

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WISCONSIN COUNCIL 40 LOCAL 79-B,  
COURTHOUSE EMPLOYEES, AFSCME-AFL-CIO**

and

**ONEIDA COUNTY**

Case 187  
No. 67768  
MA-14012

(Lyle DeLap Termination Grievance)

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**Appearances:**

**Mr. Dennis O'Brien**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin 54501, appearing on behalf of Local 79-B.

**Attorney John J. Prentice**, Simandl & Murray, S.C., 20975 Swenson Drive, Suite 250, Waukesha, Wisconsin 53186, appearing on behalf of Oneida County.

**ARBITRATION AWARD**

Local No. 79-B, Courthouse Employees, hereinafter referred to as the Union, and Oneida County, hereinafter referred to as the County, are parties to a Collective Bargaining Agreement (Agreement or Contract) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. On February 15, 2008 the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Union's grievance regarding the allegation that the County disproportionately administered discipline to the Grievant when it terminated his employment on November 7, 2007. The undersigned was appointed as the arbitrator. Hearing was held on the matter on August 15, 2008 in Rhinelander, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. This matter is properly before the Arbitrator. The hearing was not transcribed. The parties filed post-hearing briefs by November 26, 2008 marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

## ISSUES

The parties stipulated to the issue to be decided by the Arbitrator as follows:

Did the County have just cause to discharge the Grievant?

If not, what is the appropriate remedy?

## RELEVANT CONTRACTUAL PROVISIONS

### ARTICLE 7 - VESTED RIGHTS OF MANAGEMENT

Section A: The right to employ, to promote, to transfer, to discipline and discharge employees, and to establish work rules is reserved by and vested exclusively in the Oneida County Board through its duly appointed Labor Relations and Employee Services Committee and duly appointed department heads. (The reasonableness of the exercise of the aforementioned vested rights shall be subject to the grievance procedure.)

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### ARTICLE 11 - WORK DAY - WORK WEEK

The work day shall consist of seven and one-half (7½) hours a day from 8:00 a.m. to 4:30 p.m. for five consecutive days each week, Monday through Friday, for a total of thirty-seven and one-half (37½) hours each week. The noon lunch hours for employees shall be staggered. However, each employee shall be allowed one (1) hour off between the hours of 11:30 a.m. and 1:30 p.m. The hours of work for the Courthouse custodians shall remain as presently in effect unless otherwise changed by mutual consent of the employee and the employer. The hours of work for the second shift custodian shall be from 4:30 p.m. to 12:00 a.m., Monday through Friday.

### ARTICLE 15 - PAID TIME OFF (PTO)

Traditional paid leave plans consist of all forms of paid time off including but not limited to vacation, holidays, sick leave, funeral leave and Termination Benefit Days, each with its own rules for earning and spending the benefit. Paid Time Off consolidates all paid time benefits into a single "bank account" of paid leave that the employee will manage and draw from in accordance with the following

provisions. The Paid Time Off provisions of this contract will be in effect beginning January 1, 1996.

...

Section B: USING PAID TIME OFF To use Paid Time Off the employee schedules the time off with their supervisor. It will be left up to each department to establish procedures to insure that “advanced notice requests” are processed in a fair and equitable manner. Emergency requests for Paid Time Off will be handled on a case-by-case basis as they are currently.

Section C: USE The employee may use Paid Time Off in increments as small as fifteen (15) minutes. Use shall not be retroactive except in the case of an emergency. Non-emergency notification must be made and approved before the start of the employee’s shift. In cases of emergency, the employees shall be notified in a reasonable time frame following the event.

Section D: PAY Paid Time Off hours will be paid at the current rate of the employee at the time the PTO is taken.

Section E: ACCRUAL Employees may bank an unlimited amount of Paid Time Off.

Section F: PAYOUT Upon termination, for any reason, the employee shall be paid the total amount of Paid Time Off in the employee’s bank at the rate of pay of the employee at the time of termination.

### **BACKGROUND**

The underlying facts leading to the Grievant’s termination are not in material dispute. The Grievant was employed by the County as an Outreach Benefit Specialist in the Department of Aging. He worked in the field a great deal of the time and received phone calls, which he took, on a regular basis at his home after normal working hours. On October 31, 2007 the Grievant attended a work-related training session scheduled for 9:15 a.m. to 2:45 p.m. The training session agenda did not include a lunch break. He discussed the agenda with his supervisor and asked that he be allowed to leave work one hour early if there were no lunch break. She agreed. At the training session the Grievant was, in fact, given a lunch break of one hour. Upon his return to work from the training session he left work one hour early per his prior discussion with his supervisor and neglected to inform her of the fact that he had indeed been given a one hour lunch break. He then submitted time sheets reflecting the fact that he had worked 7½ hours on October 31, 2007. Upon further investigation management discovered that he had been given a one

hour lunch break at the training session and had lied about not receiving one. His termination followed in due course and this grievance followed that. Further factual information will be provided in the DISCUSSION section which follows.

### THE PARTIES' POSITIONS

#### The Union

The County had no legitimate reason to discharge the Grievant. The process and the level of discipline were both deficient. He discussed the training looking at the agenda, which failed to show a lunch break. They agreed that he could take his break at the end of the day thus leaving an hour earlier than normal. Because of his agreement to leave an hour earlier he arranged a golf date for that afternoon but, as it turned out, the training session did have an hour lunch break, which he used doing work in his car reviewing training session paperwork. He did not alter his plans to leave early and told his supervisor that he had not had a lunch break in the belief that the work he did in his car did not constitute a break. The County got wind of the fact that the training session did have a lunch break and discharged him for lying. The county clearly exceeded its management rights. Its actions are disproportionate and affront a sense of fairness and decency.

Just cause was violated. The County's attempt to suggest that the Grievant stole time is ridiculous because the Union could argue that he thought he was working during that lunch break and deserved the hour at the end of the day. There was no premeditation. He admitted that he had not represented that the training session had a lunch break when confronted. Also, the County did not offer any progressive discipline. Of course, there are certain offenses which require elevated levels of discipline on the first offense but this isn't one of them. The County's actions are more egregious than the Grievant's. He was a twenty year employee who liked his job and performed it well and had an unblemished disciplinary record. Also, he had been taught by his coworker that he should not return to the workplace to complete paperwork so he did that at his home. Prior allegations relating to time card discrepancies amount to nothing more than him doing his job the way he had been trained to do it. This warning was eight years earlier, before his position accreted to the Union and it is unlikely that he understood that his acknowledgment of the time card issue would haunt him in this discharge. He should be given credit for being a good employee.

Because the level of discipline is disproportionate it does not meet the just cause standard. The only prior example of a discharge for lying and stealing time was a sheriff's deputy who abandoned his position on a regular basis to play computer games on a regular basis.

The Grievant admitted that he "screwed up." That might merit a written warning or maybe a one-day suspension, but not discharge. Because of this discharge the Grievant was forced to retire earlier (November, 2007) than he had anticipated. He expected to work until March or April, 2008 and should be reinstated and made whole through that date.

## The County

The Grievant was terminated for lying and stealing. Early in his employment issues arose concerning his honesty and trustworthiness. In 1988 there were questions relating to meal receipts and in 1999 he received a written warning relating to his inaccurate time sheets. On October 31, 2007 he attended a work related training session which included a one-hour lunch period. He told his supervisor that he had not received a lunch break and even went so far as to claim that they had to work through lunch and eat left over food from breakfast. He left an hour early that day because of his lack of a lunch break and submitted a time card claiming that he worked a 7.5 hour day. The fact that he lied so effortlessly and so convincingly and the fact that he had a prior problem relating to his time sheets, a record required to be maintained accurately by the County and by the State, left the County with no choice but to fire him. There was a component of premeditation which makes matters worse.

Dishonesty is a serious issue. Arbitrator Hahn focused on it in PLYMOUTH SCHOOL DISTRICT, WERC MA-11820 (Hahn, 2002) when he said:

“The problem with the Grievant in this case is that I am not dealing with a job performance failing or absenteeism but theft and lying. When the Grievant took the letter from Johnson’s desk, Grievant stole the trust of the employer. An employer must be able to trust an employee’s honesty from the beginning of employment. Trust for proper performance of job duties can be and often is earned as an employee learns the job. Once an employer has reason to no longer trust an employee where honesty is involved, there is little that can be done to regain that trust.”

The same situation exists here. This is not the first time the Grievant’s honesty has been an issue. In the 1999 incident he was told to record his time accurately. The County has a zero tolerance for theft and if the Labor Relations and Employee Services office had been aware of the 1999 incident (which they had not), the Grievant would have been fired then. He dodged a bullet. The disturbing aspect of this case is not just the Grievant’s crude dishonesty, but his cynical scheming for one hour of pay. Ironically, it was his employer’s protests on his behalf (because he didn’t get a lunch break) that brought his ‘treachery’ to light. The County can no longer trust him and, for that matter, neither can anyone else. The County should not be put in a position of having to employ someone it cannot trust.

## DISCUSSION

The Union claims that the County’s actions here are more egregious than those of the Grievant’s; that its actions demonstrate a ‘stunning lack of judgment’; and that it wants to ‘terrorize’ other employees. The County characterizes the actions of the Grievant as ‘premeditated’ and refers to him as a ‘petty thief’, a ‘cynical’ schemer, and treacherous. Both sides overstate the other’s actions and intentions.

This case is about the extent of discipline given to a long term employee with a relatively clean record of service to the County who, after being caught taking an extra hour of time at the end of the day, owned up to what he had done and took responsibility for it. The County is quite right when it maintains that once an employee has earned the distrust of the employer it is very difficult to earn it back. It is also right when it maintains that theft and lying are generally actions which may support the termination of the employee guilty of it. The undersigned considers the allegations against the Grievant to be serious and certainly deserving of significant discipline.

The facts here are not in material dispute. The Grievant has acknowledged his behavior. The only issue which remains in dispute is the nature and extent of the discipline. The Union says termination under these circumstances is far too harsh. The County says otherwise, citing the Grievant's past indiscretions in posting other than accurate time cards and his initial lies to his supervisor in an attempt to leave one hour early to play golf. This, says the County, created an environment wherein future trust in the Grievant was not possible and termination was the only viable alternative.

The instant Agreement, as is most often the case, does not define the term "just cause" and there is no uniform definition of what constitutes just cause. It is the job of the Arbitrator to define such parameters based upon the facts of the case. On the function of the Arbitrator in such cases I agree with Arbitrator Harry Platt. He said:

It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge.

To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what reasonable men, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just. RILEY STOKER CORP., 7 LA 764, 767 (Platt, 1947)

Arbitrator Platt's analysis in other words, provides for what amounts to a two-pronged test: First, the employer must prove misconduct, and second, that the discipline imposed must be proper under the circumstances and under the contract. Here, there is no question that the Grievant was guilty of misconduct thus satisfying the first test. There is also no question that the contract embraces discipline, including discharge, thus satisfying that part of the second test which requires

that the discipline be proper under the contract. That part of the second test requiring that the discipline be proper under the circumstances, however, falls short under the facts of this case.

Close scrutiny of the facts contained in this record, in conjunction with the Grievant's work history and essentially unblemished disciplinary background, leads the undersigned to conclude that termination was too severe a penalty under the circumstances.

The Union argues, essentially, that the Grievant was given insufficient notice because the 1999 'discipline' wherein the Grievant was reminded to turn in accurate time cards, took place prior to his accretion into the Union. The undersigned does not agree with this conclusion. One does not need to be placed on notice that if one lies to his employer regarding job-related issues and misrepresents his time card in such a manner that his actions result in collecting a wage in excess of the work performed, that serious consequences in the form of extensive discipline may follow. The record demonstrates that the Grievant here was aware of just that, he was simply not aware that his actions would result in such a harsh penalty as discharge. The Union attempts to mitigate the actions of the Grievant by suggesting that he worked in his car during the lunch break in question. He may or may not have done so, but the issue is irrelevant in the face of the fact that he admitted lying to his employer and admitted to accepting at least some of the hour's pay for which he did not work.

The Union also argues, unpersuasively, that the County failed to perform an adequate investigation into this matter. The undersigned finds that the investigation performed by the County, under the circumstances of this fact situation, was entirely adequate.

The 1999 'corrective action' for which he received a written reprimand resulting in his having to revise his timecard to reflect accurate time worked is tempered somewhat by the fact that he never took his morning and afternoon breaks and "so he thought ending a bit early was not a problem." Also, he was trained, in 1987, to work at home sometimes in order to avoid telephone call interruptions, and he received calls at home after work hours which he factored into his conclusion that when all was said and done "it evened out", meaning that if he left a bit early he made up for it by working at home. He testified that he believed that in the end he gave more than he received. So, when he left an hour early on October 31, 2007, he felt, wrongly so, that he was justified in doing so. Further, the 1999 incident does not provide the basis for adequate progressive discipline because of the above considerations and because it is too remote in time. From 1999 until his termination the Grievant's discipline history has been clean and during that period of time he has been praised by his customers. In all respects he has been a good and long term employee.

The County seeks to apply a "black and white" test here. If an employee lies and steals from the County termination is the consequence. There is no grey area and no quarter is given regardless of the specific fact situation. The undersigned has made it clear that he agrees with the County to the extent that lying and stealing are serious acts of misconduct and must result in serious consequences to the employee. The undersigned does not agree with the premise that consideration of the operative facts may not serve to mitigate the seriousness of the acts.

Fundamental fairness requires such consideration and the record reflects that, in the past, the County has indeed made such a consideration. Lisa Charbonneau, Employment Services Manager for County Personnel, testified that in the past a Sheriff's Deputy was terminated for playing video games during work time. She did not know how much time was stolen by that Deputy, but thought it was significant. She testified that the incident was reported in the local papers and that there were two other Deputies named in the article who were disciplined to a lesser degree, suggesting that although they too were guilty of stealing time, the amount of time stolen was less and, hence, the discipline was less. Ms. Charbonneau also testified to another past incident where an employee (initials TP) was charged with misusing her time but Charbonneau did not know what the ultimate discipline was. The undersigned deems it reasonable to conclude from this testimony that, because she was called, at least in part, to bolster the County's argument that past infractions such as were committed by the Grievant were dealt with in the same way, she would have known if TP had been discharged and would have come to the hearing armed with that knowledge. Thus, I conclude that TP was most likely not terminated, but disciplined, if at all, to a lesser extent.

The County places a great deal of emphasis on the fact that it can no longer trust the Grievant because he lied to them. It cites Arbitrator Hahn in PLYMOUTH SCHOOL DISTRICT, MA-11820 (Hahn, 2002) as saying "Once an employer has reason to no longer trust an employee where honesty is involved, there is little that can be done to regain that trust." The undersigned generally agrees with that statement but recognizes that, under certain circumstances and given certain facts, one may more easily and more quickly regain the trust of others. However, in this case, the question may be moot. The Grievant has retired and does not wish to return to his employment with the County. In fact, he had planned to retire in March or April of 2008 (the record is unclear as to the specific date of his intended retirement but supports the conclusion that he intended to retire in March or April, 2008). This termination hastened his retirement plans. The Union seeks, as a remedy, "reinstatement from the time of discharge until April 15, 2008 when he planned to retire." The April 15, 2008 date appears to be an arbitrary date selected at the time the Union's brief was written. The record does not support that date and the undersigned is inclined to use a more conservative anticipated date of March 1, 2008. So, the County need not be concerned that it will have to re-employ a former employee it cannot trust.

From the foregoing it should be clear that the undersigned concludes that, while the County had just cause to discipline the Grievant, it went too far in its determination of the extent of punishment. In other words, termination was improper *under the circumstances*.

This Arbitrator does not normally disturb an employer's discretionary determination of the level of discipline to be applied. However, in this case, where the Grievant is a long term employee with a relatively clean record and one who has been praised by his customers, and where the nature of the transgression, while serious, is not extensive, I think termination is too harsh a penalty. If he had not retired I would be inclined to give him another chance, but he has retired and the Union asks only that his reinstatement run through the date of his *intended* retirement, which I have determined to be March 1, 2008. Due to the serious nature of Grievant's actions I will assess a 30 day suspension without pay.



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

**AWARD**

1. The County did not have just cause to discharge the Grievant but did have just cause to issue discipline.
2. The County shall reinstate the Grievant effective November 7, 2007 through March 1, 2008, the date of his intended retirement.
3. The County shall make the Grievant whole for that period from December 7, 2007 through March 1, 2008, which period accounts for a 30 day suspension without pay.
4. The Arbitrator shall retain jurisdiction over this matter for a period of 60 days pending the implementation of this award.

Dated at Wausau, Wisconsin, this 21st day of January, 2009.

Steve Morrison /s/

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Steve Morrison, Arbitrator

SM/gjc

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