accessing of confidential information cannot be condoned even once and the only appropriate response is termination.

The District claims that a separate and complete basis for his termination is the grievant's breach of his employer's trust. It believes that the grievant cannot be trusted with keys and cannot be trusted to cease his atrocious conduct. It observes that his Principal, Lead Worker and co-workers cannot trust him and thus, he lacks an indispensable job qualification. It insists that as the grievant cannot be trusted as a custodian and the District cannot take steps to assure that his misconduct will not occur again, discharge is appropriate and is valid, reasonable, justified and supported by arbitral precedent. It states that the grievant did not act as a "custodian", but rather as a spy, rifling files and roaming through private voice mail for his own amusement demonstrating that he was not able to handle the responsibilities given to him.

The District takes the position that the grievant's misconduct was unique and directly harmed the District and went to the heart of the employment relationship. It notes that this is not a performance problem like tardiness, carelessness or simple mistake which correction or retraining could cure; rather, it goes to the grievant's dishonest character and only the fear of being caught would be the incentive to refrain from repeating his misconduct but there would be no realistic way to catch him. It points out that too many people were hurt by the grievant's misconduct to impose a lesser penalty than termination.

The District alleges that the Union's evidence with respect to disciplinary incidents involving two other employes is irrelevant because of the uniqueness of the grievant's misconduct. It urges that the use of progressive discipline for the two employes involves performance issues or absences or problems with alcohol, but here the gravity of the grievant's misconduct in both degree and in kind support discharge. The District observes that the grievant has no excuse or justification for his misconduct and only confirms the validity of his discharge.

The District submits that the grievant's allegation that he was looking for a school calendar is not supported by the facts, as he could have easily obtained one and fails as a matter of logic as he had no need to look for a calendar during working hours. It also suggests that the grievant only admitted to what was demonstrated by other witnesses and attempted to shift the blame for his own misdeeds. It argues that the pattern of misdeeds over a period of time was concealed by the grievant so his assertion of a lack of progressive discipline merely confirms the need for discharge. It states that the grievant's excuse that he was "nosy" confirms the validity of his discharge simply because the job is not for a nosy person. The District rejects the grievant's claim that he is rehabilitated and states that there was no sign of remorse, only a concession that his many acts of misconduct were not appropriate. It insists the grievant's conduct is much worse than inappropriate, and is far worse than he is willing to admit. It argues that this is spin control, not rehabilitation. It speculates that the grievant called his supervisor about confidential documents after he had found them and made copies to shift any blame to the confidential secretary. It submits that the grievant is still denying what he did, and is far from rehabilitated.

The District contends that the grievance is procedurally non-arbitrable because the grievance was not filed within five days after the termination as required by Section 7.1.3 of the contract.

It concludes that for the reasons set out above, the grievance should be dismissed.

Union's Position

The Union notes that the District raised a threshold issue related to the timely filing of the grievance. It contends that the grievance was timely filed and was filed five days after the effective date of the termination. It points out that the issue of timeliness was not raised until the arbitration hearing and thus was waived, citing LEVI STRAUSS & CO., 69 LA 1 (Goodstein, 1977) and COLUMBIA CARBON CO., 47 LA 1120 (Merrill, 1967).

Turning to the merits, the Union argues that the District did not have just cause to discharge the grievant as it failed to administer discipline equitably, enforced rules where it had no proof the grievant was aware or had knowledge of such rules, did not apply progressive discipline and did not take into account the grievant's overall good work record.

The Union applies the seven tests of just cause offered by Arbitrator Daugherty in ENTERPRISE WIRE CO., 46 LA 359 (1966).

The Union asserts that the District failed to equitably enforce its rules by charging the grievant with malice toward a fellow employe without even investigating the allegation that Nancy Jones had also made remarks about Dan Grunau. The second area is that the grievant entered another member's voice mail box, yet Union Steward Haberman had reported to his supervisor that someone had broken into his voice mail and although his supervisor told him he would look into it, there was no follow up.

The Union submits that the next area is enforcement of rules against the grievant when the District had no proof that the grievant was aware or had knowledge of the rules or the gravity of the consequences. The Union states that it is not denying that the grievant should have known what he was doing was wrong, but the District did not make known the gravity assigned a violation. If it were spelled out to the grievant there was a potential for discharge, the Union believes he would have been dissuaded from engaging in his overly-curious behavior.

As to the confidentiality of the paper in the recycling bin, the Union observes that the evidence failed to show the arrangements the head custodians had made on retrieval of recycling paper, nor did it prove that the grievant read or discussed anything beyond his own personal records. The Union further points out that there was no evidence that the grievant was aware of the rule on the personal use of copiers.

The Union alleges that its most important argument that the District failed to adhere to the just cause test is its failure to adhere to progressive discipline. It notes that the District claims that because of the number of infractions over a period of time, the grievant should not

be afforded a lesser discipline; however, there was no discipline for these "infractions" so the grievant could be expected to be held to a higher standard should additional infractions occur. It observes that the District argues that the infractions involve significant issues of trust and malice toward other employes but the Union notes the disciplinary records of O'Hern and DiTorrice which occurred over a long period of time and involved theft of time and malice toward another employe merely resulted in multiple suspensions. It insists that the District gave little if any weight to the grievant's prior work record which had no prior discipline of any kind.

The Union refers to the grievant's testimony that he had apologized to Mr. Grunau before Mr. Grunau was made aware of the grievant's actions, the grievant admitted what he did was wrong and made a commitment that he would not jeopardize his job again, a job he loved. The Union believes that the grievant's re-employment would serve both the District and the grievant well.

It concludes that the District has failed to meet the standard of just cause and the District's actions should be overturned and a lesser discipline imposed more in line with the offense committed and the grievant be made whole for any losses less appropriate discipline.

District's Reply

The District contends that the Union's brief is an exercise in misdirection and denial. It responds to the seven tests of just cause quoted by the Union. It argues that it is outrageous that the Union would pretend that the grievant would not know his misconduct would warrant termination. It asserts that the grievant knew what he was doing and he just didn't care. It submits that District employes have the legal and moral right to expect that their personnel records will "not be dispensed like chewing gum" and "become fodder for office gossip at the water cooler", yet this is what the grievant intended to do with Mr. Grunau's evaluation and personnel file. It points out that the District offers any number of temptations to the "nosy" or "overly-curious" employe who is entrusted with a master key. It submits that the District has to have full confidence in its employes and the grievant violated his trust and should not be returned to duty as this would send the worst possible message to the rest of the staff.

Contrary to the Union's claim that the District did not properly investigate the grievant's misconduct before administering discipline, the District maintains that all the evidence and testimony demonstrates that the District immediately and thoroughly investigated the grievant's misconduct. It argues that the hint that Ms. Jones should have been disciplined is merely an attempt to cloud the issue because engaging in private banter about Grunau when he was not around, even if proved, is of an entirely different magnitude than the grievant's conduct. It alleges that the Union's call to discipline Ms. Jones, one of its members, is merely an attempt to retaliate or discriminate against her for her reporting the grievant. The grievant admitted his misconduct, so there is substantial proof of his guilt.

The District contends that the Union's attempt to compare the grievant's misconduct to that of others is comparing apples and oranges and is simply inapt. All the other examples, according to the District, are far different in degree and kind from the complete breach of trust at issue here. It argues that following progressive discipline in other cases demonstrates that it understands and follows the principle of just cause but where the misconduct is so serious as is the grievant's, summary termination is required. It states that the situation is unique, the grievant's guilt is clear, the gravity of the offense is profound, so the penalty of discharge is appropriate and richly deserved. It asserts that none of the other employes engaged in the conduct which the grievant has in this case and the discipline cannot be judged upon the discipline in other cases.

The District denies that the penalty of discharge is excessive. It insists that the breach of confidentiality is a most serious matter, and the only appropriate remedy is discharge. It urges the Arbitrator not to substitute his judgment for the District's where the District has not acted unreasonably, arbitrarily or capriciously. It notes that the grievant has a clean record but has less than three years of full-time employment. It observes that the grievant's motives for prying are not even colorably proper as he was snooping for the sake of snooping, and discharge is the only proper remedy. The District concludes that the grievance should be denied.

DISCUSSION

The District has raised an arbitrability objection alleging that the grievance was not timely filed. This issue was first raised at the arbitration hearing and was not mentioned in the prior steps of the grievance procedure. (Exs. 2B, 2D, 2F). Under the circumstances, it would appear that any objection to timeliness had been waived by the District. Additionally, the letter of termination, although dated June 21, 1999, indicates that the grievant is terminated effective June 25, 1999 (Ex. 3). The grievance was filed on June 30, 1999, which is within five (5) days after termination (Ex. 1 and 2A). Thus, it is concluded that the grievance is timely filed.

Turning to the merits, the grievant admitted that he took Mr. Grunau's evaluation off the Principal's confidential secretary's desk, read it, copied portions of it and showed it to another co-worker. Additionally, he admitted accessing the voice mail of his lead worker on two occasions and that he reviewed confidential information from the Principal's recycling bin. The grievant testified that this conduct was inappropriate. Additionally, he knew the material he read and copied from the Principal's secretary's desk was confidential, as he called his supervisor about the propriety of confidential information laying around (Ex. 11). The evidence failed to establish that anyone else read, copied and disseminated confidential information. In fact, other custodians denied engaging in conduct similar to the grievant. (Tr.

172-173, 192, 204-205). The District's investigation was fair and objective as the grievant admitted the charges against him which was verified by others.

The only real issue in this matter is whether the penalty of discharge was warranted. There are certain offenses which are serious offenses, sometimes called cardinal offenses, such as stealing, striking a foreman, deliberate sabotage, certain safety violations, which normally justify immediate discharge without the requirement of progressive discipline or consideration of the length of the employe's service. For example, arbitrators generally uphold discharge for theft without regard to the value of the item taken or the employe's seniority and prior clean record because the cumulative effect could be great and grant each employe the right to steal at least once. Also, resident abuse of an elderly person in a nursing home will generally result in discharge because abuse cannot be allowed to happen again; otherwise, abuse would become rampant.

The issue here is whether the admitted actions of the grievant constitute a cardinal offense. A review of arbitration cases reveals that the mere accessing of confidential material without authorization results in termination. DUKE UNIVERSITY, 103 LA 289 (Babiskin, 1994); NORTON COMMUNITY HOSPITAL, 106 LA 970 (Hart, 1996). A discharge for illegal eavesdropping by a long-term employe merited discharge. CLARIDGE PRODUCTS AND EQUIPMENT, 94 LA 1083 (Goodstein, 1990). Discharge was upheld for the disclosure of confidential information to a third party. UNITED TELEPHONE CO. OF KANSAS, 100 LA 541 (Pratte, 1993).

In the instant case, the grievant not only accessed confidential information, but disseminated it. Additionally, he surreptitiously entered his lead worker's voice mail on two occasions. This conduct constitutes a cardinal offense for which discharge is appropriate. Any lesser penalty would allow every employe to obtain and dispense confidential information at least once. Such a result would be so harmful that it cannot be tolerated.

The grievant has admitted that he is overly-curious, nosy or snoopy; however, given the grievant's demonstrated predilection for prying into confidential matters, he cannot be trusted to conform to the requirements of a custodian with keys and access to confidential information. The grievant has lost the trust of his supervisors and co-workers by his willful misconduct. The evidence established that the grievant lacks the responsibility to perform as a custodian. No mitigation can be found to overturn the District's decision to discharge the grievant.

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

AWARD

1. The grievance is timely filed.

2. The District had just cause to discharge the grievant and therefore, the grievance is dismissed in all respects.

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

Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

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