BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHEAST WISCONSIN TECHNICAL COLLEGE DISTRICT

and

NORTHEAST WISCONSIN TECHNICAL COLLEGE FACULTY ASSOCIATION

Case 103
No. 59885
MA-11446

(Grievance dated 1-26-01 concerning the termination of R___ E___)

Appearances:

Mr. David B. Kundin, Executive Director, Bayland UniServ, 1136 North Military Avenue, Green Bay, WI 54303, appearing on behalf of the Association.

Mr. Robert W. Burns, Davis & Kuelthau, S.C., 200 South Washington Street, Green Bay, WI 54301, appearing on behalf of the Employer.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz as arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' August 16, 1999 - August 14, 2002 Master Agreement (Agreement).

The grievance was heard by the Arbitrator at Northeast Wisconsin Technical College in Green Bay on September 13, 2001. The proceedings were transcribed. Exchanges of post-hearing briefs and reply briefs were completed on November 30, 2001, marking the close of the hearing.

ISSUES

The parties did not agree on a statement of the issues for arbitral determination, but they did agree to authorize the Arbitrator to frame the statement of the issues based on the evidence and arguments presented.

The Employer proposed that the issues be "[d]id the [Employer] violate the Agreement when it terminated the employment of probationary employee R___ E___ on January 4, 2001? If so, what shall the remedy be?"

The Association proposed that the issues be "[w]as there just cause for the [Employer]'s termination of on January 4, 2001? If not, what shall the remedy be?"

The Arbitrator adopts the Employer's proposed statement of the issues because it is a neutral issue statement that permits consideration of the full range of arguments presented by both parties.

PORTIONS OF THE AGREEMENT

ARTICLE II

MANAGEMENT RIGHTS RESERVED

The Employer, unless otherwise herein provided, hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right:

1. To the executive management and administrative control of the District and its properties and facilities, and the activities of its employees as they relate to their employment.

2. To hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions for their continued employment, to relieve from duty because of lack of work, to discipline, demote, suspend, non-renew, or dismiss for proper cause, and transfer all employees.

. . .

The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the Employer, the adoption of policies, rules regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes, Section 111.70, and then only to the extent that such specific and express terms hereof are in conformance with the Constitution and laws of Wisconsin, and the Constitution and laws of the United States.

. . .

ARTICLE IV

CONDITIONS APPLICABLE TO TEACHING DUTIES

. . .

SECTION P. FAIR DISMISSAL POLICY

1. A teacher hired by the Board shall serve a three-year probationary period. During this period, the teacher must be given guidance, assistance, and recommendations for improvement by the supervisory staff.

2. A teacher shall not be dismissed, non-renewed, suspended or discharged except for just cause; but this shall not abridge the normal management rights as regards probationary employees. Such action against any teacher shall follow these specific procedures:

a. Notification in writing to the teacher of dismissal, including reason for such action.

b. Notification in writing to the Association President of dismissal of a teacher, including reason for such action at the time the teacher receives such notification.

c. The teacher shall have the option of hearing with full benefit or representation and counsel before the Board within thirty-five days after receipt of notification or in the alternative, may initiate a grievance in accordance with the prescribed grievance procedure. If dismissal was found to be unjustified, then full pay and benefits will accrue to teacher during this period.

d. If the teacher and/or the Association are not satisfied with the Board action that fair and equitable procedures have been followed or that the decision as to the teacher's dismissal was not entirely impartial judgment, the employee and/or the Association shall have the right to appeal said decision to arbitration in accordance with the prescribed grievance procedure as outlined in this agreement beginning immediately at Step Three.

. . .

ARTICLE VII

GRIEVANCE PROCEDURES

. . .

SECTION A. DEFINITIONS

1. A grievance is a complaint by an employee in the bargaining unit, or the Association, where a policy or practice is considered improper, or unfair; where there has been a deviation from, or the misinterpretation or misapplication of a practice or policy; or where there has been a violation, misinterpretation or misapplication of any provision of any agreement existing between the parties hereto.

. . .

SECTION C. PROCEDURE FOR ADJUSTMENT OF GRIEVANCE

. . .

STEP 3

. . .

c. Nothing in the foregoing shall be construed to empower the arbitrator to make any decision amending, changing, subtracting from, or adding to the provisions of this agreement.

PORTIONS OF WISCONSIN STATUTES (1999-2000)

[Wisconsin Fair Employment Act]

. . .

111.321 Prohibited bases of discrimination. Subject to ss. 111.33 to 111.36, no employer . . . may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of . . . conviction record . . . .

111.322 Discriminatory actions prohibited. Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:

(1) To . . . terminate from employment . . . any individual . . . because of any basis enumerated in s. 111.321.

. . .

111.335 Arrest or conviction record; exceptions and special cases. (1) . . . (c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to . . . terminate from employment . . . any individual who:

1. Has been convicted of any felony, misdemeanor or any other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity; . . . .

. . .

BACKGROUND

The Employer is a public educational institution providing vocational, technical and adult education and training to individuals and businesses in northeast Wisconsin. The Association represents a bargaining unit of the Employer's certified personnel teaching at least 50% of a full teaching schedule. The Employer and Association have been parties to a series of Master Agreements dating back at least to the 1968-69 school year.

Prior to his termination by the Employer on January 4, 2001, R___ E___ (the Grievant), had been employed since August of 1999 as a full-time faculty instructor in the Employer's Network Specialist program. Throughout his employment by the Employer, the Grievant was an effective instructor who generally enjoyed the respect and admiration of both his students and his faculty colleagues.

Prior to his employment with the Employer, the Grievant was employed from February of 1997 until August of 1999 as a one-person Information Technology department for a private sector employer, M___, Inc. in Denmark, Wisconsin. While working for M___, Inc., the Grievant continued a long-standing outside personal business helping individuals and small businesses select, order, set up and use computers and computer-related equipment.

On January 14, 2000, the Grievant was questioned by a Brown County Sheriff's Department investigator, Sgt. Phillips, regarding computers and computer-related equipment purchased on M___, Inc.'s account and at M___, Inc.'s expense from M___, Inc.'s vendor, but which were either kept by the Grievant for his personal use or sold to other persons with the Grievant keeping the proceeds and not reimbursing M___, Inc. During that interview, the Grievant initially asserted that he had personally paid for the items involved, but upon further questioning admitted that he had not.

Before consulting an attorney, the Grievant met with his immediate supervisor, Associate Dean Lori Fisher. The Grievant informed Fisher that he was under criminal investigation for conduct which he generally described as involving the "resource issues" at his former employer. In response to Fisher's questions, the Grievant assured her that the

investigation did not involve conduct that would present an immediate threat to students' well-being (e.g, sex-related or violent crimes.) On the same day he spoke with Fisher, the Grievant advised co-workers that he was under criminal investigation and that whatever they might hear that he was being investigated for they could presume that he had done it.

After conferring with legal counsel, the Grievant cooperated fully with the criminal investigation. As a part of his cooperation with the investigation, the Grievant submitted to a search of his apartment in early February of 2000. During that search, the investigators found and retrieved numerous pieces of computer equipment belonging to M___, Inc.

On March 17, 2000, Fisher sent the Grievant a memorandum advising him, among other things, that

> . . . Issuance of your contract for next year is being held pending resolution of your situation. . . . Your teaching responsibilities for the Spring 2000 semester will continue unless charges are filed. In the event that charges are filed, the college will need to reexamine your status with its attorney and it could result in suspension or termination. . . . In the event that you become aware of a change in the investigation status, you will as previously agreed notify me immediately . . . so that I can make contact with HR and the college president if necessary.

On August 15, 2000, the criminal complaint resulting from the investigation was issued. It charged the Grievant with Class C felony theft of computer equipment owned by M___, Inc. without consent and with intent to deprive the owner permanently of possession of the property. It identified the loss to M___, Inc. as a result of the Grievant's thefts at somewhere between $30,000 and $45,000. The Grievant admitted at the arbitration hearing that the complaint was factually accurate and that he made approximately 20-25 improper orders for computer items at from M___, Inc.'s vendor at various times during a one and one-half year period. (Tr. 193).

The Grievant ultimately pleaded no contest to the charges and was convicted on December 18, 2000, of one count of felony theft. Sentencing was deferred until a pre-sentence investigation report was prepared and submitted to the Judge.

After learning from the Grievant and independent sources that the Grievant had been convicted, Employer management variously conferred and ultimately decided to terminate the Grievant's employment effective on January 4, 2001. The Grievant was so notified verbally and by letter dated January 4, 2001, which letter, from Human Resource Director Sandy Ryczkowski, read as follows:

This letter is to confirm our conversation of Thursday, January 4, 2001.

> As discussed, the college is terminating your probationary employment effective immediately due to the recent felony conviction, which we have concluded bears a substantial relationship to the type of activity involved with your employment with the College.
>
> Should you have any questions, please contact me.

The grievance giving rise to this arbitration was initially filed on January 26, 2001, and it was denied and appealed at various pre-arbitral steps without a settlement being reached.

Read together, the grievance and appeals basically assert that the termination constituted discipline without just cause in violation of Agreement Art. IV.P.2. and unlawful discrimination based on criminal conviction in violation of the Wisconsin Fair Employment Act, Secs. 111.31-37, Stats., because the conduct for which he was convicted had nothing to do with his responsibilities or duties as a faculty member of the Employer; and that the Grievant was accordingly entitled to reinstatement with full back pay and benefits.

The denials basically assert that the termination was within the Employer's Art. IV.P.2. "normal management rights as regards probationary employees;" that probationary terminations are not subject to the just cause standard; that the Employer terminated the Grievant's probationary employment due to a felony conviction; and that the conviction bears a substantial relationship to the type of activity involved with the Grievant's employment with the Employer.

On March 1, 2001, the Judge imposed a sentence substantially more severe than that which the District Attorney's office had agreed to recommend. It involved five years in state prison and 90 days in the county jail, both of which were suspended, subject to being reinvoked if Grievant committed any violation of a three-year probation imposed by the Judge. The Grievant's sentence also required him to perform the unperformed portion of 200 hours of community service and noted that he had already paid full restitution to M___, Inc. The Grievant was also ordered to continue in personal counseling and to obtain budget and financial counseling.

The grievance was ultimately submitted for arbitration as noted above. At the arbitration hearing, the Employer presented testimony by Ryczkowski, by Business and Marketing Division Dean Jan Campbell, and by Vice President for Administration Jay Foley. The Association presented testimony by Fisher, by two of the Grievant's former students, by the Grievant's faculty colleague Instructor Larry Huber, and by the Grievant.

Additional background is provided in the summaries of the parties' positions and discussion below.

POSITIONS OF THE PARTIES

The Employer

When discharged, the Grievant was a probationary employee. Accordingly, the specific language of Art. IV.P. establishes the applicable decisional standard for his discharge, rather than the more general proper cause requirement contained in Art. II. Two prior grievance awards involving the same parties and the same contract language support the Employer's contention that the standard applicable to probationary employees is the arbitrary or capricious standard rather than just cause. While those cases involved non-renewals rather than discharges, the language of Art. IV.P. and the Agreement as a whole draw no distinction between the decisional standards applicable to those two types of Employer actions. It is also significant that no grievance was filed in the only previous instance in which the Employer discharged a probationary period.

The Arbitrator is not authorized by the Agreement or the parties to interpret or apply Secs. 111.321-322, Stats. That is the role of the Equal Rights Division of the Wisconsin Department of Workforce Development. The Arbitrator's jurisdiction is limited to interpretation and application of the Agreement. However, even if the Arbitrator finds it appropriate to apply the external law standards applicable under that statute, the evidence clearly establishes that the discharge was lawful under the statutory standards, citing various decisions of the Wisconsin Labor and Industry Review Commission (LIRC) and courts reviewing LIRC decisions.

Regardless of the applicable standard, the termination did not violate the Agreement or the law for the following reasons.

The Grievant's conviction creates an unreasonable risk that the Grievant will steal again, this time from the Employer. The Grievant was convicted for felony theft of computer equipment from a former employer. The property stolen by the Grievant from his former employer is the same type of property that is central to the work he performs as a networking specialist instructor. Indeed, while employed by the Employer, the Grievant retained at his apartment computer property that he had stolen from his former employer. The Grievant's position as an instructor necessarily provides him with keys and access to numerous computer labs and storage areas in which the Employer's computer hardware and software are located. Those labs and storage areas, by their number and nature, have multiple points of access and they need to be left open for students and instructors to come and go at will. By necessity, instructors' access to those areas is largely unsupervised. The Grievant's opportunity for theft at the Employer is therefore far greater than it was at M___, Inc., even though the Employer has revoked Grievant's authority to purchase items on the Employer's account.

The Grievant was convicted for a pattern of crime over a substantial period of time rather than a single impulsive incident. The thefts were carefully considered and deliberate, not youthful indiscretions or crimes of passion. The Grievant admitted at the arbitration

hearing that he has no idea why he stole from his former employer, so it appears he was stealing simply for the sake of personal profit rather than to meet a temporary financial need. Thus, the Grievant has a fundamental character flaw that makes him a significant threat to steal again.

The Grievant's behavior since being caught provides no basis for concluding that he can be trusted not to steal again. Notably, the Grievant did not turn himself in to the authorities, and he did not inform the Employer about his wrongdoing until he was confronted by the Sheriff's investigator. He initially lied to the Sheriff's investigator in an attempt to avoid responsibility for his wrongdoing. Despite his agreement to keep the Employer informed of significant developments, the Grievant told the Employer only enough information about his crimes to temporarily preserve his employment. He did not inform the Employer in February, 2000, that he had confessed during his first interview with the investigator to multiple thefts of computer equipment from his former employer totaling thousands of dollars in value. As a result, the Employer only became aware that the Grievant had confessed late in the year 2000.

Thus, the record demonstrates that the Grievant has the character trait of dishonesty which is substantially related to the circumstances of his position with the Employer. The Employer has a justifiable expectation and concern that its faculty need to be above reproach in matters relating to honesty and integrity and act as role models to students and effective and trusted representatives to businesses and others in the community. The fact that the Grievant was a technically competent instructor does not alter the substantial relationship between the Grievant's conviction and his position with the Employer or the existence of non-arbitrary and non-capricious bases for the Employer's termination of his employment.

For all of those reasons, the grievance should be denied in all respects.

The Association

The applicable standard in this case is just cause. Articles II.2. and IV.P.2. make "proper cause" and "just cause" standards generally applicable to all employees, and the Agreement nowhere provides for a different standard for probationary employees. Therefore, the "normal management rights as regards probationary employees" referred to in Art. IV.P. can only refer to the "proper cause" standard set forth in Art. II.2. as regards all employees without any exception for probationary employees. To suggest otherwise requires the Arbitrator to go beyond the four corners of the Agreement which would be contrary to the limitations on the role of an arbitrator provided in Art. VII.C. Step 3.c.

The two grievance awards relied on by the Employer involved non-renewals rather than discharges of probationary employees, and the position taken by the Employer in the earlier of the two cases was that a less restrictive standard than just cause applies to probationary employee non-renewals but not to probationary employee discharges. The only discharge of a

non-probationary employee of record in this relationship was for failure to obtain a master's degree within the period of time required at the time the employee was hired. The fact that no grievance was filed does not establish what standard would have been applicable to that case had it been grieved.

Just cause requires that there be a sufficient nexus between off-duty conduct and the Grievant's job. The Employer has failed to establish the existence of such a nexus. The crimes for which the Grievant was convicted occurred before he was employed by the Employer. The Grievant never stole anything while he was employed by the Employer and he never stole anything from the Employer. Ryczkowski admitted that she was aware early in 2000 that the Grievant had stolen from his former employer. Yet, despite that knowledge, the Employer waited many months before it terminated the Grievant. Clearly, then, the Employer was never really worried about the Grievant stealing from the Employer or it would not have allowed him to teach for almost a year after the administration knew about his thefts from M___, Inc. It was only after he was criminally convicted that the Employer terminated the Grievant's employment. The Employer has not shown that the Grievant's conviction has placed the Employer in an unfavorable light with the public or that it has the potential for a negative impact on the Employer's business. There is no evidence of any significance that the Grievant's conviction has caused the Employer to be viewed in an unfavorable light. Administrators' testimony about the potential for a negative impact was mere speculation which was countered by testimony from the Grievant's former students and a former faculty colleague supportive of the Grievant's continuing effectiveness and value to the Employer notwithstanding his criminal conviction.

Even if the arbitrary or capricious standard urged by the Employer were applied, the termination violated the Agreement. That is because the offense for which the Grievant was convicted was not substantially related to his employment by the Employer. The discharge, therefore, constituted unlawful employment discrimination in violation of Secs. 111.321-322, Stats. That violation of state law violates the second last paragraph of Art. II as well as the arbitrary and capricious standard indirectly established by Art. IV.P.

The applicable decisional standards under that statute call for a determination of whether the tendencies and inclinations that the Grievant exhibited in committing the crimes for which he was convicted are likely to reappear in the context of his employment by the Employer. The factors to be considered include opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. The statute is to be liberally construed to effectuate the legislative purpose of providing employment to those convicted of crimes, without requiring employers to assume the risk of employing individuals whose conviction records demonstrate a propensity to commit similar crimes. COUNTY OF MILWAUKEE V. LIRC, 139 WIS. 2D 805, 824 (1987) AND MILWAUKEE BOARD OF SCHOOL DIRECTORS V. LIRC, 2000 WI APP 166 (CT. APP., 6-12-01).

The Grievant's conviction was for purchasing equipment on M___, Inc.'s account and then selling it for personal profit. At M___ , Inc., the Grievant had total control over all aspects of the computer systems including purchasing power, and he had the total faith of company management in his trustworthiness. In contrast, as an instructor for the Employer he is not involved in purchasing in any way, and the Employer knows all of the details of what happened at M___, Inc.

The Grievant has accepted responsibility for his criminal conduct at M___, Inc. He confessed his criminal conduct during his first interview with Sgt. Phillips. He immediately informed Fisher that he was the subject of a criminal investigation. In his conversations with Fisher and his faculty colleagues, he never denied his guilt or sought to avoid responsibility for his criminal acts. The record shows that he has not sought to minimize or justify his criminal conduct and that he has engaged in significant soul-searching since his arrest. The Grievant's criminal conduct was not a pattern or lifestyle that the Grievant engaged in. He has experienced the harsh reality of the criminal justice system as a first time offender, and the record gives no indication that he will be a career criminal.

Regarding the Grievant's character, the Grievant has expressed remorse, undergone counseling, apologized to affected victims, accepted responsibility for his wrongdoing and paid a significant price for the major mistake he made in stealing from M___, Inc. He took steps to make sure the Employer did not have reason to suspect him of similar conduct, including asking Fisher to make sure he did not have any computer purchasing authority for the Employer. He paid most of his restitution before he entered his guilty plea, and he began his community service before being sentenced, as well. He was sternly lectured by the Judge during his March 1, 2001 sentencing and threatened with lengthy incarceration if he violated his probation in any way. Being on probation and subject to that threat, the Grievant is in no way a serious risk to the security of the property of the Employer or its staff and students. At no time did the Grievant ever lie to, cheat or steal from the Employer. He was a highly regarded instructor who had the respect and confidence of his colleagues, and his supervisors never had any complaints about either his teaching or his classroom conduct. The Association's witnesses included a sampling of students and faculty who support his return to the classroom despite their knowledge of his criminal record. No witness testified with any specificity that the Grievant would not have suffered any loss of effectiveness in the classroom if he had been permitted to teach subsequent to his conviction in December of 2000. The Employer's witnesses spoke only in vague generalities about the intangible aspects that it was concerned about if the Grievant were allowed to continue to teach. Those vague generalities are insufficient to meet the requirements of Sec. 111.335.

As long as the risk to the Employer of the Grievant committing a similar crime is not "unreasonable," the statute requires that the societal value of rehabilitation should prevail over the societal fear of recidivism. The conclusion that the Grievant's conviction is not substantially related to his job is supported by the LIRC and Court of Appeals decisions involved in MILWAUKEE BOARD OF SCHOOL DIRECTORS V. LIRC, above, in which it was held

that a conviction for injury by conduct regardless of life that seriously burned a 20-month old child was not substantially related to a public school boiler attendant trainee job for which complainant was rejected because of his conviction.

For all of those reasons, the Arbitrator should sustain the grievance and order the Grievant reinstated with full back pay and benefits.

DISCUSSION

The resolution of the first of the ISSUES framed above requires a determination of the appropriate arbitral standard for review of probationary employee discharges.

As its title indicates, Art. IV.P. specifically addresses the subject of "Fair Dismissal Policy." It defines the length and general nature of probationary period in paragraph 1. In the first sentence of paragraph 2, it provides that "[a] teacher shall not be dismissed, non-renewed, suspended or discharged except for just cause," but it goes on to state, "but this shall not abridge the normal management rights as regards probationary employees."

The latter clause must mean that the parties mutually understand that "the normal management rights" reserved to the Employer "as regards probationary employees" are not subject to the just cause standard as regards some or all of the Employer actions listed in that sentence. Otherwise, the clause would be rendered meaningless. Furthermore, because "just cause" and the term "proper cause" as it appears in Art. II.2. are conventionally understood as equivalent standards, the "normal management rights as regards probationary employees" clause in IV.P.2. would also be rendered meaningless if it were interpreted to make the "proper cause" standard in Art. II.2 applicable to all of the Employer actions listed in the first sentence of IV.P.2.

The two prior awards cited by the parties were unpublished awards issued by Arbitrators Peter Davis and Stephen Schoenfeld on September 1, 1976, and November 3, 1980, respectively, under the same contract language as is contained in the Agreement. In each of those cases, the arbitrator held that the just cause standard does not apply in cases of non-renewals of probationary employees. In the 1976 award, the arbitrator concluded that "the 'normal management right' applicable to probationary employes is the Employer's ability to determine, for reasons which may not constitute cause for the non-renewal of a non-probationary teacher, that it simply does not want to risk maintaining the employment relationship with an individual probationary employe." In the 1980 award, the arbitrator concluded that "he may not reverse the decision of the District Board to non-renew [a probationary employee] unless he finds that there is absolutely no legitimate basis in fact upon which the District could have based its decision."

However, those awards are not dispositive as to the instant case because the Grievant was dismissed during a school year rather than non-renewed in advance of the following school year. Regarding that distinction, in the 1976 award, the arbitrator summarized the Employer's position as follows:

> The Employer contends that "decisions of the U.S. Supreme Court" indicate that it need not have cause for non-renewal, as opposed to discharge, of probationary employes. It asserts that it has not contractually assumed that responsibility in light of the "management rights" disclaimer contained in [what is now Art. IV.P.2.]. It thus urges that the grievance be dismissed.

In his discussion, the arbitrator went on to state the following:

> . . . the Arbitrator must conclude that the Employer need not have cause to non-renew a probationary teacher.
>
> The Union has urged that such a conclusion is inconsistent with the employer's admission that it must have cause to discharge a probationary employe. It contends that if the content of the "normal management rights" clause is not applicable to discharge, then it should not apply to non-renewal. However it must be noted that discharge, as opposed to nonrenewal, severs an existing individual contractual relationship between the Employer and the employe and that this break is not accompanied by a protective statutory mantel of notice and due process. Section 111.22, Wis. Stats. Thus a collective bargaining agreement could reasonably distinguish between these two actions and provide greater protection to probationary employes subject to the harsher impact of discharge.
>
> (Emphasis in original.)

The portions of the 1976 award quoted above are also not dispositive as to the issue in this case concerning the applicability of the just cause standard to probationary employees under the Agreement for several reasons. First, because, unlike the instant case, the issue before the arbitrator in 1976 was a non-renewal rather than a discharge. Second, because the arbitrator observed that "a collective bargaining agreement could" distinguish between discharge and non-renewal, but he did not decide that the parties agreement before him in fact did make that distinction. Third, because the award does not identify the "decisions of the U.S. Supreme Court" referred to in the summary of the Employer position. Fourth, because the arbitrator's mode of reference to those decisions suggests that he was not provided with citations to the decisions to which the Employer's arguments referred. Fifth, because the arbitrator does not appear to have determined whether there are "decisions of the U.S. Supreme Court" that indicate that the Employer must have cause to discharge a probationary

employee. And finally, because there is no showing in the instant record that the Association has relied to its detriment on the position attributed to the Employer in the 1976 award regarding the existence of decisions of the U.S. Supreme Court that indicate that the employer must have cause to discharge a probationary employee.

The Association has not identified any U.S. Supreme Court decision or any other legal or arbitral authority that indicates that an employer normally must have cause to discharge a probationary employee. On the contrary, the conventional meaning of a probationary period is that the employee is subject to discharge without the protections of a cause or just cause standard. In that regard, the comments of the arbitrators in the 1976 and 1980 awards concerning the concept of "probation" are, in the Arbitrator's opinion, persuasive as regards discharges of probationary employees, as well as non-renewal of such employees. In the 1976 award, the arbitrator observed,

> The concept of "probation" in the context of an employer-employe relationship denotes the testing and evaluation of the employe by the Employer. The parties in the instant matter have embraced this common usage of the concept as evidenced by the contractual directive that probationary teachers be given "guidance, assistance, and recommendations for improvements" during the probationary period. A second part of the general concept of probation which flows from the emphasis on evaluation is the premise that an employe's status is less secure during the probationary period or in essence until the period of evaluation ends. Given these two interrelated concepts, the "normal management right" applicable to probationary employes is the Employer's ability to determine, for reasons which may not constitute "cause" for the non-renewal of a non-probationary teacher, that it simply does not want to risk maintaining the employment relationship with an individual probationary employe. The undersigned can find no contractual basis for concluding that the parties have not adopted this common manifestation of probationary status, especially in light of the phrase "normal management rights as regards probationary employees." Indeed the commonly applied concept of probation would be gutted if an employe, though subject to evaluation, immediately attained the same protected status of his colleagues who have successfully completed the probationary period.

In the 1980 award, the arbitrator observed,

> "Probation" and "probationary" have established meanings. "Probation" is defined as an "art of testing or probing; experimentation; any proceeding designed to ascertain truth, determine character, qualification, etc; . . . trial or a period of trial." Webster's International Dictionary, 2nd Ed., P. 1971. In the field of employment relations the same meaning is normally given to the term. See, for example, Joy Mfg. Co., 6 LA 430. Probationary employes are on trial

> and occupy a different status from employes who have completed probation. Probationary employes undergo a period of testing in order that the Employer may determine whether or not they are suitable and fit for the position which they occupy as a probationary employe. Probation is more than just a word. It connotes a "tryout" phase.
>
> > In fact, for a probationary employe to be dropped is hardly a discharge in the ordinary sense and ought not to be a stigma of that character of the probationer. He simply did not "take" as an employe . . .
>
> Pullman-Standard, 40 LA 757, 762.

For those reasons, the Arbitrator concludes that the just cause and proper cause standards for discharge (i.e., dismissal) set forth in Arts. IV.P.2. and II.2. are not applicable to the Grievant in this case because he was terminated during his three-year probationary period. (The fact that no grievance was filed on the one occasion when the Employer previously discharged a probationary employee has been given no weight in reaching that conclusion. There are many possible reasons why no grievance was filed in that case besides speculation that the Association recognized that just cause would not be applicable in the case.)

Both parties take the position that, if the just cause standard does not apply to probationary employee discharges under the Agreement, then a less restrictive arbitrary and capricious standard is applicable. Consistent with the parties' agreement in that regard and the conclusion above that just cause does not apply to discharges of probationary employees, it is the arbitrary and capricious standard that will be applied in this case.

However, a remaining question concerning the applicable decisional standards in this case relates to the relevance of the Association's claim that the discharge violates external law, specifically Secs. 111.321-322 of the Wisconsin Statutes.

Article VII.C. Step 3.c., expressly prohibits the Arbitrator from "amending, changing, subtracting from, or adding to the provisions of this agreement." Accordingly, an interpretation and application of external law would not be an appropriate function of the Arbitrator unless it is necessary to resolve the meaning and application of a provision of the Agreement.

In its arguments at hearing and in its post-hearing arguments, the Association identified only Art. IV.P. and the second last paragraph of Art. II as Agreement provisions that require employer actions to conform with federal and state law. (Tr. 23-24 and Association reply brief at 9). Article IV.P. makes no express reference to external law that would support such a conclusion. The Arbitrator also finds no merit in the Association's contention that the second last paragraph of Art. II incorporates federal and state laws as general limitations on the rights

otherwise reserved to the Employer by Art. II. That paragraph makes external law a limitation on the extent to which specific and express terms of the Agreement limit the Employer's rights. It does not make external law a limitation on the Employer's rights themselves.

The same conclusion cannot so easily be reached regarding another provision of Art. II, however. Article II.2., enumerates Employer rights including the right to "dismiss . . . employees." It is at least arguable that the phrase "subject to the provisions of law" earlier in the same sentence is a limitation on the Employer's right to dismiss employees. However, neither of the parties has presented evidence or arguments concerning whether that phrase provides a proper basis under the Agreement for an arbitrator to decide whether a dismissal by the Employer violates external law. It is therefore preferable for the Arbitrator not to definitively resolve that question in this case unless it is necessary to do so in order to resolve the issues presented in this case.

It not necessary for the Arbitrator to decide that question because, for reasons the noted below, the Arbitrator concludes that even if Art. II.2. empowers the Arbitrator to interpret and apply the external law relied upon by the Association in this case, the record does not support the Association's claim that the Employer's termination of the Grievant violated external law.

More specifically, the Arbitrator concludes that the Grievant's criminal conviction was "substantially related" to his employment with the Employer within the meaning of Sec. 111.335(1)(c), Stats.

Under the applicable criteria outlined in the cases cited by the Association, the Grievant's continued employment as a network specialist program instructor with the Employer presents an unreasonable risk that he will steal computer equipment or related equipment from the Employer. As a network specialist program instructor, the Grievant has keys to and essentially unsupervised access to a wide variety of valuable computer and computer-related equipment of the Employer. The Grievant's conviction involved the theft of just such equipment from his former employer. He engaged in that conduct for personal gain on 20-25 occasions over a period of a year and one-half, and he thereby manifested a propensity to steal computers and computer-related equipment from his employer for personal use or personal gain. For those reasons, the Grievant's situation parallels others cited by the Employer in which LIRC has found criminal convictions substantially related to employees' jobs so as render lawful the refusal to hire or the discharge of the employees on account of their criminal convictions. See, SANTOS V. WHITEHEAD SPECIALTIES, INC., ERD CASE NO. 8802471 (LIRC, 2-26-92) (felony burglary conviction held substantially related to truck driving job in which employee would be solely responsible for transporting valuable merchandise and machinery to distant locations); and MULLIKIN V. WAL-MART STORES, ERD CASE NO. 8901365 (LIRC, 8-27-92) (welfare fraud conviction held substantially related to the circumstances of employee's job duties which gave him access to cash registers and included maintaining inventory, stocking shelves, watching for shoplifters, and recording price markdowns on merchandise, in a setting in which constant supervisory observation of personnel was impossible).

The Association's assertion that MILWAUKEE BOARD OF SCHOOL DIRECTORS V. LIRC, above, supports a different conclusion is unpersuasive. In that case, the Court of Appeals upheld LIRC's conclusion that a conviction for injury by conduct regardless of life was not substantially related to his application for employment as a public school boiler attendant. The conviction arose from circumstances in which the complainant threw a pan of hot grease at his girlfriend during an argument, resulting in severe burn injuries to the girlfriend's 20-month old daughter. LIRC and the Court of Appeals reasoned that the job the complainant was applying for would only bring him into sporadic contact with children and that this was not a sufficient circumstance to foster criminal conduct on the complainant's part. In contrast to the sporadic contact with children anticipated in the boiler attendant trainee job in that case, the Grievant's job with the Employer gives him numerous, wide-ranging opportunities to commit theft of the same type of equipment that he was convicted of stealing from his former employer.

For the foregoing reasons, the Arbitrator concludes that — assuming without deciding that Art. II.2. empowers an arbitrator to determine whether an employer's dismissal violates external law — the Employer's termination of the Grievant's employment did not violate Secs. 111.321-322, Stats.

For the same reasons, the Arbitrator concludes that the termination was not arbitrary or capricious, and that it did not violate the Agreement.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the ISSUES noted above that:

1. The Employer did not violate the Agreement when it terminated the employment of probationary employee R___ E___ on January 4, 2001.

2. Accordingly, the subject grievance is denied, such that no consideration of a remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin, this 27th day of February, 2002.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator

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