BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE NEENAH JOINT SCHOOL DISTRICT
BOARD OF EDUCATION

and

NEENAH EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION

Case 8
No. 58513
MA-10975

(Tim Zentner Termination)

Appearances:

Attorney Robert Torgerson, Attorney at Law, Torgerson Law Offices, S.C., 675 Deerwood Drive, Suite 2, Neenah, Wisconsin 54956, appeared on behalf of the District.

Mr. Roger W. Palek, Executive Director, Winnebagoland Educational Staff Council, 921 West Association Drive, Appleton, Wisconsin 54914, appeared on behalf of the Association.

ARBITRATION AWARD

On February 2, 2000, the Neenah Joint School District Board of Education and the Neenah Educational Support Personnel Association jointly requested that the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Hearing on the matter was conducted on June 13, 2000, in Neenah, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were submitted and exchanged by July 31, 2000.

This Award addresses the termination of employee Tim Zentner.

BACKGROUND AND FACTS

Tim Zentner, the grievant, was hired on August 26, 1996 as a Custodian I. His position was subsequently retitled to Operator I. Zentner worked for the District until he was terminated on September 16, 1999. During his tenure with the District, Zentner worked on the third shift, 11:00 p.m. to 7:00 a.m., with no on-site supervision. His work tasks included performing housekeeping duties and security functions for the High School. He performed minor maintenance on the building and equipment within the building.

Mr. Zentner's evaluations were generally satisfactory. His 1998 evaluation indicated that he maintained a good working relationship with his supervisors, that his work met District standards, and that he took pride in maintaining clean restrooms and locker room features, but pointed out that he needed to pay more attention to dusting of locker tops and foam disinfecting of showers.

Mr. Zentner's work history did contain some discipline. On December 18, 1996, he was given a written reprimand for failure to report to work timely, and to notify his supervisor. That discipline was not grieved. On January 7, 1999, Mr. Zentner was given a verbal warning for his failure to arrive at work on time, and for his use of the garage for personal purposes. He was also warned to not leave the building during work unless it was approved by a supervisor. This warning was not grieved. On June 24, 1999, Zentner received a written warning, portions of which provided as follows:

> On Tuesday, June 1, 1999, you were scheduled to work your normal hours of 11:00 p.m. to 7:00 a.m., which is an eight-hour work shift. On the above date and time you: (1) failed to follow the direction of your supervisor; (2) left the work site at 5:20 a.m. without the permission of your supervisor; (3) failed to notify your supervisor that you left the work site early nor give the reason why. These incidents are not acceptable.
>
> . . .
>
> The above three incidents are unacceptable. Any incidents such as above must not occur again or I will recommend disciplinary action or the termination of your employment with the Neenah Joint School District.
>
> Sincerely,
>
> David R. Bowser
> Supervisor of Operations

Zentner testified that on June 1 he was working in the high school when the police arrived in search of a bomb. He assisted the police in opening doors to facilitate their search. He testified to being scared and upset, without supervision or direction in how to react under such circumstances. Ultimately, he simply went home.

The District has a policy prohibiting the use of tobacco on school property. The policy was posted on December 14, 1998. The building has a number of prominent signs that indicate the building is a no-smoking area.

David Bowser, Supervisor of Operations, testified on behalf of the District. Bowser notes that the collective bargaining agreement provides for a 20-minute lunch break. It is Bowser's testimony that there exists a practice which additionally grants a 10-minute break. Bowser testified that a number of co-workers had complained about the grievant not getting his work done, extending his breaks, and not helping out as assigned. Bowser, along with Randy Bockin, the Operations Manager, inspected some of Zentner's work. They did so late in the 1998-1999 school year, and found a number of areas assigned Zentner were not clean, particularly the music room. In the fall of 1999, Bowser, along with Bockin, did a daily inspection of the grievant's work area. They found that the music area had not been completely cleaned, and that the restroom floor had not been mopped.

In the context of work not being completed, and co-worker complaints, Bowser and Bockin went to observe the grievant. On September 15, 1999, at approximately 2:30 a.m., the two men stood outside the high school and observed the grievant and another employee smoke two cigarettes outside the building from 3 until 3:20 a.m. From 3:20 to 3:55 a.m., Bockin observed the grievant and a co-worker in the teacher lounge eating lunch. At approximately 5:25 a.m., Bowser and Zentner encountered one another in the parking lot and, according to Bowser, had the following exchange:

Bowser: You cannot deny you were out smoking at 3.

Zentner: How do you know it was me?

Bowser: There were two witnesses.

Zentner: I can understand not smoking in the day. . . It's not a big deal . . . in the fresh air.

Following this exchange, Bowser sent Zentner home. He testified he did so because the latter man was evasive. Following that, Bowser checked Zentner's work area and found a good deal of work not yet accomplished; more than could have been accomplished in the remaining one hour and forty minutes of the shift.

On cross-examination, Bowser acknowledged that he had never spoken with Zentner about his breaks, or smoking. He never told Zentner of complaints from co-workers. Bowser acknowledged that he had heard of other employees who stretched their breaks. He was aware of other District employees who smoked, and were given verbal warnings.

Randy Bockin, the grievant's direct supervisor, also testified. It was his testimony that Zentner was not getting his work done. Bockin did worksite walk-arounds twice a month in the months of January through June, 1999. He observed that sometimes the work was complete, and sometimes it was not. He and Zentner discussed the situation. Bockin indicated that he could not understand why the work was not being completed. He testified that Zentner indicated there was too much work. This conversation repeated itself periodically. Bockin also testified that he received complaints from co-workers relative to Zentner's work. Employees were directed to prepare work plans, consisting of job descriptions with applicable work assignment areas. The grievant did not complete and return his. Bockin testified that most other employees did.

The record indicates that employee Kim Robertson was caught smoking and given a verbal warning. The grievant's co-worker was given a verbal warning for the smoking incident which involved the grievant. Former lead worker Dan Neubauer testified that a number of employees smoked on the job after the enactment of the no-smoking rule. According to Neubauer, the administration confronted a smoking employee and talked to that employee.

A disciplinary meeting was held on September 16, 1999 at the conclusion of which the grievant was terminated. His termination was confirmed by letter dated September 20, 1999, relevant portions of which provide as follows:

> Mr. Timothy Zentner
>
> . . .
>
> During the disciplinary meeting on September 16, 1999, areas of your work performance were addressed. Work performance concerns addressed included: 1) failure to follow supervisor directions; 2) failure to complete assigned work responsibilities; 3) taking an unauthorized extended break on September 15, 1999 from 3:20 a.m. to 3:55 a.m.; 4) failure to follow State statute and District policy regarding the prohibited use of tobacco products on September 15, 1999. It should be noted that your employment with the Neenah Joint School District was terminated immediately on September 16, 1999. . .

On September 28, 1999, a grievance was filed protesting the decision to terminate. The grievance was denied at Step Two in a letter dated October 18, and signed by Victoria L. Holt, Director of Human Resources. On November 12, 1999, Richard L. Carlson, Superintendent, denied the grievance at Step Three.

On December 15, 1999, the District sent the following letter to Mr. Roger Palek, the Association Executive Director, with a copy to Zentner, among others. This letter, a response to Step Four, provides as follows:

> Please be advised that the Board of Education of the Neenah Joint School District, as a response to the Step Four meeting regarding the Timothy Zentner grievance dated September 28, 1999, hereby offers to reinstate Timothy Zentner to the position he held on September 15, 1999, with full back pay and benefits. If Timothy Zentner desires, all reference to the current grievance will be expunged from his personnel file. However, the smoking on school property incident on September 15, 1999, will be noted in his personnel file inasmuch as such facts have not been disputed.
>
> Please advise Timothy Zentner to report for work at Neenah High School at 11:00 p.m. on December 19, 1999, if he wishes to accept such offer.
>
> Sincerely,
>
> Richard L. Carlson
> Superintendent

The letter was sent to the grievant by both certified and regular mail, and to the Union through the regular mail.

Zentner did not return to work on December 19, nor did he respond to the District's Step Four offer. That prompted the District to send the following letter, dated December 1, 1999:

> Dear Mr. Zentner:
>
> This letter is to inform you that the Neenah Joint School District is contemplating your termination of employment for failure to show up for work on December 19 and December 20, 1999, per our letter to Mr. Palek and you dated December 15, 1999.

If extenuating circumstances have prohibited your ability to return to work, I invite you to meet with me on Tuesday, December 28, 1999, at 10:00 a.m. at the Administrative Offices of the Neenah Joint School District.

Effective today, December 21, 1999, you are not to report to work at Neenah High School.

Sincerely,

Richard L. Carlson
Superintendent

cc: Roger Palek

. . .

This letter was sent by both certified and regular mail to the grievant and regular mail to the Union.

On December 28, 1999, the District sent the grievant the following letter:

Dear Tim:

Per my letter of December 21, 1999, I extended to you an opportunity to meet with me on December 28, 1999 at 10:00 a.m. to discuss any extenuating circumstances that may have prohibited you from returning to work.

In that I did not hear from you, I assume you are no longer interested in working for the Neenah Joint School District. Therefore, you are terminated effective December 28, 1999.

Sincerely,

Richard L. Carlson
Superintendent

cc: Roger Palek

. . .

This letter was also sent by certified and regular mail to the grievant, regular mail to Mr. Palek.

All certified letters were returned to the District, unopened. The grievant acknowledged receipt of the December 21 letter. It was his testimony that he needed to provide his then-current employer with five (5) days notice. He contends he communicated that fact to his union representative, but that he had no communication with the District. I believe the grievant received all letters sent to him, through the course of the regular mail. I also believe the Union was in receipt of all correspondence.

ISSUE

The parties stipulated to the following:

Did the District violate the collective bargaining agreement with the Association when it terminated the grievant on September 16, 1999? If so, what is the appropriate remedy?

The parties further stipulated that this matter is properly before the Arbitrator.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE VII
PROBATINARY STATUS/JUST CAUSE/DISCIPLINARY PROCEDURE

. . .

B. Non-Probationary Employees

Non-probationary employees shall not be reprimanded in writing, discharged, suspended or reduced in rank or compensation without just cause. Any such action which has been asserted by the District or any agent or representative of the Board shall be subject to the grievance procedure of this Agreement. All information forming the basis for disciplinary action shall be made available to the employee. The Association President shall be notified when a bargaining unit member receives a written reprimand or is suspended or discharged. Details of the reprimand, suspension, or discharge will be made available to the Association President upon the District's receipt of written consent from the employee.

C. Alleged Misconduct

1. Before any employee can be suspended or dismissed for alleged misconduct, he/she shall be notified in writing of such proposed action stating the reason(s) therefore.

2. Both parties recognize that advance notice may not be practical where the infraction is of a serious nature warranting immediate removal of the person from the job site, in which event, the written notice shall immediately follow the action taken.

POSITIONS OF THE PARTIES

It is the Employer's contention that the grievant was terminated for just cause. The Employer contends that the grievant failed to perform his assigned work. The Employer argues that the grievant was given a verbal reprimand on January 7 for, among other things, the failure to report for work on time, and leaving the school building during work hours. On June 24, the grievant was given a written reprimand for failure to complete his assigned work, failure to follow directions, and for leaving the job site without permission. The Employer contends that the grievant failed to complete his assigned work regularly after June 24 through September 15, in spite of being notified of the deficiencies and in spite of his supervisor's attempts to increase his efficiency. On September 15, the grievant was observed taking a 20-minute smoking break at approximately 3 a.m. and a 35-minute lunch break from 3:20 to 3:55 a.m. when, in fact, he was not on schedule to complete his assigned work.

The Employer contends that the grievant failed to comply with the District's no-smoking rule. The District received numerous complaints by co-workers that the grievant was smoking on school property in violation of the District rule against such activity. On September 15 he was observed smoking two cigarettes on school property during an extended break. The no-smoking policy is mandated by Section 120.12(20), Wis. Stats., and was communicated to the grievant. Numerous no smoking signs are posted on school property. After having been observed smoking cigarettes on September 17, the grievant initially stated that his supervisor would have to prove it, not realizing that two persons had observed him smoking. Not only did the grievant violate the no-smoking policy, but he expressed little remorse for doing so and considers such violation to be of little significance.

Citing authority, the Employer contends that the accumulation of relatively minor job performance infractions constitutes grounds for termination. The District contends that both the smoking and the extended breaks violations are major infractions, inasmuch as they impacted on the grievant's performance.

The District contends that it acted reasonably and in a non-discriminatory manner in investigating and reaching its decision to terminate the grievant. The District did not act arbitrarily or precipitously in deciding to discharge the grievant. The District contends that it reviewed the matter on September 15, scheduled a meeting with the grievant and his union on September 16, granted the grievant an opportunity to present his version of the incidents, caucused, and subsequently determined to terminate the grievant. The District contends that it complied with the spirit of the procedural notice requirement.

It is the position of the Union that this termination should be measured against the seven tests articulated by Arbitrator Daugherty in ENTERPRISE WIRE CO., 46 LA 359 (1966). The Association contends that the Employer satisfied few, if any, of those standards. Particularly, the Association contends that the Employer did not give the grievant forewarning or foreknowledge of the possible or probable consequences of the conduct for which he was disciplined. The Association contends that there is no record indication that the grievant was advised that his failure to complete his cleaning, his smoking on school grounds, or taking an extended break would lead to his termination.

The Association contends that while the managerial orders involved are inherently reasonable, their application in this circumstance has not been so. The Association contends that the grievant was given additional work responsibilities, and he was unable to complete the volume of work assigned him. The grievant's smoking occurred in the evening, outside the presence of schoolchildren. The Union contends that there is no rule defining work breaks, and that the testimony indicated that work breaks varied in length, depending on the amount of work performed.

It is the Association's contention that the Employer did not engage in an effort to discover whether or not the employee violated the rule or order of management. The Association contends that Bowser indicated that he had received complaints from co-workers on the quality of the grievant's work. Those co-workers were not called as witnesses, nor were the complaints brought to the attention of the grievant. Neither he nor Bockin approached the grievant directly to ask whether there was anything preventing the grievant from completing his work to their satisfaction. There was no investigation into the appropriate length of work breaks. No one ever discussed the past practice relating to the length of work breaks with the Association or any representative of the Association.

The Association contends that there was not an impartial investigation conducted. No one discussed with the grievant his perspective on the various concerns held by management. Rather, there was a clandestine surveillance of the grievant, followed by a quickly-convened meeting. The Association contends that it is not too speculative to assume that the decision to terminate the grievant was already a *fait accompli* prior to the meeting.

The Association contends that the Employer did not obtain substantial evidence or proof that the grievant was guilty of anything dischargeable. According to the Association, there is no evidence indicating that the grievant was culpable for failing to clean. Similarly, there is no proof that the grievant violated any order relative to breaks.

The Association contends that the application of discipline has not been even-handed, and in fact has been discriminatory. The co-worker with whom the grievant took his break was not disciplined. Other employees who have smoked have not been seriously disciplined.

The Association contends that the degree of discipline was not reasonably related to the seriousness of the offense as proven. With respect to the smoking allegation, the grievant had not been previously disciplined for smoking. As to the other offenses, the Association contends that prior disciplinary warnings did not address the matters that supplied the basis for discharge. The Association goes on to note that the grievant's performance evaluation should have occurred around his anniversary date in August. Neither Bowser nor Bockin had an explanation as to why this had not been done. The Association contends that an evaluation would have been the appropriate method for sharing and correcting work deficiencies.

The Association contends that Article XII(C)1, and 2 was violated in that the required notice was not sent in this instance. The Association contends that nothing occurred which was so serious as to waive the required notice.

The grievant rejected the settlement offer tendered by the school board because he needed a week to restructure his personal life after three months of being out of work. Similarly, the follow-up letter of December 15th provided the grievant with less than three days to be available for his work shift. The Association contends that the reinstatement offer was a conditional offer and cites CONSOLIDATED FREIGHTWAYS V. NATIONAL LABOR RELATIONS BOARD, 892 F.2D 1052; 133 L.R.R.M. 2320 as authority for the premise that the grievant was not required to accept the conditional reinstatement offer. The Association argues that there was no acknowledgement by the grievant or the Association that the incident of smoking was undisputed, or even more importantly, that it was undisputed as of December 15, 1999. The grievant had no requirement to accept the conditional offer, particularly in light of the limited time provided for the acceptance of its terms.

AWARD

The termination letter lists four performance concerns that prompted the termination. The first is the grievant's failure to follow supervisor directions. That appears to be a reference to the failure of the grievant to return the self-designed work plan. It may also refer to the specific behaviors subsequently set forth in the termination letter. With respect to the

work plan, it appears from the record that the grievant was not the only employee that failed to return that work plan. The record is silent as to what, if any, discipline followed those employees tardy in that task. Standing on its own, this does not appear to be a matter so serious as to warrant formal discipline.

The second concern prompting termination was the grievant's failure to complete assigned work responsibilities. The grievant was on notice of the Employer's dissatisfaction with the amount of work he performed. The grievant claimed that he had too much work to accomplish. Bockin acknowledged the need to address teachers eating in the music room, and the corresponding mess left behind. There was testimony that co-workers came forward with complaints about the amount of work performed by the grievant. However, these complaints were never brought to the grievant's attention. None of the prior discipline specifically addressed the grievant's failure to perform his work. Neither the June 24 letter, nor the prior performance evaluations of the grievant, reference productivity concerns.

The third concern prompting termination was the grievant's unauthorized extended break on September 15. It appears the grievant did stretch his work breaks. Testimony establishes the existence of a 10-minute break by operation of practice. The grievant's breaks exceeded both the practice and the contractually provided-for lunch breaks. This appears to be the first incident where the grievant was confronted with having stretched a work break. As such, this matter had never been previously addressed with him. He had no prior discipline for this, although his prior discipline does make reference to his timeliness and his utilization of time.

The fourth matter prompting termination was his use of tobacco that same evening. The record establishes that he did use tobacco, and that he used it on school grounds. The record also establishes that he was well-aware of the school policy prohibiting the use of tobacco on school grounds. The record indicates that a number of other employees used tobacco on the Employer's premises, and that little, if any, discipline was meted out to those employees.

The Employer contends that there was just cause because the grievant failed to perform his assigned work. It appears the grievant did not perform the quantity of work to which he was assigned. It further appears that the grievant stretched his non-working times, notwithstanding the fact that he was not accomplishing the work assigned. However, this is precisely the kind of work deficiency progressive discipline is designed to address. Similarly, performance evaluations are the ideal mechanism to communicate to employees deficiencies in their ongoing work performance. Here, the Employer did not bring the concerns surrounding work performance to the grievant in either his evaluations or a disciplinary progression.

The Employer contends that the grievant's refusal to comply with the no-smoking rule constitutes a basis for his termination. No other employee has been so treated. This is a first offense, which has prompted an enormous disciplinary reaction, well beyond what the behavior

calls for. Absent a record that the Employer applies this magnitude of discipline consistently for such behavior with the acquiescence of the Association, it cannot constitute a basis for termination.

The Employer contends that the accumulation of a number of relatively minor job performance transgressions constitute grounds for termination. While I agree with the contention, this record does not establish numerous and compounding transgressions such as would render the employee non-productive.

The District failed to provide the grievant with the notice required in Article VII, paragraph C(1). The District points to paragraph 2, contending that the infractions were significantly serious as to warrant the grievant's immediate removal. I disagree. There was no urgency to remove the grievant. There was no need to by-pass the procedural provisions of paragraph 1.

In conclusion, I do not believe the District had just cause to terminate the grievant.

AWARD

The grievance is sustained.

REMEDY

The traditional remedy for improper termination is reinstatement and back pay. The Employer offer dated December 15 does just that. The grievant, and his Association, received that offer. The Association claims two flaws in the reinstatement offer. The first is that it is conditional, predicated upon noting a smoking on school property incident in the grievant's personnel file. The second is that the time frame for a report back to work was too short.

On its face, the response offers to reinstate the grievant, and to expunge reference to termination from his file. It goes on to note that the smoking incident will be noted in the personnel file. The latter is found in a declarative sentence. It does not on its face appear to require the grievant to waive whatever objection he has to the smoking notation in order to be reinstated. Furthermore, the reference to the smoking on school property incident is predicated on the Employer's perception that "such facts have not been disputed". That appears to be true. In the evidentiary hearing on this matter, the smoking incident was not disputed.

The Union's reliance upon CONSOLIDATED FREIGHTWAYS is misplaced. In CONSOLIDATED FREIGHTWAYS, an employee discharged for refusing to drive a tractor he believed to be unsafe was ordered reinstated unconditionally by the National Labor Relations Board. The Company took exception to the Board rule, claiming that its reinstatement offer, which did contain a warning letter, was unconditional in that it was consistent with an arbitration panel award reinstating the grievant, on this same matter, and that the Board had

refused to grant deference to that panel. In rejecting the Company's contention, the Supreme Court concluded that the National Labor Relations Board could reasonably take the position that if it allowed an employee to be penalized for engaging in protected conduct, it would be abdicating its responsibility to remedy violations of the national labor law. There are no such law or policy implications in play here.

In this proceeding, the Association has acknowledged that the no-smoking rule is, on its face, reasonable. The rule is a by-product of statute. The grievant was clearly on notice of the rule. Finally, there is little dispute that the grievant violated its terms. A note to the file is a modest and appropriate reaction to the smoking incident.

The second union objection relates to the amount of time allowed by the School District for Zentner to report back to work. I agree that the District placed Zentner on a very short timetable. Zentner's testimony was that that timetable was inadequate to permit him to give notice to his then-current employer. I would not allow the employer to condition reinstatement on such a short time horizon. The grievant was under an obligation to mitigate his losses and evidently did so. The District is obligated to accommodate reasonable notice to that employer. Had the District insisted on such a short timetable, I would regard the Union's claim as well-placed. However, that is not the circumstance in this dispute. Rather, on December 21, Superintendent Carlson extended an offer to the grievant to meet on December 28 to discuss the matter. It does not appear that the grievant availed himself of this opportunity, or meaningfully responded to either letter.

The grievant testified that he "accepted" the offer of reinstatement, but could not satisfy the short return to work timetable. He further testified that he never dealt with the District directly. Nothing in the record indicates that this acceptance was ever communicated to the District.

I do not believe that the District was required to forever hold the position open. There is nothing in this record to suggest that the grievant advised the District that he needed to provide five (5) days' notice to his employer.

Under the foregoing circumstances, I am not directing reinstatement or back pay. I believe the grievant rejected a legitimate reinstatement offer.

Dated at Madison, Wisconsin this 6th day of December, 2000.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

gc
6166.doc