

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEKOOSA SCHOOL DISTRICT

and

NEKOOSA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

Case 51
No. 59341
MA-11257

(Grievance of Duane Exner)

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, appeared on behalf of the Nekoosa Educational Support Personnel Association.

Mr. Dean R. Dietrich, Attorney, and **Mr. S. Bryan Kleinmaier**, Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appeared on behalf of the Nekoosa School District.

ARBITRATION AWARD

On December 4, 2000, the Nekoosa School District, hereinafter the District, and the Nekoosa Educational Support Association, hereinafter the Association, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement, jointly requested that the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of the Commission's staff, to hear and decide a grievance pending between the parties. Hearing on the matter was conducted on March 6, 2001, March 7, 2001 and March 15, 2001 in Nekoosa, Wisconsin. There was a stenographic transcript made of the hearing. Post-hearing briefs and reply briefs were submitted and exchanged by June 18, 2001. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

This Award addresses the termination of employee Duane Exner.

ISSUES

The parties stipulated that there are no procedural issues and that the statement of the substantive issues is as follows:

Whether the School District violated the labor agreement when it terminated the Grievant from employment based upon his conduct on July 21, 2000? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article II – MANAGEMENT RIGHTS

. . .

- D. To suspend, discharge and take other disciplinary action against employees for cause;

. . .

Article V – EVALUATION/DISCIPLINE

. . .

Non probationary employees shall only be disciplined, suspended, reduced in rank or compensation, or discharged for just cause.

. . .

BACKGROUND AND FACTS

Duane Exner, the grievant, was hired on July 9, 1984 as a maintenance/custodian. His position was a full-time, 12 month per year position. Mr. Exner had experience in the construction trades prior to his employment with the District. Exner was initially assigned to Alexander Middle School during the school year. During the summer months, all maintenance/custodians and cleaners are assigned at various locations throughout the District.

Exner's work history includes satisfactory employment evaluations conducted in 1992, 1993 and 1995 by his then-supervisor, James Walrath. Memorandums of record to Exner's personnel file dated December 5, 1991 and March 11, 1997, although not identified as disciplinary actions, indicate Exner failed to comply with school policy and state statute by smoking cigarettes on school property. In addition, a memorandum dated October 16, 1987, also not identified as discipline, alleged that he criticized a co-worker by calling him names and using profanity. Exner responded to this memorandum, denied that he criticized the co-worker, and stated that had the District investigated the situation, witnesses would have confirmed that he did not criticize the co-worker. Further, he informed the Superintendent that he had responsibilities as an officer of the Maintenance/Custodial Workers Association and he would not be intimidated into not performing those responsibilities.

Exner has a disciplinary record, although it is dated. On July 24, 1987 he was issued an official reprimand for rude, abusive and insulting behavior to another employee. Exner responded to the July 24, 1987 letter indicating that the behavior that caused the letter was after his working hours and related to his duties as a representative of the Maintenance/Custodial Workers Association. A second disciplinary action in the form of a one-day suspension was issued on October 27, 1987 for failure to report for work on October 17 and October 24, 1987. Exner did not respond to this disciplinary action.

A final disciplinary action was intended to have been issued to Mr. Exner on or about February 19, 1997 regarding an allegation of sexual harassment. This disciplinary action would have been in the form of a written reprimand and was the result of negotiation between Mr. Exner, the Association and the District. This discipline was not issued.

On June 5, 2000, Edward Robatcek, Supervisor of Buildings and Grounds, issued a memorandum regarding the summer work schedule for summer cleaning personnel. The memorandum, in pertinent part, stated that the normal working hours for summer maintenance personnel were from 7 a.m. to 3 p.m., Monday through Friday, that morning break was from 9 a.m. to 9:10 p.m. (sic), lunch was from 11:30 a.m. to 12:00 noon, and afternoon break was from 2 p.m. to 2:10 p.m. Exner testified that he was aware of this directive from his supervisor. Exner testified that it was Robatcek's practice to travel throughout the District and check on the work of maintenance and cleaning personnel, without notice/warning to staff or predictability. Robatcek confirmed that practice, that he normally checks on all of his employees, and does so in an unpredictable manner.

Beginning on July 10, 2000, Mr. Exner was assigned to the high school. Exner's work assignment for the week including July 21, 2000 was to replace ballasts and light bulbs in the wrestling/weight room, the locker room, and the band/chorus room at the high school. Exner's routine during the summers, including the summer of 2000 was to take his lunch breaks along the Wisconsin River on Point Basse Avenue across the street from the Krcmar

residence. Exner stated he would eat his lunch, look out at the river, smoke three or four cigarettes and return to work by noon. He stated that it took two to three minutes to drive from the high school to this location.

On July 21, 2000, Marsha Kumm, the Superintendent's Secretary, paged Robatcek while he was on vacation regarding toilets that were running at Alexander Middle School. Robatcek directed Kumm to send Exner to secure the water problem. Security records indicate that Mr. Exner disarmed the security system and entered the Alexander Middle School at 9:31 a.m. on July 21, 2000. Records further indicate that he re-secured the building and departed from the school at 9:57 a.m.

At 11:53:53 a.m. that morning, the Wood County Sheriff's Department received a telephone call from Rene Dampier, a resident of Point Basse Avenue. Dampier complained that a "male in blue buick, 4dr, is watching kids at her daycare center, is 2nd day he has done this". Dispatch assigned Officer Dan Joling to respond. Officer Joling was enroute at 11:54:31 a.m., drove southbound past the Dampier residence, observed and identified Duane Exner in the vehicle parked directly across from Dampier's residence, drove approximately two blocks past the residence, made a U-turn and returned driving northbound to the residence. Joling parked his patrol car behind a sport utility vehicle that separated him from Exner. As Joling was parking, Exner pulled out onto Point Basse Avenue and drove northbound to return to the high school. Joling's arrival time at 826 Pointe Basse Avenue was 12:03:37 a.m. and he radioed to dispatch "is a school employee eating his lunch" at 12:04:12 a.m.

Joling exited his vehicle and crossed the road to speak with Dampier, Jason Olson, Dampier's boyfriend and Lorissa Savage, Dampier's neighbor. Joling informed Dampier, Olson and Savage that the individual in the vehicle was a school employee eating his lunch. During the conversation, Joling learned that Dampier believed Exner was sitting in his vehicle across from her residence for two hours. Either Dampier or Olson commented that they wished they had a job like Exner's with a two-hour lunch break. Officer Joling is also president of the Nekoosa Board of Education, and was concerned about what he heard. Joling went to the District administration offices to ascertain where he could locate Ed Robatcek, but learned that Robatcek was on vacation. He then attempted to speak with Superintendent Scarpino, but learned he was out of town. Joling next went to the high school and spoke to Mr. Exner. Mr. Exner denied taking a two hour lunch and told Joling that two of Exner's co-workers could confirm that Exner was at work. Joling then spoke with Exner's two co-workers, Harland Felch and Steve Stein.

After speaking with Felch and Stein, Joling returned to the Dampier residence. Joling asked Dampier and Olson questions regarding the amount of time that Mr. Exner was in his vehicle by the river across the street from the residence. Joling testified that Dampier, "giving him the benefit of the doubt" concluded that Exner was across the street for at least one and

one-half hours, and that Olson told him that Exner had been in the same location the day before for approximately two hours. Joling spoke to Savage later that day and she indicated to him that Exner was across the street for longer than one-half hour.

Officer Joling drafted and filed the following incident report:

On time and date I received radio dispatch advising that there was a subject sitting in the 800 BLK of Point Basse Avenue and this has the caller concerned as she runs a Day Care. It seems that this is the second day in a row and the subject has been sitting there for sometime (sic). It was reported that the individual is in a BLUE BUICK.

Upon arrival I noticed the individual in question to be DUANE EXNER, a custodian in the schools. I proceeded down to the intersection and was running the plate and was going to pull up when DUANE pulled out and left. I then at that time approached the complainant, RENEE DAMPIER and her boyfriend, JASON OLSON and a neighbor, LARISSA SAVAGE. I advised that was probably nothing to be concerned about as this was a custodian and that I knew he liked to smoke and he couldn't smoke on school property.

With this they all seemed relieved but then someone made the comment about the extended duration that MR. EXNER had been sitting there. RENEE states that she had come outside with the kids around 10:00 A.M. and he had been there since then. As for JASON he states he really didn't witness today but, yesterday he remembers him being over across the street for a long time, approximately 2 Hours (sic).

I found this interesting in light of the fact that he should be working in the school(s) during the day. I then went over to the Admin building to attempt to locate Ed Robatcek the Building and Grounds Supervisor. I was advised by MARSHA KUMM that Ed was off today but, that DUANE had been sent over to the Middle School to unstick some toilets that were running continuously. She states that DUANE otherwise should be at the high school.

I then, in an attempt to locate DUANE, went to the high school and located him in the lower hallway. I asked what he had been doing down by the river. He of course stated he was taking his lunch break down there. I then asked what the duration of his lunch period was and he replied one-half hour. When I indicated that he had been down by the river longer he emphatically denied being down there any longer than his allowed one-half hour lunch. He further stated that they all left at the same time and that I could asked (sic) anyone to confirm that

fact. I then asked if it wasn't true that he had been sent to AMS to unstick a toilet and he stated, "Yes, in fact there were three."

Due to the fact that both HARLAND "Peanut" FELCH and STEVE STEIN were working on an upper level I immediately went up and talked to them. They stated they remember DUANE headed out but don't recall the exact time as they were still cleaning the carpet in the commons area.

I then went back to the DAMPIER/OLSON residence and again asked what the duration was that MR. EXNER was sitting across the street from there (sic) residence and RENEE stated that it was about two hours. When confronted with the fact that MR. EXNER states that he was NOT there any longer than one-half hour she stated that giving him the benefit of the doubt she knows he was there at least one and one-half hours, since 10:30 AM.

Also JASON states that he had seen him there the day before and knows that he was across the street for a considerable amount of time and felt that it was easily between 1-2 hours. I also spoke to a LARISSA SAVAGE and she too confirmed that MR. EXNER was sitting across the street for longer than one-half hour.

This matter will be turned over to the School Administrator for further action.

Joling's testimony at hearing was consistent with the details of this report. Ms. Dampier's testimony at hearing was also consistent with the relevant details of Joling's report.

On Monday, July 24, Joling went to Scarpino's office and although he did not provide Scarpino with a copy of the report, reviewed with Scarpino the specific information contained in the report. Joling informed Scarpino that he must follow policy to receive a copy of the report. After receiving the information from Joling, Scarpino went to the high school and spoke to Exner with a union official present. Scarpino testified that he asked Exner "to explain why a person would contact the police and say that you were parked in front of her home." Scarpino testified that Exner became offended and accused Dampier of lying.

Exner testified that he was called to attend to a water problem at Alexander Middle School. Exner testified that he took the school truck from the high school to the middle school, attended to the work problem, and returned to the high school in the school truck. Exner does not take issue with the times reflected in the printout of the security code. Exner claims that he returned to the high school, continued to work at replacing ballasts and light bulbs until his designated lunch time of 11:30. Exner testified that he normally takes his lunch

break at Point Basse Road further up the river. It was his testimony that he moved closer to Ms. Dampier's residence on July 20 and 21 because he saw two fishermen on the river and wanted to position himself to watch them, while he ate his lunch. It was his testimony that his lunch period lasted no more than the allowed thirty minutes.

Scarpino testified that on July 26, 2000 (Wednesday) he spoke by telephone with Ms. Dampier and questioned her. Dampier informed Scarpino that she knew Exner was parked in front of her home and she knew the amount of time because she had to give the children food every two hours. Scarpino testified he asked Dampier whether she would be willing to testify. Scarpino then informed Dampier that the process would be long and drawn out and requested that she write notes for future reference. After his conversation with Dampier, Scarpino was out of the District until August 8, 2000.

On August 10, 2000, Scarpino met with Exner and Tom Ivey of the Central Wisconsin UniServ Council. Scarpino questioned Exner regarding July 21, 2000. Scarpino testified that Exner adamantly denied the allegations, stating that he took his lunch break from 11:30 a.m. to 12 noon. During this meeting, security records from Alexander Middle School were produced that identified the times in which Exner entered and exited the school. Scarpino testified that it was "logical" to him that the accusations were truthful and that Exner was "denying them to keep his job."

After the meeting, Ivey located Stein and questioned him regarding his recollection of the events of July 21, 2000. Ivey testified that Stein told him that he did not recall what time Exner left for lunch on July 21, 2000, but that he did recall that he and Felch left for lunch "just a couple of minutes" after Exner. Ivey's conversation with Stein lasted approximately three or four minutes. Ivey testified that based on the information he obtained from Stein, he believed the District would no longer pursue the issue because he believed Stein had corroborated Exner's position.

During the afternoon of August 10, Scarpino and his attorney, Dean Dietrich, met with Dampier. Scarpino testified that he did not learn anything different and that he concluded that Dampier was a credible, worthwhile person and a conscientious day care provider who followed the statutory guidelines. Scarpino testified that the meeting "reconfirmed what [I] already thought." Scarpino was out of the District from August 13 through August 15, 2000.

On August 17, 2000, Scarpino spoke to Steve Stein and Harland Felch individually, each with a union representative present. Scarpino testified that he scripted the questions that he intended to ask in advance, memorialized the responses, and did not ask any further questions of either individual during the meeting. Following is a memorandum that reviews his conversations with Mr. Stein and Mr. Felch:

TO: Memo to my notes about Duane Exner
From: Dr. Scarpino
Re: Interviewing Steve Stine and Harland Felch "Peanut" in front of
Dan Enerson

Date: August 17, 2000

I spoke with Dean Dietrich early in the day about what was going to transpire with Duane in the afternoon. Dean mentioned that he had spoken to Tom Ivey and that Tom asked about interviewing Steve Stine and Peanut. I told Dean that interviews would be taking place in a short while. Dean told me to take notes of the meeting and of the questions I was going to ask. I went to NHS and informed Dan Enerson (NESPA President) that I wanted to interview Steve and Peanut and wanted him present during the interviews.

My meeting with Steve in the NHS custodians office:

I began by telling Steve that he was not in any trouble, this was not a disciplinary meeting for him, and that I was still investigating the Duane Exner matter and wanted to ask him (Steve) some questions. I also told Steve that Dan Enerson would be present the entire time to ensure that he was treated properly, not harassed, etc.

Question: Do you regularly wear a watch?
Answer: "yes"

Question: Did you wear a watch on the date in question?
Answer: "Yes"

Question: When did you last see Duane?
Answer: "I don't remember I did not work with Duane that day"

Question: Did you work in the same area as Duane that day?
Answer: "No"

Question: Do you know when Duane went to lunch that day?
Answer: "No"

Question: If I said that you knew when Duane went to lunch what would you say?

Answer: "I don't know when Duane left for lunch I did not work with him"

Question: How do you know when to take your breaks and go to lunch?

Answer: "Ed has a letter that has the times on it and we all get the letter"

Question: Are the times for break and lunch the same as they were last year?

Answer: "Yes"

Question: So you do not know when Duane went for lunch?

Answer: "No, I don't know when Duane left"

Questions for Peanut

I began telling Peanut the same things that I told Steve earlier – this was not a discipline meeting for him, he was in no trouble and that I was still investigating the Duane Exner matter. I also told him that Dan would be present during the entire time we were together to ensure that everything went properly.

Question: Did you work with Duane that day?

Answer: "No"

Question: Do you know where Duane was working?

Answer: "Yeah, he was in the weight room changing ballast or something I didn't work with him that day"

Question: Do you know when Duane when to lunch that day?

Answer: "Nope, I didn't each lunch with him"

Question: How do you know when to take your breaks and go to lunch?

Answer: "Ed has a paper that he gives us with all the times on it"

Question: So you didn't work with Duane that day and you don't know when he went to lunch either?

Answer: "Yep"

DocLoc:DuaneExnertermination8/00

Peanut Felch testified regarding his conversation with Scarpino. Felch created notes from the conversation either the evening of August 17 or on August 18. Felch testified that Scarpino asked him whether he wore a watch, asked what time it was, asked for a definition of intimidation and coercion, asked whether Felch had talked to Exner before the meeting, asked what Felch and Exner had talked about, and asked about when breaks are to be taken. Felch stated he did not recall whether Scarpino asked him if he knew when Exner went to lunch. Felch testified that he ate his lunch on July 21, 2000 in the teachers' lounge at the high school. Felch indicated he thought Scarpino believed Exner was coercing him and that he told Scarpino that Exner had not coerced him. Felch testified he felt intimidated by Scarpino because Scarpino is "just an intimidating guy". Finally, Felch indicated that in response to Scarpino question asking what he and Exner had talked about, he refused to answer Scarpino's question.

Steve Stein also testified regarding his conversation with Scarpino on August 17, 2000. Stein had been working in the common area of the high school beginning at approximately 10:30 a.m. and was helping Felch clean carpets and move furniture. Stein indicated Scarpino referred to a police report, asked about the alarm keys for the high school and asked whether Stein wore a watch during their conversation. Stein testified he did not recall Scarpino asking him if he knew when Exner went to lunch on July 21, 2000.

At hearing, Stein testified that he observed Exner leave for lunch a couple of minutes before 11:30 a.m. Pressed, on cross-examination, Stein indicated that he looked at the clock when he saw Exner leave and that the clock registered 11:28 a.m.

Dan Enerson witnessed the interview between Scarpino and Stein. The following is a partial excerpt of his testimony:

Q: What was Steve Stein's response to these questions from Dr. Scarpino?

A: Like I stated earlier, he seemed nervous. When doc had first asked Steve if he had seen Duane go to lunch that particular day, Steve said no, if I'm not mistaken.

Q: Did he say anything else that you remember?

A: Not that I can recall right off the top of my head anyway.

Q: Did Steve Stein have any response to any question from Dr. Scarpino about what time Duane went to lunch?

A: He - he'd give a time, but I don't recall it, I don't know what it was pertaining to. I don't know. It's, like I said, it's back away and like - I probably should have took notes and I didn't, but - . . .

Enerson's testimony is confusing relative to whether Stein told Scarpino that he saw Exner leave at a specific time.

At 2 p.m. on August 17, 2000, Dr. Scarpino met with Exner and Tom Ivey. Dr. Scarpino informed Exner that he was being terminated and gave him the following letter:

Dear Mr. Exner:

This letter is to notify you that your employment with the School District of Nekoosa is terminated as of August 17, 2000.

The School District has investigated circumstances which support a finding that you were away from work during your regular work hours from approximately 10:15-10:30 a.m. to 11:30 a.m. on Friday, July 21 at a time when you were supposed to be at work and for which you received your regular pay. The District's investigation concluded that you were away from work without authorization and that this constitutes misconduct which warrants your termination from employment.

Enclosed with this letter are your last payroll check and any check for accrued benefits unused as of the date of termination.

Sincerely,

/s/ David J. Scarpino, Ed.D.

Dr. David J. Scarpino
Superintendent of Schools

Dr. Scarpino testified that he made the decision to terminate Mr. Exner on August 17, 2000 after he evaluated the information and concluded that Exner had engaged in misconduct and theft of time. Scarpino testified that he did not review Exner's personnel file nor take the contents of the personnel file into consideration when making the decision to terminate Exner's employment. The District provided Mr. Exner with the following additional memorandum at the meeting:

MEMO TO:	Duane Exner
FROM:	Rick Sutherland
RE:	Overtime Pay Settlement (bold in original)
DATE:	(sic) August 17, 2000

Enclosed are 2 paychecks which pertain to your overtime pay settlement. Your total gross wages for this settlement are \$3,304.55. These wages were calculated by multiplying the 29 Saturdays that you did not work during the school year (see attached calendar) by 5 hours per Saturday. These 145 total hours were multiplied by your hourly wage of \$15.19 and then multiplied by the overtime rate of 1.5.

Two paychecks were processed for Wisconsin Retirement System purposes. The first check in the amount of \$937.06 is for the calendar year 1999. The second check (sic) is for the calendar year 2000.

Rick Sutherland/Payroll

cc: Dr. David Scarpino

The Association contends that the grievant's protected activities are relevant to this proceeding and have affected the decision-making process of the District. The District objected to all such evidence as irrelevant. Exner testified that in 1985 after the maintenance personnel were unable to find an organization willing to represent them due to their small size, he researched, organized, and requested voluntary recognition of the Maintenance Custodial Workers Association by the Nekoosa School Board. In 1986, the Board voluntarily added the cleaners into the bargaining unit. Exner testified that in 1988 he contacted Dave Hanneman, Director of Central Wisconsin Uni-Serv Council and discussed organizing a bargaining unit to include the existing unit of maintenance, custodial and cleaner employees, as well as the remainder of the support staff. An election was conducted by the Wisconsin Employment Relations Commission and WEAC was certified to represent the entire unit.

Exner currently holds the position of Association President and has held this position for eleven or twelve years since the unit was certified 16 years ago. Exner also holds the positions of grievance chairperson and chief negotiator and has held these positions for the 16 years since the bargaining unit's recognition. The record indicates that three labor agreements have been resolved by an arbitrator. Further, various grievances have been filed. Exner testified that during Scarpino's tenure over the last three years, 13 grievances were filed with the District by the Association.

In addition to formal labor relations with the District, Exner performed informal labor relations responsibilities for the bargaining unit which included meeting with the Superintendent and School Board on various matters. Scarpino testified that Exner "stuck up for his employees" and acknowledged that there were many incidents in which he and Exner disagreed prior to Exner's termination. Exner testified that his relationship with Superintendent Scarpino "started out pretty good", but that it changed.

Exner testified to an incident in November, 1998 in which he and Scarpino had differences over Exner's union representation responsibilities. Exner stated he went to Scarpino's office and informed Scarpino that the high school kitchen staff wanted to meet with Scarpino, but they wanted two members of their staff to be excluded from the meeting because they believed the two to be "kind of like moles". Exner testified that Scarpino responded that the information was hearsay. Exner stated that when he told Scarpino that he didn't believe it was hearsay and that he was there as their union representative, Scarpino again responded that it was hearsay and then offered to get a dictionary for Exner. Exner testified that he ended the conversation and left Scarpino's office.

The situation that Exner alleges changed his relationship with Scarpino occurred when the Association conducted informational picketing at a School Board meeting in February 1999. Exner testified that a grievance was pending which alleged that the District was hiring non-union employees while union employees were on partial layoff. As a result, the Association decided to picket the School Board meeting and Exner was involved in telephoning and organizing picketers. Exner testified that when he and others were walking around with various signs before the School Board meeting, he was approached by Scarpino. Exner stated that Scarpino walked over to him, pointed his finger at Exner and told Exner "you better keep walking. If you're blocking traffic, I'll have your ass arrested".

Another incident of significance occurred in March, 1999 when Exner met with Robatcek and Scarpino in Scarpino's office. The conversation began with Scarpino asking Exner if he had been smoking that morning on school property. After Exner denied smoking, Scarpino informed Exner that he should be concerned about even the perception of others believing him to have been smoking. Exner was not disciplined for this incident although Scarpino testified during cross-examination that he concluded Exner was lying, but indicated that Building Principal, Pete Pavloski, was responsible for the conduct of staff in his building. Scarpino then dismissed Robatcek and closed his office door. Exner testified that Scarpino said "Duane, we need to get along" and "don't you realize I'm your boss and I could fire you." Exner stated he responded to Dr. Scarpino that he was a representative of the union and his primary concern was the welfare of the employees. Exner testified that Scarpino responded "I don't give a shit about employees. I'm here for the kids." Exner testified to a potential grievance which arose in the summer of 1999. The building principal was out of town, and concerned over time limits in the grievance procedure, Exner brought the matter to Scarpino. According to Exner, Scarpino told him not to worry, that he would waive the time limits. The parties subsequently met, and when Exner presented the grievance, Scarpino asked about the time limits in the grievance procedure. Exner testified that he reminded Scarpino that Scarpino had agreed to waive the time limits, and that Scarpino asked who else was in the room. Exner terminated the meeting.

Mr. Exner testified to another incident that occurred March 9, 2000, when he sent a memorandum to Dr. Scarpino, requesting the number of days that Bernie Nickel, a temporary employee, had worked. Exner's reason for requesting the information was to enforce a contract clause which limits non-bargaining unit employees to 90 days of work. Exner testified that Scarpino telephoned him, explained that the District was short on substitutes, and then questioned what Exner intended to do with the information. Exner advised Scarpino that the collective bargaining agreement needed to be maintained. Exner testified that Scarpino then asked Exner whether the promotion/transfer language of the collective bargaining agreement allowed Scarpino to transfer Exner to a teacher aide position at the kindergarten level at Humke Elementary School. Exner testified that he understood Scarpino's question to be a threat.

Scarpino gave rebuttal testimony, but did not deny any of the contentions set forth in the preceding five paragraphs.

Mr. Exner testified to a final incident between he and Scarpino prior to Exner's termination. Exner indicated that in May 2000 he and the Nekoosa Teacher's Association President, Mike McClellan, appeared before the Nekoosa School Board and informed the Board of concerns regarding Dr. Scarpino. Many of the above-noted events were raised. Exner testified that he informed the Board that employees, after meeting with Scarpino, were in tears and were very upset. Exner alleged that Scarpino had told a supervisory employee to "shut up" during the course of a meeting, an allegation that both Scarpino and the supervisory employee denied. Exner and McClellan would not provide names of allegedly concerned employees, and nothing of substance came of the meeting. Exner and McClellan were concerned that they had made serious accusations, and cautioned one another to be careful on the job.

Also pending at the time of Exner's termination was an incident that began on March 5, 1999, when Exner was told by his supervisor that it was not necessary for him to work on Saturday, March 6. When Exner returned to work on Monday, he learned that another employee had been assigned to work. Exner questioned the change and was told by Robatcek that Steve Stein had worked. As a result of Exner's belief that the hours had been misassigned, he filed a grievance. This grievance was addressed in the Spring of 2000 during bargaining and language was agreed upon in May, 2000 that created a rotational schedule for prospective Saturday work assignment. The dispute regarding lost pay for the time period March, 1999 through April, 2000 remained unresolved and negotiations continued. During July, 2000, legal counsel for Exner was in communication with Scarpino regarding the unpaid Saturdays. On August 8, 2000, a facsimile was sent to Scarpino with calculations indicating that it was the Association's position that Exner was denied 145 hours of Saturday work at time and one-half for a total gross wages amount of \$3,304.55 due Exner. As previously indicated, a check in this amount was paid to Exner on the day of his termination.

In addition to various disagreements regarding Association business between Exner and Scarpino, Exner's supervisor Robatcek testified that he and Exner had differences. Robatcek testified that he had concerns regarding Exner conducting Association business during working hours. Robatcek testified that on one occasion he observed Exner speak for a lengthy period of time to an employee during working hours. Robatcek also testified that he had received a complaint that Exner was soliciting employees to participate in picketing during work hours.

Prior to the incident giving rise to this proceeding, there has been no allegation that Exner was tardy, had unexcused absences, or otherwise abused time.

POSITIONS OF THE PARTIES

Association

The Association contends that the grievant is credible, and that his credibility is buttressed by common sense as well as strong circumstantial evidence. The grievant presented himself as not only intelligent, but a man of principle and integrity. When the Superintendent confronted the grievant and indicated that he would dock him if the grievant had taken a two-hour lunch, the grievant replied that he should be fired if it was proven he took such an unauthorized break. The Association contends that that reflects an innocent state of mind. A person who is guilty of taking a two-hour lunch break is not likely to agree that he should be discharged if the charge is proven.

The grievant's attendance record was perfect in several respects and this reflects the grievant's commitment to his job. In 16 years of employment, he was never late, never left early or extended his lunch break, and he did not abuse his lunch time. The Principal of the middle school testified that the grievant never came to work late or left early, and that he could not imagine the grievant taking a two-hour unauthorized break.

Even after the grievant had been apprised of Ms. Dampier's report, he conducted himself in a manner that was consistent with an innocent person. He did not ask Stein or Peanut what they told officer Joling. His failure to ask Stein and Peanut what they told Joling suggests the grievant had nothing to hide. The grievant did not even bother to tell Tom Ivey, his UniServ director, or any other union representative, to investigate Dampier's report at any time. At the conclusion of the workday on Friday, July 21, the grievant testified he filled out his time card as he would normally. This was after officer Joling advised him of Ms. Dampier's report. The grievant acknowledged that he could have reported a two-hour lunch break on the time card. Had he done so, he could have avoided even the possibility of serious punishment.

Circumstantial evidence supports the grievant's version of the facts. The Association contends that the grievant could not have known that Mr. Robatcek had taken a day off on July 21. Had the grievant taken a two-hour break on Thursday, July 20, and Friday, July 21, as claimed, Robatcek would have noticed his lack of progress, and, given Robatcek's supervisory philosophy, could have discovered the grievant's absence. This behavior would have been highly inconsistent with the grievant's previous behavior over 16 years of employment. The Association notes that the grievant would have taken a huge risk of being seen by officer Joling if he had parked by the river for two hours during the work day.

The Association points to the testimony of Stein, who testified seeing the grievant leave through the commons area at around 11:30 a.m. The Association characterizes Stein as a witness who took his oath seriously and wanted to cooperate as best he could. Stein was asked by officer Joling and Dr. Scarpino during their respective investigations if he recalled the exact time the grievant departed for lunch on July 21. Stein simply responded, "No". Stein's response illustrates the cautious way in which Stein, like many people who believe they must give exact answers, believes he should respond to such precise questions. Mr. Ivey had the common sense to ask Stein the broader question of how long after he saw the grievant leave for lunch on July 21, did he leave for lunch. Stein initially responded to Mr. Ivey in the same way he responded to officer Joling and Dr. Scarpino, by saying that he did not know the exact time the grievant went to lunch on July 21, 2000. However, Ivey asked how long after he saw the grievant go to lunch, did he go to lunch, and Steve immediately said that it was just a couple of minutes. Accordingly, Mr. Ivey's testimony corroborated Stein's testimony in this proceeding.

A further reason to doubt the grievant took a two-hour lunch break is the fact that as of July 21, 2000, the grievant was expecting a substantial settlement offer from the District regarding his complaint that he had been illegally denied Saturday work by Dr. Scarpino. Moreover, the grievant and Mike McClellan made a joint commitment to make sure that neither of them did anything to give the District Administrator a reason to discipline them after they appeared before the School Board in May, 2000.

The Association points to testimony that the grievant was cautious about helping himself to potato chips in the cafeteria food line, commonly enjoyed by many others, because of his concern his behavior would be subject to scrutiny. If the grievant was cautious about helping himself to potato chips, he certainly would have avoided taking a two-hour lunch break in broad daylight on a busy public thoroughfare.

Unlike the grievant's case, the Employer's case rests solely on the recollection of Renee Dampier, and there is reason to believe that Renee Dampier's recollection is unreliable with respect to the crucial issue of when the grievant arrived in front of her house. The Association notes that Dampier did not observe the grievant arrive in front of her house. She merely made a deduction as to when he probably arrived by associating his arrival with the time she came

outside with the children. She did not pay attention to the grievant until her boyfriend, Jason Olson, came outside after 11:30 a.m. and mentioned that he saw the grievant parked in front of the house for two hours the day before. Olson's comment alarmed her, and, argues the Association, caused her recollection of the grievant's arrival time to be based upon an after-the-fact deduction, not a present sense observation.

In her initial call to the police at 11:53 a.m., Ms. Dampier emphasized that the grievant had been there the day before, but she did not inform the dispatcher that the grievant had been present since 10:00 a.m. In fact, no time frame was given.

Joling interviewed Dampier, Olson and Savage, and the Association quotes Joling's report that ". . .but then someone made the comment about the extended duration that Mr. Exner had been sitting there. . . ." The Association contends that it is not clear from Joling's report whether Olson, Dampier or Savage spoke up first with respect to the alleged extended duration.

The Association contends that by reporting that the grievant had been present since 10:00 a.m. Dampier's report was consistent with Jason Olson's statement that he had observed the grievant in front of the house for approximately two hours on Thursday, July 20. There is a common human tendency for people to want to conform their memories to what other spectators claim they observe. According to Joling's report, Ms. Savage confirmed that the grievant was across the street for longer than one-half hour. Yet, it is not possible for Ms. Savage to observe the grievant for longer than one-half hour even under Ms. Dampier's recollection of the event. This is so because Ms. Dampier recalled that Jason Olson came outside after 11:30 a.m. and she thereafter spoke with Savage who told Dampier that she had not previously noticed the grievant. Ms. Savage did not have an opportunity to confirm that she observed the grievant in front of her house for longer than one-half hour.

The Association contends that the facts of this case present a classic case of faulty perception. The Association quotes extensively from Professor Elizabeth Loftus' book *Eyewitness Testimony*.

Although the grievant had parked on Point Basse Avenue every day during the summer for the last four or five years, Dampier testified that she had never seen the grievant's car prior to July 21, 2000. This indicates that Ms. Dampier simply did not pay attention to her surroundings inasmuch as she had not previously noticed the grievant's car. Further, on July 21 Dampier did not observe the sport utility vehicle parked behind the grievant. Additionally, Ms. Dampier failed to observe the fisherman in the boat on the river, even though she had a clear view of the river for over two hours. Ms. Dampier did not wear a watch. Moreover, Dampier testified that she was uncertain about the time Jason Olson came outside on July 21. The Association contends that Ms. Dampier appeared to exaggerate the amount of time she spoke to Ms. Savage.

The grievant's conflicts with Superintendent Scarpino and the School Board over an Association issue made it unlikely that the grievant would receive the benefit of the doubt in assessing the reliability of his story. The confrontations between Dr. Scarpino and the grievant give a context to the incentive for Dr. Scarpino, officer Joling, and the School Board to consider all of the evidence in the most negative light against the grievant. Likewise, officer Joling appeared to be biased against the grievant. He testified that he believed the grievant was lying but he could only support this by "instinct". Finally, the Association contends that the grievant was a longtime employee with a better than satisfactory work record. There is nothing in the grievant's lengthy work experience which suggests that he would engage in the alleged misconduct.

District

It is the position of the District that this case presents a clear-cut issue of witness credibility. The District contends that its witnesses are more credible. The District contends that the credible evidence clearly establishes that the grievant was parked on Point Basse Avenue from at least 10:30 a.m. to 12:00 p.m., and such conduct is misconduct that warrants discharge. In support of this claim, the District points to the testimony of Dampier, who has absolutely no stake in the outcome of this dispute. Dampier is simply a concerned citizen who telephoned the police department out of concern over the blue Buick parked in front of her home. The District argues that arbitral principles establish that Dampier's testimony must be given more weight than the grievant's. The District cites arbitral authority for the general proposition that a discharged employee has an incentive for denying charges that will lead to his termination. There is no evidence in this proceeding that Dampier had any ill will toward the grievant, or was motivated by anything other than a desire to tell the truth.

The District notes that Dampier serves her children a snack routinely at or around 10:00 a.m. Her observation of the grievant's vehicle occurred when she took the children outside for that snack, thus tying the time of her observation to a part of her daily routine. The District points out that Dampier's testimony has remained the same through the numerous interviews and hearings she has been forced to endure. In contrast, the District contends the grievant's testimony is not credible under the circumstances. The District notes that the grievant's job is on the line. The District contends that the only evidence introduced to rebut Dampier's testimony is that of the grievant. The District points to the grievant's pattern of denials of allegations that have arisen from a variety of sources over the years of the grievant's employment with the District.

The District contends that the testimony of Stein and the grievant should be afforded little weight as their statements were inconsistent, and are in direct conflict with statements made by more credible witnesses. The District goes on to cite arbitral authority for the proposition that a discharged grievant's testimony should be discredited where the alternative

requires discrediting a number of other witnesses. As to Stein's testimony, the District contends that it is inconsistent with his previous statements, and that it also contradicts statements made by other credible witnesses.

The District contends that the grievant's testimony should not be credited because to accept his testimony requires discrediting many other witnesses, including two bargaining unit members, and Dampier. The grievant's testimony conflicts directly with that of Dampier. The grievant testified that during a meeting involving himself, Scarpino and Enerson, that Enerson had remarked that he saw the grievant's vehicle at 10:30 a.m. At the arbitration hearing, Enerson denied making such a remark. The District contends that Felch's recollection of a July 21 conversation with the grievant is at odds with the grievant's version of that conversation.

The District contends that it had just cause to discharge the grievant for parking on Point Basse Avenue from at least 10:30 a.m. to 12:00 p.m. on July 21. The District cites arbitral authority for the proposition that taking such an extended break constitutes just cause for termination. Prior to taking the disciplinary step, the District conducted a thorough investigation, and interviewed those who had information to contribute. The evidence gathered supported the District's conclusion that Exner had taken an extended break on Point Basse Avenue.

The District cites arbitral authority for the proposition that the grievant's conduct warrants immediate discharge, in contrast to progressive discipline.

Finally, the District contends that the arbitrator should defer to the District's determination as to the proper penalty to be imposed for the grievant's inappropriate conduct. The District cites arbitral authority for the proposition that the arbitrator ought not substitute his or her discretion for that vested with the employer to determine the proper penalty to be imposed for an employee's misconduct.

The parties each submitted reply briefs which have not been summarized in this award.

DISCUSSION

Mr. Exner was terminated because the Employer concluded that he took a two-hour lunch break on July 21, and thereafter submitted a time card claiming to have worked that period. The Association's defense of Mr. Exner is that he did not take such a break.

Renee Dampier is the key witness in this proceeding. I believe that Ms. Dampier telephoned the police department out of concern for the children under her care. I do not believe she was at all improperly motivated. Ms. Dampier initially testified that she saw

Exner's blue car when she came out of her house at 10:00 a.m. She further testified that she knew it was 10 o'clock in the morning because that was the routine time for her to give her children a snack. The security system records for Alexander Middle School indicate that Exner secured that building at 9:57 a.m. It would have been virtually impossible for Exner to have secured the middle school, driven to Point Basse Avenue, and parked his car in time for Ms. Dampier to have observed it at 10:00 a.m. This is particularly so if Exner returned a truck to the high school after he left the middle school. Ms. Dampier subsequently indicated it might have been 10:15 and ultimately 10:30 when confronted with Exner's denial that he had been parked in front of her house for a protracted period of time.

Ms. Dampier indicated that while she saw Exner's car, she did not see the sport utility vehicle that all parties indicated was parked behind him, nor did she see any fishermen on the river. A part of her alarm was that she could perceive no reason for Exner to be parked. In her words, "There was no one fishing for anyone to watch. So it was just kind of odd." Exner testified that the reason he changed his location was to watch two fishermen on the river.

Ms. Dampier testified that her boyfriend, Jason Olson, came out at 11:30 a.m. On cross-examination, when asked how she knew it was 11:30 a.m., Dampier first stated that "When he came out, I asked him what time it was – or I didn't ask him what time it was, I guess." Dampier then explained that Jason usually sleeps "until like noon, 11:30 or noon" and that she just "figured it was 11:30" when he came outside. Ms. Dampier was not wearing a watch on July 21.

Ms. Dampier testified that she talked with her neighbor, Ms. Savage, for about 20 minutes after her boyfriend came out. According to Ms. Dampier, this conversation would have commenced after 11:30 a.m.

Officer Joling's notes indicate that Ms. Savage confirmed that Exner was sitting across the street for a period longer than one-half hour. If Ms. Dampier's recollection as to the time and sequence of events is accurate, Savage was not outside and/or made aware of the existence of the blue car until sometime after 11:30 a.m. Ms. Savage was not called to testify.

Officer Joling's notes indicate that Jason Olson did not witness Exner on July 21st, but did observe Exner for a period of approximately two hours the day before. Nothing in the record suggests that Exner was parked for an extended period of time on Thursday, July 20. Circumstantial evidence suggests that it was highly improbable that that was the case. Robotcek worked on Thursday, July 20. It was his testimony that he checked up on Exner every day including Thursday, and that nothing was amiss. There were very few people working in the building during that week. The District does not claim in this proceeding that Exner was absent for a protracted period of time on July 20. Jason Olson was not called upon to testify.

Officer Joling interviewed Felch and Stein, shortly after Exner returned from his lunch break. It appears that he interviewed them together. Neither his report nor his testimony in the arbitration hearing distinguish answers supplied by Felch or Stein. His report does acknowledge "They stated they remembered Duane headed out, but don't recall the exact time as they were still cleaning the carpet in the commons area." At a minimum, Joling left the interview with Felch and Stein understanding that they had seen Exner sometime in the morning. In his testimony at the arbitration hearing, Joling indicated that he left his interview with Felch and Stein with the sense that they knew more than they were telling him.

Tom Ivey's August 10 interview with Stein elicited information consistent with the testimony Stein provided at the arbitration hearing.

On the morning of August 17, Attorney Dietrich telephoned Ivey in order to schedule a time to meet that afternoon. The purpose of that meeting was to go forward with the termination of Exner. During that telephone conversation, Ivey asked Dietrich if Stein and Felch had been interviewed and was told that they had not been interviewed yet. Exner had identified Felch and Stein as witnesses to the time of his departure on July 21st. Joling's report indicated that they had seen Exner leave sometime during the morning of July 21st. The District was hours away from a scheduled termination session without having conducted an interview with these two potentially key witnesses.

Dr. Scarpino interviewed Stein and Felch on August 17. It was his testimony that he scripted his questions, and filled in the answers he was given. Scarpino's notes of his interviews are set forth above. Stein, Enerson and Felch each testified that Scarpino asked questions and received answers beyond the scope of those scripted. When asked about this interview, Stein could not recall specific questions addressed to the time Exner left the building. His recall was that he was asked questions relative to a police report that he had never seen.

Scarpino testified that based upon his experience working with Mr. Stein, he is aware of a need to explain things very slowly and very simply to Stein. Based upon Enerson's testimony and Stein's testimony, it appears to me that questions beyond those scripted by Scarpino were asked and answered. It further appears that Stein was nervous about the interview, and required a very careful questioning to be effective. I am concerned that Scarpino had already made a decision to terminate Exner, had scheduled a meeting to do so, and had satisfied himself as to the events of the day. From Enerson's testimony it appears that Stein may have produced a time that he believed he saw Exner leave. It is not clear to me that Scarpino pursued that.

Most significant is the testimony of Steve Stein. Stein was articulate and responsive to the questions he was presented. Stein recalled the time of day on July 21, 2000 he spoke to Officer Joling, the day of the week July 21, 2000 fell upon, the approximate time he arrived at the high school, the tasks that he performed during the morning of July 21, 2000 and what he ate for lunch. Mr. Stein was subjected to rigorous cross-examination. He testified to seeing Exner leaving for lunch just a minute or two before he left for lunch. Stein specifically recalled seeing Exner shortly before 11:30 a.m. Stein explained that after Exner walked past him in the commons area, he looked at the clock on the wall to “see if it was lunchtime or not.” Stein recalled Exner’s vehicle pulling out of his parking spot when Stein was entering his vehicle. Stein’s explanation of his actions in response to his observations on July 21, 2000 is believable.

The District points to inconsistency in Stein’s testimony. Mr. Stein’s testimony at hearing is consistent with the August 10 conversation he had with Ivey, as narrated by Ivey. It is not clear whether Mr. Stein’s testimony is inconsistent with his interview with Officer Joling and his subsequent meeting with Superintendent Scarpino. It is not at all clear from Joling’s notes what Mr. Stein said. Joling’s notes do not distinguish between Stein and Felch. It is clear from Joling’s notes that they saw Exner head out, but couldn’t recall the “exact time”. Similarly, it is not clear whether Stein’s August 17 interview with Scarpino resulted in Stein identifying a specific time that he believed he saw Exner leave. Enerson’s testimony at least suggests the possibility that that occurred.

Of greater consequence is the timeline that Stein’s testimony, supported by Felch’s testimony, is able to create. Stein testified that he did not arrive at the high school until 10:30 a.m., possibly as late as 10:45 a.m., on July 21, 2000. This testimony is unrebutted. Felch testified that he observed Exner after he and Stein had moved furniture in the commons. These facts, standing alone, are irreconcilable with the allegation that Exner was on an unauthorized authorized break at 10:30 a.m. It is not possible for Stein to have observed Exner at the high school sometime after 10:30 a.m. if Exner was at the river across from the Dampier residence.

I am not prepared to find, based upon Ms. Dampier’s testimony, that Exner spent one and one-half to two hours parked at Point Basse Road. In so concluding, I attribute no ill motive to Ms. Dampier. I simply do not believe that she was sensitive to, and aware of the time when the events of July 21 were transpiring. The times she testified to are being treated as precise, though she was not wearing a watch. She was initially certain she saw Exner at 10:00 a.m., but subsequently, confronted with his denial, indicated it might have been later. It was not until her boyfriend came out and expressed concern over the presence of Exner’s car for the second day that she became alarmed. There would be no reason for her to be sensitive as to time prior to that.

Her testimony cannot be reconciled with that of Exner. As the District argues, Exner has a motive to misrepresent the amount of time he spent on break. However, Mr. Stein does not have such a motive. Ms. Dampier's testimony cannot be reconciled with Mr. Stein's testimony as to when he saw Exner leave, to Mr. Stein's conversation with Mr. Ivey, nor with Mr. Stein's recollection as to when he arrived at the high school to begin work. To credit Ms. Dampier's testimony is to discredit Mr. Stein's with respect to several details. It would require me to conclude that Mr. Stein had fabricated an elaborate story. As noted above, I found Mr. Stein to be a forthright and credible witness.

Ms. Dampier's testimony is inconsistent with observations attributed to Ms. Savage. None of these various inconsistencies relate to the essence of what she saw. All relate to the detail or precise timing of events.

I do not believe the District conducted a meaningful investigation into this matter. From the very beginning, Exner indicated that Felch and Stein could corroborate his whereabouts. Joling interviewed Felch and Stein immediately, on July 21. Joling's interview was certainly sufficient for the police work he was engaged in. It was wholly inadequate to establish precise time for purposes of invoking discipline. Joling left knowing that Felch and Stein had seen Exner leave. He did not leave with an exact time. The District had Joling's report within days of the event. The District allowed virtually a month to pass before interviewing Felch and Stein, and scheduled a termination meeting for Exner without conducting an interview with the witnesses he claimed could corroborate his story. The timing of Scarpino's interview with Felch and Stein raises a concern as to the purpose of the interview.

AWARD

The grievance is sustained.

REMEDY

The District is ordered to reinstate Mr. Exner with backpay and benefits, and to otherwise make him whole for any losses he has suffered as a result of his termination. His personnel file is to be expunged of all reference to this matter.

JURISDICTION

I will retain jurisdiction over this matter to resolve any disputes arising as to remedy, until such time as the parties release me.

Dated at Madison, Wisconsin this 15th day of October, 2001.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

