BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

D.C. EVEREST SCHOOL DISTRICT

and

TEAMSTERS LOCAL UNION NO. 662

Case 61
No. 64991
MA-13077

(Discharge Grievance)

Appearances:

Ms. Andrea Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of the Teamsters Local Union No. 662, and the Grievant.

Mr. Jeffrey T. Jones, Ruder Ware, Attorneys at Law, 500 Third Street, P.O. Box 8050, Wausau, WI 54402-8050, appearing on behalf of the D.C. Everest School District.

ARBITRATION AWARD

According to the terms of the 2002-05 collective bargaining agreement between the parties, the parties jointly selected Arbitrator Sharon A. Gallagher to hear and resolve a dispute between them regarding the discharge of Grievant T.T.[1], for dishonesty. Hearing was held at the District's offices at Weston, Wisconsin on November 2, 2005. A stenographic transcript of the proceedings was made and received by November 19, 2005. The parties waived the right to file reply briefs at the hearing and they submitted their briefs by December 29, 2005, whereupon the record was closed.

[1] The Grievant's initials will be used herein.

ISSUES

The parties were unable to stipulate to the issues before the Arbitrator. However, the parties agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument and the parties' suggested issues. The District suggested the following issues:

1. Did the Grievant's discharge violate Article 10, Section 1 of the collective bargaining agreement?

2. If so, what is the appropriate remedy?

The Union suggested the following issues herein:

1. Was T.T.'s termination for just cause?

2. If not, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case as well as the above suggestions, this Arbitrator finds that the District's issues reasonably state the controversy in this case and they will be determined herein.

Relevant Contract Provision

ARTICLE 8 – ARBITRATION

A. **Arbitration Notification:** If a satisfactory settlement is not reached in Step 3, the Union must notify the superintendent in writing within fifteen (15) days of the Boards' decision that they intend to process the grievance to arbitration.

B. **Arbitration:** Any grievance which cannot be settled through the above procedures may be submitted to arbitration. The arbitrator shall be selected as follows: Either party may request that the Wisconsin Employment Relations Commission to prepare a list of five (5) impartial arbitrators. The Union shall then strike two (2) of the names on the slate, and then the Board shall strike two (2) of the remaining names on the slate. The remaining arbitrator on the slate after the strikes shall then be notified of his/her appointment as arbitrator.

C. **Arbitration Hearing:** The arbitrator selected shall meet with the parties at a mutually agreeable date to review the evidence and

hear testimony related to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the board and the Union which shall be final and binding on both parties.

D. **Costs:** Both parties shall share equally the costs and expenses of the arbitration proceeding, including transcript fees when the use of the court reporter is mutually agreed and fees of the arbitrator. Each party, however, shall bear its own costs for all out-of-pocket expense including possible attorney's fees. The Union shall have six (6) half days per year for its use in arbitration proceedings specifically to be used when a custodian is subpoenaed by the Union to testify at said proceedings. Except as herein provided, no custodians shall be paid by the Board for participation in the arbitration process.

E. **Decision of the Arbitrator:** The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the express terms of the agreement.

ARTICLE 10 – DISCHARGE

Section 1. No employee who has completed his/her probationary period shall be discharged or suspended without one (1) warning notice of the complaint in writing to the employee with a copy to the Union and Steward, except no warning notice is required for discharge due to dishonesty, being under the influence of intoxicating beverages while on duty, use of illegal drugs while on duty, immediate possession of intoxicating beverages or controlled substances, carrying unauthorized passengers in an Employer vehicle, recklessness resulting in a chargeable accident while on duty or other flagrant violations. Warning notice to be effective for not more than one hundred eighty (180) days from the date of notice. Discharge or suspension shall be in writing with a copy to the Union and the employee affected.

Section 2. Any employee, other than a probationary employee, desiring an investigation of his/her discharge, suspension or warning must file his/her protest in writing with the Employer and the Union within five (5) days excluding Sundays and holidays of the date the

> employee received such discharge or warning notice. The discharge, suspension or warning notice shall then be discussed by the Employer and the Union as to the merits of the case.
>
> **Section 3.** The employee may be reinstated under other conditions agreed upon by the Employer and the Union. Failure to agree shall be cause for the issue to be submitted to arbitration as provided for in Article 8 of this Agreement.

. . .

BACKGROUND

T.T. was employed as a Custodian Class I on the third shift (10:45 P.M. to 6:45 A.M.) at the District High School since November of 1997 prior to his termination on June 27, 2005. On March 31, 2005, T.T.'s work was evaluated. Of 26 categories, T.T. was rated as "meeting standards" in 18 categories; as "needing improvement" in six categories; and as "unsatisfactory" in one category. In two categories, T.T. was rated both as meeting standards and as needing improvement. The unsatisfactory rating was regarding attendance where it was noted that T.T. had missed 25.6 days of work in calendar year 2004.[2] Prior to June of 2005, T.T. had requested and received Workers' Compensation for on-the-job injuries.

The basic facts regarding the events of June 9, 2005 are not disputed, with one exception—the Union/Grievant has consistently asserted that T.T. slipped on a garbage bag in a baseball-type slide as he chased vandals out of the High School building in front of the Teacher's Lounge, while the District asserted that the video from the hallway camera in the area of the Teacher's Lounge showed that T.T. never slipped and never fell near the Teachers' Lounge as he claimed. Given the narrowness of the factual dispute, and the consistency of the witnesses' testimony herein, this Arbitrator finds that the following excerpt from the District's brief (pp. 2-3) accurately reflects the facts of record herein, and this Arbitrator adopts them:

> On the morning of June 9, 2005, Thomas was on duty when eight High School students broke into the High School to pull a senior prank. (Tr.103-104, 15-7.) The prank involved the students filling up garbage bags with hot air from a boy's restroom hand dryer and leaving them inflated in the lobby of the school. Thomas discovered the students in the building while they were pulling the prank and chased them out of the school. While chasing the students from the building, Thomas

[2] T.T.'s mother has Alzheimer's disease and he has used some of his sick leave to care for her under the FMLA. These absences were counted into the above total.

> claims that he slipped on a plastic garbage bag outside the door of the teachers' lounge and fell completely to the floor in the form a baseball player slide. (Tr. 113, 1-3.)
>
> Thomas called his supervisor, Jeff Belott, to inform him of the situation. (Tr.105, 8-11.) Thomas informed Belott that he had fallen and had injured himself chasing vandals from the building. (Tr. 105, 12-16.) Belott arrived at the High School to investigate the matter. Thomas also called the police, who arrived at the school to investigate. Thomas spoke with the police officer and Belott. Thomas described the incident to Belott, and identified the area in which he allegedly fell and hurt himself as before the teachers' lounge door. Thomas and Belott cleaned up the garbage bags, which involved bending, picking up bags, and placing them in garbage cans. (Tr. 28, 17-23.) Thomas worked to clean up the mess for roughly one hour, taking a three minute break. (Tr. 122, 3-14) During that time, Thomas did considerable walking on his allegedly injured leg, and walked over a quarter of a mile at one point. (Tr. 121, 19-24.) Thomas remained at work for the remainder of his shift.
>
> Thomas missed work for the next two days. (Tr. 39, 1-10.) He was granted workers compensation leave for those two days. (Ex. 4; Tr. 40, 19-25.) Thomas went to his family doctor, who took x-rays of his leg and referred Thomas to see a workers compensation doctor. (Tr. 106, 6-16.)
>
> . . .

The police report regarding the incident on June 9, 2004 read in relevant part as follows:

> On 06-09-05 at about 12:40 a.m., Officer Goff and I and Officer Gertschen of the Rothschild Police Department were dispatched to the area of the D.C. Everest Senior High School. The night shift janitor had reportedly caught eight people inside the building and these subjects then fled out of the building. The janitor believed that they were damaging the bathroom in the school.
>
> . . .
>
> I transported J.H. to the D.C. Everest Senior High School where I met with night janitor Terry Thomas and his supervisor Jeff Belott. I asked Mr. Thomas to view J.H. and he did. Mr. Thomas immediately recognized him as one of the subjects that was inside the school.

. . .

> Mr. Belott advised that Mr. Thomas had injured his leg when he ran after the subjects as they were running out of the school. I could see that Mr. Thomas was limping and he also appeared to be very upset. Mr. Thomas indicated that he believed there were eight people in the front bathroom in the high school which is just off the front lobby.

. . .

T.T. completed and signed his time card for June 9 and 10, 2005 listing that he was off on "Workers Comp" both days. On June 13, 2005 T.T. completed and signed an "Employee Absence Report" for absences on June 9 and 10, 2005, writing the reason for his absence as "Workers Comp" (Dist. Exh. 6). T.T. also filled out an "Employer's First Report of Injury or Disease" on June 9, 2005, wherein he wrote, "Slipped on garbage bag vandals dropped while running away and I landed on my right hip—buttocks." T.T. also wrote on this form that he was injured while "chasing vandals in building—senior high" and that his injury was to his "right hip and buttocks" (Dist. Exh. 12).

T.T. visited Dr. Jeffrey Kessel on June 10, 2005 around noon at which time T.T. had Dr. Kessel fill out a Worker's Compensation Injury Report, stating that he injured his hip and right buttocks from "running + slipped +fell—landed on R butt/hip + pain + bruised" (Union Exh. 1). On June 10th, the doctor prescribed a strong pain medication, Vicodin, for use during off-work hours. Doctor Kessel also prescribed Mobic and Advil and he restricted T.T. to "sedentary work/sit down job" when he returned to work on June 13, 2005 (Union Exh. 1). On June 20, 2005, Dr. Kessel saw T.T. again and lifted T.T.'s restriction stating T.T. could perform "Light medium work," frequently lifting twenty pounds and occasionally lifting thirty pounds.

On June 15th, having received from T.T. his Worker's Compensation Injury Report, the District began investigating the June 9th incident. On June 15th, Supervisor of Buildings and Grounds Howard Hoeft, T.T., and Maintenance Supervisor Terry Marcott reconstructed the events of June 9th at which time T.T. told Hoeft and Marcott the following:

. . .

> "I was walking through the hall near the auditorium restrooms, when I notice (sic) the inside lobby doors were closed. I stopped walking in about the center of the lower lobby near the gym and saw trash bags piled up in the upper lobby. Then I saw a person in a gray sweatshirt. I started walking toward the stairs, when the person yelled something. I yelled back – hey! The person took off running and when I got near the 2nd floor Boy's Restroom, a bunch of kids started running out and down the hall. I yelled at them that I called the cops and they are on the way – but the kids kept running. I ran after them, but slipped on one of the

trash bags on the hallway floor and fell. I got back up pretty fast and kept chasing them. "Howard – "how far did you chase the kids?" T.T.– "Just to door 22, they ran out and behind the school towards the woods. I was trying to call out on the cell phone, but the signal was bad. I went to the Teachers Lounge to call from that phone. I called police and Jeff Belott." Howard- "Did you fall like this? (And I slowly demonstrated falling on my right side and used my arm to cushion the fall.) T.T.– "Yes, something like that." Terry Marcott- "so you fell while chasing the kids?" T.T. – "Yes."

. . .

On 6/09/05 – D.C. Everest Senior High School – security cameras
12:13 a.m.–People enter
12:19 a.m. People start filling trash bags and putting them in main lobby
12:34:58–Person in gray sweatshirt warns others
12:35:07–T.T. shows up and starts chasing people down hallway
12:35:16-T.T. leaves hallway and goes around corner
12:35:35-T.T. goes out door 22 – but does not leave bldg.
12:37:26-T.T. comes back into view near door 22
12:38:23-T.T. goes into Teachers Lounge
12:43-T.T. comes out of Teachers Lounge and walks back up hallway
1:32–Jeff Belott and Police Officer enter building from main lobby door
1:45–Jeff Belott leaves bldg.

The videotape of this incident has been saved and recorded for any future need.

. . .

Also of Note:
When Jeff Belott arrived on the scene after being called at home, T.T. told Jeff that he had fallen while chasing people down the hallway near the Teachers Lounge and would have to go home. T. said, "He could hardly walk." Jeff asked T. to stay, even if he had to sit for a while. Jeff and T. picked up the trash bags and then Jeff left the scene. Today, Jeff Belott confirmed the fact that T.T. said he had fallen while chasing the people down the hall.

. . .

A further meeting was held on June 21, 2005 with Union Representative Leist which Hoeft confirmed by memorandum to Personnel Director Dan Rauscher which read in relevant part as follows:

. . .

the initial investigation was two-part. One part was an accident investigation completed by me to see if there was any way the accident could have been prevented, etc. The other part was due to the fact that DCE students had been charged for breaking and entering and we needed to identify them by reviewing the videotape. The fact that one of our custodians claimed to have been injured during the breaking and entering incident caused more serious charges to be filed against the students.

. . .

the claims that made were documented in police reports, workers comp claim and injury reports to doctors. He also made the claim that he fell to Jeff Belott, Terry Marcott and me, (Hoeft).

. . .

We then went to the Senior High School and had T.T. paged. You asked T. to walk you through what he did on the night of the student break-in. T. walked us from the lower lobby to the hallway where he chased the students. He said he fell near the Teachers Lounge. You asked him how he fell and he responded that he fell on his right side after slipping on a trash bag that the kids dropped. You asked him how he was injured and he said he fell on his buttocks, and got back up – sort of like a baseball players slide.

We then went into the nearby conference room. (Rauscher) asked T. to identify the workers comp claim hi filed. T. said it was his. (Rauscher) pointed out that there was the statement that you had fallen on this document and the doctor's reports as well. (Rauscher) explained to T. that his statement to the police about his injury has an impact on the students that were charged. (Rauscher) asked T. if he was sure he fell, and he said "Yes." (Rauscher) then explained that the entire incident was on videotape and no one has been able to see you fall on tape as you stated. (Rauscher) again asked T., "Did you fall while chasing the students?" T. answered, "Yes, I fell." You explained to T. that the concern is that all the claims and reports filed include the claim of a fall. However, the film does not show any such fall. (Rauscher) asked T. again, "Are you sure you fell?" T. said, "Yes."

At the end of this meeting (Rauscher) suspended T.T. without pay pending further investigation.

. . .

Rauscher then sent T.T. the following "Notice of Suspension" dated June 21, 2005:

. . .

This letter is a follow up to our meeting held at the Senior High on June 21, 2005, at approximately 2:30 p.m. Also present at the meeting were Howard Hoeft, Supervisor of Buildings and Grounds; Terry Marcott, Custodial Maintenance Supervisor, and Joel Leist, Teamster Steward. The meeting was called to discuss an injury report you filed and statements you made to supervisors about a workplace injury you sustained while chasing vandals on June 9, 2005, at approximately 12:30 a.m.

At this meeting, I asked you to show us what happened when you discovered the vandals. You walked us to an area near the main entrance where you first noticed a person in a gray hooded sweatshirt. As you approached this person, you stated that several people ran out of a nearby boy's restroom and you gave chase down the hallway. You showed us an area in the hallway in front of the teacher's lounge where you said you fell and were injured while chasing the vandals. You stated, "I fell and landed on my right hip" and were certain about the location of the fall. You went on to say that you got up and continued chasing the vandals until they left the building through door #22 a short distance away.

We then proceeded to a private conference room where I showed you the workplace accident report you submitted. I asked if the injury description section was your writing and you confirmed that it was. I explained the seriousness of this situation and that your account of your injury has an impact on how the apprehended vandals are being charged in court.

I told you that during the investigation of the vandalism, the security camera video does not show you falling in any way during your pursuit of the vandals. However,

- The accident report you completed states "slipped on garbage bag vandals dropped while running away and I landed on my right hip-buttocks."
- The subsequent Worker's Compensation injury report from your doctor indicates that you told them

- you were running, slipped and fell, landing on your right butt/hip.
- During a routine workplace accident investigation conducted by Howard Hoeft and Terry Marcott on June 15, 2005, you told them you fell and landed on your right hip in front of the teachers lounge.

I asked if there is a reasonable explanation as to why the security video does not show you falling. You could not offer any explanation and continued to maintain that you fell.

The District expects all our employees to be honest and accurate in their statements to supervisors, and in the reporting of workplace accidents. The evidence clearly indicates that your account of your accident is not honest and accurate. Therefore, effective June 21, 2005, at 2:30 p.m., the District is placing you on unpaid suspension pending the final outcome of our investigation.

. . .

On June 27th another meeting was held with Union Representatives Bob Russell present, (Distr. Exh 8), at the end of which the District terminated T. T. The District sent T.T. a letter of termination dated June 29, 2005 which reads as follows:

. . .

The purpose of this letter to confirm the termination of your employment with the D.C. Area School District effective June 27, 2005. Your discharge is based upon your dishonesty with regard to the incident which occurred on June 9, 2005. You repeatedly reported to School District officials, including myself, that on this date, you were injured while working when you chased several vandals at the High School. You stated that you were injured when you slipped on a garbage bag and fell by the teachers' lounge doorway. However, information that I received in regard to the incident unequivocally demonstrates that this is untrue.

. . .

On July 29, 2005, the District's Worker's Compensation insurer, Wausau Insurance, denied T.T.'s claim for benefits for his June 9, 2005 injury, stating as follows:

. . .

> We are not able to accept responsibility for the payment of workers compensation benefits to you for your injury of June 9, 2005. Based on our investigation, there is no evidence that an accident did take place as you described. Thus we will be making no payments for any compensation or medical bills.
>
> You may have a hearing before the Department of Industry, Labor, and Human Relations, Workers Compensation Division, if you believe you can show that you are entitled to such benefits, either medical treatment or compensation payments. If you want to apply for a hearing, you should write to the Workers Compensation Division at PO Box 7901, Madison, Wisconsin 53707, and request an application form. You may also write to them if you have questions.

. . .

T.T. did not appeal this decision and he never received any Worker's Compensation benefits for the incident of June 9, 2005.

POSITIONS OF THE PARTIES

The District

The District argued that the video-taped evidence conclusively showed that T.T. did not fall and injure himself at the time or place or in the manner he claimed on and after June 9, 2005. The District noted that the video tape (which covered the area in front of the teachers' lounge) did not show T.T. coming into contact with a garbage bag and it did not show T.T. falling near the teachers' lounge in a baseball-type slide as T.T. had consistently claimed. The District also noted that the Union offered no explanation why the video tape failed to show T.T.'s alleged fall except to state that T.T. received no benefits from making a W.C. claim. The District argued that T.T.'s intent is irrelevant and it is also irrelevant that T.T. did not appear to benefit from his W.C. claim. Simply showing T.T. was dishonest in filling out the W.C. forms was sufficient to prove T.T. was dishonest and the District was not required to prove that T.T. benefited from his dishonesty to prevail in this case.

In addition, the District argued that T.T.'s testimony herein contradicted his prior testimony at his August 24, 2005 Unemployment Compensation hearing, requiring a conclusion that T.T. was not a credible witness in this case. Specifically,

the District quoted excerpts from the U.C. transcript regarding bruising and falling, as follows:

> Q. Did you have any bruising on your buttocks"
>
> A. No.
>
> (Tr. 127-128, 24-1.)
>
> Q. At any time during this pursuit, the pursuit of the kids, did you fall to the ground?
>
> A. Not that I recollect.
>
> Q. You said that you slipped. Was this just a slip running, or on a garbage bag, or what?
>
> A. I thought I slipped on a garbage bag. Like I said, it was a myth. I was scared in the heat of the moment. Chasing.
>
> (Tr. 128-129, 23-13.)

In contrast, in this case, T.T. stated that he was bruised (Tr. 114) and that he fell to the ground on June 9th (Tr. 112). The District urged that "these inconsistencies show a pattern that T_____ is dishonest" (Dist. Brief, p. 9).

In these circumstances, the District contended it was justified in terminating T.T. Although he was given several chances to retract/change his story, he refused to do so. Thus, the District observed that T.T. falsely filled out leave and W.C. forms and he wrongly sought and was paid for two days' leave. T.T.'s proven dishonesty was sufficient to support his immediate termination under the language of Article 10 Section 1 given the fact that falsification of employer records is a material breach of the employer-employee relationship. Such a conclusion is further supported by T.T.'s dishonest testimony herein. Therefore, the grievance should be denied and dismissed.

The Union

The Union argued that the District failed to prove that it had just cause to discharge T.T., a seven-year employee of the District who had received no prior discipline. The Union asserted that the District' reliance on a jerky video tape to prove that T.T. lied about being injured on the job was insufficient to prove T.T. was

dishonest. The Union contended that the uncontradicted medical records (U. Exh. 1), showed that T.T. was injured on June 9th. In addition, the Union noted that Officer Peterson observed T.T. limping on June 9th and recorded this observation in the police report; that on June 9th T.T. reported he was injured to supervisor Belott; and that T.T. then went to see Doctors Hupy and Kessel on June 10 and 13 who found he had been injured and prescribed painkillers. Although the video tape did not show T.T. falling, it did corroborate T.T. in that it showed a garbage bag was near the Teachers' Lounge (which T.T. consistently asserted he slipped on) when T.T. chased the vandals out of the school. These facts tended to support T.T.'s testimony herein, in the Union's view.

Furthermore, the Union contended that the District failed to prove that T.T. lied about being injured at work. In this regard the Union noted that the District failed to prove that T.T. was injured outside of work, that it put in no evidence to contradict the medical evidence submitted by the Union and it failed to prove that T.T. had a motive to lie.

The Union asserted that there are various possible explanations why T.T.'s fall did not appear on the video tape: 1) the District's video camera did not take continuous pictures but only close-spaced pictures so that the camera failed to take the time when T.T. fell; 2) T.T. did not fall, and in the stress of the situation his recollection was affected - that he only slipped and hurt himself; and the District must present more than mere speculation as proof of T.T.'s misconduct DIETRICH INDUSTRIES, INC., 83 LA 287, 289 (ABRAMS, 1984).[3] An inaccurate memory is not dishonesty and is not grounds for discharge in light of the extenuating circumstances here. To sustain the grievance the Arbitrator needs only find that the District failed to prove T.T. engaged in "an intentional untruth" (U. BR. P. 8).

Finally, the Union asserted T.T. did not profit from his actions and he did not pursue a W.C. claim. The fact that the District failed to prove T.T. had a motive to lie, and that the District did not terminate T.T. for theft or fraud support the Union's arguments herein. Whether T.T.'s claim that he fell was truthful or not, T.T.'s actions did not justify termination, as such a lie, if it occurred, could be found "harmless and insignificant" (U. Br. p. 9). Therefore, the Union urged the Arbitrator to sustain the grievance, reinstate T.T. and make him whole.

DISCUSSION

This is a discharge case. As such, the District has the initial burden of persuasion and the initial burden of proof to show that it had just cause to terminate

[3] The facts of the Dietrich case are distinguishable. Also, the District has presented evidence herein leading to conclusions based upon reasonable probability which was unrebutted by the Union.

T.T., a District Custodian who had been employed by the District for seven years and who had no record of misconduct.[4]

Here, the District produced a vide tape (on CD) which came from the hallway camera at the High School to show what occurred on the evening of June 9th. This hallway camera is permanently directed toward the Teachers' Lounge door and records continuously. At the instant hearing all participants watched the CD showing the time frame during which the students pulling the garbage bag prank on June 9th were recorded by the hallway camera.

The Union has argued that the recorded pictures were jerky and that possibly the camera did not take continuous pictures but only close-spaced pictures which did not show the time period when T.T. fell near the Teachers' Lounge. The CD when played at the hearing did not appear jerky to this Arbitrator and there were no noticeable gaps in the recording of the events surrounding the prank including T.T.'s actions in chasing the vandals out of the building.

Thus, in this Arbitrator's view, no record evidence was submitted to support the Union's assertions on this point. In this regard, it was significant that the Union did not submit any collateral evidence to show that the camera was defective, that it was not properly maintained or that the camera did not faithfully record the events of June 9th due to some documented malfunction. It was also significant that the CD showed that T.T.'s actions, after he chased the vandals out of the school, were unimpaired. In other words T.T. was never observed limping or having any difficulty walking or bending over after his alleged fall. He did appear on the CD, to bend over and pick up garbage bags in the school foyer. At no time did T.T. appear to touch his back or to massage it, and he never appeared to have any difficulty performing the tasks recorded by the video camera that evening. Also, T.T. did not report that he had to sit down after allegedly falling at the school. Rather, T.T. assisted Belott in removing all of the garbage bags from the school and he worked straight through his shift that night.

The fact that T.T. told Belott and Officer Peterson that he had fallen that night and that Officer Peterson recorded in his report that T.T. appeared to be limping on June 9th is insufficient to prove that T.T. actually fell that night as he claimed. Indeed, as T.T. chased the students past the Teachers' Lounge, the camera did not record any motions that could be construed as T.T. either slipping or falling. Rather, the camera recorded that shortly after he chased the students from the building, T.T. returned,

[4] The record evidence contained no indication that the District ever issued T.T. any discipline. T.T.'s last evaluation did not constitute discipline.

walking smoothly and quickly, and he entered the Teachers' Lounge where he called the police and Belott. This evidence seriously undercuts T.T.'s assertions that he slipped and fell near the Teachers' Lounge in a baseball-type slide and injured his back (Tr. 103-105).

In addition, the fact that T.T.'s doctors filled out forms that indicated that T.T. was injured on the job does not require a different conclusion. In Workers Compensation cases, the treating physician and their assistants are required to fill out the forms with the information that the injured employee offers. At least initially, these professionals do not make an independent assessment. After examining T.T. for what was essentially a muscle pull (which would not appear on an X-Ray) his doctors were bound to treat the symptoms that T.T. had reported, pain and muscle strain. This is what T.T.'s doctors did by prescribing him Vicodin, a strong pain reliever.

The Union's assertion that T.T's recollection of the events of June 9th was faulty because it was affected by the stress of the situation is not supported by T.T's testimony herein or by his assertions throughout the District's investigation. At no time did T.T. claim his recollection was affected by stress or any other factor. T.T. consistently insisted that he slipped and fell in front of the Teachers' Lounge in a baseball-type slide and that he popped up and continued to chase the students from the building on June 9th.

Contrary to the Union's contention herein, the District is not required to prove that T.T. injured himself off the job in order to show the District had just cause to discharge T.T. for "dishonesty." Article 10, Section 1, clearly allows immediate discharge, without a prior warning for similar misconduct for employee "dishonesty." Although Article 10, Section 1 does not define the term "dishonesty," some guidance is found in the items listed along with "dishonesty" in Section 1: the use or possession of intoxicants or illegal substances on the job, carrying unauthorized passengers in an employer vehicle, vehicular recklessness resulting in a chargeable accident "or other flagrant violations."

All of these items involve knowing, intentional, serious (and in some cases potentially illegal) misconduct. In addition, the ordinary meaning of the word "dishonesty" is that one is disposed to lie, cheat or steal: Dishonesty is the opposite of sincerity, truthfulness and frankness[5] Under any definition of the term "dishonesty" it would be dishonest for an employee to claim sick leave benefits and to file for W.C. benefits if the employee was not, in fact, injured on the job as claimed.

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5 The Random House Dictionary of the English Language (Unabridged College Ed., 1968) pp. 380 and 635.

In this case T.T. told various District managers repeatedly that he had fallen at work on June 9th near the Teachers' Lounge in a baseball-type slide and injured his right hip/buttock before Rauscher showed T.T. the video recording which showed that no such fall occurred at or near the Teachers' Lounge on June 9th. Yet T.T. continued to insist that he fell at work as described above on June 9th and he failed to provide any explanation why his alleged fall was not recorded by the hallway camera that was permanently pointed at the Teachers' Lounge door. In the circumstances of this case, given the District's evidence, more was required of T.T. beyond his consistent assertion that he in fact slipped and fell at work on the night of June 9th, in order to prove the veracity of his story.

It was important that T.T. had applied for and received Workers Compensation benefits in the past at the District for his on- the- job injuries. In these circumstances, T.T. was well aware of W.C. procedures. Yet, T.T. did not appeal Wausau Insurance's decision to deny his W.C. claim regarding his alleged fall on June 9th. Again, T.T. did not explain herein, why he failed to appeal the Wausau decision.[6]

The bottom line in this case is whether the evidence showing that T.T. never slipped and never fell in front of the Teachers' Lounge while chasing vandals out of the High School on June 9th and T.T.'s statements and the forms he filled out, stating that he had been injured on the job, seeking W.C. benefits is sufficient to provide just cause for the District's decision to discharge T.T. for dishonesty. Given the lack of any evidence to dispute the District's assertions, its witnesses' testimony and documentary evidence, and although this is a discharge case which carries with it the most severe penalty for the Grievant, this Arbitrator believes that T.T. had a duty to come forward and rebut the District's evidence by offering some reasonable explanation. Yet, T.T. failed to do so.

It is significant that no evidence was proffered in this case to show that any other District employees have ever been discharged for dishonesty prior to this case. As stated above, T.T. consistently maintained that he slipped on a garbage bag near the Teachers' Lounge and fell to the ground in a baseball-type slide while chasing vandals from the school. The amount of time involved in the chase and alleged fall was less than one minute, according to the documentary evidence and the CD. It is also undisputed that T.T. filled out his own sick leave request form, listing an on- the- job injury and seeking W.C. time off; that T.T. filled out the initial W.C. injury form,

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6 The District has argued that its insurance rates will rise if its employees make false claims for W.C. benefits while the Union has argued that T.T. did not profit from his initial W.C. claim as he failed to pursue it. The Districts' assertion is true. In addition, the District proved that T.T. gained some benefit from making a W.C. claim for his alleged fall on the night of June 9th because he was allowed to use two days of sick leave, he was prescribed strong pain killers and he was limited to sedentary work/light duty for at least 10 days.

requesting W.C. benefits; and that T.T. told Belott and Officer Peterson[7] as well as various District managers repeatedly that he had fallen down on the job and hurt his right hip/buttock.[8]

Finally, the District offered excerpts from T.T.'s testimony before the Unemployment Compensation Hearing Officer which showed that T.T.'s story was significantly different in the U.C. proceeding than it was in this case. Again, T.T. failed to explain the differences herein after he was cross-examined regarding whether he had been bruised on June 9th and whether he admitted in the U.C. proceeding that his statement that he fell on June 9th had been a myth. This evidence seriously undermined T.T's credibility before this Arbitrator. This damaging evidence cannot be ignored in a case such as this one where the Union has relied almost entirely upon T.T.'s statements to support its assertion that T.T. fell on the job on June 9th.

In all of the circumstances of this case, the District met its burden of proof and I issue the following

AWARD

The Grievant's discharge did not violate Article 10, Section 1, of the collective bargaining agreement. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 14th day of February, 2006.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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[7] Officer Peterson was not called as a witness herein.

[8] The garbage bag that appeared on the CD near the Teachers' Lounge did not provide T.T. with any support for his assertions. Rather, it did quite the opposite, giving a perspective that would have otherwise been lacking and showing that T.T. was never near that garbage bag and that he never slipped and fell.