BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF PLYMOUTH EMPLOYEES LOCAL 1749-B, AFSCME, AFL-CIO

and

PLYMOUTH SCHOOL DISTRICT

Case 58
No. 61148
MA-11820

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Paul C. Hemmer,** 605 North Eighth Street, Suite 610, Sheboygan, Wisconsin 53081, appearing on behalf of the Employer.

ARBITRATION AWARD

Plymouth Joint School District, hereinafter District, and City of Plymouth Employees Local 1749-B, hereinafter Union, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding which provides for final and binding arbitration of certain disputes. A request to initiate arbitration was filed with the Commission on April 23, 2002. Commissioner Paul A. Hahn was appointed to act as Arbitrator on May 2, 2002. The hearing took place on July 10, 2002 at the District's premises in Plymouth, Wisconsin. The hearing was not transcribed. The parties were given the opportunity to file post-hearing briefs. Post hearing briefs were received by the Arbitrator on September 4 (District) and September 5 (Union). Reply briefs were received by the Arbitrator on September 25, 2002. The record was closed on September 25, 2002.

ISSUE

The parties stipulated to the following issue:

Did the School District have just cause to discharge Sherrie Laack from employment on February 11, 2002? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE THREE – MANAGEMENT RIGHTS RESERVED

The Board of Education retains and reserves all rights, powers, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin and the United States of America.

The exercise of the foregoing powers, rights, authority, duties and responsibilities of management shall be limited only by specific and expressed terms of this agreement.

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ARTICLE TWENTY-FOUR – GRIEVANCE PROCEDURE

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B. Steps and Procedure Timelines

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3. STEP THREE: . . . The arbitrator shall make a decision on the grievance, which shall be final and binding on both parties. The arbitrator's authority is limited to the application and interpretation of this contract.

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ARTICLE TWENTY-SEVEN – MISCELLANEOUS CONDITIONS

. . .

G. No employee who has satisfactorily completed the initial probationary period will be subject to reprimand, suspension, or discharge without just cause.

STATEMENT OF THE CASE

This arbitration involves the Plymouth Joint School District and the City of Plymouth Local 1749-B, AFSCME, AFL-CIO. (Jt. 1) The Union alleges that the District violated the collective bargaining agreement by discharging the Grievant without just cause for leaving her work site, removing a confidential document from the office of her supervisor and sharing its contents with other employees and lying to the District Manager of Business Services when confronted with whether the Grievant had taken the document. The Grievant was discharged by the District on February 11, 2002; a grievance was filed by the Union on behalf of the Grievant on February 19, 2002. (Jt. 4 & 2)

The District operates a K-12 school district in Plymouth, Wisconsin. The Grievant, prior to her discharge, was a custodian with the District assigned to a 3:00 p.m. – 11:00 p.m. shift in one of the District's school buildings. This building also houses the School District offices and in particular the office of the School District Superintendent, the District Manager of Business Services and Grievant's immediate supervisor, the Superintendent of Building and Grounds. The incidents that led to the discharge of the Grievant occurred in a time period from on or about February 5, 2002 to February 11, 2002, the date of Grievant's termination.

On or about February 5, 2002, the Grievant was working a 3:00 p.m. to 11:00 p.m. shift. The Grievant was assigned to normal custodial duties primarily on the second floor of the building. During the course of her shift, the Grievant, who at the time was a Union steward for the bargaining unit covered by Joint 1, was approached by fellow custodian Wendy Rosenthal and was informed by Ms. Rosenthal that she had seen a document on their supervisor, Bill Johnson's, desk that might be of interest to the Grievant as the Union representative. Johnson, the Superintendent of Building and Grounds, has his office in the basement of the building. Grievant left her work site and proceeded to Johnson's office, removed the document from underneath a desk calendar on Johnson's desk, took the document back to her work site, copied it and returned the original to underneath the calendar on Johnson's desk. The document was a letter from Business Services Manager, Elizabeth Kane, to the Local's Union Business Representative, regarding a collective bargaining proposal from the District for settlement of a grievance. (Jt. 5) During the course of her shift on February 5, 2002, after the Grievant had copied the document, she showed it to fellow custodian Richard Seefeldt and told Seefeldt that she had taken the document from under Johnson's desk calendar.

On or about February 8, 2002, Seefeldt asked to meet with Kane. Seefeldt told Kane that he had been shown a document by the Grievant, and explained to Kane how the document came to Grievant's attention through Wendy Rosenthal and that Grievant admitted that she had removed the document from Johnson's office, copied it and returned it to the office. Seefeldt stated that he did not want to be subject to discipline for something which he felt the Grievant

had involved him without his authorization. Kane then called in Rosenthal and confronted her with Seefeldt's story and the taking of the document. (Jt. 5) Rosenthal admitted she had entered Johnson's office in the course of her work on or about February 5, 2002, that she had inadvertently bumped Johnson's desk calendar and noted the document which he had placed underneath it referred to a grievance settlement and that she had advised the Grievant that she had discovered the document and that it was probably something that Grievant should see. Kane then spoke with Johnson who confirmed that he had received the letter, (Jt. 5) and placed it under his desk calendar, where he typically kept documents that he considered confidential but provided him with easy access.

Later on February 8, Kane called the Grievant into her office and showed her the document and asked whether she had ever seen it. Grievant denied that she had ever seen the document and left Kane's office. Kane then spoke with Seefeldt who told Seefeldt what she had done. Seefeldt advised the Grievant that she should tell Kane what had actually happened. The Grievant then asked to meet with Kane later on February 8th and, with Union representation present, admitted to Kane that she had lied, had in fact taken the document, copied it and returned the original to Johnson's desk. On February 11, 2002, again with Union representation present, Grievant was terminated from her employment for leaving her work site, the unauthorized taking of a confidential document and lying when asked whether she had seen or taken the document. The discharge of Grievant led to this grievance and arbitration proceeding.

The parties processed the discharge of the Grievant through the contractual grievance procedure but were unable to reach a resolution. (Jt. 3) The matter was appealed to arbitration. No issue was raised as to the arbitrability of the grievance. Hearing in the matter was held by the Arbitrator on July 10, 2002.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the District did not have just cause to terminate Grievant. The Union initially argues that contrary to the letter of termination, the Grievant did not leave her work site because as a custodian the entire building was her work site. The Union next argues that the document, (Jt. 5) was not a confidential document because as a steward and committee person the Grievant would ultimately have received the document from Business Representative Isferding. Further, the Union submits that Johnson did not treat the letter as confidential because he merely tried to secure it by putting it under his desk calendar. The Union takes the position that the District did not conduct a fair investigation since Kane did not make an effort to determine whether the Union Business Representative had already given the letter to bargaining unit members. Further the Union posits that Kane should not have investigated the grievance and also made the termination decision.

The Union recognizes that Grievant wrongfully removed the letter from Johnson's office but that it is understandable in light of Grievant's role as a Union steward and that Grievant would have received her own copy. The Union also argues that the termination decision is tainted because the discharge decision was made because of the Grievant's position as a steward.

The Union also takes the position that Seefeldt, who informed Business Manager Kane of Grievant's involvement, was trying to retaliate against the Grievant for her filing of harassment charges against him in 2000. The Union notes that the result of Grievant's termination was that Seefeldt, who at the time had a part-time custodial position, ultimately received a full-time position.

The Union next makes a disparate treatment argument in that Rosenthal only received a five-day suspension and therefore the discharge and discipline of Grievant is all out of proportion with the discipline suffered by Rosenthal. The Union submits that the punishment of the Grievant is not reasonably related to the offense and the work record of the Grievant. Grievant, the Union argues, was a good employee and that this incident was the first offense committed by the Grievant and that Grievant recanted and admitted that she lied and that ultimately no harm was suffered by the District.

In conclusion, the Union submits that Grievant demonstrated that she was repentant for what she had done, that discipline should be corrective rather than punitive and that there is no reason to believe that Grievant could not be a successful employee of the District as she had been since the start of her employment in 1995. The Union submits that the Grievant was wrong and should receive some punishment but that the punishment should not be as severe as losing her job. The Union asks the Arbitrator to reinstate Grievant to her custodial position in the District.

District

The District submits to the Arbitrator that the Grievant during the course of the arbitration hearing admitted to the essential facts underlying the reasons submitted by the District in (Jt. 4) for her termination. The District argues that there is no factual dispute as to the allegations of misconduct presented against the Grievant; she admitted to the misconduct under oath. The District submits that there are no facts in dispute to be determined by the Arbitrator because of the admissions of the Grievant, and, therefore, the Grievant was discharged for just cause.

Bolstering its argument, the Employer submits that the Grievant lied repeatedly to Business Manager Kane and was convincing in her lying and therefore demonstrated to Kane that the Grievant was untrustworthy and could not be reinstated. The District argues that the

Grievant was less than truthful in the course of the arbitration hearing and failed to discredit the testimony of Seefeldt by trying to demonstrate that Seefeldt was out to get the Grievant and therefore the Arbitrator could not credit Seefeldt's testimony. The District argues that the testimony of witnesses, both for the District and the Union, credit Seefeldt's testimony, demonstrating that Grievant has a propensity for not telling the truth and substantiating that Grievant cannot be trusted to be reinstated as an employee of the District.

The District argues that the Grievant's action of theft of the document was willful and wanton in that the Grievant attempted to have Seefeldt lie for her by trying to persuade him that he should support her story that she had never seen the document. The District takes the position that this also supports the District's position that the Grievant is completely untrustworthy and that she was discharged for just cause.

The District takes the position that Grievant's misconduct is not excused or diminished because the misconduct was disclosed by fellow custodian Seefeldt and that Seefeldt did not report the misconduct of Grievant as a means of retaliating against her for a complaint of sexual harassment presented against him in calendar year 2000. The District points out that Seefeldt did not receive Grievant's job directly as a result of Grievant's discharge because another employee bid for Grievant's position, was awarded that position and Seefeldt filled the position of that employee.

Finally the District argues that there was not disparate application of discipline to the Grievant as compared with Wendy Rosenthal. The District argues that the five-day disciplinary suspension of Rosenthal was appropriate based on her 27 years of employment with the District compared to the Grievant's 7 years, during which Rosenthal was not subject to any other disciplinary action. The District points out that Rosenthal was authorized to enter Johnson's office and readily admitted, when confronted by Kane, that she had inadvertently moved the desk calendar of Johnson that disclosed the presence of the grievance settlement proposal. Rosenthal, the District submits, left the document in place, did not remove it, did not take the document and carry it around on her work cart or copy the document, and when asked about the collective bargaining proposal by Kane, admitted immediately how she had discovered the document and told Grievant about it. Rosenthal did not lie at any time as compared to Grievant who made at least three false statements regarding the document in a matter of minutes. The Employer argues that Rosenthal's actions, when contrasted with the conduct of the Grievant, pale in comparison; Rosenthal did not commit a cardinal offense as the District submits was done by the Grievant.

In conclusion, the District submits that in view of the serious misconduct of the Grievant, discharge was the only appropriate disciplinary action as the Grievant presents a direct threat to the security interests of the District because Grievant cannot be trusted and safely employed in any capacity. Therefore, the District argues the Grievant was discharged for just cause and submits to the Arbitrator that the grievance has no merit and must be dismissed.

DISCUSSION

The essential facts in this arbitration are not in dispute. The record establishes that the Grievant was a custodian for the District, a seven year employee without a previous disciplinary record. At the time of the incident that led to her discharge, the Grievant was working a 3:00 p.m. to 11:00 p.m. shift in a District School that also housed the District's administrative offices (first floor) and the office of the Building and Grounds Supervisor (basement), Grievant's immediate supervisor. The incident happened on or about February 5, 2002. Grievant was working her shift and was assigned that evening with custodial duties primarily on the second floor of the building. At the time of the incident, Grievant was evidently a Union steward, although not the chief steward.

During the course of the evening, Grievant was told by another custodian, Wendy Rosenthal, that she had seen a document in their supervisor's office in the basement that because of its subject would be of interest to Grievant as steward. Rosenthal had seen the document because she had bumped the desk calendar of supervisor Johnson revealing the document. The document (Jt.5) was a letter from Business Manager Kane to Union Business Representative Isferding regarding a proposal for language changes in the collective bargaining agreement stemming from a grievance. Neither Grievant nor any other Union representative was copied on the letter.

Grievant, suspecting what the letter was about, left her work site on the second floor and proceeded to Johnson's office and took the letter. Grievant then copied the letter and later that evening returned it to Johnson's office placing it under his desk calendar which was large enough that placing the letter under it would hide the letter from sight. Grievant discussed the contents of the letter with Rosenthal that evening. Grievant also showed the letter to another custodian, Richard Seefeldt. While there is some dispute as to what Seefeldt said to Grievant or whether he read the letter, the record establishes that Seefeldt did not take the letter and wanted nothing to do with it; Seefeldt was concerned he might be in trouble for having had it shown to him.

Several days later, Seefeldt, having thought it over, decided to tell District Business Manager Kane about the incident and did so. Kane immediately commenced an investigation on the day Seefeldt spoke to her, February 8th. Kane spoke with Rosenthal who admitted to the details of the incident. Kane spoke with the employee involved with the grievance subject of the letter and showed him the letter; he stated he had not seen it and had no knowledge of it. Kane spoke with Johnson who related that he had placed the grievance settlement proposal letter (Jt.5) from Kane under his desk calendar out of sight, a typical practice of his. Kane then spoke to Grievant with a Union representative present. The Grievant twice denied that she knew anything about the letter and also denied the incident as described by Rosenthal. After leaving Kane's office and a short time later, Grievant discussed the matter with Seefeldt.

Again there is a dispute as to what was said between the two employees, but I find the record established that Seefeldt convinced Grievant to tell Kane the truth which she did in a subsequent meeting which Grievant requested of Kane at the end of the business day on February 8th.

The Grievant met with Kane, with Union representation, on February 11th. At the meeting Grievant's employment was terminated. District Superintendent Reinke was present with Kane at the meeting with Grievant. Rosenthal received a five-day suspension without pay which she did not grieve. The Union's essential argument on behalf of the Grievant is that discharge was not warranted; Grievant should have received a lesser punishment. The primary argument of the District is that Grievant enjoyed a position of trust with the District, having access to all the District's offices and Grievant's actions violated that trust warranting termination of employment.

The Union initially submits that I should follow the seven tests to establish just cause proposed by arbitrator Daugherty. I do not necessarily subscribe to those standards and consider them only another guideline that can be considered depending on the facts of the case. For example, it is rarely required of an employer that it has to have a work rule that prohibits theft and lying, both present in this case, and, therefore, no notice is required as to the consequences of being guilty of those two actions.

The Union presented several arguments on behalf of the Grievant. In response to the first reason for the discharge that Grievant left her work site, the Union argues that the whole building was her work site. While that may be true, her work location on the night she took the letter was not the basement or Johnson's office. It was established by the Grievant's own testimony that she left her assigned work area on the second floor and went to Johnson's office in the basement. This reason for discharge is substantiated.

The Union submits that the document was not really confidential and was something that the Grievant would have seen any way. The word "confidential" in this incident is used as an adjective and has been defined variously as private, undisclosed, in confidence. The letter was, at the time it was sent, only meant to be shared with Union representative Isferding. There is nothing in the record to support Grievant that she would have shortly seen the letter and this would not excuse Grievant's unauthorized taking of the letter from Johnson's office. I find no support in the record for the Union position that Johnson did not treat the letter as confidential. It may not have been in a locked drawer, but it was out of sight and not meant to be seen by anyone other than himself, something Grievant had to have known given what Rosenthal told the Grievant about the letter's location.

It is difficult to find fault with the District's investigation, a normal due process requirement in a discipline case. District representative Kane spoke with the employees of the District she needed to speak to, and once Grievant admitted to Kane what she had done more

investigation hardly was necessary. Any due process problem was sanitized by Grievant's admission of guilt in the presence of Union representation. Kane creditably testified that she recommended termination, the inference being that someone other than herself made the final decision. Even if Kane alone made the termination decision and conducted the investigation, I find nothing in arbitral or court case law to find that combination violative of due process.

I find nothing in the record to support the Union argument that Grievant was given harsher punishment because of her present and past activities as a Union steward. It is pure speculation and not even the Grievant stated in her testimony that she felt she was punished because she was a Union steward. Contrary to the Union, I find nothing in the termination letter (Jt. 4) that would indicate Grievant's Union membership or steward activities had anything to do with her termination.

Nor do I find any evidence in the record that Seefeldt was retaliating against the Grievant for being charged by her with harassment two years ago. I credit Seefeldt's testimony that his concern about getting into trouble outweighed the probability that Grievant would be in trouble once he told his story to Kane. Seefeldt's actions are logical as he had a warning letter in his file (Er. 1) from the harassment issue and would be concerned about additional discipline. Nor is this a case where somehow Seefeldt set the Grievant up for a fall. Everything the Grievant did was on her own. True, without Seefeldt going to Kane, the District may never have known, but that does not excuse the actions of the Grievant. There was also testimony that Seefeldt demanded that Grievant, as steward, work to get Er. 1 removed from his file. But the Union's own witness, Cheryl Reilly, who was present, testified that Seefeldt never threatened the Grievant, as alleged by the Union.

The Union does not argue that Grievant is without fault. Its basic and perhaps strongest argument is that given that Rosenthal only received a five day suspension, Grievant's discharge was too strong. However, as argued by the District, there is a significant difference in the facts of Rosenthal's and Grievant's involvement. When Rosenthal told Grievant about the letter, Grievant could have done and should have done nothing; she instead took and copied the letter. Contrary to Rosenthal, when asked about the letter, Grievant lied to Kane three times. Grievant had to be convinced to recant. What is particularly bothersome is that several times during the hearing the Grievant testified that at the time she did not think it was such a big deal. This belief or attitude shows a lack of judgment which supports the District's position that Grievant cannot be trusted, particularly here, as by her own admission, Grievant's actions were intentional, the letter did not accidentally fall into her hands.

Grievant's access to all the District's offices and much of their unlocked contents required that she could be trusted. Grievant's actions do not support that trust.

I have reviewed the case law submitted by the parties, and I appreciate their effort in that regard. As expected, the Union offered cases where discipline had been modified and the District offered cases where termination was upheld. The rulings of other arbitrators are helpful, but ultimately the decision is mine. I also note the Union's cases were limited to lying and recanting; they did not include theft. I agree with the Union that discipline's first goal should be correction not punishment. The problem for the Grievant in this case is that I am not dealing with a job performance failing or absenteeism but theft and lying. When Grievant took the letter from Johnson's desk, Grievant stole the trust of her employer. An employer must be able to trust an employee's honesty from the beginning of employment. Trust for proper performance of job duties can be and often is earned as an employee learns the job. Once an employer has reason to no longer trust an employee where honesty is involved, there is little that can be done to regain that trust.

This record supports that the District has proven just cause for discipline of the Grievant. It is not for me to alter the judgment of discharge unless I find the discharge to be arbitrary based on the facts. The District argues that it cannot trust the Grievant and should not be put in the position of reemploying someone the District cannot trust. I do not find this to be an arbitrary position or a position without support in the record. And, therefore, I do not find the discharge decision to be arbitrary.

Based on the record as a whole, I issue the following

AWARD

The School District had just cause to discharge the Grievant from employment on February 11, 2002. The grievance is denied.

Dated at Madison, Wisconsin, this 8th day of October, 2002.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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