BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WASHINGTON-CALDWELL SCHOOL DISTRICT

and

OPEIU LOCAL NO. 9, AFL-CIO-CLC

Case 6
No. 68844
MA-14361

(Borgwardt Discharge)

Appearances:

Brian J. Waterman, Buelow Vetter, Buikema Olson & Vliet, LLC, Attorneys at Law, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, appearing on behalf of the Washington-Caldwell School District.

Patricia A. Lauten, Jeffrey S. Hynes & Assoc., 2300 N. Mayfair Road, Suite 390, Wauwatosa, Wisconsin 53226, appearing on behalf of OPEIU Local No. 9, ALF-CIO-CLC.

ARBITRATION AWARD

OPEIU Local No. 9, AFL-CIO-CLC ("Union") and the Washington-Caldwell School District ("District") are parties to a collective bargaining agreement ("Agreement") which provides for final and binding arbitration of grievances arising there under. The union made a request, in which the employer concurred, for the Wisconsin Employment Relations Commission to provide a panel of five staff members from which the parties could select an impartial arbitrator to hear and decide a grievance concerning the discharge of Ryan Borgwardt. The parties selected the undersigned to so serve. Hearing in the matter was held in Brookfield, Wisconsin, on December 4, 2009, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A stenographic transcript of the proceeding was made. The parties submitted written arguments, with the record being closed on February 2, 2010.

ISSUE

The parties stipulated to the following statement of the issue to be heard:

Did the Washington-Caldwell School District have just cause for terminating Ryan Borgwardt? If not, what is the appropriate remedy:

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE III – MANAGEMENT RIGHTS

Section 1. Management retains all rights of possession, care[,] control and management that it has by law, and retains the right to exercise these functions under the term of the Collective Bargaining Agreement. These rights include, but are not limited by enumeration to, the following rights:

. . .

D. To suspend, discharge and take other disciplinary action against employees;

. . .

ARTICLE XI – PROGRESSIVE DISCIPLINE

Section 1. The purpose of discipline is to encourage employees to take corrective action and to make improvement in their work performance and work habits. It is recognized that the employer has the right to accelerate the discipline level in accordance with the severity of the incident. The employer agrees that when disciplinary action is taken against an employee, discipline shall be corrective and progressive following, to the extent practicable, the steps listed below:

Step 1. Verbal warning with written documentation;

Step 2. Written warning;

Step 3. Suspension without pay;

Step 4. Discharge.

Section 2. Any employee who is involved in a disciplinary action has the right to have a Union representative of their choice present. Any such action shall be subject to the grievance procedure.

Section 3. In the event the employee engages in no further misconduct or rule violations following the issuance of any disciplinary warning, said disciplinary warning shall be removed from the employee's personnel file after one (1) year.

ARTICLE XII – DISCHARGE

Section 1. (A) No employee having seniority shall be discharged without just cause. Except in cases of disciplinary or performance-based discharges, discharged employee shall be given at least two (2) weeks notice in advance or, in the alternative, two (2) weeks pay in lieu of such notice. Notice of discharge shall be in writing to the employee, with a copy submitted to the Union. A discharged employee must challenge her/his cause of discharge within five (5) working days after receipt of notice of discharge, with a copy submitted to the Union. Failure on the part of the employee to do so will deem the discharge action final and binding.

. . .

BACKGROUND

Ryan Borgwardt began to work for the District as a part-time evening custodian on July 2, 2008. This grievance concerns the termination of his employment for activities occurring on March 10, 2009.

On that date, the District had a book fair in the library, along with a basketball game in the gymnasium and a bowling activity in a hallway. Between 6:00 and 7:00 p.m., there were between thirty and seventy people in the school building attending the book fair. After the book fair, at approximately 7:30 p.m., a District teacher came to the library and asked Media Specialist Kelly Vogt if she had a key to unlock that teacher's room. Vogt accompanied the teacher to her room and attempted to unlock it, but Vogt's key did not work. Noticing Borgwardt's cleaning cart in the hallway and believing he might have a key to the classroom but not wanting to have to track him down, Vogt stood in the hallway and called out to Borgwardt for assistance, stating, "hey, Ryan, we need you". At hearing, Vogt testified she believed she yelled loud enough for Borgwardt to have heard her through the closed doors and cinderblock walls of the room it turns out he was in. Borgwardt testified that he did not hear her. There is no way to verify either contention. In any case, after a few minutes, Borgwardt emerged from the side door of one of reading classrooms near where Vogt and the teacher were standing. Both doors of the reading room classroom had been closed. Vogt did not ask Borgwardt what he had been doing, and Borgwardt did not volunteer that information. At Vogt's request, Borgwardt used his key to open the teacher's classroom.

The next morning, Vogt became suspicious about what Borgwardt had been doing when she called for him, so she asked the teacher who uses the reading classroom if she could check her computers. Vogt accessed both a laptop and a desktop computer in the classroom. By looking at the properties of the programs on the computers, Vogt could tell that someone had used one of the computers to access a pre-packaged solitaire game at around seven o'clock the previous evening. Vogt was unable to determine who had accessed the game or for how long. Vogt then went to see District Superintendent/Principal Mark Pienkos to relate this

information. Vogt gave Pienkos screen shots she had taken which showed the date, time, and activity for which the computer had been accessed.[1]

Upon Borgwardt's arrival at work in the afternoon of March 11, Pienkos called him into his office to ask if he had played games on a school computer the night before. Borgwardt answered in the affirmative. Pienkos mentioned to Borgwardt his concern that Borgwardt had failed to respond to Vogt's call for assistance in connection with this activity. Pienkos did not ask Borgwardt if he was on his break when he accessed the computer, and Borgwardt did not indicate to Pienkos that he had been on break. This conversation lasted for only about one minute. At no point during the conversation did Pienkos inform Borgwardt that he could face any kind of discipline for having accessed the computer, although Borgwardt understood from Pienkos' tone that he might get in trouble for having done so. Pienkos informed Borgwardt at the end of the conversation that a follow-up meeting would occur on the next day.

On the afternoon of March 12, again shortly after Borgwardt arrived for work, Pienkos convened another meeting with Borgwardt. Pienkos also had asked union steward Mandy Fiehweg to attend the meeting, and she did so. Again, Pienkos asked Borgwardt if he had been on a computer on the evening of March 10th, and Borgwardt said he was. Pienkos told Borgwardt that he had committed a serious infraction, and he fired Borgwardt on the spot.

At the hearing in this matter, Pienkos indicated during his direct examination that, at the March 12 meeting, he gave Borgwardt a letter stating that he would be terminated. On cross-examination, however, Pienkos testified that he did not provide such a letter at the March 12 meeting. He stated that he knows he wrote a document, for his own purposes, but recalls that he did not provide anything in writing at the meeting. He also testified that he did not mail any document to Borgwardt, subsequent to the meeting, which discussed his discharge. Further, no such document was offered as evidence at hearing.

Around the time when Borgwardt began working for the District, his mother, an accountant for the District, gave him a brief job description. The District's lead custodian, Fred Vergenz, gave Borgwardt an orientation and tour of his area of responsibility. This orientation lasted only about an hour or two. No District employee ever informed Borgwardt about any District policy regarding the use of school computers, either how to use them or what constituted abuse of them. The District has no written policy applying to District employees regarding computer usage. The District does issue computer passwords to its employees. Borgwardt never was given such a password, and he never requested one. He never was told that he was prohibited from accessing District computers. Borgwardt was aware that District computers are password protected. Borgwardt did not access the internet or any personal or classroom-related material through the school computer on March 10, 2009.

[1] Pienkos did not provide Borgwardt or the Union with a copy of the screen shots, and they were not introduced as evidence at hearing.

Prior to the incident of March 10, 2009, Borgwardt had, on multiple occasions, used school computers to play solitaire on his breaks. He was able to do so by finding a computer from which the previous user had not logged off. The District has not issued directives or posted notices reminding teachers to log off when they finish using their password-protected computers, and teachers fail to log off a regular basis. Furthermore, the District never has disciplined any teacher for failing to log out.

Pienkos stated at hearing that, in making the decision to terminate Borgwardt's employment, he took into consideration not only the incident of March 10, but also Borgwardt's prior record of misconduct and his short period of employment. On February 16, 2009, Borgwardt had failed to report to work or inform the District that he would not be in. When he reported for work on the next day, he informed Pienkos that he had lost his cell phone and was unable to call in. On the February 19, Pienkos issued to Borgwardt the following memo:

> Re: Failure to Report to Work/Communicate Reason
>
> Union Contract: Article XI – Progressive Discipline
> Step 1. Verbal warning with written documentation
>
> As mentioned at yesterday evening's meeting with you, Ryan, I am documenting the reason for our conversation.
>
> On Monday, February 16, 2009, you failed to report to work and did not call anyone to let Fred Vergenz or I know that your work would not be completed. Also, we did not her from you until Tuesday evening, causing us to not only worry about you well-being, but also left wondering how your area would get cleaned again that night.
>
> I appreciated your apology for failing to report, as well as notifying Fred or me.
>
> We discussed the importance of responsibility, communication, and working as a team, especially with your evening co-worker, Jennifer Joyce.
>
> Finally, we discussed the importance of being a self-starter since you and Jennifer do not have direct supervision in the evening. At the present time, you have some flexibility due to your full-time day work allowing you to come to school at different starting times. It is essential that you keep a schedule of five hours each night.
>
> Let's work together as a team, Ryan. When we do so, our organization will be an even stronger one.

Between February 19, 2009, and Borgwardt's date of discharge, he had no further incidents in which he failed to report for work.

Pienkos testified at hearing that, also apparently around in the early spring of 2009, he "had gotten reports that maybe, you know, Ryan wasn't fulfilling his work duties, those five hours". Thus, Pienkos made the decision to take Borgwardt off of his somewhat flexible work schedule and place him on a fixed schedule, from 5 p.m. to 10 p.m. There is no evidence that Pienkos verified those "reports" or ever conveyed them to the Grievant.

Following his discharge, Borgwardt applied for various other jobs before being hired at an area hotel on July 23, 2009. Because he already was working twenty to thirty hours per week as a painter, Borgwardt did not apply for unemployment compensation benefits.

POSITIONS OF THE PARTIES

In support of the grievance, the Union cites the so-called "Seven Tests" as enunciated by Arbitrator Carroll Daugherty, using them to assert that the District failed to establish just cause. Noting that the District has no formal policy regarding computer use and never informed Borgwardt that he could face termination for using a school computer, the Union asserts that the District did not adequately warn Borgwardt of the consequences of his conduct. Noting that the District, in addition to having no written policy on computer use, also never disciplined any teacher for failing to log off, the Union asserts the District failed to establish that its rule was reasonably related to the safe and efficient operations of the enterprise. The perfunctory nature of the investigation, the Union states, was inadequate to satisfy Borgwardt's due process, or to provide substantial evidence of his guilt. The District's failure to discipline teachers who did not log off their computers – and thus risked the system's security – shows, the Union states, that the District did not apply its rules and penalties in an evenhanded and non-discriminatory manner. Finally, the penalty of immediate discharge was not reasonably related to the seriousness of the offense, namely playing solitaire for a few minutes while on break. Progressive discipline, as mandated by the Agreement, had worked in getting Borgwardt to improve his work habits, and a written warning in this instance would have accomplished the same result. As remedy for his lost wages and benefits, the Union asserts that the District should pay Borgwardt $4,995. This amount accounts for the vacation, sick, and personal leave hours Borgwardt had accrued at the time of his discharge, as well as Borgwardt's lost earnings from the date of his discharge until he found alternative employment on July 23, 2009.

In opposition to the grievance, the District first states that it is untimely, because the Grievant failed to follow the contractual requirement to challenge the discharge within five days after receipt of notice of his discharge. Because the Union failed to offer any evidence demonstrating that the Grievant challenged his discharge in a timely fashion, it must be considered final and binding. But even if timely, the District states, the grievance should still be denied because the District had just cause to discharge Borgwardt in light of his unauthorized use of District computers, his past record of misconduct, and his short period of

employment with the District. The District argues for a two-pronged just cause analysis, which requires an employer to establish, first, the existence of conduct by a grievant in which the employer has a disciplinary interest and, second, that the discipline imposed is consistent with its interest. That the District has no written policy is not significant, the District states, because when conduct is clearly wrong, employees need not be notified of rules; the very nature of a password-protected system indicates that if you don't have a password, you are not authorized to use the system. Borgwardt knew a password was needed, and he knew he didn't have one; it is absurd and ridiculous, the District states, for Borgwardt to claim he was not aware that he was engaging in serious misconduct when he chose to play computer games on a District computer behind closed doors. The District contends that there were other indications that Borgwardt knew his actions were prohibited: namely, he closed the doors of the room he was in on the night of March 10 and did not attempt to defend his conduct at his discharge meeting of March 12. Discharge is particularly appropriate, the District contends, given the Grievant's failure to respond to another staff member who needed assistance on the night of March 10, his multiple instances of misconduct, and his brief tenure with the District.

In response, the Union denies Borgwardt was a "disciplinary problem" as asserted by the District, noting that the verbal warning from the no-call/no-show incident does not allege misconduct, and that progressive discipline accomplished its goal and Borgwardt improved his performance. The Union also rejects the District's description of the events of March 10, denying that Borgwardt was unavailable to assist Vogt, and that he did not respond in a timely manner. The Union also challenges Vogt's testimony that she called out to Borgwardt loudly enough for him to have heard her, noting that her testimony is uncorroborated, and that Borgwardt denied having heard her. The Union also challenges the District's assertion that Borgwardt played solitaire on the laptop computer, which was the only computer in the reading room to have shown activity on March 10. The Union further notes that the District did not save a screen shot of the allegedly illicit activity, which would have shown which computer was in use and at precisely what time. The Union rejects the District's claim that the grievance is untimely, noting that in the nine months it took to proceed from the initial filing to the arbitration hearing, the District never raised that issue; by accepting the grievance and arbitrating the case on the merits, the Union asserts, the District effectively waived the time limits. The Union reiterates its argument that the District failed to establish conduct in which it had a disciplinary interest, given the District's failure to have and communicate a policy against use of school computers without an assigned password. Contrary to the District's assertion, the Union contends, using a password-protected computer that had been left logged on to play solitaire while on break is not so clearly wrong that an employee would reasonably know, in the absence of a stated policy, that it would subject him to immediate termination.

In its response, the District reiterates that the grievance is untimely, and should be dismissed on procedural grounds. The District also dismisses as distracting various Union arguments, contending that the fundamental issue is that Borgwardt used a District computer without a password, which, in light of his short tenure with the District and his disciplinary history, gave the District just cause to terminate him. The District contends that it does not matter whether the Grievant was on break, as he was not permitted to use District computers at

any time. It also contends, for the same reason, that the material Borgwardt accessed on the computer is not relevant. Further, in light of Borgwardt's admission to the activity for which he was discharged and the fact that he did not question or defend against his discharge, the District asserts that there was very little to investigate and the length of its investigation is therefore not relevant. The District disagrees with the Union theory that Pienkos fired Borgwardt to placate Vogt, noting there is nothing in the record about Vogt wanting Borgwardt fired. The District also challenges the Union characterization of Vogt's testimony as misleading, contending that it was instead Borgwardt who gave the misleading and inconsistent testimony. The District also challenges the Union's emphasis on the fact that District teachers who are provided passwords sometimes fail to log off their computers, contending that blaming the teachers who do not log off their computers for misconduct like Borgwardt's is like blaming a homeowner who didn't lock the door for getting burglarized. The District concludes that, regardless of the absence of a written policy, Borgwardt knew passwords were required to access District computers; he clearly understood the wrongfulness of his conduct; and, in light of his prior misconduct and his short period of employment, his termination was indeed with just cause.

DISCUSSION

The first issue to be addressed is the District's contention that the grievance is untimely. I find that it is not untimely and is, therefore, properly before me. As the Union correctly notes, the District never raised any objection on this point until after the hearing. It accepted the grievance without objection; processed it through the grievance procedures without objection; scheduled the arbitration hearing without objection; and conducted the hearing, still without objection. On those facts alone, I would be inclined to reject such an objection. As Arbitrator Harold Curry stated in CLEO, INC., 121 LA 1707, 1716 (Curry, 2005), "it is well settled in arbitral law that for a party to seek dismissal of a grievance at an arbitration hearing for lack of timeliness, the issue must be raised or objected to prior to the arbitration hearing." In TRIANGLE CONSTRUCTION, 119 LA 559, 567-568 (Sergent, 2004), the union clearly filed its grievance well after the time limit specified in the collective bargaining agreement; however, Arbitrator Stanley Sergent held the grievance timely and arbitrable because the employer did not raise this objection until hearing, explaining that an employer "waives the procedural defense of untimely filing and processing of grievance if it does not invoke that defense and preserve it prior to arbitration. Otherwise, if such a defense is raised now … the Union will have been unfairly and substantially disadvantaged." Here, of course, the District waited until *after* the arbitration hearing to raise an objection to timeliness, raising the matter for the first time in its post-hearing brief.[2]

But in this case, there is an even greater reason to deny the District's timeliness objection – namely that under the terms of the Agreement the grievance does not appear to have been untimely. The Agreement provides as follows:

[2] *Accord, see also* SEATTLE SCHOOL DISTRICT, 119 LA 1145 (Elinski, 2004) and SAN LUIS OBISPO CMTY. COLL., 120 LA 1545 (Gentile, 2005).

ARTICLE XII – DISCHARGE

Section 1. (A) No employee having seniority shall be discharged without just cause. Except in cases of disciplinary or performance-based discharges, discharged employee shall be given at least two (2) weeks notice in advance, or, in the alternative, two (2) weeks pay in lieu of such notice. ***Notice of discharge shall be in writing to the employee, with a copy submitted to the Union. A discharged employee must challenge her/his cause of discharge within five (5) days after receipt of notice of discharge***, with a copy submitted to the Union. Failure on the part of the employee to do so will deem the discharge action final and binding. (***emphasis*** added).

Notwithstanding the clear mandate of this provision, the District did *not* provide written notice of the discharge, either to Borgwardt or to the Union. Although Pienkos testified on direct examination that he gave to Borgwardt and Fiehweg, at the meeting of March 12, "the reasons why, but also the letter that stated that he would be terminated," he testified on cross-examination that he had not done so:

Q Okay. Did you give Mr. Borgwardt any written notice of his termination?

A On the 12th?

Q A written document saying, you know, you're being terminated effective today for –

A I believe that that was – I have a document that was written.

Q I'm sorry. You did or you did not?

A I know I – let me put it this way. I know I wrote a document. Whether Ryan received a document or not, I know I wrote one for myself, for my own purposes. I would say, no, then. That's my recollection.

Q So to the best of your recollection, you did not present anything to Mr. Borgwardt in writing at that meeting?

A Again, I'm going to say I don't recall doing that, no.

Q After that meeting, did you mail Mr. Borgwardt anything in writing that discussed why he was terminated?

A I did not.

By never giving the required written notice, the District never started the clock running on the contractually-established five days' deadline to determine timeliness. Based on this reason as well, I find that that the grievance was not filed in an untimely manner and is properly before me.

The District's failure to provide written notice seems clearly to have violated the Agreement between the parties. However, the Union did not raise this point as an independent basis for sustaining the grievance and overturning the discharge. Although it is my understanding that this element of the Agreement remains relevant and in force, I am reluctant to base an award on this argument, given that it was not advanced at hearing or in the briefs. Accordingly, I will evaluate the grievance on its merits.

Turning to those merits, I again find the District's arguments lacking. Whether one accepts all of the so-called "seven tests" as enunciated by Arbitrator Daugherty, the core concepts of "just cause" are universally understood: the employee must have known certain behavior was prohibited, as well as the potential penalty for engaging therein; the employee must have engaged in the prohibited behavior, and the penalty must be commensurate with the offense, taking into consideration the totality of the employee's work history. Moreover, the Agreement applicable in this case explicitly establishes progressive discipline, with the District agreeing "that when disciplinary action is taken against an employee, discipline shall be corrective and progressive," following, to the extent practicable, the progression set forth therein from verbal warning with written documentation, written warning, suspension without pay, and finally discharge.

At hearing, Pienkos testified that he fired Borgwardt because of the "misuse of the technology, the computer without permission, and then also failure of Ryan to not respond to another staff member's call for assistance," adding that "the thing that happened on February 16th was playing on my mind, in addition to the fact that, you know, I had to again specifically state, five hours worth of work, you have to start at five and end at ten, because I've got to have, you know, there for those five hours." That is, Pienkos summarily fired Borgwardt for four reasons: playing solitaire on a District computer on March 10, 2009; his failure to respond to Vogt on that evening; his no-show/no-call on February 16, 2009; and his general work habits.

No detailed discussion is necessary to establish that the last three reasons did not provide just cause for Borgwardt's termination. Borgwardt testified he did not hear Vogt call for assistance; there is no evidence in the record that he did; and when he emerged from the room a mere few minutes after the call, Borgwardt immediately provided the assistance Vogt needed. Borgwardt already had been disciplined for his no-call/no-show incident of February, and had not repeated that behavior. And Pienkos gave only vague and indefinite comments about Borgwardt's work habits and related "reports"; though Pienkos testified that he changed Borgwardt's schedule, he never warned Borgwardt about discipline, much less discharge, if he didn't improve.

The District's primary reason for firing Borgwardt was his use of one of the computers in the reading room to play solitaire on the night of March 10. To show that it had just cause to fire Borgwardt for that offense, the District must establish that Borgwardt knew that engaging in that activity could lead to his discharge, and that discharge was an appropriate discipline given his tenure and work record.

Certainly there are offenses, such as workplace violence or theft, which all employees should know subjects them to immediate termination. Some misuse of an employer's computer system could also be serious enough to justify such a response; had Borgwardt accessed a teacher's personal or classroom files or viewed child pornography, the District's action may have been more appropriate. But Borgwardt did not do any of those things, and there is no allegation that he did. All he did was play a pre-packaged card game for a few minutes.

As noted, the District had no policy on who was allowed to use its computers and for what purpose. It apparently provided no written or oral directive to District employees warning them of the potential discipline for improper or unauthorized use of a computer. As Pienkos testified at hearing:

> Q Okay. Did you see in that personnel file any sign-off sheet by Mr. Borgwardt on any computer policy or any policy that would have told him about this authorization to use the computer?
>
> A No.
>
> Q Okay. And prior to his termination, and now I'm talking about while you're employed as the superintendent, was there anything given to Mr. Borgwardt to sign about the computer policy or use of the computer?
>
> A No, there was not.
>
> Q Okay. And currently, as we sit here today, there is still no written policy?
>
> A That's correct.

And as Vogt later testified:

> Q Do you have a written policy or a guidance sheet that they need to get when you train them on the computers?
>
> A Something that I give them?
>
> Q Right, so they would know what the policies are and what –

A No.

Q Okay. So there isn't anything that governs your access or what you can access in writing that –

A For staff members, no.

Given the relatively benign nature of the activity and the absence of a District policy, there simply was no way for Borgwardt to know that playing a pre-loaded game of solitaire on a District computer could lead to his immediate termination.

The District is correct that Borgwardt knew he needed a password to use a computer, and that he knew he didn't have one. A reasonable person would likely have concluded from those two facts that he was not authorized to use a computer. Such knowledge, however, does not cause Borgwardt's actions to rise to the level of an immediately dischargeable offense. Further, it is significant that Borgwardt apparently was able, repeatedly, to access District computers without the benefit of a password. Because other District employees regularly failed to log-off their computers, Borgwardt could regularly reactivate computers by simply moving a mouse or pressing a key. The District suggests that putting any weight on this evidence is tantamount to concluding that a homeowner who forgets to lock his door deserves to be burglarized. This argument misses the point, which is not to hold another District employee responsible for Borgwardt's actions. The evidence is significant, rather, because it demonstrates that the District and its employees, despite having a password system, took a rather casual attitude toward guarding access to the District's computers. This reality not only facilitated Borgwardt's ability to access the computers repeatedly, but also mitigated the seriousness of his actions when he did.

In determining whether a particular level of discipline is just, it is appropriate to consider an employee's work history with the employer. As noted, Borgwardt had been employed by the District for only about ten months at the time of his discharge. While short, his tenure was, by no means, one characterized by "multiple acts of misconduct", as alleged here by the District. There is one documented instance in the record of Borgwardt failing to report for work, and failing to alert the District that he would be absent. According to Pienkos, Borgwardt was apologetic and did not have any further such incidents following the progressive discipline of a verbal warning with written record.

Pienkos also testified that he had "gotten reports that maybe, you know, Ryan wasn't fulfilling his work duties, those five hours," so he placed him on a set work schedule. Such a vague and unsupported allegation, which apparently was not conveyed to the Grievant, is not disciplinary in nature and does not make the Grievant "a disciplinary problem", as alleged by the District. Indeed, such a characterization, in light of the immediate termination and as a repeated reference to a non-disciplinary incident, almost makes it appear the District was attempting to bolster its justification for having fired the Grievant.

Borgwardt was terminated without just cause. The parties stipulated that Borgwardt was earning $10.30 per hour at the time of his discharge. The Union asserted and the District did not dispute that this hourly rate equated to a weekly salary of $257.50. Thus, Borgwardt's lost wages, between the date of his discharge and the date on which he found alternative employment, amount to $4635.00. Further, the parties stipulated that Borgwardt is owed ten hours of vacation, twenty hours of sick time, and five hours of personal time by the District. The Union asserted and the District did not dispute that these unpaid leave hours entitle Borgwardt to an additional payment of $360.50. Thus, Borgwardt's total wage loss resulting from his discharge was $4,995.50. Because Borgwardt has found new employment, the Union is not seeking reinstatement.

On the basis of the Agreement, the record evidence, and the arguments of the parties, it is my

AWARD

That the grievance is sustained. As remedy for terminating the Grievant without just cause, the District shall make the Grievant whole by paying him $4,995.50. The District may do so in three equal payments, the last to be made no later than October 26, 2010.

Dated at Madison, Wisconsin, this 26th day of July, 2010.

Danielle L. Carne /s/
Danielle L. Carne, Arbitrator

DLC/gjc
7601