

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WAUPACA AIDES AND SECRETARIES ASSOCIATION,
CENTRAL WISCONSIN UNISERV COUNCIL**

and

SCHOOL DISTRICT OF WAUPACA/WAUPACA SCHOOL BOARD

Case 32
No. 60972
MA-11770

(Rasmussen Discipline Grievance)

Appearances:

Mr. Timothy E. Smith, Director, Central Wisconsin UniServ Councils, Unit 3, 625 Orbiting Drive, P.O. Box 158, Mosinee, Wisconsin, appearing on behalf of Waupaca Aides and Secretaries Association.

Davis & Kuelthau, S.C., by **Attorney Edward J. Williams**, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin, appearing on behalf of the School District of Waupaca.

ARBITRATION AWARD

Waupaca Aides and Secretaries Association/Central Wisconsin UniServ Council, hereinafter "Association," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the School District of Waupaca, hereinafter "District," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on May 30, 2002, in Waupaca, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reserved the right to file reply briefs by August 3, 2002. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties were unable to stipulate to the substantive issues.

The District frames the issues as:

1. Did the Association comply with the provisions of Article XXIII with regard to the time lines with regard to filing and processing of the grievance through the grievance procedure to arbitration? and;

2. Did the District violate the provisions of Article XXII of the collective bargaining agreement when it issued a one-day suspension without pay to Christine Rasmussen for her conduct on December 13, 2002; and if so, what is the appropriate remedy?

The Association frames the issues as:

Was the suspension of the grievant in accordance with Article XXII, page 4, of Discipline? If not, what shall the remedy be?

Having considered the evidence and arguments of the parties, the Arbitrator finds that since there is no material difference between the substantive issue identified by the parties, but that the Association ignores the procedural issue, I find the District's issues to be acceptable.

RELEVANT CONTRACT LANGUAGE

III. MANAGEMENT RIGHTS

3.01 The Board, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves onto 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 the following:

. . .

B. To establish reasonable work rules and schedules of work;

...

D. To suspend, demote, discharge and take other disciplinary action against employees in accord with the terms of this Agreement;

...

XXII. DISCIPLINE

22.01 Employees shall not be discharged or suspended except in accord with the following:

1. Whenever possible, the employee shall be given notice of his/her misconduct or incompetence and the possible consequences of continued incompetence or further misconduct.
2. The penalties assessed must be in keeping with the nature and degree of the employee's misconduct.
3. The employee's past service in the District must be taken into account in the assessment of penalties.
4. Progressive discipline is acceptable and is to be encouraged where appropriate.
5. Rules, policies, regulations, and order will be applied evenhandedly among all employees.

...

XXXIII. GRIEVANCE PROCEDURE

23.01 Purpose The purpose of this procedure is to provide an orderly method for resolving grievances. A determined effort shall be made to settle any such grievances at the lowest possible level in the grievance procedure. Meetings or discussions involving grievances or these procedures shall not interfere with the work duties. Nothing in the procedure shall be construed to inhibit the continuation of rapport and informal discussion between staff, principals and the District Administrator and his/her staff.

- 23.02 Definition For purposes of this Agreement a "grievance" is defined as any complaint involving the interpretation or application of a specific provision of this Agreement.
- 23.03 Form of Grievance Written grievances shall give a clear and concise statement of the alleged grievance including the facts upon which the grievance is based, the issues involved, the specific section(s) of the Agreement alleged to have been violated, and the relief sought.
- 23.04 Initiation and Processing Grievances as herein defined, shall be processed in the following manner:
1. The employee shall orally present the grievance to the Principal or immediate supervisor no later than ten (10) working days after the grievance occurs. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later. The Principal or immediate supervisor shall, within five (5) working days, orally inform the employee of his/her decision.
 2. If a satisfactory settlement is not reached at the Principal or immediate supervisor level, the Association shall prepare and present the grievance in writing to the District Administrator within ten (10) days of the decision at Level One. The District Administrator shall provide a written answer within ten (10) working days after receipt of the grievance.
 3. If a satisfactory settlement is not reached at the District Administrator level, the Association shall prepare and present the grievance to the Personnel Committee within (10) working days after receipt of the District Administrator's written decision. The Personnel Committee shall hold a meeting within ten (10) working days of receipt of the written grievance to discuss the grievance with the aggrieved employee and the Association representative. The Personnel Committee shall respond in writing within ten (10) working days of the meeting.
 4. Grievances not settled at the Personnel Committee level of the grievance procedure may be appealed to arbitration provided written notice of a request for arbitration is made with the Clerk within ten (10) working days of receipt of the answer of the Personnel Committee.

When a timely request has been made for arbitration, within ten (10) working days of the appeal, the Association shall request the Wisconsin Employment Relations Commission to appoint an arbitrator from its

staff. The arbitrator shall schedule a hearing on the grievance and after hearing such evidence as the parties desire to present shall render a written decision.

- 23.05 Time Limits Time limits set forth may be extended by mutual agreement of the parties, only if in writing. If the employer fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped and final.

. . .

23.07 Arbitration Guidelines

1. The arbitrator shall have no power to add to [sic] modify or otherwise alter the terms of this agreement.
2. Cost of arbitration mutually incurred shall be equally shared by the parties such as the expense of the arbitrator, the cost of the hearing room and transcript.
3. The decision of the arbitrator, within the scope of his/her authority, shall be final and binding upon the Board, the Association, and the employees. Matters of jurisdiction and authority must be determined by the courts.

BACKGROUND AND FACTS

The Grievant, Christine Rasmussen (hereinafter, "Grievant") was employed by the District for five school terms ending in June of 2002 when she voluntarily resigned. The Grievant initially held the clerical position of vocational education secretary and subsequently the guidance office assistant/secretary position. The Grievant's supervisor was High School Principal Bruce Gunderson. Of significance to this grievance are the Grievant's telephone responsibilities which included answering the main high school telephone and taking and distributing any telephone messages for students and staff. The Grievant's disciplinary history includes a written reprimand initially issued on October 29, 2001, revised and re-issued on December 19, 2001, for disregarding the direction of her supervisor and jeopardizing the safety of students and staff.

The Grievant's work area was in the main office with Mary Johanknecht and Joy Griffin. There is a history of interpersonal conflict between and among the secretaries in the District's high school main office. The first documented instance in May of 2000 when

Grievant met with Gunderson and Mr. Richmond, Vocation Coordinator and the Grievant's half-time supervisor. Gunderson informed the Grievant that he had received a list of concerns from three clerical co-workers that related to the Grievant's duties, timecard, reporting times, lunchtimes, etc.

On November 9, 2001, Gunderson held a Secretaries Meeting with Rasmussen, Mrs. Beth Oestreich, Mrs. Geary, Mrs. Karen Peterson, Johanknecht, Neumann and Griffin in attendance. Gunderson prepared minutes from the meeting that read in pertinent part:

. . .

He also pointed out that we would all be starting over on November 9, 2001 - this meant that any documentation that secretaries held, prior to November 9, could and would not be used in future disciplinary actions to defend themselves or used to file complaints against another union member. He directed us to start over as of November 9, 2002 [sic].

Mr. Gunderson informed and directed the secretaries to try and be pleasant with each other, directing them to start saying "Good Morning" or "Hello," and exhibit positive attitudes with each other.

Mr. Gunderson directed them to show slow progress to get back to a sense of creating a positive office and working environment. He chastised all for being immature and uncooperative. He also reminded them, that he was responsible for nearly 1000 people in a \$23 million dollar building everyday and that he was spending an inordinate amount of time dealing with matters regarding inter-personal conflicts between secretaries.

. . .

Five weeks later, on December 13, the Grievant and Beth Oestreich engaged in a verbal altercation. The altercation began with Oestreich questioning the Grievant's compliance with a telephone usage policy and concluded with the Grievant telling Oestreich to "take your raging hormones and go home." The District investigated the incident and on December 17, 2001, imposed discipline in the form of a suspension without pay against the Grievant. The day without pay was December 18, 2001.

On December 19, when the Grievant returned to work, she asked Gunderson whether he was going to "reinstate" her. 1/ Gunderson did not understand the Grievant's question and asked her to further explain her question. The Grievant then asked Gunderson whether he was going to reinstate her from her suspension and retract the letter of reprimand. Gunderson told the Grievant he would not.

1/ There is a discrepancy as to the date when the oral conversation between Gunderson and the Grievant occurred. Gunderson testified the date was December 19, 2001, which was the date in which the Grievant returned to work following the date of suspension. The written documents drafted by both the District and the Association indicate that the conversation occurred on December 20, 2001. I find that the oral conversation occurred on December 19, 2001.

On January 8, 2002, the Association submitted the following letter to Bruce Gunderson, Waupaca High School Principal:

. . .

Re: Grievance for Christine Rasmussen

Dear Mr. Gunderson:

The Waupaca Aides and Secretaries Association is submitting this grievance in writing on behalf of Christine Rasmussen. The informal presentation of the grievance was made with you by the grievant on December 20, 2001, and no action was taken to correct the violation.

Please feel free to contact me at the CWUC office at: 1 (800) 472-0010 or (715) 693-1740 if you have any questions.

Sincerely,

/s/
Timothy E. Smith
CWUC UniServ Director
Unit #3

Gunderson responded in writing to Smith in a letter dated January 14, 2002, as follows:

. . .

Dear Mr. Smith:

I am in receipt of your January 8, 2002 letter regarding a grievance for Ms. Christine Rasmussen and I have a number of concerns relative to that letter.

First, your state than an "...informal presentation of the grievance was made with you by the grievant on December 20, 2001..." is not correct. There was no mention of a contract violation at the meeting I had with Ms. Rasmussen on December 20.

Second, if your letter is intended to meet the requirements in Step 2 of the grievance process as outlined in the contract between the WASA and the School Board you have sent the letter to the wrong person.

Since your letter does not indicate your expectations for a response I do not know how you wish to proceed. However, in any event, I would like the opportunity to have the grievance orally presented to me as required in Step 1 of the Grievance procedure. Please let me know how you would like to proceed.

Sincerely,

/s/

Bruce Gunderson
High School Principal

...

On January 25, 2002, Smith directed the following letter to Poeschl:

...

Dear Dr. Poeschl:

The Waupaca Aides and Secretaries Association is submitting this grievance in writing on behalf of Christine Rasmussen. Ms. Rasmussen presented the first informal step of the grievance to Mr. Gunderson on December 20, 2001. However, Mr. Gunderson indicated it was not clear to him that a grievance was being presented at that time. I met with Mr. Gunderson on January 23, 2002 and went over the violation of the agreement and was told by Mr. Gunderson that you and he had decided to stick to your decision.

Your immediate response to this matter will be greatly appreciated. Please feel free to contact me at the CWUC office. . .

Sincerely,

/s/

Timothy E. Smith
CWUC UniServ Director

...

Poeschl responded to Smith's January 25, 2002 letter on or about January 31, 2002. Poeschl denied the grievance for the following reasons:

. . .

1. The grievance was not filed in a timely manner. Contract Article 23.05 states "Grievances not processed to the next step within the prescribed time limits shall be considered dropped and final."
2. The contract was not violated.

. . .

Smith submitted the grievance to the President of the School Board of Waupaca on or about February 4, 2002. The Board Personnel and Negotiations Chair responded on February 26, 2002, indicating that the Board had met on February 18, 2002, to consider the grievance and denied the grievance for the same reasons cited in Poeschl's response of January 31, 2002, above.

The Wisconsin Employment Relations Commission received the Association's Petition for Arbitration on March 7, 2002.

POSITIONS OF THE PARTIES

The District

The District argues that the express provisions of Article XXIII of the parties' collective bargaining agreement requires that grievances not processed to the next step within the prescribed time limit shall be considered dropped and final. It notes the Association did not adhere to the time limits when the Grievant orally presented the grievance to her supervisor, Gunderson. The District acknowledges that the Grievant had a conversation with Gunderson on her first day back to school after her one-day suspension, but that during that conversation she neither uttered the word "grievance" nor did she allege a violation of any specific contract clause. As such, the letter of January 8, 2002, was the first lodging of the grievance and it was untimely since it was submitted 12 days after the grievance occurred.

The District next challenges the timeliness and processing of the written grievance. First, the January 8, 2002, document was not the written grievance because the oral grievance had not occurred. Second, the document was directed to Gunderson rather than District Administrator Poeschl. Third, if the January 25, 2002, document constitutes the written grievance, then it was written 25 days after the grievance first arose and 15 working days late.

The District argues that the Association failed to comply with Article 23, Section 23.04, Subsection 4, when it failed to provide the requisite written notice of a request for arbitration with the clerk of the School Board. Poeschl testified that as of the date of the hearing, the Association had yet to comply with Subsection 4. The District asserts that for solely this reason, the arbitrator is "without jurisdiction in this matter."

The District notes that the testimony demonstrates that the Association was not afforded an extension of time at any level and as such, the grievance was untimely at three separate levels and should be denied. The District reviews arbitral decisions, which uphold the strict enforcement of negotiated time lines, and the resulting dismissal of a grievance when the parties have negotiated specific times lines which are not followed. See DIAMOND POWER SPECIALTY CORP. 44 LA 878 (DWORKIN, 1964), NEW YORK RACING ASSOCIATION 43 LA 129 SCHEIBER, 1964), OSHKOSH SCHOOL DISTRICT, CASE No. 51-390 0067 85H, (MUELLER, 8/85) and KAUKAUNA SCHOOL DISTRICT, CASE 18, No. 37988, MA-4419 (HOULIHAN, 8/87).

Turning to the merits, the District argues that it complied with the provisions of Article XXII of the collective bargaining agreement when it disciplined the Grievant. The District argues that the Grievant had interpersonal problems with Oestreich and Griffin. The District asserts that Gunderson admonished the Grievant and all of the secretarial staff in November, 2001, and informed them that discipline would result if inappropriate relations continued. The District argues that there is no dispute that the Grievant told Oestreich to "take your raging hormones and go home." The District asserts that the Grievant's admission, coupled with her past service and prior discipline, which include a verbal warning on October 10, 2001, and a written warning on October 29, 2001, justify the discipline imposed. The District argues that the determination of the penalty for misconduct is a function vested with management and arbitrators should hesitate to substitute their judgment for that of management and cites STOCKHAM PIPE FITTINGS Co., 1 LA 162 (McCOY, 1945). The District concludes that arbitral case law support the discipline meted out in this case of a one-day suspension without pay.

For the above reasons, the District submits that the grievance should be denied.

The Association

In response to the District's timeliness issues, the Association asserts that all timelines were followed. The Association asserts that as a result of Gunderson misunderstanding the nature of the conversation he had with the Grievant on December 20, 2001, the Association agreed to meet with Gunderson. The Association argues that Gunderson's request to meet to discuss the grievance constituted a waiver of the timelines.

Turning to the merits, the Association argues that the discipline imposed on the Grievant fails to satisfy the contractual provisions of the labor agreement. The Association challenges the District's compliance with Article XXII, Section 1, states that employees shall

be given notice of their misconduct or incompetence and the possible consequences. The Grievant was never given notice of her misconduct and further, that at the meeting with the Office staff on November 9, 2001, the District communicated to the staff that it would devalue any past memorandums.

The Association next argues that the District has violated Section 2 and Section 3 of Article XXII. It asserts that the District failed to take into account the Grievant's work history since the Grievant's supervisor had no complaints regarding the Grievant's work ethic. The Association next argues that the District failed to follow progressive discipline. The Association notes that although the Grievant may have been disciplined in the past, that discipline was entirely different and not related to interpersonal relationship conflicts among office staff.

The Association further asserts that the District has failed to comply with Section 4 of Article XXI discipline is contractually required to be imposed in an evenhanded manner and the District has not meted out discipline evenhandedly in this instance. The Association points out that two employees were involved in the interpersonal conflict giving rise to this grievance, but that only one employee was disciplined for the offense.

The Association concludes that the District had been aware of the interpersonal conflicts among its clerical staff for an extended period of time, but failed to intervene and appears to have taken the position that the situation would "just go away." The Association asserts that for the District to all of a sudden decide to discipline one employee is a clear violation of the labor agreement. The Association asserts that ruling for the Association will place the District on notice in the future of how discipline should be administered.

DISCUSSION

The District has raised the question of procedural arbitrability and this is a threshold issue. The District argues that the grievance was untimely at Steps 1, 2 and 4 of the Grievance procedure. The Association argues that the District waived its right to object on the basis of timeliness as a result of its invitation on January 14, 2001, to meet to discuss the grievance. While I conclude that there was not a procedural violation with the oral presentation of the grievance, I do find that there was a technical violation with the presentation of the written grievance of a substantive violation with the submission to arbitrate.

The event giving rise to the grievance occurred on December 13, 2001. The grievance procedure provides in Section 4, Subsection 1, that an employee "shall orally present the grievance to the Principal or immediate supervisor no later than ten (10) working days after the grievance occurs" and the Principal or immediate supervisor will orally provide his/her response within five (5) working days. Thus, the Grievant and/or the Association had 10 working days from the date of the incident to meet and orally discuss the grievance. Principal

Gunderson, the Grievant's supervisor, testified that on December 19, 2001, the Grievant inquired as to whether Gunderson was "going to reinstate me [the Grievant] from my suspension and retract the letter of reprimand." (Transcript p. 36). The District argues that this conversation does not satisfy the "oral" of Subsection 1 of the grievance procedure because, according to the undisputed testimony of Gunderson, the Grievant did not use the word "grievance" in their conversation. I accept the conclusion of Arbitrator Kates who stated "[a]ll that is necessary, in my opinion, is an oral objection to the propriety or validity of some Company action or decision and an effort by the Grievant's comments to obtain a change in the action or decision." COLUMBUS SHOW CASE CO. 44 LA 507 (KATES, 1965). The District had knowledge on December 19, that the Grievant was objecting to her suspension and further, was aware that she desired that it be remedied. Gunderson understood what the Grievant was requesting and responded that he would not be rescinding her one-day suspension nor would he be removing the letter of discipline. I therefore find that the Association complied with Subsection 1 of the grievance procedure.

Subsection 2 of the grievance procedure requires that the Association submit a written grievance to the District Administrator within 10 days of receipt of the immediate supervisor's denial. Accepting that the conversation between Gunderson and the Grievant, which occurred on December 19, 2001, constituted the Subsection 1 oral presentation of the grievance, I find that the Association complied with the Subsection 2 time limit. The Association filed the written grievance on January 8, 2002, with Gunderson. Although the record does not indicate the number of working days between December 19, 2001 and January 8, 2002, there is no dispute that 12 working days elapsed between December 17, 2001, and January 8, 2002. Inasmuch as there is a two working day difference and December 17-19, 2001, are two working days, I conclude that the written grievance was provided to Gunderson within the 10-day requirement as specified in Subsection 2. The next question as it relates to Subsection 2 is whether the written grievance was submitted to the proper individual.

The District asserts that the Association erred when it submitted the written grievance to Gunderson rather than District Administrator Poeschl. Subsection 2 clearly provides that the Association "shall prepare and present the grievance in writing to the District Administrator" which they did not do. The language of Article 24, Section 4, Subsection 2 of the collective bargaining agreement is clear and unambiguous; the written grievance is to be submitted to the District Administrator. There is no question that Poeschl was aware of the grievance. There is also no question that the District challenged the processing of the grievance based on non-compliance with the express terms of Subsection 2. Where clear and timely objection is made to procedural violations, no waiver will result from subsequent processing of the grievance on the merits and further, the objecting party should discuss the grievance on the merits in preparation for arbitration. Elkouri and Elkouri, How Arbitration Works, 5th Edition p. 278 (1997). The Association did not explain why it filed the written grievance with Gunderson nor was any evidence presented at hearing to indicate that the parties have a practice of not submitting subsection 2 written grievances to the District Administrator. Even if I were to conclude that the Association had substantively complied with the labor agreement and that this violation is technical, I find that in combination with the subsection 4 violation, this grievance is nonarbitrable.

Subsection 4 of the grievance procedure states that the Association will provide written notice of a request to arbitrate a grievance to the Clerk of the District's Personnel Committee within ten days of receipt of the answer from the Personnel Committee. This is not a mere formality. The uncontroverted testimony of District personnel indicates that the District did not have any knowledge of the Association's decision to arbitrate this grievance and only learned of it when this Arbitrator scheduled the hearing date. The failure by the Association to apprise the District of its' intent to arbitrate was in violation of the clear language of the labor agreement and potentially prejudiced the District. The Association did not present any facts or circumstances to either explain or overwhelm the clear time limit language of the parties' negotiated labor agreement and therefore, the non-compliance with Subsection 4 results in my finding the grievance was untimely.

In this case, the District asserted a procedural defect argument in each of its responses to the grievance filings. The facts bear out that the grievance was procedurally defective at Subsection 2 and Subsection 4. Although it is not my desire to dismiss this grievance based on procedural grounds, the language of the parties' agreement requires that I do so. Having dismissed the grievance on procedural grounds, it is unnecessary to address the merits.

AWARD

No. The Association failed to comply with the provisions of Article XXIII with regard to time lines and processing the grievance through the grievance procedure to arbitration and therefore, the grievance is denied.

Dated at Wausau, Wisconsin, this 1st day of November, 2002.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator