BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL DISTRICT OF PHILLIPS EMPLOYEES' UNION, LOCAL 1405-B, AFSCME, AFL-CIO

and

SCHOOL DISTRICT OF PHILLIPS

Case 111
No. 71679
MA-15190

Appearances:

Mr. John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 East 9th Street, Merrill, Wisconsin 54452, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Andrea M. Voelker**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-2030, on behalf of the District.

ARBITRATION AWARD

School District of Phillips Employees' Union, Local 1405-B, AFSCME, AFL-CIO and (herein the Union) and School District of Phillips (herein the District) were, at all pertinent times, parties to collective bargaining agreements covering the period March 11, 2011 through June 30, 2013. On July 16, 2012, the Union filed a request for arbitration with the Wisconsin Employment Relations Commission (WERC) alleging that the District terminated bargaining unit member Myles Peterson, the Grievant herein, without just cause. The parties requested a panel of WERC staff members from which to select an arbitrator. John R. Emery was selected by the parties as arbitrator. A hearing was conducted on October 23, 2012. The proceedings were not transcribed. The parties filed initial briefs by December 17, 2012, and reply briefs on January 11, 2013, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues.

The District would characterize the issues, as follows:

Did the District have just cause to terminate the Grievant?

If not, what is the appropriate remedy?

The Union would characterize the issues, as follows:

Did the Employer violate the collective bargaining agreement when it terminated the Grievant's employment?

If so, what is the remedy?

The Arbitrator adopts the issues as proposed by the District.

PERTINENT CONTRACT LANGUAGE

ARTICLE 3 –MANAGEMENT RIGHTS

The Board possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include but are not limited by enumeration to the following:

. . .

D. To suspend, demote, discharge and take other disciplinary action against employees for just cause.

. . .

Whether or not the Employer has been reasonable in the exercise of its management rights is subject to the grievance procedure.

ARTICLE 25 – PROGRESSIVE DISCIPLINE

The Employer agrees to the principle of progressive discipline for just cause. The following is the normal sequence for discipline:

1. Oral reprimand;
2. Written reprimand;
3. Suspension without pay;
4. Discharge.

> But for serious infractions of regulations and/or other standards of job performance, disciplinary action up to and including immediate discharge may be exercised.
>
> The employee shall have the right of Union representation at any disciplinary meeting or hearing. The employee and the Union shall receive copies of any disciplinary action placed in the employee personnel record.

BACKGROUND

Myles Peterson, the Grievant herein, was employed as a Custodian by the School District of Phillips for approximately 18 months, during which time he was a member of the bargaining unit represented by Local 1405-B. He worked at an elementary school during the second shift which ran from 3:15 p.m. – 11:45 p.m. During his tenure, Peterson received two written reprimands, the last having been issued in October 2011 for insubordination.

On March 9, 2012, District Administrator Walter Leipart was approached by the Transportation and Maintenance Supervisor, Paul Lehman, who told Leipart that another Custodian, Mark Henn, reported a concern about Peterson. Henn claimed that he had a conversation with Peterson wherein Peterson told him he would not post for a position in the middle school because there were security cameras there, so he would not be able to leave work early. Leipart decided to follow up on the report and went to the elementary school that night to check on Peterson. After searching the building, Leipart determined by 11:20 p.m. that Peterson was not on the premises and concluded that he had left work early. On March 12, Leipart met with Peterson and Union President Pat McCormick and asked Peterson whether he had worked his full shift on the 9th. Peterson stated that he left early on the 9th because he had worked extra time on February 29 doing snow removal, so he "flexed" his time. Peterson's time sheets for the days in question showed he worked his full regular schedule on both days with no alterations. He claimed that another Custodian, Frank Soul, was unable to get to work on time on the 29th due to the snow, so Peterson was called in and worked from 5:00 a.m. to 2:00 p.m., that Soul would verify his extra time worked and that it was standard practice for employees to record their normal hours on their time sheets even when they alter their schedules in order to enable the District to avoid overtime. Leipart later spoke with Soul, who could not confirm that Peterson worked late on the 29th.

After completing his investigation, Leipart sent Peterson a letter on March 26, 2012 instructing him to attend a meeting on April 10, 2012 to discuss his findings. Peterson did not attend or reschedule the meeting so on April 11, 2012, Leipart sent Peterson the following letter:

> Dear Mr. Peterson,
>
> This letter is to inform you that the School District of Phillips administration has completed the investigation regarding your leaving work without permission on

March 9, 2012. Because you did not attend the meeting scheduled for April 10, 2012 to discuss these findings or reschedule the meeting as instructed in the letter of March 26, 2012, I am communicating the findings to you in this letter.

The administration has found that you did in fact leave work early on the night in question without permission. Furthermore, it has been found that you falsified your time card in attempts to cover up your early departure from work. For this cause, the administration will recommend to the Board of Education that your employment with the District be terminated. The Board of Education will hear this recommendation in closed session at the regular meeting of the Board scheduled for 6:00 PM on Monday, April 23, 2012.

You have the right to attend this meeting and if you so choose, you have the right to request that any evidentiary portion of the meeting be held in open session. Should you choose to have the evidentiary portion of the meeting in open session, we ask that you notify the District Office by the close of business on Friday, April 20.

If you have any questions, pleas contact me.

Sincerely,
Wally Leipart
Superintendent

Peterson did not attend the April 23 Board meeting. At the meeting, the Board accepted the Superintendent's recommendation and terminated Peterson's employment based on the finding that he left work early on March 9 without permission. Peterson was informed of his termination and his grievance rights in a letter dated April 25. Peterson grieved the action and the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The District

The District asserts that the conduct for which the Grievant was terminated was uncontested. The Union does not dispute that the Grievant left work before 11:20 p.m. on March 9, 2012, but recorded on his time card that he left at 11:45. It is universally acknowledged by arbitrators that falsification of employer records is a serious offense and is such obvious misconduct that employees can be expected to understand it without need for a written policy or work rule setting it forth. Further, the District has promulgated policy 522.4, which requires employees to "…abide by a standard of conduct that models good citizenship, integrity, high ethical standards, and self-discipline." Falsification of time cards would violate

this standard, especially for a custodian, like the Grievant, who works with minimal supervision.

The Grievant's excuses for his misconduct are meritless. He initially claimed that he "comped" his own time, due to having worked an extra half hour on February 29, which he said he had done many times. Superintendent Leipart discovered, however, that Peterson did not work late on February 29, based on information from another custodian, Frank Soul. Leipart also learned that comp time does not exist for Local 1405-B employees. Further, while there is a Department policy permitting flexing of time, it must be pre-approved. The District concedes that while some employees may have flexed their own schedules prior to October 2011, at that time Supervisor Lehman gave written notice to the employees, including Peterson, that flexing required pre-approval. Lehman testified that to his knowledge no one flexed their schedule after October 2011 until the incident with the Grievant. Custodians Terry Curran and Frank Soul corroborated this.

It is clear that the Grievant is a chronic liar. He changed his story repeatedly throughout the grievance process. He first claimed that he "comped" his own time after working late on February 29, but then said he "flexed" it after he learned comp time was not an option. At hearing, when he learned that the District had evidence that he did not work late, he changed his story to state for the first time that he actually came in early on that date. Clearly, Peterson lied to Leipart, the Board and the Arbitrator. Further, Peterson's time card for February 29 shows he started work at 5:00 a.m., not at 4:30, as he later claimed. Since 5:00 was not his regular start time, there was no reason to record that time unless that is when he actually started work. The Grievant also claimed at hearing that he contacted Lehman on the 29th to ask him how to handle the issue of working extra time, but Lehman denied this and Peterson had never mentioned this supposed conversation at any earlier time.

The District conducted a full investigation and based its termination decision on the information available at the time. When initially questioned, Peterson said that he had "comped" his time and that was what the District knew when it made its decision. Peterson offered no other explanation until after he filed his grievance.

It is clear that the seriousness of Peterson's actions warranted departing from the progressive discipline protocol and issuing a summary termination. Falsification of time cards is an act of theft where the Grievant left work early, falsified his time card to make it appear he worked his full shift, and where his claim of working extra on February 29 is patently false. Arbitrators have consistently found that such dishonestly warrants immediate termination. c*itations omitted.* In addition, Peterson is not a long time employee with a good work record. He had only been working 18 months and had received a written reprimand on October 19, 2011, in addition to several other documented performance concerns. Arbitrators have held that in just cause cases, arbitrators should not substitute their judgment as to the appropriate penalty for that of management unless the penalty is clearly arbitrary, capricious, discriminatory, or excessive. None of those criteria exist here, therefore, the arbitrator should uphold the discharge.

The Union

The Union contends that there was an established past practice in the District whereby employees were able to "flex" their schedules by leaving work before their scheduled shift ended in cases where they began their shifts early. This practice was testified to by custodians Terry Kern and Mark Henn. District Administrator Leipart also conceded the existence of the practice, which he discovered during his investigation. The District claims that Peterson was clandestine about his work schedule, but the evidence shows he contacted Supervisor Lehman on February 29 to inform him he had worked an extra half hour and to find out how to handle it. Lehman said he would discuss it with him later, but never followed through. Peterson was left to his own devices and decided to leave half an hour early rather than record an extra half hour, which he explained to Leipart during the investigation. Peterson did nothing out of the ordinary or inconsistent with how such cases had been handled previously.

Having established the existence of a past practice of flexible scheduling, the Union asserts that the District never repudiated the practice and that it remained in force at the time Peterson was discharged. Arbitral authority holds that a practice existing outside the contract cannot be unilaterally changed during the term of the contract, but can only be repudiated at the end of the term upon proper notice to the other party. Based on the criteria necessary to terminate a practice, Lehman's email on September 22 was not sufficient and even if it was, the practice would have remained in effect until the contract expired on June 30, 2013.

The record also establishes that Peterson worked the required hours for the pay he received. According to the contract, Peterson works forty hours per week, and the practicing of "flexing" schedules was in effect at the time of his discharge. He testified that on February 29 he arrived at work at 4:30 a.m. to remove snow. He was the only employee present, but nothing in the record suggests he did not arrive at that time. He noted 5:00 on his time card, but also testified that he always filled out his sheet at the end of the week. He left work at 1:30, thus working 81/2 hours. It is the District's burden to prove otherwise and it has failed to do so. At most, Peterson is guilty of not keeping an accurate time card for the days in question. This was a minor infraction, at best, and one committed by other custodians, as well, including Kern and Henn. Thus, the issue is not whether flexing occurred, but that it was permissible and that Peterson did not work any more or less hours than he was required. Flexible scheduling was encouraged by his supervisor in order to avoid overtime and there was no written policy indicating that extra hours worked in one pay period could not be flexed during the next.

Assuming that just cause for disciplining Peterson is found to exist, the parties have agreed to a progressive discipline policy, under which discharge in this case is inappropriate. Where the infraction is not serious, discipline should be measured and appropriate to the offense. This is not a case of a serious infraction, Peterson simply worked extra hours on one occasion and fewer hours on another. The only potential disciplinary issue is that of not

accurately filling out his time card. Given the progressive discipline language in the contract, the discharge should be rescinded and the Grievant should receive, at most, a written reprimand.

The District in Reply

The District disputes the Union's assertion that there was a binding past practice of employees being permitted to "flex" their time. The Union's position is that there is a binding practice of essentially letting employees come and go as they please. That is not so. The District acknowledges that it has allowed employees to flex their schedules with prior approval. That is the only practice that exists and does not apply to the facts here. In fact, the Grievant worked from 5:00 a.m. to 1:30 p.m. on February 29, 2012, as indicated on his time card. In his investigative interview, he claimed he worked later than 1:30 on that day. At hearing, he claimed he came in earlier. There is no evidence supporting either claim, nor, prior to hearing, did he claim to have told anyone at the time that he worked extra hours, certainly not Lehman.

There is no evidence that employees have ever been permitted to unilaterally flex their time. To the contrary, when the District became aware that some employees were coming and going a few minutes early he specifically instructed them that they must stop, at which point they did. Arbitrators have held that where the employer is unaware of a pattern of conduct, no binding practice exists. Where there is no binding practice, there is no requirement that it be disavowed.

In short, the Grievant did not work extra hours on February 29 to justify his leaving early on March 9 and, even if he did, there was no practice permitting such behavior. He was paid for work he did not do and discharge was an appropriate response.

The Union in Reply

The District's version of the facts is very misleading. It was mutually known and accepted that employees always put their regular hours on their time cards, whether they were a few minutes over or under. Further, the District had no policies in place for what to do when flexing time. The District also asserts that the Grievant did not work extra on February 29, but only knew when he left work, not when he came. Lehman admitted that the Grievant called him about how he should record the extra half hour, but, given the poor relationship between him and management, it is no wonder that they did not believe him. Instead, they looked for an excuse to terminate him. There was no intent to deceive. Peterson merely did what had been done by other employees regularly.

The arbitrator should also consider Lehman's credibility issues. Lehman was only called as a rebuttal witness clearly because the District had concerns about his testimony. His work history indicated trouble getting along with his superiors and his subordinates and he left the District under poor circumstances. Bothe he and Peterson admitted that they had a poor

relationship and Lehman admitted that Peterson asked for direction on how to account for his time and Lehman gave none. The District's response to Lehman's failure was to blame the Grievant and call him a liar. There is no credible evidence supporting the District's case for discharge. At best, there is a case for a lesser level of discipline and the arbitrator has the flexibility to adjust the penalty to an appropriate level.

DISCUSSION

This case involves two very different versions of the same basic story. The District maintains that the Grievant, Myles Peterson, was in the practice of leaving work early from his custodian position without permission, while recording on his time cards that he worked his entire shift, in effect stealing from the District because he was being paid for time he did not work. This was confirmed when the District Administrator, Wally Leipart, acting on a tip from another employee, went to the school on the night of March 9, 2012 and discovered that Peterson was not on the premises at least 25 minutes before the end of his shift. Leipart later confronted Peterson about his absence, at which time Peterson claimed he left early because he had worked an extra half hour removing snow on February 29 without recording it and so left early, in effect taking compensatory time. When he was told the Union contract does not provide for compensatory time he said he was "flexing" his schedule, which he claimed was common practice among the custodial staff. Leipart undertook an investigation of the matter and learned that employees had, in fact, been flexing their schedules, but that employees were required to obtain advance approval to do so from Transportation and Maintenance Supervisor Paul Lehman. Peterson had not requested or received any such approval. Leipart was also unable to confirm that Peterson had worked extra time on February 29. Initially, Peterson had told him that he had worked from 5:00 a.m. until 2:00 p.m., instead of 1:30 p.m., as his time card reflected, and that another custodian would confirm that he had worked the extra half hour. When the other employee could not confirm the time Peterson claimed he left work, Leipart concluded that Peterson's story was a fabrication to cover his misconduct and, taking into account Peterson's short work history and disciplinary record, determined to terminate him.

The Union maintains that Peterson did, in fact, come to work at 4:30 a.m. on February 29 and worked until 1:30 p.m., even though his time card for that day indicates he came to work at 5:00. It was common practice for employees to always record their regular hours even when they came in early or left late, but that they then would "flex" their time by leaving early on another day, while still recording their regular hours. This practice was supposedly intended to help the District avoid paying overtime and was well known to and accepted by the District. Thus, on March 9, Peterson left work a half hour early to recapture the extra time he had worked on February 29. He further claimed that he spoke to Lehman on February 29 to ask him how to account for his extra time worked and Lehman told him they would work it out later, but then did not follow up. Peterson acknowledged receiving an email from Lehman on September 22, 2011 instructing him not to come in to work early as a result of an incident where he had come to work an hour early and left an hour early on an inservice day, but believed the email addressed only that incident and was not intended to be a general

directive. He claimed, and the record indicates, that he and Lehman had a poor working relationship and that his termination was the result of a calculated effort by Lehman to set him up. Peterson insisted that he never sought pay for more time than he worked and that his only mistake was filling out an inaccurate time card, which should not warrant termination.

Peterson's regular shift was from 3:15 p.m. until 11:45 p.m., Monday through Friday. The parties' contract makes no provision for compensatory time or for flex schedules. Any enforceable policy establishing such, therefore, must be based on a binding practice acknowledged by and between the parties. In order to be binding, a practice must be unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time and mutually accepted by the parties. I do not find those criteria in evidence here. Some of the witnesses testified that in the past they had started or ended work a few minutes before or after their scheduled times, but typically no more than five to ten minutes and that when they were told by Lehman they could not vary their work times without pre-authorization they no longer did it. Both Leipart and Lehman denied any knowledge of a practice of allowing employees to unilaterally change their work schedules without the knowledge of the District. Indeed, it is hard to conceive of an employer giving employees carte blanche to decide for themselves when they would come to and leave from work and to not reflect their actually hours on their time cards. I find the contention that Peterson was acting on an established past practice of allowing employees to unilaterally alter their own schedules to be meritless. There is no question, therefore, that Peterson left work early on March 9, 2012, without permission and without the support of any practice authorizing it.

The Union argues, however, that even conceding that Peterson acted without permission, he is only guilty of improperly filling out his time card, since he worked an extra half hour on February 29, and that this should not warrant termination. This contention, however, relies on the credibility of Peterson, since there is no independent evidence that he actually worked the extra time on February 29, because his time card only records him working eight hours on that day and no one else can confirm that he actually came in earlier. Unfortunately for Peterson, the record before me is so replete with inconsistencies and misstatements that I cannot regard him as reliable.

When confronted by Leipart about his absence, Peterson did admit to leaving early, but explained to Leipart that it was to make up for the extra half hour he worked on February 29. He originally said he used compensatory time, but when Leipart informed him that the contract did not permit comp time he then said he "flexed" his schedule, even though his time cards for both February 29 and March 9 show him working only a regular shift.

He initially claimed that he had worked from 5:00 a.m. until 2:00 p.m. on February 29 and that his quitting time would be confirmed by another employee, Frank Soul, who saw him leave. Leipart then spoke to Soul, who could not corroborate Peterson's quitting time. At hearing, however, Peterson testified that he came in at 4:30 a.m. and left at 1:30 p.m. on February 29, but that since he was the only employee present his start time could not be corroborated. Peterson's time card shows him coming in at 5:00 a.m. and he did not deny that

he had originally told Leipart he left at 2:00 or that Soul would corroborate this. It also begs the question, posed by the District, of why Peterson would record 5:00 a.m. as his start time on February 29 if he actually stared at 4:30, since it was not his regular shift. One is left with the impression, therefore, that he changed his start time after the fact to one that could not be verified only after Soul could not or would not confirm his story about when he left.

Most damning of all, to my mind, is the testimony of custodian Mark Henn, whose original report to Lehman and Leipart started the investigation. Henn testified that in March 2012 there was an open custodial position at the middle school and that he asked Peterson if he was going to post for it. Peterson said no because there were security cameras at the middle school, which would make it hard for him to leave work early. Henn reported this to Lehman and Leipart on March 9, leading Leipart to come to the elementary school that night to check on Peterson, whereupon he found that Peterson was, in fact, not on site at 11:20 p.m. and so had left work at least 25 minutes early. Peterson did not challenge Henn's testimony about their conversation, so I take it to be true. This leads to the conclusion that Peterson was in the habit of leaving work early and knew that it was wrongful, hence his concerns about the cameras at the middle school detecting him. It also casts doubt on Peterson's story about flexing his time on March 9 because it would be an enormous coincidence to my mind for Peterson to leave early on the one night that Leipart decided to check up on him.

Peterson also claimed that he called Lehman on February 29, reported his extra time worked and asked Lehman how to handle it, whereupon Lehman said they would discuss it later. The Union asserts that Lehman never followed up and that Peterson was left to his own devices as to how to handle the extra time worked, which he did by leaving early on March 9. No explanation was given for why Peterson did not follow up with Lehman and seek permission to leave early on another day, or why he did not accurately fill out his time card on February 29 to create a record of the extra time worked. Lehman denied the conversation, which the Union asserts is not credible due to the poor relationship between the men and Lehman's own employment problems. Peterson's own testimony, however, was to the effect that this conversation was a phone call he placed to Lehman after lunch on February 29 while he was still at work. Since he was still at work, one is left to wonder how he knew at the time that he would end up working extra time on that day. Furthermore, Peterson never mentioned this conversation in his disciplinary interview with Leipart, but only raised it at hearing. Taken as a whole, therefore, despite any concerns about Lehman's veracity, it is hard to credit Peterson's account.

Based on all the evidence in the record, I conclude that Peterson deliberately left work early on March 9 without permission and attempted to conceal the fact by falsifying his time card. His explanation of having worked an extra half hour on February 29 is unsupported by any other evidence in the record and his lack of credibility on other points undercuts its veracity. The District had, therefore, just cause to discipline him and. given the seriousness of the offense and his disciplinary history I cannot say that termination was excessive under the circumstances. For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The District had just cause to terminate the Grievant. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 22nd day of April, 2013.

John R. Emery /s/
John R. Emery, Arbitrator

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