BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 560

and

EAU CLAIRE AREA SCHOOL DISTRICT

Case 57
No. 58501
MA-10968

(David C. Steindl Grievance)

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720.

Weld, Riley, Prenn & Ricci, by **Attorneys Stephen L. Weld** and **Brian K. Oppeneer**, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030,

ARBITRATION AWARD

On January 31, 2000, AFSCME Local 563, AFL-CIO and the Eau Claire Area School District requested the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. The parties waived an evidentiary hearing and submitted a joint stipulation of facts, received May 9, 2000. The parties thereafter filed briefs and reply briefs, which were received and exchanged by July 13, 2000.

This award addresses the discharge of employee David Steindl.

ISSUE

The parties have stipulated to the following issue:

Did the District have just cause to discharge the grievant for his non-work related misconduct and, if not, what is the appropriate remedy?

FACTS

The parties have stipulated to the following facts:

Grievant Steindl, classified as a Hauler/Shuttle, was hired in February, 1988. His performance evaluations have been favorable. Steindl received a letter of admonishment on May 14, 1997, which stated that he had failed to properly secure the buildings for which he was responsible. He received another such letter on December 4, 1998, which criticized his work. Neither letter mentioned the terms "discipline" or "written warning", nor made any specific reference to discipline.

The grievant on April 6, 1999, was charged on three felony counts of theft (Class C), and one misdemeanor count of theft (Class A). The alleged thefts all took place away from the District's premises when Steindl was off-duty and none of them involved District property or equipment. Steindl on October 12, 1999, pleaded no contest to one felony (Class C) count of theft and one felony (Class E) count of theft. On November 29, 1999, he was found guilty by the court of those counts and he was sentenced to four years of probation and up to 120 days of jail time with Huber privileges.

Steindl's immediate supervisor, Charlie Kramer, Director of Buildings and Grounds, became aware in April or May of 1999 that Steindl had been criminally charged. Kramer did not notify the District's Central Office staff, including Human Resources, of the charges. Steindl continued to work in his regular position until he was suspended on December 17, 1999, and discharged on January 26, 2000. Steindl was available to work at the time of his suspension/discharge and he is still available to work.

There were media reports of the theft charge, investigation, pleadings, and conviction. The media reports did not identify Steindl as a District employee.

Throughout Steindl's career with the District, there were no allegations of theft or misappropriation of school property levied against him. Other Union employees who have worked with Steindl at the main facilities shop do not object to his return to work.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I – RECOGNITION

. . .

Section 4. The Board reserves the right to discipline or discharge for just cause.

. . .

POSITIONS OF THE PARTIES

The Union argues that the District lacked just cause to terminate the grievant because it has failed to prove that his off-duty conduct bore any "nexus with the employment setting." The Union also claims that Steindl had a discipline-free work record; that he was, and is, available to work; that there is nothing in the record showing "what Board policy or rule the grievant violated"; that the District has subjected him to double jeopardy by terminating him even though he was sentenced to jail and four years' probation; that the District failed to conduct any independent investigation; that the grievant's *nolo contendere* plea was "not synonymous with a plea of guilty"; and that the District's reputation did not suffer as a result of the grievant's actions. As a remedy, the Union requests a traditional make-whole remedy that includes Steindl's reinstatement and a backpay award.

The District contends that it had just cause to discharge Steindl because "off-duty conduct can constitute just cause for discharge"; because his felony theft convictions impair his usefulness given his lack of trustworthiness; and that the "reputation of the District requires the denial of the grievance." It also maintains that his guilt is shown by the fact that the court convicted and sentenced him; that the record is silent as to whether it conducted an independent investigation; and that "the grievant's duties as a security custodian require trustworthiness."

DISCUSSION

At the outset, it must be noted that the Circuit Court of Eau Claire County on December 29, 1999 ruled: "the defendant is guilty as convicted and sentenced as follows. . ." for two counts of felony theft (Joint Exhibit 9). Hence, he was in fact found guilty of the criminal conduct relied upon by the District as the basis for his termination. The parties dispute the adequacy of the record on this key fact. In light of my conclusion below, it is unnecessary to resolve this dispute.

The record is silent as to what, if any investigation, the District conducted. The parties dispute the implications to be drawn from this portion of the record. I believe it is incumbent upon the District to establish that it looked into the matter sufficiently to establish that the facts and conduct which prompted the discharge did occur.

The Union is right in pointing out that the May 14, 1997, and December 4, 1998, letters of admonition to Steindl referenced above did not refer to discipline. As a result, I conclude that he had a discipline-free record during his nearly twelve years of employment. The Union also is on the mark in stating that the District has failed to establish any specific District rule or policy that the grievant supposedly violated, as none has been identified by the District.

The Union errs, however, in claiming that the discharge must be overturned because Steindl supposedly was subjected to "double jeopardy". Steindl, in fact, was punished under the criminal laws because he was convicted of theft. That is a separate question than whether the District under the contract had just cause to terminate him because of his off-duty conduct which the District claims no longer makes him fit for his job. Since the principles and purpose surrounding the criminal law and the contractual just cause are dissimilar, and since the District in any event was not responsible for Steindl's prior criminal sentencing, no double jeopardy exists here.

For its part, the District argues that Steindl's convictions for theft have jeopardized the District's reputation because "the public wants to be assured that its tax payments are not supporting the lifestyle of a thieving custodian." In fact, though, there is no evidence establishing that the grievant was ever publicly identified as a District employee. To the contrary, the parties' jointly agreed-to Statement of Facts states: "The media reports did not identify David C. Steindl as an employee of the Eau Claire Board of Education." That being so, it is hard to envision just how Steindl's criminal conviction has damaged the District's reputation.

The District also asserts that public employees should be held to a higher standard than private employees and that it therefore had just cause to terminate Steindl in part because his conviction shows that he has breached the public's trust. While some arbitrators have reached such a conclusion, I do not agree that Steindl's off-duty conduct here should be measured by a higher standard. His is not a position which serves as a role model or which serves as a keeper of the public trust. Hence, no extra weight can be given to the fact that he was a public employee.

Given all of the above, this case turns entirely on whether the grievant's criminal conviction for theft represents enough of a nexus so as to be an exception to the general rule that an employee's off-duty conduct ordinarily is unrelated to the employer-employee

relationship and that, as a result: "The right of management to discharge an employee for conduct away from the plant depends upon the effect of that conduct upon plant operations (footnote citations omitted). See *How Arbitration Works*, Elkouri and Elkouri, p 896 (BNA, 5th Ed., 1997).

The Union cites W.E. CALDWELL CO., 28 LA 434, 436-437 (Kesselman, 1957), in support of its position that such a nexus does not exist. The District cites the following cases in support of its claim that such a nexus does exist: GREAT ATLANTIC AND PACIFIC TEA CO., INC., 45 LA 495 (1964); INLAND CONTAINER CORP., 28 LA 312 (Ferguson, 1957); SPOONER SCHOOL DISTRICT (WERC Case No. 28477, MA-2158, 3/83); CSX HOTELS, 93 LA 1037 (Zobrak, 1989); SAFEWAY STORES, INC., 74 LA 1293 (Doyle, 1980); INSPIRATION CONSOLIDATED COPPER CO., 60 LA 173 (Gentile, 1973); HILTON HAWAIIAN VILLAGE, 76 LA 347 (Tanaka, 1981); FAIRMONT HOSPITAL, 58 LA 1295 (Dybeck, 1972); POLK COUNTY, 80 LA 639 (Madden, 1983); GENESSEE COUNTY, 90 LA 48 (House, 1987).

There is little point in here describing the factual patterns surrounding each of these cited cases, as the decisional line that cuts across them holds in effect that the question of nexus depends on the particular facts of each case.

Arbitrator Kesselman's analysis in W.E. CALDWELL, supra, is quoted in *How Arbitration Works*, p. 896, and provides as follows:

. . .

> The Arbitrator finds no basis in the contract or in American industrial practice to justify a discharge for misconduct away from the place of work unless:
>
> 1.) behavior harms [sic] Company's reputation or product. . .
>
> 2.) behavior renders employee unable to perform his duties or appear at work, in which case the discharge would be based upon inefficiency or excessive absenteeism. . .
>
> 3.) behavior leads to refusal, reluctance or inability of other employees to work with him. . . (foonote citations omitted).

. . .

Factor 1 does not apply since the parties have stipulated that no media reports identified Steindl as a District employee and since there is no proof that Steindl's off-duty conduct in any way adversely affected the District's reputation or the manner in which it provides its educational services. Factor 3 does not apply since the parties have jointly stipulated: "Other Union employees who have worked with David Steindl at the main facilities do not object to his return to work."

As for Factor 2, there is no evidence that Steindl's arrest prevented him from reporting to work. To the contrary, the record shows that he continued working from the time of his April 6 arrest to the time of his December 17 suspension. Hence, this is not a case involving absenteeism and whether an employer had just cause to terminate an employee for being absent.

Factor 2 goes on to provide, however, that just cause exists if the "behavior renders the employee unable to perform his duties. . ." . The arbitral authority cited by the Employer supports this standard. Steindl works alone as a custodian and possesses keys to most, if not all, District buildings. It is the District's view that Steindl's conviction for theft renders him untrustworthy and dischargeable for cause

There are two components to the grievant's job; hauling and shuttle. The hauling refers to the hauling of snow. The job additionally entails maintaining and repairing the physical structure of buildings, furniture and equipment. I see no nexus to the complained-of conduct relating to this aspect of the job.

The shuttle portion of the job appears to require the grievant to go from building to building on the weekend to check equipment and building security, including doors, windows, and unsupervised student activity. Other employees secure the buildings. The security aspect of the job requires someone who will not pilfer from the buildings he secures. In that respect, the theft conduct relates to the job. However, that must be kept in context. The record establishes that the grievant has worked for nearly 12 years without discipline and without any allegation of theft or misappropriation of school property. Kramer, the grievant's supervisor, was aware of the charges for 7-8 months and was not sufficiently alarmed to intervene and/or change Steindl's assignment. There is no applicable work rule involved.

The bottom line here is that Steindl has keys to the buildings. In the overall context of this dispute, that is insufficient nexus to justify his termination for conduct away from work.

AWARD

The grievance is sustained.

REMEDY

The Employer is directed to reinstate the grievant, and make him whole for lost wages and benefits. The Employer is free to offset the directed backpay with Unemployment Compensation, if any, and interim earnings, if any. The grievant's record should be expunged of any reference to this termination.

JURISDICTION

I will retain jurisdiction for purposes of resolving any dispute as to remedy.

Dated at Madison, Wisconsin this 1st day of November, 2000.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

WCH/gjc
6149.doc