

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 2414, AFL-CIO

and

SCHOOL DISTRICT OF MUSKEGO-NORWAY

Case 65
No. 59799
MA-11410

(Tom Kasch Grievance)

Appearances:

Mr. John P. Maglio, Staff Representative, Council 40, on behalf of the Union.

Quarles and Brady, LLP, by **Mr. Sean M. Scullen**, 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 Muskego, Wisconsin, on June 25, 2001, at which time the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and the parties thereafter filed briefs that were received by August 27, 2001.

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

ISSUE

The parties have agreed to the following issue:

Did the District have just cause to suspend grievant Tom Kasch for one day and, if not, what is the appropriate remedy?

BACKGROUND

The District operates a number of school buildings, including a high school which has a three-bay garage where vehicle maintenance is performed and the Lake Denoon Middle School which has no such facilities, where grievant Kasch works as a maintenance person. Kasch, who has been employed by the District for about 23 years, was transferred from the high school to the middle school in June, 2000. (Unless otherwise stated, all dates herein refer to 2000).

Head Custodian Mark Buelow, Kasch's direct supervisor, testified that he told Kasch on October 9 that he would have to change the oil on a District van in the high school garage on Friday, October 13, and that he then also had to prepare the van for an emission test; that Kasch asked whether he instead could do the work at Lake Denoon; that Buelow then checked with supervisor for buildings and grounds Gary Rosploch, who said that the work had to be performed at the high school; and that he, Buelow, then relayed that fact to Kasch. Buelow also said that Kasch on October 13 performed the work at Lake Denoon; that when he asked Kasch why he was not doing the work at the high school, Kasch replied that he "couldn't find the things he needed" in the high school and that he therefore had to purchase certain items, i.e. a jack, washer solvent, a steel creeper, super solution and a drain pan. Kasch at that time gave Buelow the receipts for the purchases (District Exhibit 1).

Buelow on Monday, October 16, told Rosploch what happened and gave him the receipts. In reply, Rosploch said he would look into the matter. Buelow on October 18 prepared a written memo for Rosploch which summarized his prior October 13 discussion with Kasch (District Exhibit 2) and which stated, *inter alia*:

...

On October 13 at apx. 8:15 a.m., Tom left Lake Denoon to get the van to the district office. Some time later, he returned to the receiving room with the blue district van and he had purchased all the equipment needed to perform the oil change.

I had asked him if he had gone to the High School as he was instructed to do. He said he had and a garage bay was open, but there was a vehicle in it. Tom said there wasn't any rubber gloves, oil wrench, oil pan, car jack, and tools for him to use. Because of this, he went out, purchased all the equipment, and then returned to Lake Denoon. Tom also said that if Gary Rosploch had any questions, he should contact him directly.

I called Jim King to see if Tom made any effort to contact anyone at the High School for help in locating equipment or to move the vehicle from the bay. Jim King informed me that Tom had not asked for help.

...

Kasch and Rosploch met with Kasch on October 20, at which time Rosploch told Kasch that all of the materials were at the high school. Buelow said that Kasch then changed his story by claiming that he did not change the oil at the high school on October 13 because a certain wrench needed for the oil change was not at the high school.

On cross-examination, Buelow testified that he did not object to any of Kasch's October 13 purchases; that he then did not object to Kasch performing the oil change at Lake Denoon; and that he then never warned Kasch that he could be disciplined for not doing the oil change at the high school.

Supervisor Rosploch testified that while employees usually can purchase items up to \$50, "we had nothing written as far as department policy". He said that he wanted the October 13 oil change done at the high school because: "I wasn't looking to buy new tools, set up a second garage." He also said that he inventoried the high school garage on the week of October 16 after Buelow told him what had happened, and that he then discovered that "the tools for oil changes were there, the creeper was hanging on the wall, floor jack was on the floor, drain pan was over there. . .even oil that was still available."

Rosploch said that he related that fact to Kasch on October 23 and that Kasch then replied that he could not work at the high school because while "most of the equipment was there", he was missing a wrench. Rosploch decided that Kasch was untruthful and decided to suspend him, rather than fire him, in recognition of Kasch's 23 years of seniority.

Rosploch in an October 23 memo informed Kasch (District Exhibit 6), *inter alia*:

...

It was most disturbing to find out that you knowingly and intentionally, disregarded those instructions. Specifically you purchased new equipment totaling over \$170.00, and proceeded to make repairs at Lake Denoon School as you originally told Mr. Buelow you wanted to do. You stated to Mr. Buelow you did this because there was a vehicle parked in the garage bay and there wasn't any rubber gloves, oil wrench, oil pan, car jack, or tools for you to use. That was not a true statement. The workday following your vehicle repairs, I inventoried the garage and found all materials and equipment necessary to complete an oil change, except for the oil filter used on that vehicle.

In our conversation on Monday, Oct. 23, you confirmed to me that most of the equipment was located in the garage, but you did not have a wrench to finish the job. However, upon reviewing the list of materials and equipment you purchased at the auto supply store, the “needed” wrench was not on the receipt of purchased items.

...

Rosploch also testified about a July 9, 1999, meeting with Kasch over Kasch’s refusal to wait to meet supervisor Jim King. Rosploch said that Kasch was then issued a verbal warning (District Exhibit 5).

On cross-examination, Rosploch acknowledged that the District had asked the Union to agree to reduce the number of maintenance positions (such as those occupied by Kasch) and increase the number of lower-paid custodians, and that the Union had refused to agree to that proposal. He added that Kasch was disciplined for not carrying out an assignment, rather than for making the purchases he did; that Kasch keeps certain electrical testing equipment in his truck; that there is no maintenance bay at Lake Denoon; and that Kasch on October 13 did not refuse to change the oil in the van. He also said that Kasch never saw his note relating to the July 9, 1999, oral warning (District Exhibit 5); that the note does not appear in Kasch’s personnel file; and that he could not recall whether he then told Kasch he was receiving a verbal warning.

Kasch testified that when he reported to the educational support center on October 13 to work on the District’s van, he also was asked to fix the sliding door of the van; that he then went to the high school garage to do the oil change on the van; that he then spoke to fellow maintenance employee Joe Gehling who pulled a vehicle out of a bay so that Kasch could change the oil; that he, Kasch, then went to a store to purchase oil and an oil filter because he did not want to use Gehling’s oil; that when he returned to the high school garage, he discovered that he did not have an oil filter wrench; that he then tried to contact Gehling by walkie-talkie so that he could open up his tool chest, but to no avail; and that he then went back to the store. Asked what he did after going to the store “to purchase the oil, filter and the oil itself” he replied: “I believe I drove directly to Lake Denoon School, and I started to work.”

He said: “I guess my way of thinking that day was that there is going to be more oil changes in the future” at Lake Denoon School, which is why he brought a second jack, an oil pan and a creeper – all of which he purchased on his second trip to the store at a cost of about \$126. Asked why he made two trips to the store instead of one, he replied:

Because my first intention was to change the oil at the high school. That's what I was told to do, what I wanted to do. But in lieu of the fact that I needed the electrical equipment and other tools, I made the decision to set myself up at Lake Denoon for the reasons I've already stated."

He added that when he returned to Lake Denoon to do the oil change, Buelow "seemed kind of happy" that he had bought the floor jack and that Buelow did not complain about either the other purchases or the fact that Kasch performed the oil change there. He also said that he told Buelow he could not do the oil change at the high school because he did not have a wrench to remove the drain plug, an oil filter wrench, or the electrical test meter. He also said that he never before had seen a copy of Rosploch's July 9, 1999, letter (District Exhibit 5), relating to his supposed oral reprimand, and that he then "didn't realize I was being disciplined."

On cross-examination, he asserted that Rosploch was dishonest when he testified that he told Kasch on July 9, 1999, that a failure to follow a supervisor's order constituted insubordination and could lead to discipline. He also said that Buelow specifically told him Rosploch did not want him to perform the oil change at Lake Denoon; that Buelow never told him he could not purchase additional materials; and that he never before had performed an oil change at Lake Denoon. He also said that rubber gloves, an oil filter wrench to remove the drain plug, and the meter to test the folding door were not at the high school. He acknowledged that he fixed the sliding door without any of the materials he had purchased, but denied telling Buelow that he had purchased the materials because they were not at the high school.

POSITIONS OF THE PARTIES

The Union claims that the District lacked just cause to suspend Kasch because he performed the oil change and thus was not insubordinate and because Buelow never told him on October 13 that he could not perform the oil change at Lake Denoon or that he had improperly purchased the equipment. The Union adds that even assuming *arguendo* that some form of discipline was warranted, a suspension was too severe a penalty because he had an unblemished record given the fact that the purported July 9, 1999, verbal warning to him was never properly communicated or recorded in his personnel file.

The District asserts that it had just cause to suspend Kasch because he "was insubordinate and dishonest with management regarding the reasons for his insubordination." It also contends that since insubordination is such a serious offense, the one-day suspension here was "inappropriate" and that there is no basis for mitigating it.

DISCUSSION

In agreement with the District, I find that: (1), Kasch on October 13 told Buelow that he had purchased the oil wrench, oil pan, car jack and tools because they were not at the high school; and (2), Kasch told Rosploch on October 23 – after Rosploch told him that all that equipment was at the high school - that he did not perform the oil change at the high school because he had to buy a wrench to finish the job. I base this finding on the credible way that both testified and the contemporaneous notes they prepared (District Exhibits 2 and 6). Having made those statements, it is clear that Kasch gave conflicting reasons for not performing the oil change at the high school and that those reasons were false since Kasch, in fact, never purchased the wrench he claimed he was missing and since the high school also contained the other needed equipment.

I also credit Buelow's testimony that Kasch on October 16 told him he also did not work on the van at the high school because a vehicle was in the bay – a claim that is directly at odds with what Kasch testified to here. Moreover, Kasch acknowledged on cross-examination that Buelow specifically told him that Rosploch did not want him to perform the oil change at Lake Denoon and that, furthermore, he never before had performed any oil changes at Lake Denoon. Accordingly, he knew that he was not allowed to work at Lake Denoon. His insistence on doing so therefore constituted rank insubordination which was worthy of a one-day suspension.

It therefore is immaterial that Buelow on October 13 never admonished Kasch for purchasing the tools and that he also never told him that he would be disciplined for performing the oil change at Lake Denoon, as Buelow credibly testified that he had no reason on October 13 to disbelieve what Kasch told him. Hence, it was entirely appropriate for the District to discipline Kasch after Rosploch conducted an investigation into what really happened on October 13.

The Union nonetheless asserts that the suspension should be reduced because Kasch was never told on July 9, 1999, that he was being disciplined. Since Rosploch himself admitted that he did not recall whether he then showed Kasch the July 9, 1999, letter and whether he was then being given an oral warning, I find that that discipline cannot stand because it is axiomatic that an employee must be told at the time that he/she is being disciplined. In addition, there is no merit to the District's claim that it was not required to put the July 9, 1999, letter in Kasch's personnel file, as it also is well established that personnel files must contain all formal discipline. If purported discipline is not in those files, and if there is no proof that discipline was properly communicated at the time it was imposed, it cannot be considered valid. See Elkouri and Elkouri, *How Arbitration Works*, (BNA, 5th Ed., 1997), p. 926. Hence, it must be assumed, as the Union correctly argues, that there was no prior discipline at the time of Kasch's suspension.

Ordinarily, that might be enough to reduce a suspension since an employer ordinarily must follow progressive discipline. Here, though, Kasch's misconduct was so severe and so deliberate that no such reduction is warranted for such a serious infraction. Moreover, the District points out that Kasch's long tenure already has been factored into giving him only a one-day suspension.

As a result, it is my

AWARD

1. That the District had just cause to suspend grievant Tom Kasch for one day.
2. That the grievance is therefore denied.

Dated at Madison, Wisconsin this 5th day of October, 2001.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

