BEFORE THE ARBITRATOR

AMERY SCHOOL DISTRICT

and

NORTHWEST UNITED EDUCATORS

Case 56
No. 63184
MA-12516

(Jones Termination)

Appearances:

Mr. Tim A. Schultz, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin, appearing on behalf of Northwest United Educators.

Mr. Stephen L. Weld, Attorney, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of the Amery School District.

ARBITRATION AWARD

Northwest United Educators, hereinafter "Union" requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Amery School District, 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 March 12, 2004, in Amery, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on June 21, 2004, at which time the record was closed. Based upon the evidence and arguments of the parties, the Undersigned makes and issues the following Award.

ISSUES

The parties agreed at hearing that there were no procedural issues in dispute and framed the issues as follows:

Did the School District have just cause to terminate the Grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE IV – MANAGEMENT RIGHTS

A. The Board 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 the United States.

B. These rights include, but are not limited by enumeration to, the following rights:

. . .

4. To suspend, demote, discharge, and take other disciplinary action against employees.

. . .

C. The exercise of the powers, rights, authority, duties and responsibilities by the Board, 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 terms of this Agreement and then only to the extent such terms hereof are in conformance wit the Constitution and the laws of the State of Wisconsin and the Constitution and the laws of the United States.

ARTICE XIV – PROBATION AND JUST CAUSE

All employees shall serve a probationary period of one (1) year from the date of hire in the bargaining unit. . . . Upon completion of the probationary period, the employee shall be granted seniority rights from the employee's date of hire. And following the probationary period, no employee shall be disciplined, demoted, or discharged without just cause.

BACKGROUND AND FACTS

The essential facts are not in dispute.

The Grievant was employed by the District from September 1, 1996, through December 3, 2003, at which time his employment was terminated. The Grievant was initially employed as a substitute custodian until January 8, 1997, when he was hired to a full-time custodian position. Prior to his termination, he had an unblemished work record and positive evaluations. The record is unclear as to the specific dates in 2002 and 2003 during which the Grievant was on an unpaid leave of absence for health reasons. The Grievant worked continuously from the start of the 2002-2003 school year until his termination. The Grievant's supervisor was Joe Mara, Building and Grounds Superintendent.

At the time of the Grievant's hire to the full-time position, he completed an Application for Employment that contained the following question:

HAVE YOU BEEN CONVICTED OF A FELONY OR MISDEMEANOR? ☐ YES ☐ NO

The Grievant placed an "x" in the "NO" box on the application form. There was an "Authorization" section located at the end of the application form which included the following:

> I CERTIFY THAT ALL INFORMATION SUBMITTED BY ME ON THIS APPLICATION IS TRUE AND COMPLETE, AND I UNDERSTAND THAT IF ANY FALSE INFORMATION, OMISSIONS, OR MISREPRESENTATIONS ARE DISCOVERED, MY APPLICATION MAY BE REJECTED AND, IF I AM EMPLOYED, MY EMPLOYMENT MAY BE TERMINATED AT ANY TIME.
>
> SIGNATURE /s/ Preston Wayne Jones DATE 9-23-96

The Grievant was interviewed by Mara and Gregory Blair, prior District Middle School Principal. The Grievant did not inform Mara or Blair during his interview that he had been convicted of a felony or offense. Mara and Blair recommended the Grievant's hire to then District Administrator Ray Norsted.

In the Fall of 2003, District Administrator Stephen Schiell, received a telephone call from a citizen informing Schiell that the Grievant was a convicted felon. As a result of the telephone call, Schiell conducted an investigation and learned that the Grievant had been convicted on September 30, 1974, for possession for sale of a controlled substance, hashish oil in the state of California. The Grievant, who was 21 years and living in California at the time, was sentenced to two years prison, but actually served 18 months in prison including four months with Huber privileges and was placed on probation for one year. Hashish oil is a liquid which contains approximately 15 percent THC and a common use is to place a drop or two on a cigarette which causes a psychoactive effect similar to a single "joint" of marijuana.

Schiell and Middle School Principal, Tom Bensen, met with the Grievant and Tim Schultz, Executive Director, Northwest United Educators, on November 25, 2003. Following the meeting, the District issued the following letter:

. . .

Dear Mr. Jones:

This letter is a follow-up to the conversation I had with you and Mr. Bensen following our initial meeting that included Tim Schultz from NUE.

As I discussed in the first meeting, I was going to do my best to deal with the questions at hand as soon as possible. Shortly after the first meeting, I did contact our attorneys and was told there is no issue about timeframe. Once a felony is placed on your record, it is there for life unless you take legal action to have the record expunged.

Due to the fact that you misled the School District of Amery when you checked the box indicating "No" to the question asking if you have ever been convicted of a felony or misdemeanor, the following action is going to take place:

1. You are being suspended with pay through December 2, 2003.

2. During this suspension, if you are able to provide me with any information that clears you of any wrongdoing, you will be immediately returned to work.

3. If you are not able to provide information by December 2, 2003, you will have the option of resigning your position or of having your employment with the School District of Amery terminated immediately.

4. If you choose to resign, I will not contest Unemployment benefits.

5. If your position is terminated, Unemployment benefits will be contested due to the falsification of an application.

If you have any questions, please feel free to contact me.

. . .

The Grievant attempted to contact his probation and parole agent from California, but was unsuccessful. As a result of his failure to provide the District with the information it requested, he was discharged pursuant to a December 4, 2003 letter which read in pertinent part:

. . .

> As of this date, you have been unable to provide any verification that you were told that your criminal record was cleared. Due to the misrepresentation that you provided the District upon your application for employment, effective Wednesday, December 3, 2003, your employment with the School District of Amery has been terminated.

. . .

The NUE filed a step II grievance on December 4, 2003, alleging that the District did not have just cause to terminate the Grievant and sought immediate reinstatement, expungement of documents referencing his termination and repayment for lost compensation. The District denied the grievance on December 23, 2003, placing the case properly before this Arbitrator.

POSITIONS OF THE PARTIES

Union Initial Brief

The Union asserts that the District did not have just cause when it terminated the Grievant. Accepting the analysis articulated by Arbitrator Raleigh Jones S & M ROTOGRAVURE SERVICE, INC., CASE 3, NO. 56875, A-5720 (JONES, 6/99), the essential elements to a just cause review in Wisconsin are:

> the first is whether the employer proved the employe's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which is imposed was justified under all the relevant facts and circumstances. The relevant facts and circumstances which are usually considered are the notions of progressive discipline, due process protections, and disparate treatment.

There is no question that the Grievant marked "no" in response to the question on his application. The question is whether he willfully tried to deceive the District when he filled out his application and whether or not his action constituted cause for termination.

The Union asserts the Arbitrator should adopt the analysis of Arbitrator Eric B. Lindauer wherein he stated:

> Generally speaking, arbitrators do not uphold summary discharge for (falsification of employment applications,) but look at several factors to determine the level of discipline an employee should receive. Arbitrators will consider the type of falsification, the time period between the misrepresentation and its discovery, the employee's job performance, how the falsification was discovered, and whether the employee would have been hired if the employer had know the truth.
>
> "Serious Employment Misconduct - The Cardinal Offenses," Eric B. Lindauer, Chicago Program on Law and Labor Arbitration, 2003.

Should the Arbitrator follow this analysis, the discharge cannot be upheld.

The Grievant's falsification was not willful, rather it was an error on his part. The Grievant incorrectly understood that his felony had been expunged and that his record would be sealed. He reached this conclusion as a result of information he believes he was told by his parole officer in California. The Grievant testified that he did not intentionally deceive the District. Lacking willfulness, termination is excessive.

The time period between the misrepresentation and its discovery was greater than seven years. This favors the Grievant. Moreover, the manner in which the misrepresentation was brought to the District's attention further supports the Grievant. The District failed to act in good faith. The School Board President and the Grievant's supervisor were aware of Jones' conviction of a crime as a youth. The District had more than seven years to conduct a background check on the Grievant and failed to do so. It was only after an anonymous citizen threatened the District Administrator did the District over-react.

The District terminated the Grievant for misrepresentation of his employment application and not for the circumstances pertaining to the conviction. The Union acknowledges that the Grievant was convicted of distributing drugs, but at no time prior to hearing did the District focus on this issue. Rather, the District provided the Grievant the opportunity to return to work following submission of documentation confirming that his felony had been expunged.

The Grievant was an excellent and trustworthy employee. Co-workers and teaching staff testified he was conscientious and helpful. His evaluations contain accolades. The District failed to take into account the Grievant's work history when deciding to terminate him.

The District did not summarily terminate another employee for falsification of her job application. Theresa Gaudette, a currently employed custodian, claimed to have graduated from high school when she did not and the District retained her because "the job that she was doing . . . was very satisfactory." Union Brief p. 14 The District's termination of the Grievant was excessive and inconsistent with its treatment of Gaudette.

The Grievant has been forthright and honest with the District throughout the investigation of his application. He has never denied his arrest and conviction, rather he has all along mistakenly believed that his felony had been expunged. This misunderstanding, coupled with his excellent work record and the fact that the District did not terminate another employee who also falsified her job application, support the conclusion that the Grievant's termination is excessive.

District Initial Brief

The Grievant was terminated for falsification of his employment application. The question on the application was straightforward and the application clearly stated that any false information, omission or misrepresentation could result in termination. As Arbitrator Richard McLaughlin concluded in NEW RICHMOND SCHOOL DISTRICT, CASE 50, NO. 60182, MA-11555 (MCLAUGHLIN, 7/02), failure to disclose a felony conviction on a job application in and of itself warrants termination.

The felony conviction the Grievant lied about was possession with intent to distribute illegal drugs. This crime is substantially related to his employment in a school district and thus the termination was justified. Relying on COUNTY OF MILW. V. LIRC, 139 WIS.2D 805 (1987) and GIBSON V. TRANSPORTATION COMMISSION, 106 WIS.2D 22 (1983), and MOTEL V. LAKESHORE BUSES, LIRC, (1993), the case law clearly supports the termination of the Grievant. Had the District known at the time of the Grievant's hire that he had been convicted of this felony, there is no question from the testimony that he would not have been hired. Moreover, the seriousness the District placed on the Grievant's prior criminal conviction is evidence by the steps taken once the conviction became known; the Grievant was immediately suspended and removed from student contact. The District must act *in loco parentis* for its students and inherently there is a legitimate interest in ensuring that its employees are not drug dealers.

The Grievant's omission of a felony conviction for possession of illegal drugs with intent to sell is far more egregious than a school district employee who states that she received a high school diploma when in fact she had only obtained a GED. The Union's attempt to compare these vastly different offenses is misplaced.

Union Reply Brief

The Union first takes issue with the District's portrayal of the Grievant in a negative manner. Since his conviction at the age of 21, he has lived peacefully and without incident in the Amery community.

The District's reliance on MOTEL V. LAKESHORE BUSES, LIRC, (1993) is misplaced. There is no evidence that the Grievant has a "tendency or inclination" to engage in criminal activity. Rather, the Grievant is a model citizen behaving in a highly responsible and exemplary manner.

As to the District's continued assertion that the Grievant purposefully lied, that was neither his testimony nor did his behavior indicate this intent. The Grievant talked about his conviction to his colleagues with his supervisor present. His testimony confirmed that he did not understand the law.

The District's argument that it would not have hired the Grievant had it known of the Grievant's conviction in 1996 is disingenuous. Had the District cared in 1996 if the Grievant had a criminal record, it would have checked.

In conclusion, the Grievant was a loyal, conscientious, hardworking and trustworthy employee. He has already been punished for a crime that occurred greater than 30 years ago. He should not be punished again.

For all the above reasons, the grievance should be sustained.

District Reply Brief

The District maintains that the just cause standard has been met in this case. The Grievant deliberately and calculatedly falsified his employment application. Prior WERC cases have held discharge is appropriate when the employer can demonstrate that the employee willfully falsified the job application. CITY OF BROOKFIELD, CASE 99, NO. 49606, MA-8004, (MAWHINNEY, 4/94). It is only the Grievant's self-serving testimony that contends his falsification was not willful. He could not and still cannot provide any documentation or testimony from the parole agent that supports his contention.

The District is in a unique position of *in loco parentis* to its students and the Grievant's failure to disclose his felony conviction for possession with intent to sell would have precluded his initial employment. Former Superintendent Norsted testified that he would not have hired the Grievant had he know about the conviction.

As to the Union's desire to analogize another employee's claim that she had a high school diploma when she only had a GED to the Grievant's falsification, it is within the bounds of the District to differentiate these penalties.

Finally, the Grievant should not be allowed to profit from the delay in discovering the felony conviction. The Grievant concealed his conviction from the District. The District has a strong interest in truthfulness. Given the severity of the omission, the District was within its rights to terminate the Grievant, despite his job performance.

The District requests that the Arbitrator uphold the termination and dismiss the grievance.

DISCUSSION

The parties labor agreement, Article XIV, provides that no employee will be disciplined unless the employer has just cause. The parties' agreement does not define just cause. The Union recommends that the Arbitrator adopt the "Wisconsin definition" as articulated by Arbitrator Raleigh Jones in S & M ROTOGRAVURE SERVICE, INC., CASE 3, NO. 56875, A-5720 (JONES, 6/99). Although I do not accept that there is a universal "Wisconsin Method" of just cause analysis, I am willing to address this case in the context articulated by Arbitrator Jones. This analytical framework requires evaluation of two elements; first, whether the employee engaged in the conduct for which he was disciplined and second, whether the discipline was justified given the relevant facts and circumstances.

The District terminated the Grievant for the "misrepresentation" of information, specifically his felony conviction, on his application for employment. Misrepresentation is defined as "to give a false or misleading representation of usu. with an intent to deceive or be unfair . . ." Meriam Websters' New Collegiate Dictionary (1981) p. 729. There is no dispute as to whether the Grievant answered "No" to the felony conviction question on the District's employment application. The question becomes whether he did so with the intent to deceive. The Union asserts that the Grievant erroneously believed that his conviction had been expunged and thus, the deception was not willful and a misrepresentation did not occur.

The heart of this case is the Grievant's testimony. As the District correctly points out, the Grievant offered uncorroborated self-serving testimony explaining that he responded "no" to the question because his parole agent had told him that his conviction would be sealed and not subject to public release after 15 years. The question is whether his testimony is credible. The record establishes that the Grievant time and again stated that he believed his conviction had been expunged. He told this to the NUE representative, the Superintendent, the Building and Grounds Superintendent and to this Arbitrator at hearing. The fact that he consistently uttered the same rationale throughout the District investigation is convincing, but significant is the conversation between the Grievant and his supervisor Mara on Tuesday, November 25, when the Grievant informed Mara that he did not believe he would be working for the District any further. The Grievant explained to Mara the circumstances including the fact that he responded "no" to the question because he believed that the conviction had been expunged. If the Grievant had concocted the "parole agent told me it was expunged" story to exculpate himself of responsibility and thereby retain his job, he would not have concluded that he would no longer maintain employment with the District. Rather, he would optimistically have believed that his employment was secure.

There is no question from this record that the Grievant has little or very limited knowledge in the criminal justice system. Although the District attempts to discredit the Grievants' testimony regarding his mistaken belief that his felony conviction had been expunged, there is no evidence to support this assertion. Rather, the Grievant convincingly testified that he understood his conviction "after 15 years . . . would be sealed" meaning that it "was not under public record anymore." (Tr. p. 78) The Grievant's testimony reflects his understanding that the term "expunge" is interchangeable with "sealing" his criminal conviction thereby making it no longer a public record. The Grievant's lack of understanding of the legal system is further evidenced by his testimony that he was afforded "Hubert law" privileges which allowed him to leave prison to work. Although "Hubert" and "Huber" are very similar sounding words, the fact is that they are not the same. I am persuaded that the Grievant, when completing the District's application for employment, honestly believed that his felony conviction no longer existed. As such, the record does not support a finding that the Grievant committed the misconduct for which the District disciplined him since he did not intentionally provide false or misleading information on his employment application.

The District implores the Arbitrator to consider the serious nature of the offense to which the Grievant was convicted and to conclude that such a conviction forecloses continued employment with a public sector employer whose primary purpose is the education and welfare of children. I concur that a conviction for intent to sell is very serious. But, the Grievant's conviction occurred in 1974 when he was 21 years of age in California and, although drug crimes are treated very seriously today, norms and mores. At the time in which he committed the crime, it would not necessarily have been seen as a disqualification from employment in a school district. Felony convictions, especially those relating to illegal drug use and sale, are neither frivolous or inconsequential especially in a school district setting. Mara and Blair's testimony indicating that they would not have hired the Grievant had they been aware of his conviction is concerning, but the fact of the matter is that I am unwilling to castigate the Grievant a second time given that he is different person today than he was in 1974.

Subsequent to his conviction, the Grievant has had absolutely no contact with law enforcement professionals. That is a 30-year clean record during which time he moved to the Amery community, obtained and maintained respectable employment, gained the trust and respect of numerous community and school district professionals, and ultimately has proven to be a responsible citizen.

The Grievant has been employed by the District for seven years. Colleagues, including District management, describe him as a conscientious and caring employee. He has earned positive evaluations and compliments from co-workers.

The District asserts it has a legitimate interest in ensuring that its employees are truthful. I concur. The District's stated strong interest in truthfulness has not been violated. Excluding the Grievant's employment application, the District has not cited any examples or instances in which the Grievant has been untrustworthy.

The Union asserts that the Grievant has been subject to differential treatment in as much as another employee similarly falsified her employment application and was not terminated. The record evidence supports this assertion. The described offenses are the same, misrepresentation of employment application. Although I understand that the District believed its actions were justified as a result of the nature of the alleged misrepresentation committed by the Grievant, it failed to base the Grievant's termination on this and thus, the differential treatment between Gaudette and the Grievant was inappropriate.

Finally, the Union asserts that the fact that the District learned of the felony conviction from an anonymous source, coupled with the facts that Mara was present when the Grievant referred to his previous stay in prison and that District Board President David Duxbury was aware of the Grievant's conviction are indications of bad faith on the part of the District. I do not reach this conclusion. The Grievant and Duxbury are social friends. It is reasonable to conclude that whatever information Duxbury gained as a result of that relationship, especially a prior felony conviction, was information that Duxbury could reasonably believe the District was aware of and, therefore, Duxbury was under no obligation to report the conviction to District officials. As to the Union's attempts to discredit Mara, it is indeed suspicious that he did not recall his participation in the conversation at the old school until cross examination, but regardless of whether he became aware during that conversation or once the anonymous tip was called in, the fact result is the same.

As to the issue of remedy, the Grievant seeks reinstatement and restoration of benefits and privileges including back pay. The District acted in good faith when it made the decision to terminate the Grievant. It was the Grievant's mistake that caused this situation to come to fruition and I am unwilling hold the District responsible for the Grievant's erroneous understanding of the law. As such, back pay is inappropriate.

AWARD

1. No. The School District of Amery did not have just cause to terminate Preston Wayne Jones from his custodial position.

2. The appropriate remedy for the violation found in item one above is: the District shall immediately reinstate Jones and expunge all references to Jones' termination from its personnel files. No back pay or retroactive benefits are awarded.

3. I shall retain my jurisdiction for at least sixty (60) days to resolve any questions involving application of this Award.

Dated at Rhinelander, Wisconsin, this 21st day of October, 2004.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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