BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN LAKE COUNTY

and

GREEN LAKE COUNTY COURTHOUSE EMPLOYEES LOCAL 514-C, AFSCME, AFL-CIO

Case 76
No. 59081
MA-11167

Appearances:

Mr. Lee Gierke, Staff Representative, Local 514-C, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, Wisconsin 54936-2236, appearing on behalf of the Union.

Attorney John B. Selsing, Corporation Counsel, Green Lake County, 120 East Huron Street, Berlin, Wisconsin 54923, appearing on behalf of Green Lake County.

ARBITRATION AWARD

Green Lake County, henceforth County or Employer, and Green Lake County Courthouse Employees Local 514-C, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement which provides for final and binding grievance arbitration. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide the instant grievance. Coleen A. Burns was so appointed on August 16, 2000. The hearing was held in Green Lake, Wisconsin, on October 3, 2000. The record was closed on December 6, 2000, upon receipt of post-hearing written arguments.

The parties stipulated to the following statement of the issue:

> Did Green Lake County have just cause to discipline Wendy Grahn by requiring her to pay back wages for 47.45 hours?
>
> If not, what is the remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 1 – PREAMBLE

The mutual interest of the Employer and the Employees is recognized by this Agreement for the operation of the various departments under methods that will promote safety to the Employees, economy of operations, cleanliness and proper care of equipment and the protection of property, the facilities of a fair and peaceful adjustment of differences that may arise from time to time, the promulgating of rules and regulations and ethical conduct of business and relations between the Employer and the Employees and to this end have reached this Agreement.

ARTICLE 2 - RECOGNITION

. . .

B. The Employer and Green Lake county retain and reserve the sole right to manage its affairs in accordance with all applicable laws, resolutions, ordinances and regulations. Included in this responsibility, but not limited thereto, is the right to determine the number and classification of Employees, the services to be performed by them; the right to manage and direct the work force; the right to establish qualifications for hire and to test and judge such qualifications; the right to hire, promote and retain Employees; the right to transfer and assign Employees; the right to demote, suspend, discharge for cause or take other disciplinary action subject to the terms of this AGREEMENT and the grievance procedure; the right to release Employees from duties because of lack of work or lack of funds; the right to maintain because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, means and personnel by which such operations are conducted, including the right to contract out provided that the exercise of this right shall not result in layoff of permanent Employees (Employees other than part-time, seasonal or probationary) and provided that in the case of the layoff of non-permanent Employees, that the Employer shall have the burden of proving that the exercise of such right will result in a more economical operation of the department, and to take whatever actions are reasonable and necessary to carry out the duties and responsibilities of the Employer.

In addition to the foregoing, the Employer and Green Lake County reserve the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions giving due regard to the obligations imposed by this AGREEMENT. The

Employer shall give reasonable notice of new rules and regulations or changes therein as promulgated by it to the Employees. Any disagreement over the meaning or applications of such rules and regulations may be the subject of a grievance. However, the Employer and Green Lake County reserve total discretion with respect to the function or mission of the County, its budget, organization and the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this AGREEMENT.

C. The Employees, Management and the Elected Officials shall show respect to each other, fellow employees and the general public.

RELEVANT BACKGROUND

On April 19, 2000, County Clerk Margaret Bostelmann, acting on behalf of the County Personnel Committee, issued the following letter to Wendy Grahn:

On Thursday, April 13, 2000, the Personnel Committee reviewed the information referred by the Health and Human Service Board regarding inappropriate use of the County phone system. Evidence was presented documenting personal use of the phone system in the amount of $324.26 and 40.46 hours of time from September of 1999 to March 25, 2000. Additional charges and time will be know (sic) after the April bill is received later this month.

The Personnel Committee has asked me to issue the following reprimand: The amounts of all phone charges relating to personal use of the tool-free (sic) line are to be paid back to the County in full. The total amount will be known when the phone bill is received at the end of this month. Charges as of March 25th are $324.26.

The amount of time spent on the phone, 40.46 hours plus the additional hours on the current phone bill will also be paid back to the County. Charges as of March 25th are $483.02 (current hourly rate of $11.9976 x 40.26).

The amount must be paid in full prior to the end of this year. Monthly payments of not less than $100 are to be made to the County Clerk. The first payment is to be made in May.

> Receiving any personal phone calls on the 1-800 Health & Human Services phone line is a violation of policy and will not be tolerated. All personal calls received during work time should be few in numbers (sic) and short in duration.
>
> You are advised that any other disciplinary conduct may result in further reprimand, suspension or discharge. The Committee also reserves the right to refer this matter to the District Attorney's Office.
>
> If you have any questions please contact me.

In a letter dated September 27, 2000, County Clerk Bostelmann advised AFSCME Staff Representative Lee Gierke as follows:

> Thank you for your call yesterday asking me to clarify the amount of the charges for the phone calls received by Wendy Grahn on the 1-800 line and the amount of time to be paid back.
>
> As we noted there were two typographical errors in my original correspondence.
>
> The Total cost of the phone charges on the 1-800 number as of March 25, 2000 was $326.24. The charges after that date were $50.31 for a total of $376.55.
>
> The total time as of March 25th was 40.46 hours and 6.99 hours after that date for a total of 47.45 hours. Total cost of time is 47.45 hours x 11.9976 wage for a cost of $569.27.
>
> This brings the overall total ($376.55 plus $569.27) to $945.82.
>
> I hope this clarifies this matter. If you need any additional information, please let me know.

A grievance was filed on the disciplinary action. The grievance was denied at all steps of the grievance procedure. Thereafter, the grievance was submitted to arbitration.

POSITIONS OF THE PARTIES

County

As established by the testimony of the County Clerk, the County is not insensitive to the fact that employees may need to make emergency telephone calls of a personal nature. Under the practice of the County, such telephone calls must be short in duration and limited to emergency situations. Additionally, the employee is required to reimburse the County for the cost of any telephone call that exceeds 50 cents.

From October 1999 through April 2000, the Grievant violated the express written policy of the County in her use of County phones for personal business. This violation occurred while the Grievant was on duty and at times when the Grievant was not scheduled to work.

The Grievant's use of the County phone during work time resulted in the County paying for something that it was not receiving, i.e., an employee functioning at their full capacity while on the job. The Grievant's conduct in using a County phone for private business for a long duration and without an emergency purpose is inexcusable. To claim wages for time that was used to conduct personal business is fraudulent.

The Grievant entered County premises at times that she was not authorized to be on County premises for the purposes of using the County phone lines. Inasmuch as these premises house material of a confidential nature, the County has a legitimate concern that County clients will perceive that there has been a breach of confidentiality.

The County Personnel Committee, who reviewed the matter in great detail, considered the Grievant's conduct to be a serious violation of the County's trust and work rules. The County Personnel Committee considered the Grievant's conduct to be criminal in that she entered the County's premises without authorization and used the County's property and funds for personal enjoyment. The County Personnel Committee discussed that, if the matter had been turned over to the District Attorney, the Court would have very likely ordered restitution to the County.

In deciding the appropriate penalty for the Grievant's misconduct, the County considered the level of misconduct and the Grievant's employment history with the County. To send a message that employees are free to do what they want while in work status so long as they perform the basics of their job would create a very poor work environment.

The County did not act beyond its authority in imposing the discipline of asking for the return of wages for the time that the Grievant did not perform her work duties. The grievance

should be denied. The Arbitrator should affirm the actions of the Personnel Committee or, in the alternative, determine an appropriate remedy for the loss that the County has incurred as a result of the Grievant's misconduct.

Union

The Union does not dispute that the Grievant engaged in misconduct. The Union does not take issue with the County's right to ask the Grievant to reimburse the County for her personal use of the County's telephone. Nor does the Union dispute the County's right to issue a written letter of reprimand. The Union, however, disputes the right of the County to direct the Grievant to reimburse the County for the hours that the County alleges the Grievant was on the telephone conducting personal business.

The County has never disciplined anyone for the personal use of telephones at either the local or long distance level. The County has only required the repayment of long distance costs.

When the Grievant was on the phone during work time, the Grievant continued to perform her normal job duties, i.e., answering the telephone; taking telephone messages; receiving members of the public; typing and keyboarding. The Grievant performed services for the County and is contractually entitled to be paid for these services.

The labor contract does not permit the imposition of the "restitution" penalty sought by the County. Nor is such a penalty commonly accepted in arbitration. Additionally, such a penalty would be contrary to the wage and hour laws of the State of Wisconsin. The Grievant performed services for the County and is contractually entitled to be paid for performing these services.

The Grievant, who has an exemplary work record over twenty years of service, did not realize that her use of the County long distance phone line was costing the County any additional money. At the time, the Grievant's boyfriend was supporting her as she went through a divorce.

The County violated the collective bargaining agreement by implementing the penalty of paying back wages. Therefore, the grievance should be sustained.

DISCUSSION

It is the function of the grievance Arbitrator to interpret and enforce the parties' collective bargaining agreement. The County's assertion that the Grievant has violated a

criminal statute for which restitution is an appropriate remedy, or the Union's assertion that the County has violated wage and hour laws, are matters to be decided by a court or administrative agency, and not by the grievance Arbitrator.

The Union acknowledges that the Grievant has engaged in misconduct. The County made a determination as to the appropriate level of discipline for this misconduct when it issued the reprimand letter of April 19, 2000. The Union contests only one aspect of this reprimand letter. Specifically, the Union denies that the County has just cause to discipline the Grievant by requiring the Grievant to repay wages for the 47.45 hours that the County alleges that the Grievant was on the telephone conversing with her boyfriend, rather than performing her work duties. 1/

1/ The County relies upon two arbitration awards: DAYTON POWER AND LIGHT COMPANY, 63 LA 653 (1974) and KNIGHTS OF COLUMBUS, 56 LA 1072 (1971). In the former, the Board of Arbitration found that it was appropriate to send an employee home without pay when the employee refused to perform work that could have been performed in a reasonably safe manner. In the latter case, the Board of Arbitration found that it was appropriate to not pay employees who had abandoned their work area for coldness, when the coldness posed no imminent danger to the health or safety of the employees. The Grievant did not refuse to perform any work assignment, nor did she abandon her work area. Inasmuch as neither case is on point, neither case supports the County's assertion that it has a right to reclaim wages from the Grievant.

The Grievant occupies the position of Receptionist in the County's Department of Human Services. When the parties negotiated Appendices A, B, and C of their 1998-2000 labor contract, they agreed upon an hourly wage rate to be paid for Receptionist work. Thus, the Grievant has a contractual right to receive her Receptionist hourly wage rate for all hours in which she performs her normal Receptionist duties.

The Grievant's normal Receptionist duties are answering the telephone; taking telephone messages; routing telephone calls and telephone messages; responding to inquiries from clients and members of the public who come to her window; making appointments; typing and keyboarding. The Grievant claims that she performed her normal work duties during the 47.45 hours at issue by placing her boyfriend on hold, as necessary, to respond to telephone calls and inquiries at the window; and by typing and keyboarding while she was on the telephone.

During the relevant time period, September 1999 through April 2000, the County did not receive any complaint that the Grievant was not answering telephone calls or responding to inquiries. Indeed, the only complaint received by the County, in the latter part of March,

2000, was from a client who telephoned the County to complain that the Grievant was talking on the phone to her boyfriend while the client was waiting for an appointment. This complaint triggered the County investigation that resulted in the discipline of the Grievant.

As the Grievant's immediate supervisor, LeRoy Dissing, acknowledged at hearing, if the Grievant's use of the County telephone line for personal business had precluded the Grievant from performing the majority of her job duties, it is likely that he would have received more than the one complaint about the Grievant. The undersigned is persuaded that the lack of complaints lends credence to the Grievant's claim that she placed her boyfriend on hold, as necessary to respond to other telephone calls or inquiries.

At hearing, Dissing stated that the Grievant does multi-tasking very well. More specifically, Dissing stated that the Grievant has the ability to respond to questions and provide information to one individual while she is on the telephone with another individual. The Grievant's written evaluation of April 1, 1999, which was prepared by Dissing, includes the following:

> Ms. Grahn has the distinct ability to stay focused while performing multiple functions. She prioritizes calls from the public, assists walk-ins, and staff asking for information. In addition, she types and inputs SAL's for the CHMC system while performing the agency's receptionist duties.

Dissing's testimony, as well as Dissing's written evaluation of the Grievant, demonstrates that the Grievant is adept at multi-tasking. The evidence of the Grievant's skill at multi-tasking lends credence to the Grievant's testimony that, when she was conversing with her boyfriend, she continued to perform her normal Receptionist duties of typing and keyboarding.

In summary, the record demonstrates that, for 47.45 hours from September 1999 through April 2000, the County's telephone line was used by the Grievant for personal business. The record, however, provides no reasonable basis to discredit the Grievant's testimony that, during these 47.45 hours, she continued to perform her normal Receptionist duties.

As discussed above, the County is contractually required to pay the Grievant her Receptionist hourly wage for all hours that the Grievant performed her normal Receptionist duties. Inasmuch as the record demonstrates that the Grievant performed her normal Receptionist duties during the 47.45 hours at issue, the County's requirement that the Grievant repay 47.45 hours of wages violates the parties' collective bargaining agreement. Thus, the County does not have just cause to discipline the Grievant by requiring her to repay 47.45 hours of wages.

Conclusion

The County does not have just cause to discipline the Grievant by requiring her to repay 47.45 hours of wages. The appropriate remedy for this unjust discipline is to (1) order the County to remove the requirement that the Grievant repay wages from the reprimand letter of April 19, 2000, and from all other of the Grievant's personnel files and (2) order the County to make the Grievant whole for any wages that the Grievant repaid as a result of the County's unjust discipline.

The County suggests that, if the Arbitrator concludes that the County does not have the authority to require reimbursement of the 47.45 hours, then the Arbitrator should impose some alternative discipline upon the Grievant. The County, however, is mistaken in its suggestion. The County required the repayment of wages because it believed that it had paid for time that was not worked. As discussed above, the record does not demonstrate that the County has paid for time that was not worked. Inasmuch as the County has failed to prove that the Grievant engaged in the misconduct for which the repayment of wages was required, neither the County, nor the Arbitrator, may impose an alternative discipline upon the Grievant.

Based upon the above, and the record as a whole, the undersigned issues the following:

AWARD

1. Green Lake County does not have just cause to discipline Wendy Grahn by requiring her to pay back wages for 47.45 hours.

2. In remedy of the County's unjust discipline, the County is ordered to immediately:

   a) remove the requirement that the Grievant pay back wages from the reprimand letter of April 19, 2000, and all other of the Grievant's personnel files; and

   b) make the Grievant whole for any wages repaid to the County by the Grievant as a result of the County's unjust discipline.

Dated at Madison, Wisconsin, this 8th day of March, 2001.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/mb
6201.doc