

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**DANE COUNTY MUNICIPAL EMPLOYEES UNION
LOCAL 60, COUNCIL 40, AFSCME, AFL-CIO**

and

MONONA GROVE SCHOOL DISTRICT

Case 100
No. 66462
MA-13533

Appearances:

David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

David E. Rohrer, Lathrop & Clark, LLP, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the District.

ARBITRATION AWARD

Dane County Municipal Employees Union Local 60, Council 40, AFSCME, AFL-CIO, hereafter Union, and Monona Grove School District, hereafter District, are parties to a collective bargaining agreement that provides for final and binding grievance arbitration. On November 13, 2006, the parties jointly requested that the Commission appoint Staff Member Coleen A. Burns as arbitrator to hear and decide the grievance on the discharge of Mr. Ness. A hearing was held in Madison, Wisconsin on March 6 and April 9, 2007. The hearing was transcribed and the record was closed on August 13, 2007, upon receipt of the parties' post-hearing written argument.

ISSUES

The parties stipulated to the following statement of the issues:

Did the employer have just cause to discharge the Grievant?

If not, what is the appropriate remedy?

CITED CONTRACT LANGUAGE

ARTICLE IV – PROBATION

4.01 All newly hired employees shall be considered probationary for the first six (6) months of employment. Probationary employees shall have all rights provided by this Agreement except as are specifically limited. Probationary employees may be disciplined or discharged and such action by the Employer shall not be subject to Article X, Grievance Procedure during their probationary period. The probationary period for part-time employees shall be one thousand forty (1,040) hours or one (1) calendar year, whichever is less.

4.02 All newly hired employees, if still employed on the first day of the pay period following the probationary period, shall be considered to have satisfactorily completed their probationary period and no other notice of their permanent status shall be necessary.

. . .

4.04 Upon completion of the probationary period, employees may be disciplined or discharged, but only for just cause. Any employee being suspended or discharged for whatever reason shall receive written notice of the disciplinary action and the reasons therefor.

. . .

ARTICLE V – HOURS OF WORK AND OVERTIME PAY

5.01 Appendix A. Classification and Salary Schedule shall be and remain a part of this Agreement for the life hereof. Employees shall be paid every other Friday. An attachment to the check stubs shall indicate hours worked, overtime paid and deductions made.

5.02 Definitions:

a) Regular Full-time Employee – Regular full-time employees are those employees who normally work a schedule of eight (8) hours per day, forty (40) hours per week.

. . .

5.03 Hours of Work.

a) The regular schedule of hours for regular full-time employees shall be eight (8) hours per day, Monday through Friday, forty (40) hours per week. The schedule shall be established in advance by the Employer and not less than one week advance written notice shall be given in the event of any schedule change. A one-half (1/2) hour lunch period shall apply during the summer work schedule, on non-teaching contract days and when a school day is scheduled for one-half (1/2) day.

. . .

ARTICLE XIV – MANAGEMENT RIGHTS

The Board shall have the right to determine the number of employees to be employed, the duties of each employee, the place of their work, and all other matters pertaining to management and operation of the District, including the following:

1. To direct the employees, including the right to assign work and overtime;
2. To establish and require observance of reasonable work rules and schedules;
3. To hire, examine, classify, promote, train, transfer, assign in positions with the school system;
4. To increase, reduce, change, modify or alter the composition in size of the work force, including the right to relieve employees from their duties because of lack of work, and to suspend, discharge or take other disciplinary action against employees for just cause;
5. To contract out for goods or services, but Employer would have to bargain impact;
6. To take whatever action is necessary to carry out the functions of the school system in situations of emergency and to take whatever action necessary to comply with state and federal law;
7. To change or eliminate existing methods, equipment or facilities, and to introduce new or improved methods or facilities.

The exercise of the foregoing shall be limited to the terms of this Agreement.

BACKGROUND

The Grievant began his employment with the District in 1992. At the time of his discharge, the Grievant was employed by the District as Head Custodian/Night Shift Coordinator at Winnequah Middle School. The Grievant's primary responsibilities were to perform routine cleaning and custodial duties; coordinate evening custodial duties with the day Head Custodian; and provide work direction to the two other night shift Custodians at Winnequah, Dan Marron and Kevin Meicher.

The Grievant was paid by the District as an hourly employee. While employed by the District, the Grievant was entitled to a one-half hour unpaid lunch break, during which time the Grievant was free to leave the worksite, and a fifteen minute paid break, during which time the Grievant was expected to remain at the worksite.

Except for Christmas, spring, and summer breaks, the night shift employees, including the Grievant, had a regular work shift of 2:30 p.m. to 11:00 p.m., Monday through Friday. As a Head Custodian, the Grievant was expected to attend the Head Custodian meeting which was regularly held at 2:00 p.m. on Fridays. The District has seven Head Custodians in addition to the Grievant. As the District's Director of Facilities and Safety, Mark Scullion supervised the District's custodial staff, including the Grievant.

The Grievant was asked to report to the District office on June 6, 2006. When he arrived at Supervisor Scullion's office, he was informed that the District was conducting an investigation. The Grievant was offered the opportunity to have Union representation; which the Grievant declined. On June 6, 2006, in the presence of Supervisor Scullion, the Grievant was interviewed by District Director of Business Services, Mary Ellen Van Valin. At the conclusion of this interview, the Grievant was informed that he was being placed on a paid suspension pending the District's completion of its investigation.

On June 13, 2006, the Grievant was verbally informed by District Director of Business Services Van Valin that he was being discharged from his employment. On June 14, 2006, District Director of Business Services Van Valin sent the Grievant a letter that states:

This letter is to officially notify you that as of 4 P.M. on Tuesday, June 13, 2006, your employment with the Monona Grove School District has been terminated. This termination is for "Just Cause." Please be informed that you are not to be present on school grounds at anytime.

On or about June 16, 2006, the Grievant filed a grievance alleging that his discharge violated Article IV, Paragraph 4.04, and Article XIV, Paragraph 4, of the parties' collective bargaining agreement, as well as any other applicable provision. In remedy of the alleged violation of the parties' collective bargaining agreement, the Grievant requested that the disciplinary action be rescinded; that the Grievant be reinstated and made whole; and any and all other appropriate remedy(ies).

By letter dated June 26, 2006, District Director of Business Services Van Valin advised the Grievant of the following:

Per Article IV, paragraph 4.04, of the Local 60 AFSCME Agreement for 2004-2006, I am placing in writing the verbal reasons that were stated to you on June 13th when you were terminated for "Just Cause". The reasons that were stated are:

Knowingly and admittedly falsifying both paper and electronic ("True Time") timecards for approximately a three-year period of time.

Knowingly and admittedly defrauding the District of payroll attributable to time not worked for approximately a three-year period of time.

Knowingly and admittedly lying to Administration during the investigative meeting that occurred on June 6, 2006.

The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

District

The standard to be applied by the Arbitrator is to determine whether the District has shown by a preponderance of the evidence that the Grievant committed the acts cited as reasons for the discharge and whether the discharge is appropriate given the acts committed by the Grievant. The Arbitrator should not credit the Grievant's claim that, in attending AA meetings during his work shift, he had Mr. Scullion's permission. Rather, the Arbitrator should find that the Grievant was discharged with just cause for having engaged in a pattern and practice of working less than his reported work time and knowingly submitting false time cards.

The Grievant's initial attempt to conceal his absences during the investigation, as well as his failure to leave work to attend AA meetings during the time that Mr. Scullion conducted the audit at Winnequah School, indicate that the Grievant did not believe that he had Mr. Scullion's permission to attend AA meetings on the clock, as he claimed. By the Grievant's own testimony, he "guessed" that he had such approval.

The notion that his supervisor only cared that he got his work done and that his supervisor would approve the Grievant working less than the forty hours for which he was paid so that the Grievant could attend AA meetings is ludicrous. The Grievant did not have a reasonable belief that his conduct was known to and approved by his supervisor.

Time-card falsification is considered a form of theft. Arbitrators generally hold that an employee does not need a rule to advise the employee that theft is wrong and a dischargeable offense.

If the employee has acted knowingly and willfully, arbitrators generally uphold discharge. Employee intent can be shown through an employee's admission or attempt to conceal information during a subsequent investigation. Some arbitrators reduce penalties in the face of traditional mitigating factors, such as good work record, lengthy service and minimal value of the item taken; but such mitigating factors are given less weight where there is serious dishonesty and the employee's job requires trustworthiness.

As Head Custodian, the Grievant is required to lead, direct and coordinate the work of two other Custodians. The Grievant's work is largely unsupervised and he has keys that provide access to most, if not all, of the school building. The Grievant's trustworthiness is an especially important consideration to the District. The Grievant's prevarications when questioned by Ms. Van Valin rebut the Union's claim that the Grievant has been "forthright."

There should be no question that the Grievant acted intentionally. For up to three years, the Grievant had been leaving work for an hour or more almost every night without indicating his absence on his time-cards. The record establishes that the District advised the custodial staff, including the Grievant, of the importance of accurately reporting time and how to prepare time reports.

The Grievant provided no records to substantiate his claim that he made up time missed while attending AA meetings. The Grievant could not specify when he made up any time and acknowledges that he did not make up all of the time. Fellow employees testified that, despite being gone from Winnequah some time between 6 and 8 p.m. five days per week, the Grievant would also take his half hour lunch break later in the shift and leave at the end of his regular shift. During the June 6, 2006 meeting with Ms. Van Valin, the Grievant initially stated that he usually took his duty-free thirty minute lunch break from 9 to 9:30 p.m. Although the Grievant often came to work early, he was not observed to be working, but rather, was observed to be sitting at a break table.

During the three days that the District had the Grievant under surveillance, the Grievant was gone from Winnequah for over an hour each day, which absence was not recorded on the Tru Time system. Although the Grievant claims that at least 45 minutes of this time was his own, on two of those days he recorded having taken a half hour lunch break. Clearly, the Grievant was routinely absent for more than his 45 minute break and lunch period without making up for such absence.

The Grievant was entitled to understanding and cooperation from his employer in dealing with his problem with alcohol; which he received from Mr. Scullion. The Grievant was not entitled to a full day's pay for less than a full day's work. The Grievant's misconduct

may be distinguished from that of Mr. Schroeder in that Mr. Scullion had no reason to believe that Mr. Schroeder has extended his lunch hour on more than a couple of occasions and, when confronted by Mr. Scullion, Mr. Schroeder immediately admitted his culpability.

The Grievant has engaged in egregious time-card falsification and, thus, was properly discharged. However, if the Arbitrator should conclude that the penalty for the Grievant's misconduct is excessive, then the Arbitrator should not return the Grievant to his Head Custodian position, or award back pay or seniority.

Union

As set forth in the stipulated issue, the Arbitrator must determine whether or not the District has just cause to discharge the Grievant. "Just cause" is not explicitly defined in the parties' collective bargaining. Many arbitrators, in applying the just cause standard, consider the following:

Did the Employer prove that the Grievant is guilty of misconduct in which the Employer had a disciplinary interest?

If so, is the punishment imposed commensurate with the severity of the proven misconduct?

Are there mitigating or aggravating circumstances which justify consideration?

Consideration of the above questions, leads to the conclusion that the District does not have just cause to discharge the Grievant.

While the "preponderance of the evidence" is the appropriate standard in "ordinary discipline and discharge cases," this is not an ordinary case. The Grievant has been charged with criminal conduct; been threatened with prosecution; has had his reputation sullied; and the discharge, if upheld, will affect his future employment opportunities. Given the nature of the charges against the Grievant, arbitrators generally require a higher quantum of proof, *i.e.* clear and convincing evidence.

The Grievant had approached his supervisor; had informed his supervisor of his desire to attend AA meetings; and received a favorable response from his supervisor. The Grievant had a reasonable basis to believe that his conduct was known to and approved of by his supervisor.

Following their initial conversation about the Grievant's attending AA meetings during work time; Supervisor Scullion understood that the Grievant would get back to him. When the Grievant did not do so, Supervisor Scullion should have considered that there had been a misunderstanding and that he needed to check with the Grievant on what the Grievant understood. Supervisor Scullion did not do so.

The Grievant did not sneak about. The Grievant made no secret to his co-workers of his activities; wore his uniform to the AA meetings; and made no secret that he was there during his work shift. When confronted by Director of Business Services Van Valin, he did not deny leaving the workplace and admitted that it had been going on for three years.

The Grievant may have underestimated the amount of time that he was gone from the building; which may make him guilty of having a faulty memory; but not a liar and, therefore, a thief. Neither the Grievant, nor the District, has any idea if the Grievant owed the District time, or if the District owed the Grievant time.

Prior to the introduction of the Tru Time system, employee time records consisted of hand written forms filled out every two weeks. Employees were not held to strict start and end times and the objective was to put in your eight hour, forty-hour week, and get your work done. Given the long-standing practice of loose adherence to start and quit times, it is understandable that the Grievant believed that his conduct was acceptable.

Information contained on the Grievant's time cards and Tru Time reports was not accurate and in accordance with procedures established by the District. The Grievant, however, did not have any intent to defraud the District.

The District criticizes the Grievant's "honesty" at the June 6th investigatory meeting with Director of Business Services Van Valin. Given the lack of notice and the gravity of the situation, as presented by management, the Grievant was understandably flustered and, under the circumstances, reasonably forthright. Indeed, without prompting from the District, the Grievant later sought to correct some of his June 6th statements.

The record is rife with examples of employees who were absent from their workplace without authorization during working hours or otherwise extended break times. The Principal arrived at DR's building midway through DR's shift and found a dark building. After a second incident, DR continued to work for a month before resigning. The District took no action prior to this resignation. With respect to DR, the District had evidence of far more egregious conduct and, yet, had issued only a written reprimand.

The District's treatment of LS is also in stark contrast with its treatment of the Grievant. Although Supervisor Scullion cites LS's honesty as a significant reason why LS was not terminated, the February 5, 2003 disciplinary notice indicates that, to the end, LS denied that he was gone more than 20 to 15 minutes, despite the Principal's documentation of an absence of more than 30 minutes.

The District considered LS to have violated a work rule, but called the Grievant a thief. The District conducted surveillance of the Grievant, but not of LS. Significantly, Supervisor Scullion was aware that LS's absences from the workplace while in paid status may have been going on for some time, but he did not question him regarding the number of times this may have happened.

The Grievant is not a perfect employee, but did have an unblemished disciplinary record for the nearly 14 years that he was employed at the District. Early issues regarding outbursts with co-workers were resolved when the Grievant took steps to deal with his alcoholism.

To sustain the allegation that the Grievant falsified time cards, the District must establish that inaccuracies were deliberate with the intent to defraud the District. The record more reasonably establishes that the Grievant had a good faith belief that he had his supervisor's permission to attend AA meetings during his work hours and that the Grievant made attempts to minimize any impact upon his work hours by routinely leaving the meeting early and providing services to the District prior to his normal shift hours. The Grievant lacked intent to defraud the District.

Other employees had been given far less discipline for conduct which 1) plainly affected their work; and 2) unquestionably was done "behind the back" of supervision. The zeal with which the District went after the Grievant is in stark contrast with the forbearance it offered other employees who were guilty of the offenses leveled against the Grievant. This case is rife with evidence of disparate treatment.

The Union requests that the Arbitrator find that the District did not have just cause to terminate the Grievant. The Union further requests that the Grievant be reinstated to his former position and made whole for all losses suffered as a result of his unjust termination.

DISCUSSION

District Time Reporting Requirements

From the time that the Grievant was hired until the time of his discharge, the District prepared its payroll using paper time cards that were filled out by the employee. (T. 71; 123) Since at least 1999, the subject of time cards has been on the agenda at numerous meetings involving District custodial staff. (Ex. #6, 7, 8, 12, 13, 14)

Annual meetings of custodial, maintenance and grounds staff are mandatory. (T. 61-62) If an employee was absent, then they would be sent to a make-up date. (T. 62) Supervisor Scullion does not recall that he ever sent the Grievant to such a make-up date. (Id.)

At the August 19, 2003 annual meeting, Supervisor Scullion prepared an example which instructed employees on how to prepare the paper time card. (EX. #12) The minutes of this annual meeting include the following:

- 6) Mark went over time cards, showed example and explained what he wants to see on them. Make copy for your own records. . . .

Supervisor Scullion recalls that each employee received a copy of this "Example" at the August 19th meeting and that copies were also placed in the break rooms. (T. 21;23) In this "Example," the employee is instructed, *inter alia*, to write in the time that employee is "In" and the time that the employee is "Out;" the times that overtime is earned and the amount of this overtime; and the approximate time that they took their ½ hour unpaid lunch.

Supervisor Scullion confirms that, at the August 29, 2003 meeting, employees were instructed to write in the approximate time that the employees took their ½ hour lunch. (T. 24) Supervisor Scullion's subsequent testimony, reasonably indicates that employees did not always comply with this instruction. (T. 64)

The Grievant states that, from day one, he wrote on the paper time card when he came in to work and when he left work, but that he never wrote in a break or lunch. (T. 266) This testimony is consistent with the Grievant's paper time cards for the time period beginning 3/13/06 through 6/4/06. (EX. 30-36) On these paper time cards, which were approved by a supervisor, the Grievant does not identify a lunch period.

The Grievant states that he never wrote in on his paper time card if he stayed past 11:00 p.m. unless it was approved overtime, or when he left the building, except when he went home or left on sick time. (T. 266; 282-3) The Grievant confirms that, during his tenure with the District, payroll was based upon paper time cards. (T. 265)

In August of 2005, Supervisor Scullion introduced True-Time at the annual meeting. (EX. #14, T. 28) In August of 2005, True-Time was to be used on a test basis for a year. (T. 28) True-Time, which was formally implemented in July, 2006, is a record keeping system in which the employee records his/her time on a computer, including when the employee punches in and out of work status; earns overtime; and uses paid leave. (T. 29)

At "Head Custodian Team Meetings" held on January 18, 2006, February 22, 2006, March 16, 2006 and April 12, 2006, Head Custodians received updates on True-Time. (EX. 15, 16, 17, 18, 19, 20, 21) At the January 18, 2006 meeting, the Head Custodians were informed that they had until the first of February to "play" with the system. (EX. 16) The minutes of January 18, 2006 do not report the absence of any Head Custodian.

The minutes of the February 22nd report only one absence, *i.e.*, Custodian Schroeder, and the minutes of the March 16th meeting reflect that the Grievant was present at this meeting. (EX. #18, 20) The Grievant prepared the minutes for the April 12, 2006 meeting, which minutes state that “Mark handed out a sheet on True-Time.” (EX. 29) This sheet includes the following:

4. 7-minute push will be for punch in and punch out only and “Lunches and breaks will be exact time.” (EX. #28)

For at least three months prior to his discharge, the Grievant’s True-Time verification report records a time punched in and out of work, as well as a time punched in and out of lunch break. (EX. #37)

Custodian Marron states that he was given training in True-Time as well as in paper time cards. (T. 124) Custodian Marron recalls that True-Time training occurred at the annual safety meeting, which involved the entire staff, and at Head Custodian meetings, which he had been invited to attend because he was the Union VP. (Id.) When asked if he recalled whether the Grievant was in attendance at any of these meetings, Custodian Marron responded “yes.” (Id.)

Supervisor Scullion recalls that, approximately two to three months prior to the Grievant’s discharge, employees’ True-Time reports were supposed to mirror the employee’s paper time cards. (T. 92) Supervisor Scullion states that, if an employee indicated that his “Regular Hours” were 6 to 2:30, then Supervisor Scullion would expect that employee to be at work during those hours, except for the half hour unpaid lunch period. (T. 24) Supervisor Scullion further states that employees are not supposed to be late, but that he would not have a problem with an employee who arrived a few minutes early or a few minutes late reporting on the time card that the employee had arrived and left at their normal start and end times. (T. 65-66)

Head Custodian Grogan states that he received training in True-Time. (T. 199) According to Head Custodian Grogan, from this training, he understood that employees were supposed to punch in when the employee arrived at work and punch out when the employee left work, with a little leeway either way. (Id.) Head Custodian Grogan was questioned and answered as follows:

- Q: And was it your understanding that Tru-Time was supposed to be an accurate recordkeeping at the time it was being implemented?
- A: Yeah, I guess so. Yeah, I mean, I could look the previous week over and I could see when I punched in and when I went home, punched for home, and your breaks and your lunches and all of that stuff. (T. 199-200)

Custodian Marron understands that, if an employee came in to work early, then the employee could leave work early, so long as the employee worked his/her eight hours. (T. 134-5) Custodian Marron believes that, when doing so, it would be appropriate to record the employee's regular work shift hours on the time card. (Id.) Custodian Marron states that, if you record your regular eight hour shift on your time sheet, then you need to work eight hours and fill out the time sheet correctly. (T. 134-5)

Summary

For more than three years prior to his discharge, the Grievant received District instruction on how to prepare paper time cards. These instructions were sufficient to inform the Grievant that he was to accurately report the number of hours worked on his paper time cards.

The Grievant understood that the District paid the Grievant on the basis of the information that the Grievant wrote on his paper time cards. Thus, even without instruction, the Grievant had to know that he was to accurately report the number of hours worked on his paper time cards.

It was acceptable for the Grievant to report that he had started and ended his work shift at his regular shift times even though the Grievant may have been a few minutes early or late. However, the fact that the Grievant could punch in and out a few minutes early or late and still claim his regular eight hour shift pay did not provide the Grievant with a reasonable basis to conclude that he had permission to claim pay for other time not worked by the Grievant.

On August 19, 2003, Supervisor Scullion directed employees, including the Grievant, to identify the approximate time of the ½ hour unpaid lunch period on paper time cards. Notwithstanding this direction, it was acceptable for the Grievant to not identify his ½ hour unpaid lunch hour on his paper time card.

When True-Time was first introduced, there was a period of time in which employees, including the Grievant, were allowed to "play" with True-Time. For two to three months prior his discharge, the Grievant knew that when he entered his "True-Time" data, he was to accurately report his work hours, including when the Grievant punched in and out of work.

Grievant's Attendance at AA Meetings

At the time of his discharge, the Grievant worked the night shift at Winnequah with Custodian Marron and Custodian Meicher. Of these three employees, only Custodian Marron and the Grievant testified at hearing.

At hearing, Supervisor Scullion recalled that, on May 19, 2006, Custodian Marron and he had a discussion about Custodian Marron's comp time and that, during this discussion, Custodian Marron said that he had to ask Supervisor Scullion about an agreement that Supervisor Scullion had with the Grievant. (T. 36) Supervisor Scullion recalls that he then asked what agreement?; Custodian Marron responded the agreement about the Grievant's leaving every night; Supervisor Scullion said every night?; Custodian Marron responded yes; Supervisor Scullion said how long has this been going on?; that Custodian Marron replied I don't know - probably three, three and a half years; and that Supervisor Scullion told Custodian Marron that he was not aware of this. (T. 36-7) Supervisor Scullion further recalls that Custodian Marron said that the Grievant left between 6:00 and 6:30 p.m. and that, on several occasions, the Grievant told Custodian Marron, that if Supervisor Scullion ever came into the building, he was to call the Grievant. (T. 38; 96) Supervisor Scullion's undated written "Rick Ness Investigation Summary" is consistent with this testimony, but also states that Custodian Marron told Supervisor Scullion that the Grievant was gone for an hour or so. (EX. 42) Supervisor Scullion recalls that he was a little miffed; could not really believe it; wrote it all down and then went to talk to Director of Business Services Van Valin to ask if he could pursue an investigation to see if it was true. (T. 37). Director of Business Services Van Valin recalls that, on May 19, 2006, Supervisor Scullion advised her that a custodian had told him that another custodian had been attending meetings on work time, claiming that there was some sort of arrangement; that Supervisor Scullion stated that he was not aware of any arrangement and that he had not given permission for someone to leave work while getting paid; and that Director of Business Services Van Valin decided to conduct a formal investigation. (T. 142-3)

Supervisor Scullion states that he conducted surveillance on the Grievant on May 22, 23 and 24, 2006. (T. 37-39) Supervisor Scullion further states that he prepared a report of his investigation. (T. 43) This report includes the following:

On 5/22/06 6:03 PM I arrived at the Community Center parking. At 6:23 PM Rick Ness left the parking lot in his wife's car. . . . At 7:38 PM Rick Ness returned to the building. True-Time indicated that he then punched out for lunch at 9:09 PM and punched back in at 9:39 PM.

On 5/23/06 6:01 PM I arrived at the Community Center parking lot. At 6:13 PM Rick Ness left again from Winnequah. At 7:32 PM Rick Ness returned to the building. Tru-Time indicated that Rick Ness punched out for lunch at 9:29 PM and punched back in at 9:56 PM.

On 5/24/06 I arrived at the Community Center parking lot 6:03 PM. At 6:21 PM Rick Ness left the parking lot. I proceeded to follow Rick Ness to the Monona Serenity Group located on Prairie Dock Dr. I returned to the District Office for a Board Meeting that evening. Tru-Time indicated that Rick Ness punched out for lunch at 9:37 PM and punched back in at 10:07 PM.

I proceeded to investigate the web site of this facility and found it to be AA. I printed the dates and times of meeting to indicate that other times are available prior to Rick's work schedule. I reported this information to Mary Ellen Van Valin and informed her of Rick Ness's and my conversation approximately three years ago. (EX. #42)

Supervisor Scullion acknowledges that, on the days that Supervisor Scullion conducted surveillance, he did not observe the times that the Grievant began or left work. (T. 75)

Custodian Marron recalls that, in the Spring of 2006, during a conversation about Custodian Marron's comp time, Custodian Marron stated that, because he was not the Union VP, Supervisor Scullion better inform the new VP of what was going on with the Grievant; that he was referring to the Grievant leaving for AA meetings; that Supervisor Scullion was very surprised and asked Custodian Marron what he meant; and that Custodian Marron told Supervisor Scullion about the Grievant leaving at night to go to his meetings. (T. 117-118) Custodian Marron states that he has worked with the Grievant at Winnequah for the last seven years; that, for about three years, Custodian Marron has observed the Grievant leaving to attend meetings, Monday through Friday; and that the Grievant would leave at approximately 6:00 p.m. and return within one to two hours. (T. 115-19)

Custodian Marron states that he thought that the Grievant's leaving work was odd; that Custodian Marron broached the subject with the Grievant "a couple of times;" and that the Grievant told Custodian Marron that Supervisor Scullion knew about it. (T. 135) Custodian Marron recalls that the Grievant told Custodian Marron that, if Supervisor Scullion ever showed up while the Grievant was gone, Custodian Marron was to call the Grievant. (T. 120)

The Grievant recalls that, approximately four and one-half years ago, he started attending AA meetings at Noon. (T. 241-2) According to the Grievant, he stopped his regular attendance at Noon meetings after a year or year and one-half and began to attend AA meetings at 6:30 p.m..(T. 241-2; 247) When asked how often he attended the 6:30 meeting, the Grievant responded:

On an average, I would have to say for the vast majority of the time, four days a week, three and a half. Quite often it was every day of the week. There were times when something was going on at school, if I was just plain too tired or what have you, maybe it would only be a couple days a week. . . (T. 247)

According to the Grievant he would arrive at the 6:30 p.m. meeting shortly before or after it started and, generally, on average, would leave at 7:10 p.m. (T. 242) The Grievant states that, before the AA meetings moved to the present location approximately two years ago, it would take the Grievant two to five minutes to drive to the meeting from his worksite and that the drive from his worksite to the present location takes approximately five minutes. (T. 242-3) The Grievant states that he was not secretive about leaving for the meetings and would usually check in with his fellow custodians. (T. 256)

The Grievant recalls that, beginning approximately one and one-half months prior to his termination from employment; the Grievant took more time than usual to attend the AA meetings. (T. 273-4) When asked how much more time than usual, the Grievant responded that he did not have a recollection. (T. 276)

TB states that she has known the Grievant through AA for at least four years; that she attends AA meetings every day; that, for at least three years prior to hearing, she observed the Grievant attending the 6:30 to 7:30 p.m. AA meetings several times a week, maybe three to four times during a Monday through Friday week. (T. 215-217) TB recalls that the Grievant would arrive at, or shortly after, the start of the meeting; leave between 7:15 and 7:20 p.m. and that it was rare for the Grievant to stay until the end of the meeting. (T. 216; 218)

JS states that he regularly attended the 6:30 p.m. AA meeting on Tuesday and saw the Grievant there consistently. (T. 231; 235) JS recalls that the Grievant would arrive five to ten minutes before the meeting and leave ten to fifteen minutes before the meeting ended. (T. 231)

MP states that he has known the Grievant through AA for three to four years; that he attends six or seven AA meetings per week, most consistently at 6:30 p.m.; and that he would see the Grievant at this meeting, on average, two to three times per week. (T. 222) According to MP, the Grievant would arrive for the meeting right around the 6:30 p.m. starting time, maybe a little before or later, and leave about 7:10 p.m. (T. 223)

The Grievant indicates that, at the time that he had his initial conversation with Supervisor Scullion regarding AA meetings, the Grievant had been attending AA meetings during his unpaid lunch, but had been overextending this lunch period. (T. 243-5) Subsequently, the Grievant was questioned and answered as follow:

Q: Now, if you found it difficult to get back within the time frame, what did you do about your time?

A: I stayed late.

Q: How late?

A: Fifteen minutes, 20 minutes. The emphasis again was to make sure . . .
(T. 245-6)

. . .

Q: Did you occasionally stay after 11?

A: Yes.

Q: Why?

A: Things needed to be done. I spent too much time away from the building earlier, the AA meetings.

Q: So did you feel like you were trying to make up that time?

A: Yes.

Q: Did you ever leave your work undone?

A: No. (T. 267)

The Grievant recalls that, due to his attendance at the AA meetings, he advised Supervisor Scullion that the Grievant did not intend to request overtime for a day that he spent visiting other schools on behalf of the District, but that Supervisor Scullion refused this offer. (T. 255)

Custodian Marron, who has worked with the Grievant at Winnequah for seven years, states that the Grievant “pretty much always” took his lunch break with Custodian Marron and that lunch breaks were half an hour, plus or minus. (T. 136) Director of Business Services Van Valin recalls that, when she interviewed the Grievant on June 6, 2006 she asked the Grievant when he typically took his duty-free lunch; that he initially responded “9, 9:30” and then said sometimes “6, 6:30.” (T. 148) The Grievant’s True-Time records from February 27, 2006 through June 5, 2006 do not indicate that the Grievant’s lunch period was taken at “6, 6:30” but do indicate that, on more than fifty occasions, the Grievant punched in and out for lunch between 7:45 p.m. and 10:30 p.m. (EX#37) These True-Time records indicate that the one-half hour lunch was most frequently taken between 8:30 and 9:45 p.m. (Id.)

Custodian Marron states that his shift and the Grievant’s shift were scheduled to end at the same time and that “most of the time” he and the Grievant left together at 11:00 p.m. (T. 120-1) Custodian Marron’s testimony is consistent with the Grievant’s True-Time records, discussed above, which indicate that, at the times that the Grievant was on his night shift, he punched out at 11:00 p.m. on more than forty nights and after 11:00 p.m. on twelve nights. Head Custodian Grogan states that, at Winnequah, the alarm is set for 11:30 p.m. and that you need to make special arrangements if your remain in the building after 11:30 p.m. (T. 208)

On nine of the twelve nights, the Grievant punched out at 11:15 p.m. The Grievant’s paper time cards, which record overtime, do not establish that the Grievant requested overtime for any of these extra 15 minutes. On two of the twelve nights, the Grievant punched out at 12:00 a.m. and requested overtime for both of the extra hours. (EX. #33) On one of the twelve nights, the Grievant punched out at 11:30 p.m. His paper time card indicates that, on this day, he worked his regular night shift from 3:00 p.m. to 11:30 p.m. (EX. #35)

The Grievant states that he typically arrived at work prior to his 2:30 p.m. start time and then would perform work related tasks, such as speaking with Head Custodian Grogan, checking to see if there were any notes on his table; straightening things up; checking and answering emails, including personal emails; checking “school dude,” and organizing things. (T. 251-2) John Grogan, who has been a Head Custodian at Winnequah since approximately 1995, states that he normally returns to the maintenance office at 2:15 p.m.; that he has seen the Grievant in the office at that time; that half the time the Grievant has been eating his lunch; that half the time the Grievant has been at the computer; and that Head Custodian Grogan had

not observed what the Grievant was doing on the computer. (T. 193; 198-99; 200) Head Custodian Grogan states that, while in the maintenance office, he would have conversations with the Grievant regarding District operations. (T. 200) Head Custodian Grogan does not recall observing the Grievant cleaning the building prior to the start of the Grievant's night shift. (T. 197-98)

John Walsh has been a District Service Person for ten years, with the bulk of his responsibility at Winnequah. (T. 181-2) District Service Person Walsh states that he is typically in the maintenance office by 2:20 p.m. and has observed the Grievant eating; getting ready to punch-in; getting organized for work, *e.g.*, putting his lunch in the refrigerator and settling in; and having discussions with Head Custodian Grogan. (T. 184-7) District Service Person Walsh has observed the Grievant at the computer, but does not know what the Grievant was doing at the computer. (T. 185-6) District Service Person Walsh states that he did not observe the Grievant eating while the Grievant was at the computer and that maybe half the time the Grievant was eating and half the time the Grievant was at the computer. (T. 187-88) District Service Person Walsh does not recall observing the Grievant performing any cleaning duties prior to 2:30 p.m. (T. 185)

The Grievant's True-Time records, identified above, indicate that, at the times that the Grievant worked his night shift, he generally, but not always, punched in at 2:00 p.m. on Fridays (which would be consistent with the testimony that the Head Custodian meeting was held at 2:00 p.m. on Friday) and, generally, but not always, claimed one-half hour of overtime for that day. These True-Time records also indicate, between February 27, 2006 and June 5, 2006, the Grievant punched in at 2:30 p.m. on more than forty days.

On February 28, 2006, the Grievant punched in at 2:00 p.m. and then again at 2:15 p.m. It is not evident that the Grievant claimed any overtime for that day. On March 16, 2006, the Grievant punched in at 12:30 p.m. and claimed 2 hours of overtime for his time between 12:30 and 2:30 p.m. On April 12, 2006, a day on which the Head Custodial Meeting was held at 1:00 p.m., the Grievant punched in at 1:00 p.m. and claimed one and one-half hours of overtime for his time between 1:00 and 2:30 p.m. On April 21, 2006, the Grievant punched in at 2:00 p.m. and claimed one-half hour of overtime for his time between 2:00 and 2:30 p.m. On May 17, 2006 the Grievant punched in at 1:00 p.m. and claimed one and one-half hours of overtime for his time between 1:00 and 2:30 p.m.

The Grievant was questioned and answered as follows:

Q: How did you always know you had worked 40 hours a week?

A: How did I know I worked 40 hours a week? I did my work.

Q: I don't think that quite answers the question. How did you know that you worked 40 hours a week, not whether you get your work done.

A: I was really tired when I came home.

Q: Again, I'm going to ask the same question. How did you know? Was there anything that you looked at or any records that you kept - -

A: Mr. Scullion signed my timecards and said there was 40 hours a week there.

Q: How did you know, since you left during your work shift, that you worked 40 hours a week?

A: I didn't keep very close tabs of it. I never saw a need to. I was never told to. I was never told to record any of it, nor did anybody else when they did certain things. (T. 279)

. . .

Q: Now, how much time do you think that you missed working for the district that you didn't report, all together, any idea?

A: As I said, the District would not give me my timecards nor the True-Time.

Q: And you never kept any record all yourself?

A: I wasn't asked to. Again, this was a very informal deal. There was an agreement. (T. 287)

. . .

Q: You don't know whether you made all of it up or some of it or any of it. Which is it?

A: I made up the time. Whether I made up all of it, I don't know. It seems rather immaterial to me considering I offered to give some time back and Mark said no. (T. 299)

. . .

Q: I'm curious about the issue of the time frame over which you would make up your time. In your mind, were you trying to make up time minute by minute each day or did you have sort of a broader time frame that you thought that you could make up your time? Do you understand what I'm asking?

A: I think so. It was more in a broad general concept. There was not a big concern placed on making up the time in the first place. The biggest concern was making sure that the job was done every night. That is where the emphasis was put on, and when I spent more time than usual, you know, at a meeting, talking to somebody afterwards that needed to talk, I had an obligation to make up that time. Now, was it that particular night? No, not necessarily. . . . as long as the work was done that night, it didn't really matter when I made it up, in my mind. (T. 300-01)

Summary

For three years prior to his discharge, the Grievant regularly left work during his normal night shift of 2:30 p.m. to 11:00 p.m. to attend three to four AA meetings per week that were held between 6:30 and 7:30 p.m. Including travel time, the Grievant's attendance at these meetings involved, at a minimum, forty-five minutes per meeting. At times, the Grievant's attendance at these meetings involved more than an hour. On days that the Grievant was attending these AA meetings, he also regularly took his one-half hour unpaid lunch.

At times, the Grievant arrived at the worksite prior to the start of his regular night shift and left the worksite after the end of his regular night shift. At times when the Grievant arrived at the worksite prior to the start of his regular shift and left the worksite after the end of his regular night shift, the Grievant performed work for the District without requesting, or receiving, payment for such work. Neither the time that the Grievant offered to the District for visiting other schools on behalf of the District, nor the other times that the Grievant performed work outside of his normal work schedule without requesting pay, is sufficient to offset, in any significant amount, the time that the Grievant used to attend AA meetings during his regular night shift.

Alleged "Agreement" Between the Grievant and Supervisor Scullion

The Grievant and Supervisor Scullion each recall a conversation in which the Grievant brought up the subject of AA meetings. At hearing, Supervisor Scullion recalled that, three to four years ago, Supervisor Scullion was at Winnequah; that the Grievant approached him as they were in the break room; and that the Grievant told Supervisor Scullion that the Grievant had some personal issues, that the Grievant was an alcoholic, and that the Grievant wanted to continue going to classes. Supervisor Scullion was unsure if the Grievant mentioned Serenity House or another meeting location. (T. 40-1) Supervisor Scullion recalls that he was receptive to the idea of the Grievant attending AA meetings and responded by telling the Grievant something like "nice job," "I'm glad you're doing that. It's a hard thing to do. The district is here to help you out as best we can." (T. 41)

Supervisor Scullion recalls further conversation as follows:

We talked a little bit about, I asked him when, you know, what time or what days are you looking at, and he said maybe one or two hours a week during the evening, he wasn't sure, because he was attending classes at around noon or 12:30 and it might work out that way. And I informed him at that time that the district would be willing to work with him, but he needed to have eight hours a day and 40 hours a week in, and he had some choices that he could use vacation time, comp time, sick time or he could make up his time. (T. Id.)

Supervisor Scullion maintains that, after this discussion, the Grievant never came to Supervisor Scullion to tell him of any definite plans to attend AA meetings. (T. 42)

Subsequently, Supervisor Scullion was questioned and answered as follows:

Q: Now, when you met with Rick, and he mentioned to you that he would like to go to these AA meetings and some of them would be during the shift, right?

A: He did not tell me that, no.

Q: Well, you said that he told you that.

A: He was thinking about that. He needed to give me an answer when he was leaving.

. . .

Q. . . . And you told him that he could either use comp time or vacation. He could come in early or stay late, but whatever he did, he had to make sure he gets eight hours a day, and put in 40 hours per week?

A: Yes, that's correct. (T. 76)

In his undated written "Rick Ness Investigative Summary," Supervisor Scullion states, *inter alia*, as follows:

. . .

Rick had approached me in the custodial break room with a confidential question. No other witnesses were present during this conversation. Rick informed me that he was a recovering alcoholic and that he wanted to continue going to meetings. I informed Rick that I was proud of his steps he was taking to recovery and that it's a hard step. I also informed him that we (the District) would work with him so that he could continue his meetings for recovery. I asked Rick, how many meetings are we talking about. Rick indicated to me that it would be maybe once or twice a week, no more than an hour because the facility was not far away. He also indicated that maybe this could be done off work hours as well depending on the class schedule. I informed him that we could work with that however; he had some choices to make. He could either use comp time, vacation time or come in early to make up the time as long as he got his 8 hours per day in. He was not sure at the time if he wanted to lose comp time or vacation. I informed him at that time that he needed to let me know so I could let Mr. Avery know (Former Business Director). He indicated he would let me know when he figured it out. He also asked if this could be

kept confidential. I informed him that whatever we agreed upon is no one else's business. I just need to keep my boss informed. I immediately informed Mr. Avery of our conversation and informed him that I would let him know Rick's decision as soon as Rick informed me. Approximately three months later Mr. Avery asked if Mr. Ness had informed me on what choice he was going to do. I informed Jeff at that time that I had not heard from Rick and I assumed that he found meetings off his work hours as previously discussed. Mr. Avery is willing to be witness to these statements. (EX. #42)

. . .

At hearing, the Grievant was questioned and answered about his attendance at AA meetings as follows:

Q: Now, what made you think that you could do this during your scheduled work shift?

A: Well, initially I wasn't so sure I could. When I initially got into AA, I made a commitment to my sponsor. He asked me if I was willing to go to any lengths to stay sober. I said yes, I'm willing to sponsor you then. He said one of the things I'm going to ask you to do is to go to at least one meeting a day for 90 days. They called it 90 and 90, but it is up to the individual, but I made that commitment.

At some point, I couldn't make it to a noon meeting. I went to a 6:30 meeting. And I figured, I go down there and leave early. I had a hard time making it back within that time frame. I went down and caught part of a meeting. I had done that a few times it had happened, and then I realized I better talk to Mark about this, and I didn't want to get in trouble. I approached Mark. . . . (T. 243)

The Grievant then explained that he told Supervisor Scullion, *i.e.*, Mark, who is sponsor was and that "Mark" had known this sponsor for years. The Grievant's testimony continues as follows:

. . . and I told him (Mark) what I had been doing up to that point, and I told him that I had gone to some meetings. I'm getting back a little late. It has happened, and you know, where can I go from here? Is this something I can do? And he said yeah, you can't get anything done in a half hour is what I remember him saying.

Q: What was he referencing?

A: Half an hour lunch time.

Q: Okay. So he said you can't get anything done in a half hour. What else did he say?

A: He said that's fine. Do what you need to do. He gave me some positive . . . (T. 244)

Following an interruption for an objection and response, the Grievant continued:

He said do what you need to do. He was giving me some positive reinforcement. He was glad I was doing it, the way it seemed, and I was getting his blessing was the gist of it. He said do what you need to do. Make up your time however, but make sure that the guys that you work with are cool with this, and make sure the work gets done. (T. 244-45)

Subsequently, the Grievant was questioned and answered as follows:

Q: Whatever Mr. Scullion said, you understood that you were to work 40 hours per week?

A: Yes. Again, that was not the emphasis. The emphasis was making sure the work gets done. Mark was in favor of me going to the meetings. (T. 287)

. . .

Q: He agreed to have you work less than 40 hours per week?

A: I had an agreement with him for me to do this, to go to the meetings, so –

Q: Did you have an agreement with him to work less than 40 hours per week?

A: I guess I did. (T. 299)

At some point, perhaps a year or two prior to the Grievant's discharge, Supervisor Scullion conducted an audit, or time study, of the custodians at Winnequah. (T. 97) The Grievant confirms that, during the time that Supervisor Scullion shadowed employees while conducting this time study, the Grievant did not attend AA meetings during his work shift because it did not seem appropriate. (T. 248) The Grievant was then questioned and answered as follows:

Q: Why?

A: Because there was something wrong, and I didn't know what it was, and Mark wouldn't tell me, nor would he tell anyone else. He was going to work with us, and that's all there was to it. He didn't say that there was a problem with our cleaning, . . . I don't really know what the problem was from Mr. Scullion. (Id.)

The Grievant recalls that, after this time study, Supervisor Scullion initiated a conversation with the Grievant about the time study; that, during this conversation, the Grievant mentioned that he went to the meetings at night; that Supervisor Scullion stated that the Grievant had not been going to the meetings at the time of the study; that the Grievant responded yeah, and that he had not gone to a meeting since, which was over a month; that Supervisor Scullion said that he hoped that it was nothing that Supervisor Scullion said; and that the Grievant responded that yes, it was something that Supervisor Scullion said. (T. 249-50) The Grievant states that, after this conversation, he did resume his attendance at the evening meetings and that he thought that would be appropriate because “Mark said I hope that you didn’t stop going to the meetings because of anything that I said.” (T. 250)

Summary

Contrary to the argument of the Union, Supervisor Scullion did not have any obligation to follow-up on the initial conversation with the Grievant by contacting the Grievant to determine what the Grievant had decided to do about attending AA meetings or for any other purpose. The Grievant’s testimony that he “guessed” that he had an agreement with Supervisor Scullion to work less than forty hours per week is not only contradicted by the testimony of Supervisor Scullion, but also, is inconsistent with the Grievant’s testimony that he was told that he needed to make-up his time; that he understood that he was to work forty hours per week; and that he made up some, if not all, of the time that he spent at AA meetings.

Supervisor Scullion did not agree that the Grievant could attend AA meetings on District time. Nor did Supervisor Scullion otherwise give the Grievant permission to claim pay for time not worked.

Meetings and Conversations with Director of Business Services

Director of Business Services Van Valin recalls that Supervisor Scullion suggested that he conduct surveillance; that Supervisor Scullion reported back on his surveillance; that Director of Business Services Van Valin then decided to interview the two night custodians that worked with the Grievant; that one of the Custodians was very hesitant to answer questions; that the other Custodian reported that, for three years, the Grievant regularly left work for an hour or two; and that Director of Business Services Van Valin then interviewed the Grievant. (T. 143-146) Director of Business Services Van Valin recalls that the interview of the Grievant occurred on June 6, 2006. (T. 147) According to Director of Business Services Van Valin, after the Grievant declined Union representation, she told the Grievant that there had been an allegation that custodians may be leaving during paid time; that she confirmed the Grievant’ shift and asked the Grievant when he typically took his duty-free lunch; and that the Grievant initially responded “9, 9:30” and “then just almost as an afterthought, he said, well, sometimes 6, 6:30.” (T. 147-8)

Director of Business Services Van Valin recalls that, at the onset of the investigative meeting, the Grievant stated that, for approximately three years, he had been attending AA meetings and that three years ago he had a meeting with Supervisor Scullion in which Supervisor Scullion stated that it was ok for the Grievant to attend meetings. (T. 148) Director of Business Services Van Valin recalls that she then asked how many days per week that the Grievant went to these meetings and that the Grievant initially said three to four meetings, but, at one point the Grievant said it was up to five days per week. (Id.) According to Director of Business Services Van Valin, the Grievant initially stated that he would be gone for 45 minutes "tops," but following further questioning, the Grievant said sometimes up to an hour and one-half and that the number of days and length of time changed during this meeting. (T. 148-9) Director of Business Services Van Valin states that the Grievant's statements were "fragmented" and that it was very difficult to get a consistent story. (T. 149)

Director of Business Services Van Valin recalls that the Grievant initially stated that he had never been informed as to how to fill out a paper timecard or True-Time; that she presented the Grievant with copies of his paper timecard and True-Time record for the period that included May 22, 23 and 24, 2006 (EX. 35 and 37); that the Grievant confirmed that it was his signature on the paper time card and that it accurately reported his time; that the Grievant verified that it was the True-Time record that he had submitted electronically; that Director of Business Services Van Valin then had Supervisor Scullion discuss his surveillance of the Grievant; that Director of Business Services Van Valin told the Grievant that she had asked for honesty, asked if there was anything else the Grievant wanted to change; and that the Grievant sat back and replied "It looks like you got me. Looks like I'm in a lot of trouble. What would you like me to do?" (T. 151-2) Director of Business Services Van Valin recalls that she responded that he needed to be honest, that he had not been honest and that the Grievant was being placed on paid suspension pending the conclusion of the investigation. (T. 152)

Director of Business Services Van Valin states that she subsequently selected two custodians at random and questioned them as to whether or not they had received adequate training in paper timecard and True-Time reporting and each, independently, confirmed that they had. (T. 152-3) Director of Business Services Van Valin recalls that, on Thursday June 8th, she returned the Grievant's telephone call and that, during their telephone conversation, the Grievant indicated that he had lied during the June 6, 2006 investigatory meeting; that his AA sponsor had advised him to come clean; that she asked the Grievant how much he had stolen from the District and the Grievant responded that he did not know and was there anything that he could do; and that she told the Grievant that he needed to figure out how much he owed the District. (T. 153-4)

Director of Business Services Van Valin states that, later that day, she called the Grievant to inform him that she had completed her investigation; that she would like to meet with the Grievant the next day at 10:00 a.m. and that he should bring Union representation because discipline would be involved; that the Grievant brought a Union representative with

him to the Friday meeting; that, at this meeting, the Grievant admitted that he had lied to her during the investigatory meeting of June 6th; that she asked the Grievant if he had figured out how much time he had stolen from the District; the Grievant indicated that he had not; and that she told the Grievant that she had calculated a ballpark figure of \$20,000 and that the District could pursue criminal relief, as well as termination; and that she gave the Grievant the option of voluntarily resigning in lieu of termination. (T. 154-5) Director of Business Services Van Valin states that, at the Friday meeting, she gave the Grievant three reasons for his termination, *i.e.*, stealing district time, knowingly falsifying the timecard; and knowingly and admittedly lying during the investigative process. (T. 155-6) Director of Business Services Van Valin does not recall the Grievant taking issue with her, but does recall that the Grievant looked at Supervisor Scullion and commented that we all need to be honest and that the Grievant stated that he had made up some, but not all, of the time. (T. 156) Director of Business Services Van Valin states that, at a later date, the Grievant telephoned her to advise her that he would not be resigning. (Id.)

The written notes of the June 6th and 8th meetings prepared by Director of Business Services Van Valin are consistent with, but more extensive, than her testimony. According to these notes, the Grievant stated that he had never been told to write his duty-free lunch on his timecard; that the Grievant acknowledged that he left District grounds without indicating the absence on his timecard; that, as Supervisor Scullion recalled the conversation that occurred three years ago, Supervisor Scullion had told the Grievant that he had three options to attend AA meetings: 1) use accumulated comp time, 2) use sick time or 3) come in early or leave late in order to make up the time and that the Grievant quoted what Supervisor Scullion said “just make sure that you get your eight hours in;” that the Grievant recalled a second conversation, which Supervisor Scullion did not recall, in which Supervisor Scullion asked the Grievant “Are you working 8 hours? To which the Grievant responded “you know I’m not here all the time;” and that the Grievant recalled a third conversation in which the Grievant indicated to Supervisor Scullion that Supervisor Scullion had been really good to the Grievant about attending meetings, that the Grievant did not need to receive overtime for the hours visiting the Elkhorn and Lake Geneva Schools, that Supervisor Scullion should put it toward the Grievant’s time and that Supervisor Scullion stated that the Grievant would need to be paid, like the other support staff personnel. (EX. #41) Supervisor Scullion, who was present at the meeting of June 6th, recalls that, after the Grievant was advised of the surveillance, the Grievant said “you’ve got me. I guess I’m in a lot of trouble.”(T. 49)

The Grievant recalls that, after he rejected Supervisor Scullion’s suggestion that he obtain Union representation, he and Supervisor Scullion went into Director of Business Services Van Valin’s office and he was questioned about his hours and breaks. (T. 253) The Grievant recalls, in particular, being asked “When did you take your break,” “Are these the only breaks that you take?” and that the Grievant said that he took his supper at 6:30, because he attended AA meetings and that Mark knows that. (Id.) According to the Grievant, Supervisor Scullion then made a motion that caused the Grievant to conclude that something was not right. (T. 253)

The Grievant recalls that he was then asked how long he spent at the meetings and whether it was longer than his break; that the Grievant replied “no;” and that Director of Business Services Van Valin asked the Grievant “pointblank” “Did you ever spend any time longer than your break?” and the Grievant said “Maybe,” but, basically, denied it. (T. 253-4) The Grievant states that the conversation then focused on whether or not Supervisor Scullion was aware that the Grievant was going to meetings. (T. 254) According to the Grievant, Supervisor Scullion stated that the two had had a conversation four years ago and that there was never another word about it; that the Grievant responded that there was; that the Director of Business Services asked when; that the Grievant responded a week ago and then described a telephone conversation in which Supervisor Scullion called the Grievant at home to ask if the Grievant wrote in his time card for the trip visiting the schools; that the Grievant replied “no;” that Supervisor Scullion told the Grievant that he needed to write it in; and that the Grievant responded that he had not planned on getting paid for it, it was something that the Grievant had wanted to do, and that the Grievant appreciated that Supervisor Scullion allowed him to go to AA meetings. (T. 254-55) According to the Grievant, Supervisor Scullion did not respond to any of that. (T. 255) The Grievant recalls that, the day after the telephone conversation, that Supervisor Scullion approached the Grievant at work and asked if the Grievant had written in the overtime; the Grievant responded yes; and then Supervisor Scullion left. (Id.) According to the Grievant, Supervisor Scullion denied that the Grievant had mentioned anything about AA meetings and then the Grievant became angry and said “okay, fine you’ve got me.” (T. 256) According to the Grievant, he was making the point that, if Supervisor Scullion was not going to tell the truth, then there was not much that he could do about it. (T. Id).

The Grievant recalls that, after the meeting of June 6th, he spoke with his AA sponsor. (T. 259) The Grievant further recalls that, after this conversation, he left a message for Director of Business Services Van Valin and, when she returned his call, he stated, *inter alia*, that he had spoken with his sponsor; that he had some things that had to be straightened out; that he had not been completely honest; that he had taken more time than usual for the last month, month and one-half; that Director of Business Services Van Valin asked if he was sticking to his story about thanking Supervisor Scullion for letting him go to AA meetings and that he had wanted to donate the time for the Lake Geneva trip; that he said yes, that is the truth; and that he again apologized for her having to go through all of that. (T. 260-2) At hearing, the Grievant confirmed that, when he was first interviewed by Director of Business Services Van Valin, he lied about being gone. (T. 291)

The Grievant states that, at the meeting attended by Union VP Strausberg, and in response to Director of Business Services Van Valin’s statement that they had been looking for honesty, he directed a comment toward Supervisor Scullion, *i.e.*, “Yes, I was hoping for honesty all the way around.” (T. 264) According to the Grievant, he made that statement because Supervisor Scullion had sat there and lied and hung the Grievant out to dry. (T. 264)

Summary

Director of Business Services Van Valin states that the Grievant admitted that he had lied during the investigative meeting of June 6, 2006. At hearing, the Grievant admitted that he lied to Director of Business Services Van Valin during the June 6, 2006 investigative meeting.

Conclusion

For three years prior to his discharge, the Grievant prepared and signed paper time cards claiming pay for working his regular eight hour night shift when the Grievant knew that he had not worked his regular eight hour night shift due to the fact that the Grievant had attended AA meetings during his regular eight hour night shift. The amount of time claimed, but not worked by the Grievant, varied between forty-five minutes to over an hour per meeting attended. Neither the time that the Grievant has worked outside of his regular eight hour shift without claiming pay, nor the overtime pay that the Grievant tried to decline for visiting other schools on behalf of the District, has compensated the District, to any significant degree, for the pay that the Grievant has claimed for time not worked due to his attendance at AA meetings.

The Grievant did not have an agreement with Supervisor Scullion that permitted the Grievant to attend AA meetings on District time or otherwise claim pay for time not worked. The Grievant did not have a reasonable basis to believe that he had such agreements. The Grievant could not have a good faith belief that he could attend AA meetings on District time so long as the Grievant got his work done.

For several months prior to his discharge, the Grievant knew that the District required him to accurately report his work time when he made his True-Time entries. During this time period, the Grievant did not accurately report his work time when he made his True-Time entries because the Grievant reported that he was at work at times that the Grievant knew that he was attending AA meetings.

The record fails to establish that the Grievant admitted that he falsified both paper and True-Time cards for approximately a three-year period of time. The record establishes that the Grievant knowingly falsified paper time cards for approximately a three-year period of time and that the Grievant knowingly falsified True-Time reports for two to three months prior to his discharge.

The term “defraud” may be used to describe a crime or, in a more general sense, to describe deception deliberately practiced to secure a gain to which one is not entitled. This is not the forum to prosecute a crime and the undersigned makes no determination as to whether or not the Grievant has committed a crime.

When the Grievant prepared paper time cards claiming that he had worked his regular eight hour shift on days that the Grievant knew that he had attended AA meetings during his regular eight hour shift, the Grievant deliberately deceived the District to secure pay to which he was not entitled. The record establishes that the Grievant knowingly defrauded the District of payroll attributable to time not worked for approximately a three-year period of time. The record fails to establish that the Grievant admitted that he defrauded the District of payroll attributable to time not worked for approximately a three-year period of time.

The Grievant admits that he lied to Director of Business Services Van during the June 6, 2006 investigative meeting. The record establishes that the Grievant knowingly and admittedly lied to Administration during the investigative meeting that occurred on June 6, 2006.

The record is sufficient to establish that the Grievant has engaged in misconduct for which he was disciplined. The established misconduct is sufficiently egregious to warrant discharge.

Mitigating Circumstances and/or Disparate Treatment

The Grievant is a fourteen year employee with no prior disciplinary record. The Grievant's one evaluation, although indicating a need to improve in a number of areas, was apparently satisfactory. (T. 70)

For the last three of the Grievant's fourteen years, the Grievant regularly left the worksite at times in which he was being paid to work for extended periods of time and falsified time cards by regularly claiming pay for time not worked. The Grievant's work record is not a mitigating factor.

In arguing that the Grievant has been the recipient of inappropriate disparate treatment, the Union relies upon the District's response to the conduct of lead Custodian DR. It is evident that current District Director of Instruction William Breisch, who was then a Principal at DR's school, concluded that, on one evening in January of 1997, lead Custodian DR had been absent from her building during work time. (T. 102; 105-6; 111-12) When Principal Breisch confronted DR, approximately one and one-half hours after he entered the building and had not been able to find DR, DR acted like she had been there, but did not offer any explanation. (T. 112) DR was the only evening Custodian in the building. (T. 104) Principal Breisch reported this incident to DR's supervisor. (T. 106)

DR's supervisor investigated and then issued DR a disciplinary letter dated January 22, 1997. (T. 107; EX. # 53) This supervisor did not testify at hearing and, thus, the only evidence of conclusions reached during this investigation are those reflected in the disciplinary letter. Although it is evident that Principal Breisch is convinced that DR was absent from the

building during work time, a fair reading of the disciplinary letter establishes that DR was disciplined for not providing appropriate cleaning and security duties. DR was warned that “Most importantly you must be working at Nichols if your time card reads that you are, if you were not and you put on your time card that you were, than you falsified your time card and you would be terminated.”

The record reasonably establishes that DR’s supervisor did not conclude that DR had been absent from the building during work time. The record provides no reasonable basis to conclude that DR’s misconduct was similar to, or more egregious than, the Grievant’s misconduct.

On or about March 20, 1997, Principal Breisch made a written report to DR’s supervisor in which he described an incident in which he observed that the DR was not in the gym at 2:30 p.m., as instructed; did not respond to pages; was not found when Principal Breisch checked the locker rooms and custodial room; and did not arrive at the gym until 3:00 p.m. (EX. #54) According to this report, Principal Breisch asked DR where she had been and DR responded that she had been in the Pupil Services office making a telephone call and that she had not answered her page because she was not wearing a pager. The record provides no reasonable basis to conclude that, on or about March 20, 1997, DR engaged in misconduct that was similar to, or more egregious than, the Grievant’s misconduct.

The record indicates that this second incident involving DR occurred on March 20, 1997; that the incident was reported to DR’s supervisor on March 24, 1997; that District Administration made the decision to terminate DR; and that DR resigned prior to the meeting in which she was to be notified of her termination. (T. 109; EX. #54) Contrary to the argument of the Union, it is not evident that DR continued to work for more than a month prior to her termination. Rather, the record establishes only that the termination meeting was scheduled for April of 1997 and that DR resigned prior to that meeting.

Supervisor Scullion was first advised of the Grievant’s alleged misconduct on May 19, 2006. The Grievant was not discharged until June 9, 2006. Thus, the fact that DR continued to work after District Administration received a report of her misconduct is consistent with the Grievant’s situation. The evidence of DR’s misconduct and the District’s response thereto does not establish that the Grievant has been the recipient of inappropriate disparate treatment.

It is evident that, over the years, District employees under Supervisor Scullion’s supervision have extended their lunch and break period both on and off the premises. That some break “extension” is tolerated is evidenced by Supervisor Scullion’s August 19, 2006 direction to write in the “approximate” time of the ½ hour unpaid lunch; Custodian Marron’s testimony that lunch breaks were half an hour, plus or minus; and Supervisor Scullion’s testimony that he observed a surveillance tape which indicated that night Custodians were extending their break by fifteen minutes, but did not discipline the Custodians. (T. 86-7; 136)

It is also evident that not all break “extensions” have been tolerated. According to Supervisor Scullion, Head Custodian S, who lived two doors down from his school, was disciplined for extending breaks on two occasions, one of which involved a lunch break and one of which involved the fifteen minute break. (T. 78-79)

On February 3, 2003, S received a notice from Supervisor Scullion advising S that the District was investigating a complaint that S was absent from the workplace without permission. (EX. #50) On February 5, 2003, S received a disciplinary letter from Supervisor Scullion in which Supervisor Scullion found that S had a “violation of time use.” In this letter, Supervisor Scullion stated, *inter alia*:

It is clear that there is a violation of time use. As stated in the union contract section 2.03, the Board agrees to maintain certain amenities of work and one 15 minutes coffee break per day. This is a paid break and you are not allowed to leave the building unless approved by your immediate supervisor. I have also stated at the annual safety meeting for the last three years that you’re entitled to one 15 minute break and ½ hour lunch, any time beyond that, you will be written up for. You must inform the office staff at anytime when you leave the building and who will be the emergency contact person when you are not available. It is imperative that these rules are followed.

Discipline

This letter will be laced in your personnel file. Any future incidences of this nature will result in disciplinary actions, which may include suspension without pay and/or termination.

In this letter, Supervisor Scullion indicates that S readily admitted that he had left the building during his fifteen minute break time; that S denied that he was gone more than 30 minutes as alleged by the Principal; and that S maintained that he was gone no more than 20 to 25 minutes. Supervisor Scullion states that this was the first report that he had received about S extending time. (T. 79) The record does not establish otherwise.

Like the Grievant, S readily admitted that he had been away from the workplace and denied that he had been absent as long as alleged by others. S and the Grievant were each away from work when they were being paid to be at work, but unlike the Grievant, the evidence of S’ misconduct indicates that it was an isolated incident involving approximately fifteen minutes of work time.

By letter dated March 4, 2005, Supervisor Scullion advised S that he was being suspended for three days for a violation of time use. (EX. #52) The disciplinary letter indicates that Supervisor Scullion had received three complaints from the Principal, *i.e.*, that, on February 22, 2005, S had left the building on his lunch period and extended this lunch

period by approximately 15 minutes; that the Principal had received reports from “someone” in the back area that S was taking longer than his fifteen minute break by talking excessively; and that S was also regularly talking to staff members about non-work related issues during work time.

While this letter is not without ambiguity, it is most reasonably construed to be imposing discipline for S’s February 22nd conduct in extending his lunch break by approximately fifteen (15) minutes; not obtaining approval for this extension; and misrepresenting his time on his February 22, 2005 time card. Such a conclusion is consistent with Supervisor Scullion’s testimony. (T. 81-82)

In this letter, Supervisor Scullion states that he met with the Kitchen Manager to inquire about her accusations that S was taking extended breaks and that the Kitchen Manager indicated “that on several occasions (S) takes extended breaks past the 15 minutes in the back room area several times a day.” Apparently, the Kitchen Manager is the one who reported that S was extending his fifteen minute breaks by “excessive” talking. The accusation that S was “extending” his fifteen minute break by talking to other employees while at the worksite does not involve misconduct that is similar to, or more egregious than, the Grievant’s misconduct.

In leaving the building and extending his lunch by approximately fifteen minutes, S, like the Grievant, was absent from work while on work time. The prior disciplinary letter establishes that Supervisor Scullion knew that this was not the first incident of absence from work at times that S was being paid to work. However, Supervisor Scullion’s testimony regarding Principal Rene’s “concerns” “that this had been going on evidently” is too vague to reach any conclusion regarding the duration and frequency of S’s absences from the workplace while in pay status. (T. 89) Having no reasonable basis to conclude that S had more than two incidents of absence from work while on work time or that either absence involved more than approximately fifteen minutes, it cannot be reasonably concluded that S’ misconduct is similar to, or more egregious than, the misconduct for which the Grievant was disciplined.

As the Union argues, Supervisor Scullion did not conduct surveillance of others who engaged in misconduct. The District, however, is not required to use the same investigative tools in every instance of alleged misconduct.

It is not evident that Supervisor Scullion’s surveillance of the Grievant was conducted for any purpose other than determining whether or not the Grievant was leaving the workplace as reported by Custodian Marron. As discussed above, Custodian Marron reported that, for three years, the Grievant had left work for between one and two hours every night with the agreement of Supervisor Scullion. It is not evident that Supervisor Scullion had ever received another such report. Supervisor Scullion’s behavior in conducting surveillance of the Grievant does not indicate that the Grievant has been the recipient of inappropriate disparate treatment.

Had the Grievant continued to attend AA meetings during his unpaid one-half hour lunch period and not returned from this lunch period precisely within the one-half hour, then there may be merit to the Union's argument that the Grievant has been the recipient of disparate treatment. This, however, is not a case of an employee extending a lunch or break period.

As the Union argues, other employees have engaged in misconduct and received less discipline than the Grievant. It is not evident, however, that any other employee regularly took his one-half hour lunch break and then also, over a three year period, regularly left work three to four days per week for at least forty-five minutes per day for the purpose of attending to personal business.

The Grievant's misconduct is distinguished from that of the other employees on the basis of kind and/or degree. The Union's contention that the Grievant had been the recipient of inappropriate disparate treatment is without merit.

As the Union argues, the parties' collective bargaining agreement does not define the burden of proof that must be applied in determining "just cause" for discharge. Under either standard of proof argued by the parties, the District has just cause to discharge the Grievant. Accordingly, the grievance is denied and dismissed.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did have just cause to discharge the Grievant.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 20th day of December, 2007.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator