

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**HOWARD-SUAMICO BOARD OF EDUCATION EMPLOYEES UNION,
LOCAL 3055, AFSCME, AFL-CIO**

and

HOWARD-SUAMICO SCHOOL DISTRICT

Case 95
No. 65974
MA-13387

(DeBauche Grievance)

Appearances:

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 65 Webster Heights Drive, Green Bay, Wisconsin, appearing on behalf of Local No. 3055.

Mr. Robert W. Burns, Attorney, Davis & Kuelthau, S.C., 318 South Washington Street, Green Bay, Wisconsin, appearing on behalf of Howard-Suamico School District.

SUPPLEMENTAL ARBITRATION AWARD

Howard-Suamico Board of Education Employees Union, Local 3055, AFSCME, AFL-CIO hereinafter "Union," and Howard-Suamico School District, hereinafter "District," requested that the Wisconsin Employment Relations Commission assign a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, heard the matter on October 25, 2006 and issued an Arbitration Award on May 31, 2007 in favor of the Union and retained jurisdiction for the purpose of resolving any issues relating to remedy.

Thereafter, the parties informed the arbitrator that they were unable to agree as to remedy. On April 8, 2008 a hearing was convened for the purpose of resolving the outstanding issues relating to remedy. The hearing was transcribed. The parties submitted post-hearing briefs and reply briefs by June 23, 2008 at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Supplemental Award.

BACKGROUND

The Grievant, Steven DeBauche, was terminated from his employment as a custodian on March 9, 2006 for timecard fraud and excessive use of the internet on work time. The Union grieved the termination asserting it violated the just cause provisions contained in the parties' collective bargaining agreement. Following hearing and briefing by the parties, an Arbitration Award was issued on May 31, 2007 which ordered as follows:

1. The District lacked just cause to discharge Steve DeBauche from his employment with the District.
2. The Grievant is guilty of falsification of his time card. The Grievant shall be issued a written warning.
3. The appropriate remedy is to reinstate the Grievant and make him whole.
4. I shall retain jurisdiction for not less than 60 days to resolve any issues relating to remedy.

A complete recitation of the case is contained in HOWARD-SUAMICO SCHOOL DISTRICT, MA-13387 (Millot, 5/31/07).

ARGUMENTS OF THE PARTIES

District

The Grievant's back pay remedy must be reduced because he failed to take reasonable measures to mitigate his damage during the time period he was out of work.

The Grievant is not credible. There is no reason to believe that he made at least two job applications each week for 26 weeks mounting to 52 applications for employment. He was incapable of naming a single prospective employer and it is unbelievable that of the 52 inquiries, none panned out to even an interview. The Grievant did not act like someone that was truly attempting to obtain employment to support himself and his family. He did not broaden his job search and did not utilize the services of a temporary employment agency. The Grievant undertook the bare minimum obligation under state unemployment compensation law.

The Grievant had an affirmative obligation to seek out employment opportunities. He made no effort to locate alternative employment after his unemployment compensation benefits expired. He did not make a good faith job search.

The Grievant's back pay must be offset by his taxidermy business income. The Grievant began operating taxidermy as a trade business in 2007 and he showed \$4,093 in gross

income. 2007 was the first year that the Grievant treated taxidermy as a business and had never previously reported it as income.

The Grievant also earned \$723 by purchasing and re-selling an investment house. This was an income-generating venture which the Grievant and his wife had been intending to do for some time. Had the Grievant not been off work due to his discharge, he would not have engaged in the investment house.

As to the written warning, the Arbitrator's Award states that it "shall be issued". This is a prospective statement. The Arbitrator could have stated that the discharge was to be amended, but that did not occur. Had the written warning been effective March 19, 2006, that amounts to virtually no discipline at all since the parties labor agreement allows for retention of disciplinary documents for 36 months.

District in Reply

The District carried its burden of establishing that the Grievant failed to take reasonable steps to mitigate his damages. Even if only a minimal effort is required of the Grievant to fulfill his mitigation obligation, he has not met this standard. The record establishes an appalling lack of diligence by the Grievant.

The District maintains that the Grievant did not engage in his taxidermy enterprise as a business until after he was terminated from the District. The tax records support this conclusion. As a result, his back pay must be reduced by his income derived from the taxidermy work.

The Union's desire to back date the discipline creates nonsensical results. There are cases when a retroactive modification of discipline is appropriate, but this is not one of those cases. Given the 36 month contractual limit under which discipline may be considered, the Union's position would require the Grievant's adherence to the terms of the discipline for only half that time.

Union

The Union calculates the back pay due to the Grievant as \$41,645.29. The District has not challenged this amount, but seeks for a reduction in this amount.

The District cannot reduce the Grievant's back pay as a result of his taxidermy work or his working on an investment house. Part-time employment and odd jobs may not be used to reduce a back pay award because they could be earned during an employee's regular working periods. The Grievant has offered taxidermy services for a number of years, including those when he was employed by the District. The Grievant's sons performed a fair amount of work in the investment house. As a result, mitigation does not include the Grievant's taxidermy work or the investment house.

There is no proof that the Grievant worked and received compensation from his brother-in-law, Gerard Sheedy. The District called witnesses who testified as to what they “heard” the Grievant was doing. The District’s case is premised on rumors about the Grievant. The Grievant was serious and diligent in his efforts to find another job.

As to the effective date of the revised discipline, the letter of discipline was a revision of the earlier discipline. It was not a new disciplinary action. The date of termination was March 9, 2006 and therefore, the effective date for the revised discipline is March 9, 2006. The grievance and arbitration process should not indefinitely delay the effective date of discipline or provide an employer reason to delay an arbitration hearing in order extend the effectiveness of disciplinary action.

Union in Reply

The District’s attack on the Grievant’s job search efforts is unwarranted. The Grievant remained in the labor market and did not refuse “substantially equivalent” work. Other factors led to the Grievant not finding work including his age, work experience and the arbitration proceeding.

There is no evidence that supports the District’s contention that the Grievant did not make a reasonable effort to find alternative work. There was no reason for the Grievant to seek work from a temporary agency. The District never asked the Grievant whether he sought lower paying employment. It never asked him if he had looked into different jobs or careers. Instead, the District just argues these conclusions without any factual support.

The Grievant was not obligated to retain records of his job search, although he was able to locate some job search records. The burden is on the employer to prove that the Grievant did not take reasonable steps to find alternate work.

The District next indicts the Grievant for seeking work from his family members. Apparently, when a Grievant is unlawfully terminated from his employment, he is forbidden from going to family members or risk his job search efforts being characterized as “lacking in good faith”.

The Grievant has performed taxidermy work for a number of years and the District’s claim that it is a new business is unfounded. Earnings from odd jobs and part time work are not deducted from a discharged employees back pay because they can be done outside of the work day. The Grievant’s taxidermy work fits this category.

The written warning should be effective March 9, 2006. The Union is not seeking a revision of the original award. Rather, the Union is seeking clarification.

The Union requests the Arbitrator make the Grievant whole in the amount of \$41,645.29 within fourteen (14) calendar days of the date of the decision and that the Arbitrator order the District to date the revised discipline as of March 9, 2006.

DISCUSSION

The parties could not agree as to the appropriate amount of back pay. The District maintains that the Grievant failed to mitigate his damages by not seeking employment and argues that his taxidermy and house sale earnings must offset the back pay amount.

The parties further seek clarification on the date of issuance of the Grievant's disciplinary sanction.

Mitigation

An employee's obligation to mitigate damages is relatively clear. As stated by Marvin Hill and Anthony Sinicropi in *Remedies in Arbitration*, (BNA, 2nd. Ed. 1991):

A discharged employee should be required to make a reasonable effort to mitigate "damages" by seeking substantially equivalent employment. The reasonableness of his effort should be evaluated in light of the individual's qualifications and the relevant job market. His burden is not onerous, and does not require that he be successful in mitigating his "damages." Further, the burden of proving lack of diligence or an honest, good faith effort on the employee's part is on management.

Wisconsin arbitrators have followed this general rule:

It is well recognized in grievance arbitration that an employee has a duty to mitigate his economic loss by taking reasonable steps to find and keep suitable alternate employment during the period between his discharge and reinstatement.

BROWN COUNTY, Case 412, No 43062, MA-5885, p.5 (Gratz, 5/23/91)

Similarly,

An award of back pay is generally understood to carry with it a duty to mitigate economic losses. A person who is discharged is not entitled to simply sit back and let damages accumulate without taking reasonable steps to find and keep suitable alternate employment.

LLOYD TRANSPORTATION, Case 2, No. 54286, A-9611, p. 6 (Nielsen, 6/9/97)

The initial Award in this case ordered a make whole remedy for the Grievant. The District has not paid the Grievant any back pay. The District challenges the Grievant's efforts at seeking and finding employment. In this regard, I accept the following view:

I believe, in a discharge or similar situation, that the employee is obligated to minimize his damages; he is required to make reasonable efforts to obtain gainful employment; he may not sit at home "licking his chops" in anticipation of the large money award that may be in the offing.

And, in determining his damages, I will consider his actual earnings elsewhere during the period of nonemployment. Or, if he has no other earnings, then he must satisfy me that he took all reasonable steps to seek other employment, and, should he fail to do so, then I will rely on my "expertise" to determine what he could have earned and to fix his damages accordingly."

Bornstein, Gosline, Greenbaum, *Labor and Employment Arbitration*, 2nd Ed., p. 39-19 (2002) citing Wolff, "Power of the Arbitrator to Make Monetary Awards", Proceedings of the 17th Annual Meeting of the National Academy of Arbitrators, 176, 178 (1964).

My charge is then to determine whether the facts of this case establish that there were substantially equivalent jobs available for the Grievant, that the Grievant was qualified for the jobs, and that he failed to make reasonable efforts to find employment.

The record is silent as to the availability of employment opportunities in the local labor market. While the Grievant's testimony establishes that the housing industry was experiencing a downturn at the time he was searching for employment, that does not provide sufficient information so as to determine whether there was work in the areas of similar employment to his custodial position with the District.

As to the positions in which the Grievant actually sought work, it is questionable whether he was actually qualified. The Grievant identified on his resumé that he had work experience as a taxidermist, building custodian and grocery store assistant manager. He listed skills in safety, computer, efficiency, organization, problem solving, dependability, and working with others. Yet, he applied for work in the archery business, the excavating business, the landscaping business, the construction business and a transfer and storage business. I find that the Grievant's search efforts for building trades and landscaping positions when he had 20 years experience performing custodial work to be illogical.

I next move to the question of whether the Grievant made reasonable efforts to obtain employment. The Grievant was terminated on March 9, 2006 and returned to work, effective June 10, 2007. The Grievant collected unemployment compensation for 26 weeks, ending in October 2006.

State unemployment compensation laws require a claimant make application with two employers weekly and document those contacts on a Weekly Work Search form. The Grievant fulfilled this expectation to the Agency's satisfaction for the first six weeks. For weeks seven through 26, the Grievant was not asked by the Agency to submit work search documentation, but continued to receive benefits. Given the Agency's determination that the Grievant had fulfilled his job search obligations during the first 26 weeks following his termination, I find that he made reasonable efforts to find alternative work for that time period. I therefore move to the time period after unemployment benefits had expired.

In response to a subpoena from the District requesting job search records, the Grievant submitted two documents that he identified as a listing of employers he contacted in his search for employment. The first document (Exhibits 4) contained a total of eight employers including two archery businesses one excavating business, two landscaping businesses, two construction businesses and a transfer and storage business. The second document (Exhibit 5) spanned the time period between March 11, 2006 and April 15, 2006 and contained six of the same businesses found on exhibit 4, a construction business, a painting business and an auto sales business. The problem with this data is that these documents represent solely job search efforts during the time period when the Grievant collected unemployment compensation.

As to the Grievant's job search efforts after April 15, the following exchange occurred at hearing between the Grievant and District legal counsel:

Q And do you have any job search data that corresponds to a period after April 22, 2006?

A I did, but I don't have it because I didn't know I'd need it.

Q You didn't retain that material?

A No, I did not.

Q Why did you retain this material?

A It was in an envelope that I found as I was looking for my '05 taxes, and I don't know why - I think because the yellow booklet for unemployment benefits were in with that. And then these were my first job searches, and this was the only sheet that they sent along with that, so -

Counsel went on to inquire:

Q Do you recall any of the other jobs that you applied for other than those reflected on Exhibits 4 and 5?

A Yeah. Well, the Leight's transfer, just different construction job sites that I'd go around to and ask the owners of, you know, construction sites and stuff; and there was – you know, the housing market went to heck.

The Grievant testified that he applied at “at least two” places of employment each week the entire time he was away from the District. He described his efforts to his representative as follows:

Q Approximately how many jobs a week would you apply or contact?

A For sure two, if not more than that, depending on – you know, I had the bug out in people's ear that I was looking for work, and they'd suggest places to go.

Q Why didn't you keep records of those job searches?

A They weren't requested from the unemployment, so I don't keep that stuff around.

The issue of a reasonable search relates to the diligence of the discharged employee's efforts. A discharged employee need make only make a good faith effort to find a job and is not required to be successful. CLEVELAND PNEUMATIC Co., 89 LA 1071, 1074 (Calvin Sharpe, 11/13/87). There are arbitration decisions that address the number of applications an employee must make efforts in order for his efforts to be deemed reasonable.¹ There are also arbitration decisions where an employee admitted he had not applied for any work following discharge is denied back pay.² That is not the case here. Rather, in this case, I am asked to rely exclusively on the testimony of the Grievant, without any record or recollection of applications he made from October 2006 to May 2007, and reach a conclusion as to whether his efforts were reasonable.

There is no question that the traditional view is to place the burden of proof on the employer to show that an employee did not make any significant efforts to obtain employment during a period of wrongful termination. But, as stated by Arbitrator Nolan, when the sole evidence offered to support an employee's efforts is his testimony:

¹ Two applications in two months HONEYWELL, INC. 51 LA 1061 (Alex Elson, 1968) and one-and-one-half applications per month GOOD HOPE REFINERIES, INC., 73 LA 1173 (Howard LeBaron, 1979) were not reasonable, but seven contacts in two months and six contact in six weeks were found to be sufficient ATLANTIC SOUTHEAST AIRLINES, 103 LA 1179 (Dennis R. Nolan, 12/94) at 1182 citing APA WAREHOUSES, 307 NLRB 838 and EAST TEXAS STEEL CASTINGS Co., 38 LRRM 1471 (1956).

² See E.F. HAUSERMAN CO. 64 LA 1065 (Rankin M. Gibson, 6/24/75).

The employer's burden of proving a failure to seek work can seem impossible. There is usually no way to prove a negative, short of recantation on the stand. Strict adherence to the initial allocation of the burden of proof would enable a lying claimant to obtain unjustified back pay. That in turn would defeat the purpose of the mitigation requirement and would encourage perjury.

As a result, there has to be an alternative way for the employer to challenge undocumented assertions of job application. If a diligent search for verification of the claimed applications turns up nothing, sooner or later the grievant will lose the presumption of truthfulness. At that point the employer will have met its initial burden of persuasion, and the burden of proof will shift back the grievant to show some evidence of some applications.

ATLANTIC SOUTHEAST AIRLINES, 103 LA 1179, 1183 (Dennis R. Nolan, 12/22/94).

The District had no means to verify the Grievant's job search efforts. It requested a listing of employers where the Grievant applied. In response, the Grievant provided the listing of applications that he prepared for Unemployment Compensation during his first six weeks off work. The Grievant named one additional place of employment during the hearing. The District's effort to verify the Grievant's job search were severely hampered, if not completely frustrated, by the Grievant.

Looking to the Grievant's efforts, he did not avail himself to internet web sites, newspaper advertisements, Wisconsin Job Center, or job fairs where there would be information as to vacant or available positions. Rather, he made cold calls on businesses seeking employment. He did not apply for custodial and maintenance positions where he was most qualified, but rather applied for positions where he had absolutely no experience or very limited experience. Ultimately, I am struck by the Grievant's apparent lack of concern over his financial situation. The Grievant's search efforts are highly suspect.

As to the Grievant's truthfulness, I concluded that Grievant was not credible at the original hearing and reach the same conclusion as it relates to his job search efforts given the number of inconsistencies in his testimony. The Grievant first testified that the employers listed on exhibit 4 that were lined out were employers that he had made contact with. When it was pointed out by District legal counsel that exhibit 4 was purportedly a listing of all employers that the Grievant had made contact with, the Grievant was unable to further respond.

The Grievant next stated that had applied at Cedar Bay Construction and included this employer on exhibits 4 and 5. Cedar Bay Construction provides general contracting services for high cost homes. Gerard Sheedy, the Grievant's brother-in-law, owns Cedar Bay Construction. Sheedy testified that the Grievant never applied for work with his company.

The Grievant testified that he spent no more than three hours a day at the investment home work site leaving five hours (assuming an 8 hour day) for what he described as searching for work and doing other things for the remainder of the day. When asked what else he was doing, he was unable to respond.³ It is beyond inconceivable that the Grievant would fathom that this Arbitrator would believe he was dedicating the remainder of his day to job seeking efforts, especially when he claimed to have applied for just two jobs each week.

These inconsistencies diminish the Grievant's credibility as does his inability to produce any evidence of job search efforts post April 2006. It is not unreasonable to expect an employee involved in unlawful termination litigation to maintain records regarding his job search efforts in order to prove he attempted to mitigate his damages. See *RETAIL CLERKS V. MEAT CUTTERS*, 52 LA 1205, 1206 (David L. Cole, 12/10/68).

Ultimately, there is absolutely nothing in this record to support the Grievant's testimony that he made at least two applications per week for the time period after his unemployment compensation benefits expired. The lack of any tangible evidence from which to verify the Grievant's contacts and applications and the inconsistencies and outright conflict between the Grievant's testimony and the evidence leads me to conclude that the Grievant failed to fulfill his obligation to take reasonable steps to mitigate damages.

Reduction in Back Pay due to Earnings

The District argues that the Grievant's earnings as a result of his private employment ventures during his period of discharge should be deducted from his back pay payment. In light of my finding with regard to mitigation, it is unnecessary to address this component of the District's challenge to back pay.

Date of Disciplinary Sanction

The parties seek clarification of the date of disciplinary sanction as ordered in the original Award. The language of the Award indicated that the discipline shall be issued. The District's prospective application was appropriate.

AWARD

The Award in this matter, dated May 31, 2007, shall be modified as follows:

1. Make the Grievant whole for all wages he lost as a result of the discharge and minus any payments/benefits he received from unemployment compensation for the period of time from the date of discharge (March 9, 2006) through the date he stopped receiving unemployment compensation, October 2006.

³ The record establishes that the Grievant spent time working on his niece's home, taught his nephew to shoot a bow and did general clean-up duties at Gerard Sheedy's personal shop.

2. The Arbitrator shall retain jurisdiction for at least sixty (60) days to address any issues over remedy that the parties are unable to resolve.

Dated at Rhinelander, Wisconsin, this 24th day of September, 2008.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

