

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

FOND DU LAC COUNTY

Case #183

No. 68947

MA-14417

Appearances:

David Dorn, Staff Representative, WI Council 40, AFSCME, AFL-CIO, 336 Doty Street
Fond du Lac, WI 54935 for the labor organization.

Michael Marx, 160 S. Macy Street, 4th Floor, Fond du Lac, WI 54935, for the municipal
employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. They made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to discipline. The Commission designated Stuart D. Levitan as the impartial arbitrator. Hearing in the matter was held in Fond du Lac, Wisconsin, on May 15, 2009. The parties submitted written arguments and replies by September 16, 2009.

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE VI – DISCIPLINE, DISCHARGE AND SUSPENSION

6.01 No regular employee shall be disciplined or discharged except for just cause.

...

ARTICLE XVIII WORK SCHEDULE

18.02 Employees shall be allowed one paid fifteen (15) minute break for each shift providing such shift is four (4) hours or longer.

. . .

BACKGROUND

C.S., the grievant, has been a housekeeper at the Fond du Lac County Health Care Center since January, 1988. On September 4, 2008, she was working the second shift. At about 2:45 p.m., 15 minutes after the start of the shift, Housekeeping Supervisor Jody Goebel was walking down a first floor hallway when she heard women's voices emanating from the housekeeping closet. Opening the door, she found C.S. talking to fellow housekeeper S.R., who was seated. Goebel instructed the women to "get back to work," which elicited the response, "yes, we do," and which they did.

Goebel conducted pre-disciplinary hearings with both C.S. and S.R. Goebel told S.R. she would be disciplined "unless you can say you were discussing work," to which S.R. replied, "no, I wish I could say that." C.S. was accompanied at her meeting by the union president and vice president. She did not make a statement at that time.

On September 5, 2008, Goebel issued S.R. a written reprimand, as follows:

Description: Abuse of break time

Article XVIII of the Contract with Union Local 1366a, AFL-CIO

"Employee shall be allowed one paid fifteen (15) minute break for each shift providing such shift is four (4) hours long. Employees working a shift of 6 or more hours shall receive an unpaid break of thirty (30) minutes.

On September 4, 2008 at 2:45 pm you were seen sitting in the first floor housekeeping closet visiting with another housekeeper. This is not a usual break time. This is the 2nd time your (sic) have abused break times within 4 months.

Action plan: It is expected that you will abide by approved break times and will be performing job duties when not on break.

On September 9, 2008, Goebel issued C.S. the same written reprimand, as follows:

Description: Abuse of break time

Article XVIII of the Contract with Union Local 1366a, AFL-CIO

“Employee shall be allowed one paid fifteen (15) minute break for each shift providing such shift is four (4) hours long. Employees working a shift of 6 or more hours shall receive an unpaid break of thirty (30) minutes.

On September 4, 2008 at 2:45 pm you were seen sitting in the first floor housekeeping closet visiting with another housekeeper. This is not a usual break time. This is the 2nd time your (sic) have abused break times within 4 months.

Action plan: It is expected that you will abide by approved break times and will be performing job duties when not on break.”

C.S. had been issued a verbal reprimand on May 19, 2008, for taking an outdoor smoking break at 2:55 p.m., at a time and place which was not approved under the county’s break and smoking policies.

On October 2, 2008, the union grieved C.S.’s discipline, stating, “C. was disciplined for being in 1st floor housekeeping closet at 1445 on 9-4-06 visiting with another housekeeper. C. was discussing a work order with peer.” The union did not grieve S.R.’s discipline.

The county denied the grievance at all steps. The union filed a timely request for grievance arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

The county violated the just cause provision of the collective bargaining agreement by depriving the grievant of due process, specifically three of the elements in the “seven factor test” enunciated by Arbitrator Carroll Daugherty.

The county did not make an effort to discover whether C.S. did in fact violate the provisions regarding breaks. From the time Goebel saw C.S. in the housekeeping closet to the issuance of the discipline, there was no discussion at all between the employer and C.S. about what had occurred. There was no pre-disciplinary meeting, and the final discipline letter was drafted in advance. C.S. was never asked her side of the story.

The county did not sufficiently investigate prior to issuing discipline, which resulted in C.S. being written up for working while at work. Goebel saw two housekeepers talking in the closet, and told them to get back to work without making any effort to find out how long they had been there or whether they were discussing something related to work. C.S. and S.R. were in a housekeeping closet in the normal course of their work day; had the employer asked, it would have found out that they were discussing something related to work, which hardly constitutes a break. The county has offered no definition of what it believes a “break” is, and the union is unaware of any policy forbidding employees from talking about their work.

The fact that the other employee who was disciplined, S.R., did not file a grievance is inconsequential. That one employee chose not to file does not speak to the merits of the grievance filed by the employee who had the wherewithal to stand by her convictions and endure a potentially intimidating process.

The concepts of fairness, just cause and due process require greater diligence than the county displayed in issuing this unwarranted discipline. The county has taken a guilty-until-proven-innocent approach and has made the problem worse by failing to allow C.S. to assert her innocence. C.S. should not be punished for having a brief conversation with a fellow employee about work-related matters while in a normal work area. Because the collective bargaining agreement protects employees from facing discipline without just cause, the grievance should be sustained and the disciplinary letter removed from C.S.’s file.

In support of its position that the grievance should be denied, the employer asserts and avers as follows:

Although the county may not have followed every step exactly correctly does not negate that the two employees were taking a break at an inappropriate time, which they had both been disciplined for just four months prior. The employees were provided an opportunity to correct any errors during their meeting with their supervisor. S.R. acknowledged they should not have been taking a break while the grievant made no statement. That the disciplinary form had already been prepared did not prevent C.S. from correcting any errors. The union selectively grieved these disciplines and then offered new information during the grievance process which had not been presented earlier and which did not match what the other employee provided. That is why the employer rejected C.S.’s grievance, and why the arbitrator should, too.

In reply, the union posits further as follows:

The county errs by arguing facts not in evidence, namely what S.R. told Goebel. The record is silent on the content of any conversation between the two, and although S.R. was present at the hearing, the county did not call her about the alleged conversation.

Further, there is no evidence that the two employees had a meeting with Goebel at which they were provided an opportunity to correct any errors. Goebel's testimony was that the only meeting with C.S. took place on September 9, 2008, the meeting at which the discipline was issued. This meeting was not a pre-disciplinary meeting but rather a disciplinary meeting; there is no evidence that C.S. was given an opportunity to make a statement. C.S. signed the prewritten disciplinary document as she was instructed, and turned to the grievance process for redress. There is no evidence that any supervisor conducted any sort of investigation or pre-disciplinary meeting with the grievant prior to the issuance of discipline. The facts which the county has created in its post-hearing scenario are without evidentiary support and some are even in direct contradiction of the testimony of the county's lone witness.

The grievant was not given even minimal due process. There was neither investigation nor pre-disciplinary meeting. C.S. was disciplined for taking an "unauthorized break" while in her normal work place, during the work day, while having a normal work-related conversation. The concepts of just cause and due process were specifically developed to protect workers from the sort of hurried, unfounded and unsubstantiated discipline present here.

Because the county has not met its burden of proving just cause, the grievance should be sustained and the disciplinary letter removed from C.S.'s file.

In reply, the employer posits further as follows:

The union errs when it states that C.S. was not provided an opportunity to speak. She was, and was accompanied by the union president at the time. The investigatory standard is higher the more severe the discipline. Here, S.R. said she should have been working and did not mention anything about work orders. The union offered no testimony that C.S. and S.R. were working or discussing work orders.

That S.R. did not file a grievance is important because of the principle of equal treatment. It speaks volumes that, to the union, the discipline given to S.R. was proper but that given to C.S. was not.

Further, since the union offered no exhibits or testimony, all statements in its brief are hearsay since they are not supported by any evidence or testimony. Based on the evidence, along with prior arbitration awards that a flaw in the process does not negate the whole process, the grievance should be denied.

DISCUSSION

The grievant, C.S. is a housekeeper with the Fond du Lac County Health Care Center, employed in that capacity since July, 1988. The grievance concerns a written reprimand the employer issued C.S. for talking with a co-worker in the housekeeping closet on September 4, 2008. Because the Disciplinary Action Record issued on September 9 contains a material allegation not supported by the arbitration record and reflects a penalty disproportionate to the offense, I have sustained the grievance and replaced the written reprimand with a written record of verbal counseling.

There is no dispute that C.S. was inside the closet at about 2:45 p.m. on September 4, 2008, talking with fellow housekeeper S.R. Beyond that, the record is slight. There is nothing in the record about how long the women were in the closet, or what they were talking about, or how often housekeepers are in the closet together. There is testimony that S.R. was sitting, but nothing about what C.S. was doing.

The arbitration hearing lasted about twenty minutes, with Housekeeping Supervisor Jody Goebel the only witness. She testified that at about 2:45 p.m. on Sept. 4, 2008, she was walking down the first floor hall when she heard voices emanating from inside the housekeeping closet; that she opened the door and found C.S. and S.R. "in the closet, talking," and that "S. was sitting." Goebel further testified that she told the pair, "you guys need to get back to work," which called forth the reply, "yes we do." Goebel further testified that at S.R.'s pre-disciplinary hearing on Sept. 5, she told her she would be disciplined, "unless you can say you were discussing work," to which S.R. replied, "no, I wish I could say that." Finally, Goebel testified that at a meeting with C.S. and union representatives (both the local president and vice president) on Sept. 9, she told C.S. she could make a statement if she wanted, which offer C.S. declined. On cross-examination, Goebel testified she had the Disciplinary Action Record (DAR) already prepared at the start of the meeting with C.S. on September 9, which she considered a pre-disciplinary meeting.

On May 14, 2008, the county had issued C.S. a verbal reprimand, for taking a smoking break in an improper place at an unauthorized time. On the basis of the closet incident being a second “unauthorized break” offense in four months, the county increased the punishment to a written reprimand. Because S.R. had also been given a verbal reprimand for her own previous unauthorized break within four months (the nature and date of which is not in the record), she was also given a written reprimand.

On that record, Goebel issued identical written reprimands to S.R. (Sept. 5) and C.S. (Sept. 9), as follows:

On September 4, 2008 at 2:45 you were seen sitting in the first floor housekeeping closet visiting with another housekeeper. This is not a usual break time. This is the 2nd time your (sic) have abused break time within 4 months.

Action Plan: It is expected that you will abide by approved break times and will be performing job duties when not on break.

Goebel issued the Disciplinary Action Record to C.S. immediately upon conclusion of the pre-disciplinary meeting. The union has complained that Goebel’s ability and readiness to issue the discipline at that time shows its investigation was a sham and thus inconsistent with just cause.

The union is right that it is wrong to determine discipline without direct investigation. As it has been said, a “central purpose of confronting the employee is to explain the basis of the charges and allow the employee to tell (his or her) side of the story. For that to be purposeful the final decision to invoke discipline has to await the employee response so that the response can be considered.” VERNON COUNTY, MA-13606 (HOULIHAN, 6/5/2008).

Here, the county really conducted no investigation, other than letting C.S. make a statement (a matter of fundamental fairness, even more than just due process). But just allowing C.S. to make a statement is not the same as informing her of the specific charge – taking an unauthorized break – and asking for a response. The county contends that Goebel was only being efficient when she brought a DAR already prepared to the “pre-disciplinary” meeting with C.S., and that she would have reconsidered in light of any persuasive explanation from C.S.

But the record shows that the DAR the county issued to C.S. on Sept. 9 was the same document presented to S.R. on Sept. 5. While there are certainly situations in which a single reprimand for multiple employees is appropriate, here each reprimand contains a specific, personalized, material allegation – “you were seen sitting....” A specific, material question is whether the record supports that allegation.

There are routine tasks the housekeepers perform while in the housekeeping closet. Some of these require the housekeeper's total attention; others require only such focus and energy as to also allow for communications with co-workers. Such communication can range from brief general pleasantries to deep personal conversations. There is a point at which a workplace communication becomes too little about the work and too much about the communication. Employees who abandon the work for conversation to an excessive degree are subject to discipline.

However, while the union did not offer evidence that the women only talked a brief time, the employer offered no evidence that they talked at length. As it is the county's burden to establish the elements of the offense, I find no evidence in the record that C.S. abandoned her work for any significant period of time.

If C.S. had been sitting while talking with S.R., it would have lessened the likelihood that she was also performing a work-related task at the same time (most, if not all, of the routine duties I understand to be performed in the housekeeping closet require the worker to be on her feet), and thus increased the likelihood that she had abandoned her work. The allegation that C.S. was "seen sitting" is therefore a critical component to the DAR.

Goebel testified that "S. was sitting..." but she said nothing about C.S. sitting, and there is no evidence in the record that she was. Indeed, the county in its argument does not even claim that C.S. was sitting and talking, only that the women were talking (which the union does not contest). On the basis of Goebel's testimony, therefore, this critical component to the DAR is without support in the record.

The union does not deny C.S. was talking to S.R., but claimed in its opening statement that they were discussing a work order and thus C.S. was legitimately engaged in the employer's business with her co-worker. The union had also made that same claim earlier in the grievance process (but after the issuance of the DAR.) The employer counters that work orders are only to be discussed with a supervisor, and thus any discussion between or among municipal employees would be an irrelevant and unauthorized work activity. I reject this last point; certainly, it can be a bit of proper business for co-workers to discuss a work order, even (sometimes especially) in the absence of a supervisor. However, the significance of such an explanation depends on its legitimacy, and the union offered no evidence as to the nature, importance, or even existence of the work order purportedly under discussion. It should not have been difficult or embarrassing for C.S. to cite the specific work order she was discussing with S.R.; there should even have been a documentary record. The fact that C.S. and the union four times declined to cite the specific work order purportedly under discussion – in the closet, at the pre-disciplinary, during the grievance process and before me – compels the conclusion that it was not the true topic.

Goebel further explained that she issued C.S. a written reprimand for the Sept. 4 incident because it was the second time C.S. had taken an unauthorized break in four months, and progressive discipline calls for increased penalties for subsequent offenses. In its denial of the grievance on May 8, the Grievance Hearing Committee endorsed the written reprimand because C.S. "had received a verbal reprimand for a similar issue a few months ago."

In May, C.S. was caught smoking in a no-smoking area and taking a smoking break at an unauthorized time. For these two offenses, the county issued a single verbal reprimand, with the dual action plan of abiding by approved break guidelines and smoking only in approved areas during approved break times. Here, the most the county has established is that at one moment in time, C.S. was in the housekeeping closet (a proper work location), talking with a co-worker about non-work activities.

Just because both alleged offenses purportedly involved an unauthorized break does not make them comparable, and does not require that a second offense brings an increased punishment. Smoking in a no-smoking area and taking a smoking break at an unauthorized time are overt offenses significantly more serious than talking to a co-worker in the housekeeping closet. Indeed, the September incident is so significantly less serious than the May incident that it cannot justify a more serious punishment, even though it happened afterward.

The Disciplinary Action Record thus contains a material allegation of misconduct which is not supported by the evidence in the record. It also imposes a penalty disproportionate to the offense.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

The grievance is sustained. As remedy, the written reprimand which C.S. signed September 9, 2008 shall be removed from her file and replaced with the following written record of a verbal counseling:

On September 4, 2008 at 2:45 pm you were observed talking with another housekeeper in the first floor housekeeping closet. This is not a usual break time. This is to remind you not to engage in break activities other than during authorized breaks. You have already abused break time within the past four months.

Action Plan: It is expected that you will abide by approved break times and will be performing job duties when not on break.

Dated at Madison, Wisconsin, this 15th day of December, 2009.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

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