BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1486, DISTRICT COUNCIL 48, AFSCME, AFL-CIO

and

NICOLET HIGH SCHOOL DISTRICT

Case 49
No. 60645
MA-11677

Appearances:

Ms. Donna L. Billman, Attorney at Law, Podell, Ugent & Haney, S.C., Suite 200, 611 North Broadway, Milwaukee, WI 53202, appearing on behalf of the Union.

Mr. Sean M. Scullen, Attorney at Law, Quarles & Brady, LLP, 411 East Wisconsin Avenue, Milwaukee, WI 53202-4497, appearing on behalf of the Employer.

ARBITRATION AWARD

The Union and Employer named above are parties to a 1999-2001 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to hear the grievance of Darcey Bethel. The undersigned was appointed and held a hearing in Glendale, Wisconsin, on March 22, 2002, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by June 10, 2002.

ISSUES

The parties did not agree on the framing of the issues. There are two issues raised in this proceeding:

1. Did the District have just cause to issue a written reprimand to the Grievant? If not, what is the appropriate remedy?

2. Did the District violate the collective bargaining agreement by failing to remind the Grievant of her right to have Union representation when the Grievant was given a written reprimand? If so, what is the appropriate remedy?

BACKGROUND

The Grievant is Darcey Bethel, a custodian with the District for seven years, who is also a Union Steward. She was given a written reprimand on March 1, 2001, for her language and conduct toward her supervisor, Paula Evert. The Grievant and Evert were the only people involved in a discussion, and both of them tell very different versions of what was said.

The dispute arose in late February of 2001 after the Grievant noticed that a teacher had posted a note on her classroom board that said, "It's colder in here than management," and reported it to Evert, the Custodial Supervisor. Evert in turn brought the matter to the attention of her supervisor, Brian Reiels, the Director of Facility Services. Reiels informed the school principal about it but asked the principal to leave the Grievant out of the matter. Reiels told the principal that if the teacher asked who found the writing, he should tell the teacher that Reiels found it.

About a day or so later, Evert spoke with the Grievant in the common area of the school and told her that she told Reiels about the note in the classroom. According to Evert, the Grievant got very upset and started yelling at her. Evert testified that the Grievant was concerned that she would get in trouble. Evert asked the Grievant to stop yelling so that she could tell her that Reiels told the principal to keep the Grievant out of it, but that the Grievant would not stop yelling. Then, Evert testified, the Grievant said "fuck you" and thrust her hands forward toward Evert's face and walked away.

The Grievant admits to saying "fuck" in that conversation but in a far different manner than that described by Evert. The Grievant wanted to know why Reiels went to the principal about the classroom note that the Grievant had reported to Evert. The Grievant found Evert in the commons area and asked her why Reiels went to the principal. Evert responded that the teacher should not have notes like that posted in the classroom, but the Grievant was still confused. The Grievant wanted to know why the matter went as far as the principal when Reiels was the Director of Facility Services. The Grievant testified that Evert got belligerent, so the Grievant threw up her hands toward her own face and said "fuck it" and walked away. The Grievant stated that her comment meant that she was through with it, she was leaving it alone. The Grievant testified that she did not raise her voice with Evert, say "fuck you" or throw her hands out toward her.

Both Evert and the Grievant agree that they were standing fairly close to each other during the conversation in question, only about two or three feet from each other. Evert testified that she felt threatened by the Grievant when she threw her hands up toward Evert,

that the Grievant was in her face and her personal space. The Grievant testified that if she thrust her hands outward toward Evert as Evert claimed, she would have hit her because of the short distance between them. The Grievant testified that she raised her hands toward her own face in a gesture of frustration and dismissal of the conversation.

Evert spoke with Reiels about the incident and they decided to issue a written reprimand. The reprimand was dated March 1, 2002, and stated:

> I am writing this written letter of discipline in response to your behavior last night in which you directed vulgarity at me. While I understand you were upset with the situation we were discussing, directed the "F" word to me is in violation of work rules 9 and 15 as stated in the collective bargaining agreement. Failure to take immediate corrective action will result in further disciplinary action up to and including termination.

Evert wrote on the bottom of the reprimand that the Grievant refused to take the written notice. Evert saw no reason to offer the Grievant Union representation when giving her the notice of discipline because Evert was not going to discuss anything.

Evert and Reiels have spoken to the Grievant in the past about talking in a civil manner. Evert stated that she and Reiels had spoken to the Grievant on numerous occasions to tell her to control her temper and speak in a civil way to her supervisor. In March of 1999, the Evert gave the Grievant an oral warning about unacceptable demeanor, following a discussion between Evert and the Grievant wherein the Grievant called Evert a racist and said that she did not know how to talk to black people. Reiels has spoken to the Grievant in the past and told her to find a better way of dealing with issues other than having confrontations with a supervisor.

Employees have used profanity in the work place around supervisors. Employees are not to use profanity around students or school visitors, but they have not been told to avoid such language in other circumstances. Evert has heard the Grievant use profanity while at work and did not previously reprimand her for using profanity. Neither Evert nor Reiels were aware of any employee directing profanity at a supervisor in the manner as claimed here. Shortly after Reiels started with the District, an employee was dismissed for using profanity to a supervisor. Evert's predecessor, Mike Gagliano, attempted to intervene in a heated argument between two employees, and one of them told him "fuck her, fuck you, I don't need this shit." When Gagliano asked the employee to go to his office, the employee said "fuck that – let's go see Frank." The employee was suspended for one week for that conduct. The employee suspended was not a Union steward. There were other issues with that employee involving tardiness and reading a newspaper when not on break time.

The District does not generally offer Union representation when giving a written reprimand to an employee. It offers Union representation when there is going to be a discussion regarding the discipline or potential discipline. The Union raised the issue

regarding the lack of an offer for Union representation for the Grievant during the 2nd step of the grievance process when meeting with Jeff Dellutri, Director of Business Services. Dellutri responded in a letter to District Council 48 Staff Representative Malou Noth that the lack of Union representation was irrelevant because there was no investigatory interview.

Dellutri also testified that he had met with the Grievant, Evert and Reiels to defuse some animosity that might occur in that relationship between them. When the written reprimand was issued, Dellutri denied the grievance because there had been enough oral warnings. Dellutri testified that whether the Grievant said "fuck you" or "fuck it," her anger and gestures were inappropriate and justified the disciplinary measure.

While processing the grievance, Noth advised Dellutri that six custodians would say that the same thing happened before without a written reprimand. Dellutri interviewed those six custodians, who stated that there was profanity in the workplace but they had not directly used profanity towards a supervisor, except for Randy Martin.

There was a confrontation between Martin and Evert which was overheard by Dr. Elliot Moeser, Superintendent of Schools. Moeser told Reiels that he talked to Martin and told him he was out of line with Evert, that he was loud and confrontational. Evert and Reiels spoke with Martin and told him it was not appropriate to get loud and speak to his supervisor in that way. Martin apologized to Moeser.

Martin testified that he told Evert that "If you don't get the fuck out of my face, I'm going to put my foot in your ass." Evert testified that Martin did not use profanity toward her. Dellutri asked Moeser if Martin had used profanity toward Evert, and Moeser told him there was no profanity, but that Martin was loud and talking in an inappropriate way to his supervisor. Martin also testified that Dellutri got different incidents mixed up, and that Martin did not use profanity on the occasion where Moeser overheard him.

After investigating the grievance, Dellutri found no credible evidence that any other employee had engaged in the same conduct and had not been disciplined. Dellutri did not believe Martin's claim that he used profanity with Evert.

Martin testified that on another occasion, he was in the midst of a heated argument with Evert and the Grievant, and he said, "This is a bunch of fucking bullshit" and claimed that Evert was picking on him. He thought he may have gotten a letter or reprimand, but he claimed he refused to take it.

There was another incident between Martin and Evert where he said he would hit her if she weren't his supervisor. Martin was given a memo but not a written reprimand. On March 25, 1999, Evert gave Martin a memo that his behavior was unacceptable, and this was considered his first oral reprimand.

Dellutri asked another employee, Jim Meier, if he or any others swear in front of management and each other. Meier told him that they did – that employees, management, teachers, coaches, and everyone swears. Meier testified that he has heard employees use swear words in arguments with Evert and Reiels. He has said "this is bullshit" while arguing with them. He believes he said "fuck it" to Reiels once during an argument.

THE PARTIES' POSITIONS

The District

The District asserts that it had just cause to issue a written warning to the Grievant for directing the word "fuck" at her supervisor, whether the Grievant said "fuck you" or "fuck it" as the Union contends. Both statements, in the context of the confrontation that the Grievant initiated, justify the District's non-discriminatory and reasonable response to inappropriate behavior.

The Grievant's use of the word "fuck" was not an example of "shop talk" that was tolerated at the District. While Meier stated he heard other employees say "fuck" around Evert, it is noteworthy that "fuck" was undoubtedly directed at Evert and not used in a joking or casual manner as Meier testified others may have used it. The District's Business Manager found that the use of profanity had not been directed at a supervisor, unlike the Grievant's actions.

The District contends that there is a clear distinction between the propriety of using profanity in general and directing it at management. In this case, even the comment "fuck it" as the Grievant contends she stated was directed at her supervisor. The Grievant was clearly upset with Evert, and before allowing Evert to explain, she walked away and ended the conversation by saying "fuck it." This statement was directed at her supervisor and was not the type of profanity that is tolerated as shop talk.

While the Union suggested that the Grievant was treated unfairly and disciplined because she was a Union steward, it failed to substantiate that contention. An employee who engaged in similar conduct was disciplined. Martin's testimony that he told Evert "if you don't get the fuck out of my face, I'll put my foot up your ass" was unbelievable and should be disregarded for several reasons. First, Dellutri investigated the incident between Evert and Martin, which was overheard by Moeser. Moeser said there was no swearing involved or profanity used toward Evert. Also, Martin mentioned this allegation for the first time at the hearing and not during the grievance process. Martin's prior confrontations with and distaste for Evert show the bias in his testimony. Finally, Evert denied that Martin or any other employee ever made such outrageous statements to her. Evert gave Martin a warning for significantly less serious conduct. Further, the District states that the Grievant was not treated

disparately where it previously disciplined a custodian who was not a Union steward for the same kind of conduct. In 1995, a custodian told his supervisor "fuck her, fuck you, I don't need this shit" and was disciplined.

The District states that the level of discipline was commensurate with the Grievant's conduct and prior work record. She was warned on several occasions about her confrontational and threatening demeanor when dealing with Evert. She was warned by both Evert and Reiels about it and told to communicate in a courteous and civilized manner with her supervisor. Thus, she had notice that about unacceptable conduct and that she could get progressively disciplined.

The Union argued that the Grievant's conduct did not warrant discipline because she stated "fuck it" rather than "fuck you." Even assuming that is true, the grievance should still be denied because of the use of the word "fuck" within the context of the confrontation that she initiated with Evert. Even the Grievant's own version is that she not only said "fuck it" but threw her hands in the air and walked away from Evert who was trying to address the issues that the Grievant was angry about. Yelling profanely at a supervisor for no justifiable reason violates the prohibition against creating discord and a lack of harmony among employees. Even the Union's witnesses understood that stating "fuck you" was inappropriate behavior.

The District asserts that it did not violate Article IX, Section 2, by not offering the Grievant Union representation. The contract is clear and unambiguous. As evidenced by the title of the section "Disciplinary Conferences," there must be a conference or discussion to trigger the reminder. Only when there is a discussion will the employee be reminded of the right to have Union representation at the discussion. There was no discussion when Evert handed the disciplinary notice to the Grievant. The contract codifies an employee's WEINGARTEN rights which afford employees representation when the employer engages an employee in an interview or discussion that the employee reasonably believes may result in discipline. In this case, Evert merely tried to give the disciplinary notice to the Grievant.

The Union

The Union asserts that the discipline imposed on the Grievant was unjust, discriminatory and used for the purpose of trying to weaken the Union. The District deliberately disciplined the Grievant for the same kind of conduct other employees have exhibited yet only received verbal reprimands or no reprimand whatsoever. It was only because of her known status as a Union steward that she was singled out for punishment.

While an employer has a right to discipline employees who are Union officials, that right is premised upon the idea that there must be reasonable rules or standards that are consistently applied and enforced. The Grievant's use of the word "fuck" was the primary

reason given for issuing a written reprimand. Evert admitted that if the Grievant engaged in the exact same behavior without the use of profanity, it probably would not have led to a written reprimand. Evert has used profanity around employees and has allowed employees to use profanity around her. The testimony showed people swear while in arguments with supervisors or other employees, while on break, while joking around, and while in the hallway during work. Evert has witnessed the Grievant using the "F" word but has never corrected or reprimanded her for that.

The Union alleges that profanity and actual threats have been directed at Evert in the past but only the Grievant was targeted for discipline. Martin testified that he yelled at Evert, "If you don't get the fuck out of my face, I'm going to put my foot in your ass." Evert had no recollection of this occurrence. Moeser overheard a heated argument between Martin and Evert. Martin has not had any written reprimands and only received verbal warnings or no discipline at all. The only evidence that the District has to show it has fairly disciplined other employees for similar behavior was a discipline from seven years ago.

The Union further submits that the Grievant was never put on clear notice that the use of profanity around her supervisor was no longer acceptable. If the employer decides to begin enforcing a rule it has previously ignored, it must first give clear notice of the intent to do so. The use of profanity in the workplace has been accepted by the District and there was no notice to employees that this was suddenly going to be a disciplinary offense. Work Rule 9 "Creating Discord" is so vague and subjective as to be of no real value in providing notice to any employee as to what violates it.

The Union argues that the District violated the collective bargaining agreement by failing to provide Union representation when the Grievant was given the written reprimand. Article 9, Section 2, explicitly states that when a written reprimand is to be placed on record, the employee will be reminded of his/her right to bring a Union representative. The District believes that the language requires the reminder if there is going to be a discussion regarding the reprimand, and Evert did not remind the Grievant because there was to be no discussion. The contract covers instances when there is to be a discussion about a matter which is likely to result in discharge or suspension. Then the section uses the word "or" – "or when a written reprimand is to be placed on record, the employee will be reminded of his/her right to bring a Union representative . . ." The section provides that whenever a written reprimand is to be placed on record, as in this case, the employee will be reminded to the right to have Union representation. To construe it any other way would encourage management to avoid discussions on written reprimands. The language is clear that its intent is to provide employees with Union representation when they have a written reprimand place on their record. Even as a Union steward, the Grievant could not and should not have been expected to act as her own Union representative in her own personal discipline matter.

DISCUSSION

When the only two people present at an incident tell very different stories about it, it is difficult if not impossible to discern which person is telling the truth or whether the truth lies somewhere in between. In this case, under either the Grievant's version of the incident or her supervisor's version, the Grievant was using profanity directed at her supervisor. This is not a case of profanity being used as shop talk and profanity being expressed around a supervisor. The particular remarks at issue here were directed at Evert. It is not unreasonable to give an employee a low level discipline when an employee directs profanity at a supervisor in such a manner.

The Grievant had been previously warned about her conduct with Evert. She received a notice on March 25, 1999, that her confrontational and threatening demeanor was unacceptable and that discussions should be in a civil and courteous manner. Both Evert and Reiels had spoken with the Grievant several times, telling her to be civil to her supervisors and to control her temper. Thus, the Grievant was clearly on notice about her conduct toward supervision. She did not have to be specifically told that using the term "fuck you" or "fuck it" to her supervisor in the heat of an argument would cause further discipline. Common sense has to prevail at some point.

It is unlikely that the Grievant was calm and cool, as she testified, and it is more likely that the Grievant and Evert were in a heated argument. The Grievant refused to listen to Evert and walked off following the profane remark (whichever it was) directed to Evert. Such conduct is bound to get most employees disciplined. Since the Grievant had a prior oral reprimand and had been previously warned about her conduct toward Evert, the Employer had just cause to issue a written reprimand. This was part of the progressive nature of the disciplinary process.

Work Rule 9, "Creating Discord," is the rule cited by the District. It states, "Employees shall not create discord or lack of harmony among the employees of the Board or with pupils or the public." The Union believes that this rule is so vague that employees do not know what behavior violates it. Both the Grievant and Evert are employees of the Board. Having a fight with your supervisor and directing profanity at her is discord or a lack of harmony. Again, common sense tells employees that certain behavior will get them in trouble, that it will be unacceptable conduct.

The Union has argued that the Employer disparately disciplined the Grievant because she is a Union steward, and that she was singled out for punishment to weaken the Union. There is no evidence that the Employer disciplined the Grievant because of her Union status. There is also no evidence that the Employer has treated other employees differently. The only evidence of this was Martin's testimony, and his testimony was not credible.

Martin received an oral reprimand on March 25, 1999, for his conduct toward Evert in which he said that if she were not his supervisor, he would have hit her a long time ago. Martin testified that sometime around the end of the year 2000 or the beginning of 2001, he and Evert got into an argument in which he told her, "If you don't get the fuck out of my face, I'm going to put my foot in your ass." He claimed he never got a reprimand for this remark but that the Union steward (who is the Grievant in this case) said that Reiels said he better never talk to Evert that way again. The Grievant did not confirm Martin's testimony regarding his profanity but confirmed that Reiels told her to tell Martin that he didn't like the way Martin talked to Evert. Martin testified that another time he used profanity in an argument with Evert, and that he and the Grievant might both have received a reprimand. This could be the March 25th incident, since the record shows that both of the receive reprimands on the same date. Martin did not use profanity with Evert in the incident that was overheard by Moeser, although he initially told Dellutri that he did.

The District did a thorough investigation – Dellutri interviewed six custodians that the Union named to support its position that other employees have used profanity with supervisors and not been disciplined. Martin was the only one who claimed to have used profanity with a supervisor, and Martin told Dellutri that Moeser overheard that conversation. However, Martin testified at the arbitration hearing that he did not use profanity in the conversation that Moeser overheard, and Moeser also said there was no profanity in that conversation. Martin now claims that Dellutri has mixed up the incidents, but his testimony is so confusing that no one can be sure what he's talking about, when it occurred, or whether it even happened. There is no one who confirms Martin's testimony about statements he claims that he made to Evert. It is not believable that Martin would say such things to Evert without consequences or discipline, particularly when he was previously disciplined for telling her he would hit her if she were not his supervisor.

The District has disciplined an employee in the past for using profanity with a supervisor, not even directed at the supervisor, but for being loud and profane and threatening. While that incident is old – going back to 1995 – there is no evidence of any other employee acting in a similar manner without being disciplined. Martin's record at most confirms that the District does not tolerate employees threatening supervisors. Accordingly, the Union's argument that the Grievant was disparately disciplined because of her Union status fails for lack of evidence.

Finally, there is the matter of whether the Grievant should have been reminded to have a Union representative present when she was given the written reprimand. The relevant part of Article IX, Section 2, Disciplinary Conferences, states the following:

> When the Business Administrator, or designee, is to discuss with an employee a matter which is likely to result in discharge or suspension or when a written reprimand is to be placed on record, the employee will be reminded of his/her right to bring a Union representative to the discussion at that time.

The Union focuses on the part of the sentence that says "when a written reprimand is to be placed on record, the employee will be reminded of his/her right to bring a Union representative," without including the last clause "to the ***discussion at that time***." The sentence clearly states that the Union representation is to be brought to the discussion. The whole sentence refers to discussions twice.

The question is whether the word "discussion" as used in this contract section is broader than an investigatory interview. I believe the word "discussion" may be broader than an investigatory interview. A "discussion" involving a disciplinary action may take place without an investigatory interview, or it may take place after the discipline has been imposed.

However, there must be ***some*** discussion to invoke this section of the contract, and there is nothing on the record to indicate that there was any discussion between Evert and the Grievant when Evert handed her the disciplinary notice. Obviously, a written reprimand falls within this contract section, but only when there is a discussion. The Employer may be walking a fine line here when it hands out a reprimand, because the action could easily lead to a discussion where the offer to have Union representation needs to be made. Nonetheless, on the record here, there was no discussion, no offer of Union representation, and no violation of Article IX, Section 2 of the collective bargaining agreement.

Based on the record as a whole, I find no violations of the collective bargaining agreement.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this 8th day of July, 2002.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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