BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

UNITED STEEL WORKERS OF AMERICA, LOCAL NO. 2006, UNIT 218-1

and

WE ENERGIES

Case #14
No. 66879
A-6286

(Erin Galemba Discharge)

Appearances:

Tonya Devore, Staff Representative, United Steel Workers of America, District 2, 12687 Goldenrod Court, Wayland, MI 49348, appearing on behalf of the Union.

Lynn English, Attorney at Law, We Energies, 231 West Michigan Street, Milwaukee, WI 53290-0001, appearing on behalf of We Energies.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, We Energies (hereinafter referred to as either the Company or the Employer) and United Steel Workers of America, Local 2006, Unit 218-1 (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the termination of Erin Galemba. The undersigned was so designated. A hearing was held on May 15, 2007 at the Company's offices, at which time the parties submitted such exhibits, testimony and other evidence as was relevant to the dispute. A stenographic record was made, and a transcript was received on May 23. The parties submitted briefs, which were exchanged through the undersigned on July 5, 2007, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Arbitration Award.

ISSUES

The parties agreed that the following issues should be answered herein:

1. Did the Company have just cause to terminate the Grievant, Erin Galemba?[1]

2. If not, what is the appropriate remedy?

BACKGROUND

The facts of this case are reasonably straightforward. The Company provides gas and electric service to customers in Wisconsin and Michigan, including the City of Milwaukee. The Union is the exclusive bargaining representative of certain of the Company's personnel, including those providing customer service in the classification of Customer Consultants. The Grievant, Erin Galemba, was employed as a Customer Consultant in the Customer Contact Center in Milwaukee for six years.

The Company's Confidentiality Policy

Customer Consultants regularly use the Company's databases to answer customer questions about their accounts and services. The principle database is Customer Service Solutions, commonly known as CSS. This database contains a great deal of information about the customer, including credit information, payment histories, and the like. The Company has always had rules against employees looking at these confidential records for any non-business purposes. The most recent version was drafted in 2000:

Use of We Energies Customer Information

> Customer information records are confidential company records that are to be used strictly for business purposes. This includes all customer records whether they are paper or electronic (e.g. Customer Service Solution (CSS), OMS, CAD, etc). Under normal circumstances, customer information should not be released to non-employees. The only authorized exceptions are those involving:
>
> - the release of information in response to subpoenas,
> - requests made by regulatory and government agencies,
> - requests made by certain third parties either under contract to us or with written confidentiality agreements in place, or
> - requests involving explicit authorization by the customer of record.

[1] The collective bargaining agreement provides that employees may be discharged only for just cause. See Joint Exhibit 1, Article II, Section 1 and Article V, Section 2.

> No customer information, whether obtained from the on-line system, printed material, or in the course of doing business with customers is to be used for personal purposes. System users are not authorized to make any adjustments to their own accounts without prior supervisory approval, nor should they be making adjustments to the accounts of other known company employees, relatives, friends or acquaintances.
>
> To prevent the unauthorized use of customer systems, it is important to remember to lock your PC every time you leave your workstation. Locking your PC will prevent the unauthorized entry of transactions that would be processed using your ID.
>
> Inappropriate use of customer information systems as described above is a serious matter which may result in disciplinary action, including the possibility of termination of employment. If you have a question about the release of customer information or an adjustment to a customer's account, please refer the matter to your supervisor.
>
> Employees who have access to customer information are required to have completed the We Energies Customer Information Policy e-learning course regarding the use of customer information. Failure to complete this course will result in an employee losing authorization to access any customer systems.... . .
>
> . . .

In 2004, in the midst of a heated election for Mayor of Milwaukee, a local radio talk show host revealed that one of the leading candidates had fallen behind in his payments on his utility bills. This disclosure received a great deal of publicity, causing considerable embarrassment for the Company. The Company investigated and learned that one of its employees had accessed the candidate's records, made copies and showed them to his wife, who then passed them to the talk show host. That employee was terminated, but in the course of its investigation, the Company determined that many employees were not abiding by the existing policy, and were accessing the records of local celebrities, politicians and community leaders. Since this represented a violation of the administrative rules regulating the industry, and raised the possibility of legal liability for the Company, managers decided to aggressively re-educate employees about the Company's policies, the steps being taken to enforce them, and the consequences for violations. Meetings were held with all employees to review the policy, and the reasons for the policy. At these meetings, the presenters used standard talking points, including a statement that a "new line is being drawn" and that accessing confidential information for non-business purposes would be a dischargeable offense.

In addition to the employee meetings, the Company instituted an annual, mandatory annual training, testing and certification on customer confidentiality. In 2006, this course was conducted on-line, and included the following scenario:

. . .

> Lee is on his lunch break. He frequently goes into CSS looking at accounts out of curiosity. He decides to look up several prominent members of the community in CSS because he is interested to know where these individuals live and what they pay for their gas and electric bills. Did Lee violate corporate policy?

. . .

> Lee violated the Use of We Energies Customer Information policy. He used CSS for personal reasons and violated the confidentiality of customer information. Lee's situation resulted in discharge from the company.
>
> Viewing accounts just out of curiosity is not tolerated and is in direct violation of the policy. This includes looking at accounts for prominent figures, boyfriends, girlfriends, co-workers, ex-spouses, relatives, friends, neighbors, acquaintances, etc.

. . .

Employees are required to score 100% on the test. At the conclusion of the training, the employee certifies that he or she has read and understands the company policy on confidential information, and agrees to abide by it. The Grievant took the test in 2004, 2005 and 2006, and completed the certification in each case.

As part of its enforcement efforts, the Company does a monthly check of accounts belonging to high profile customers – Company officers and officials, elected officials and celebrities. The Company does not have a system for checking unauthorized access to accounts other than those on the monthly check list, other than responding to customer complaints.

Events Leading To The Grievant's Termination

On October 2, 2006, the Grievant's Team Leader noticed that she was "in wrap" – off the telephone and presumably wrapping up the paperwork related to the last call – for 15 minutes or so. This is an unusually long time for a Customer Consultant to be off the phone, so the Leader remotely accessed the Grievant's computer screen. She determined that the Grievant was reviewing her own account, and that of former employee [JMK]. There was no

immediately apparent business reason for this, but Company supervisors were aware that the Grievant had in the past been romantically involved with [JMK]. The Company reviewed its records to determine which accounts the Grievant had accessed during the prior year. In addition to accounts being accessed in response to customer inquiries, and her own account, which is permitted so long as no changes are made, they found that she had reviewed the records of [JMK] some 40 times in the prior year, and those of customer [CL] 35 times.

A meeting was held with the Grievant and Union representatives on October 10th. The Grievant acknowledged having accessed the accounts of [JMK] and [CL] without their knowledge or permission. She identified [CL] as a friend, but offered no other explanation for having accessed his account. The Company advised the Grievant and the Union that it would proceed with discharge proceedings, and pursuant to the parties' procedure, the Union requested a hearing. The hearing was held on October 27th, at which time the Grievant explained that accessing [JMK's] account was a way of keeping in touch with him. Again, she offered no explanation for reviewing [CL's] account, but acknowledged that neither customer had known of her reviews of their accounts, and that there had been no business related reason for the access.

The Grievant was discharged effective October 31st and the instant grievance was filed. At the third step grievance meeting, the Union presented a letter from [JMK]. The letter explained that he and the Grievant had been in a long term relationship which ended in 2005, and that he viewed her accessing his account as being a method of staying connected with him. The letter stated that he was not offended by her actions, and that he believed she regretted her mistake and had learned a valuable lesson. The Company did not change its position, and the matter was referred to arbitration.

Evidence Presented At Arbitration

At the arbitration hearing, in addition to the facts set forth above, the Company presented testimony from Vice President of Customer Service Joan Shafer, who stated that she made the decision to terminate the Grievant, and that it was a difficult decision, because the Grievant had an excellent work history and had been used to mentor and train new employees. Shafer said that the Company's policy was not to automatically discharge employees for violating the CSS policy, but to review the entire record and all of the circumstances. In this case, according to Shafer, the number of violations, the duration of the violations, and the fact that multiple customers were involved, all persuaded the company that the Grievant could not be trusted with confidential information.

Union President Wendy Johnson testified that the Company has hundreds of policies, and it is impossible for employees to be well versed in all of them, even though they supposedly review them all annually. She also expressed the opinion that an employee could not recall each of the many scenarios presented in the Company's on-line training on customer information. Johnson noted that there were a fair number of cases in which employees who violated the CSS policy were not discharged, and suggested that the Company's administration of discipline under the policy was not uniform.

Both parties presented evidence of prior cases. The Company identified 13 cases of discipline for employees having accessed the CSS in violation of the policy. In three cases, the employee received a one day disciplinary suspension for having accessed his or her own account and for making changes. In two cases, the employee received a one day disciplinary suspension for submitting grant applications for herself or a family member. Two employees were discharged for making changes in their own accounts. Five employees – including the Grievant - were discharged for accessing customer accounts with no business reason. One employee was given a five day disciplinary suspension and required to execute a last chance agreement for accessing the accounts of twenty-five co-workers. The Company explained that this employee was a twenty year veteran, who was involved with the Company's Sunshine Club and accessed some of the records to obtain birthdays and other information related to that activity.

The Union identified six other instances in which it believed employees received one day suspensions for violating CSS. Three had accessed account information for public figures, and three had accessed accounts of family members. Five of those cases involved a single instance of accessing an account. One involved multiple accounts.

The Grievant, Erin Galemba, testified that she had reviewed the accounts of both [JMK] and [CL] on numerous occasions between November 2005 and October 2006. She conceded that there was no business purpose to her review of [JMK's] account, and explained that she had been involved with him for three or four years, and that the breakup of their relationship had been terribly difficult for her. She had looked at his account as a way of keeping in touch with him, and helping her to deal with her severe depression. The Grievant noted that she had been receiving psychological counseling to help her deal with the break-up and had made progress in the counseling.

The Grievant said that when her supervisors first asked her if she had accessed customer accounts, she volunteered [CL's] name. She did not believe that the Company asked if she had reasons for looking at [CL's] account, though she was emotionally distraught in these meetings and let the Union do most of the talking. She explained that [CL] was a friend who had contacted her because he was in trouble on his account, and was in danger of having his utilities disconnected. She advised him that he should speak to the Billing Department, but checked his account on her own.

On cross-examination, the Grievant denied having any special relationship with [CL] and said that her review of his account was unrelated to her depression. She agreed that she had never approached any Company officials to tell them that she was suffering from any disability or psychological problems before she was called in and asked about her violations of the CSS policy. The Grievant insisted that her review of [CL's] account was for business purposes, though she was not sure she had ever said this in any meeting before the arbitration hearing. She admitted that she offered [CL's] name in response to a question by supervisors about whether she had accessed any other accounts for non-business purposes. Nonetheless,

she insisted that there was a business purpose to her review. Asked what she had done with the information gleaned from reviewing [CL's] account, she said she had done nothing. When asked how her reviews had helped [CL], she said she had advised him to contact the Company's collections department to avoid a shutoff of services. She could not explain why she had to review the account 35 times in order to do this.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Company

The Company takes the position that the Grievant was guilty of repeated violations of the rule against accessing customer records for non-business reasons, and that the presumptive penalty for violating this rule is termination. The Grievant admitted accessing [JMK's] account 40 times, and [CL's] account 35 times in the period between November 2005 and October 2006. She admitted knowing of the Company's policy against accessing accounts for non-business reasons, and knowing that her conduct violated the policy. She participated in meetings and on-line training sessions during which she was put on notice that this was a dischargeable offense. Thus she knew the policy, knew the consequences for violating it, and knew that her conduct violated the policy. There is no plausible defense to the discharge.

The Company rejects the Union's argument that there are too many Company policies for employees to keep track of, noting that the Grievant does not claim to have been unaware of the policy. Moreover, the customer information policy is plainly among the most important and sensitive of the Company's policies, which is proved by the specific company-wide meetings on the policy in 2004, and the annual on-line training, testing and certification sessions on the policy in 2004, 2005 and 2006.

The Grievant's claim that her accessing of [JMK's] account was occasioned by the stress of their breakup cannot excuse her conduct. She never informed the Company of any unusual stress that was affecting her behavior, and the policy does not excuse employees from compliance if they think they have a good reason. The Company points out that this was not an isolated instance or a momentary lapse. This went on for twelve months, with 40 separate violations involving his account.

The Grievant's explanation that stress accounted for her actions is belied by the fact that she did not only access [JMK's] account. She also accessed the account of a friend, [CL], almost as many times in the same time period. At the arbitration hearing, she claimed for the first time that there was a business purpose to this, in that [CL] had asked her for help with his account. The Company argues that her credibility should be completely discounted as the

result of this transparent lie. She never made this claim until the arbitration hearing. Instead, she twice told the Company during the investigation and the processing of the grievance that there was no business purpose to her viewing of [CL's] account. In addition, her claim makes little sense. She said she viewed his account because he was concerned about the possibility of being disconnected. However, she accessed his account at least sixteen times during times when a disconnection moratorium was in effect.

The Company argues that discharge is the appropriate penalty. The Grievant's job requires access to confidential information, and she has forfeited the Company's trust that she will treat that information as confidential. She may not have realized any tangible personal benefit from her actions, and it may be that these two customer did not object to her actions, but that is not the point of the policy. The Company has a compelling interest in the confidence its customers, regulators and public can have in its ability to safeguard information. It has an equally compelling interest in avoiding the potential legal liability it is exposed to when customer information is treated as something other than confidential. The enforcement of the rule cannot depend upon after the fact determinations of how unhappy the customer is.

The Grievant was a good employee, and the Company did not casually decide to terminate her. However, balancing her good work history against her relatively short tenure, the great importance of the policy, and the deliberate and repeated nature of the violations, the Company reasonably determined that discharge was the appropriate response. Contrary to the Union's suggestion of disparate treatment, the penalty in this case is completely consistent with the enforcement of this rule in other cases. Every case is judged on its own facts, and in order to make out a case of disparate treatment, the Union must show that other employees who were not terminated were similarly situated to the Grievant. Twelve other employees have been disciplined for violating this policy. Six have been discharged. One was given a five day suspension and a last chance agreement. Five were given one day suspensions. The five employees who received one day suspensions were all found to have inappropriately changed account information in their own accounts, or in one case to have submitted a grant application for a family member. These are clearly distinguishable from the Grievant's case. The 20 year veteran employee who received the five day suspension accessed twenty-five employee records, but it appeared the she did so largely in connection with her role with the Company's Sunshine Club. Plainly this did not justify her conduct, but the Company reasonably judged that this and her length of service mitigated her case enough to warrant less than a discharge. In short, there is no case of a similarly situated employee who was not discharged.

The Position of the Union

The Union takes the position that the Company overreacted to the Grievant's admittedly poor judgment in accessing [JMK's] account, and misunderstood her actions in accessing customer [CL's] account, resulting in the discharge of an exemplary employee. In the former case, she was moved by the emotional turmoil resulting from the break-up of a long term relationship. In the latter, she was providing assistance to a customer, precisely as any Customer Consultant might have done.

The Union refers the arbitrator to the familiar seven tests of just cause, articulated by Arbitrator Carroll Daugherty in his seminal Enterprise Wire decision. Three of these questions are pertinent to this case. The first of the questions is whether the employee was given notice of the likelihood of discipline. The answer is plainly "no." The Company's policy says that termination is a "possibility" – nowhere does it suggest that termination is likely. The Company has retained flexibility to use the appropriate level of discipline, under all of the circumstances. Here, the Grievant is an employee with six years of service, and an excellent work history with no trace of discipline. She did her job well, and served as a mentor and motivator for her department. She was caught up in a unique circumstance, and her misconduct was solely attributable to a painful break-up. She sought psychological counseling to help her deal with the situation, and was making progress in learning to cope with the end of her relationship. This is a valuable employee whose career is obviously worth salvaging, and who can obviously be rehabilitated. Termination is the industrial equivalent of capital punishment, and it should be reserved for employees who are incorrigible.

The sixth of Daugherty's questions is whether the Employer has applied its rules even-handedly, without discrimination, to all employees. The Company announced in 2004 that employees violating the customer information policy would be discharged. However, reviewing the cases of discipline for violations of the policy since then, it is evident that the Grievant has been treated more harshly than others, without any apparent justification. One employee who accessed twenty-five accounts was given a five day suspension and a last chance agreement. In 2005, another employee accessed the account of the same public official involved in the 2004 incident giving rise to the new, supposedly stricter policy. She was given a one day suspension. Seven other employees accessed customer accounts for non-business reasons, and were given one day suspensions. While the Company argues that these were one time events, that is only the case because they involved accounts flagged for monitoring by the Company, and the employees were caught immediately. [JMK's] account was not flagged, and thus the Grievant was able to access it more often. The vagaries of the Company's enforcement policies are not a reasonable basis for treating the Grievant more harshly – the nature of the violation is precisely the same in all of these cases.

Finally, Daugherty poses the question of whether the penalty administered by the Employer was reasonably related to the seriousness of the offense. Under all of the circumstances here, the answer to that question must be "no." Again, the arbitrator must consider the unique circumstances leading to the violation, and how unlikely it is that the Grievant would re-offend. He must also factor in her exceptional work record. The policy may be important to the Company, but it is not styled as a "zero tolerance" policy and it has not been so administered. As such, it cannot obliterate the Company's obligation to follow progressive and corrective discipline in dealing with its employees. This is a case which could have been resolved, and should have been resolved, on the basis of a lesser measure of discipline.

DISCUSSION

The Grievant is accused of having improperly accessed the accounts of two customers on 75 occasions between November 2005 and October 2006. One of them, [JMK], was her longtime boyfriend, with whom she had broken-up in the Spring of 2005. The other was, by her description, a friend, [CL]. The accessing of [CL's] account represents the only significant factual dispute. The Grievant admits that her accessing of [JMK's] account on 40 occasions was a violation of the Company's policies, but alleges that she reviewed [CL's] account 35 times as part of an effort to assist him as a customer, in response to his request for help. The Company is skeptical of this claim, and I find that their skepticism is well founded. The great weight of the evidence is that there was no legitimate business purpose to her viewing of [CL's] account.

The Grievant met with the Company in the investigation process, and at the termination hearing, and made no claim that she viewed [CL's] account for business purposes. It is very unlikely that such an important point would have failed to occur to her as she faced termination. It is even more unlikely that she could have been so confused that she told Company officials when they asked, that her accessing [CL's] account was done for non-business reasons. Yet supervisor Alfreida Long and manager Michelle Waters both testified that she did admit there was no business purpose with [CL's] account, and the Grievant testified that she had told them this. Even if there was some reasonable explanation for her admission, I find that the duration and number of times she accessed his account make very little sense as a reaction to [CL] having asked her to look at his account because he was receiving disconnection threats. The Grievant says that her response to his concern was to advise him to contact the billing department. Assuming he did that, she might plausibly have checked the account once or twice to determine its status and whether he had followed her advice. It is difficult to understand why she felt the need to keep looking at his account 35 times over a one year period. He either resolved the problem or he didn't. As the Company points out, if disconnection was the issue, it is also difficult to understand why she felt the need to keep checking the account 16 times during the months in which there is a moratorium on disconnections. It is not at all clear what business purpose she could possibly have been pursuing by checking his account so many times over so long a period of time.

I conclude that the Grievant had no legitimate business purpose in accessing [CL's] account, and that it was done without the knowledge or consent of the customer. There are many arguments to be made about her conduct with respect to her former boyfriend's account – principally the possibility that she was psychologically unable to control her actions and the unlikelihood of repetition in the future – and the Union has vigorously made those arguments on her behalf. There are no such arguments to be made about her conduct with respect to [CL's] account.[2] This was a knowing and volitional breach of the policy, done repeatedly and over a long period of time. There is no evidence of some unique characteristic about her relationship with [CL] to suggest that the Company could trust her not to repeat the behavior in the future. In short, this was an egregious violation of the customer information policy.

[2] While it is not possible to determine what the Grievant's true reasons were for accessing [CL's] account, she testified that her depression played no role in it.

The Union's arguments are all seriously undercut by the Grievant's untruthfulness about the circumstances surrounding her reviews of [CL's] account. However, in answer to the principal arguments, while it is true that the policy does not mandate termination in every case of a violation, the policy, the briefings on the policy, and the annual training on the policy all make it clear that termination is among the possible sanctions. The 2006 training which she completed included a scenario in which an employee was terminated, and the explanation included the following: "Viewing accounts just out of curiosity is not tolerated and is in direct violation of the policy. This includes looking at accounts for prominent figures, boyfriends, girlfriends, co-workers, ex-spouses, relatives, friends, neighbors, acquaintances…" This is directly on point to the Grievant's case. It is simply not possible to say that she did not have notice of the likelihood of discharge for her actions.

As the Union notes, the Grievant's work record does her credit. She was by all accounts a very good employee. That entitled her to the benefit of the doubt, but here the volume and duration of her violations do not leave much room for doubt. They put her in a category distinct from all of the other cases cited by the parties. For this reason, it is impossible to characterize her as being similarly situated to other employees who have received lesser penalties since 2004. Even if some of the 40 instances involving [JMK's] account are treated as mitigated by her emotional turmoil, no one else has approached the magnitude of violations that she is guilty of.

On a careful review of the record, it is clear that the Grievant repeatedly violated the customer information policy, and that the Company had just cause to discipline her for those violations. Given the scope of the violations, the choice of discharge as the penalty is a reasonable exercise of the Company's right to determine and impose penalties, and is consistent with the principles of just cause.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The Company had just cause for discharging the Grievant, Erin Galemba.

2. The grievance is denied.

Dated at Racine, Wisconsin, this 16th day of November, 2007.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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