

BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of the Grievance of

MARGARET READY

Under the Grievance Procedure of

CUBA CITY SCHOOL DISTRICT

Case 26
No. 72204
MM-6469

DECISION NO. 34689

Appearances:

Miguel Morga, Staff Representative, AFSCME Council 40, 601 Alfred Street, Soldiers Grove, Wisconsin 54655, appearing on behalf of Ms. Ready.

Lori Lubinsky, Attorney, Axley Brynerson, Attorneys at Law, P.O. Box 1767, Madison, Wisconsin 53701-1767, appearing on behalf of the District.

DECISION OF THE IMPARTIAL HEARING OFFICER

On August 6, 2013, the Cuba City School District filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint Raleigh Jones, a member of its staff, to serve as the Impartial Hearing Officer in a proceeding involving the termination of employee Margaret Ready. Ms. Ready was represented by AFSCME Council 40 as noted above. A hearing was conducted on September 25, 2013, in the offices of the Cuba City School District, Cuba City, Wisconsin. The hearing was not transcribed. Thereafter, the parties filed briefs and reply briefs, whereupon the record was closed on October 18, 2013. Having considered the evidence, the arguments of the parties and the record as a whole, I issue the following Decision.

ISSUE

The parties did not stipulate to the issue to be decided herein.

The Appellant proposed the following issue:

Does the Employer have just cause in its decision to terminate Peggy Ready? If not, what is the remedy?

The District proposed the following issue:

Should the grievance of Margaret Ready be sustained, modified or denied?

I adopt the District's proposed issue as the issue to be decided herein. My rationale for doing so is addressed in the Discussion.

BACKGROUND

Margaret "Peggy" Ready was employed by the District as a teacher's assistant – also known as an instructional aide – for 15 years. She worked with a variety of teachers and students at the elementary school. Sometimes she worked one-on-one with a student and sometimes she worked with small groups of students. Some of the students she worked with had learning disabilities and some did not.

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Instructional aides are evaluated yearly by the building principal. From the 2008 school year to the 2010 school year, the rating form which the District used for instructional aides had four rating categories: Distinguished, Proficient, Basic and Unsatisfactory. In 2008 and 2009, Ready was rated Distinguished in all six of the categories considered on the evaluation. In 2010, Ready was rated as Distinguished on one of the categories on the evaluation, and Proficient in the other five categories on the evaluation. In 2011, the Employer dropped the Distinguished category and left the other three categories intact. That year, Ready was rated Proficient in all six of the categories considered on the evaluation. In 2012, Ready was rated Proficient in thirteen of the categories considered on the evaluation, Basic on nine of the categories and one category as Needs Improvement. (Note: That year, the Employer dropped the category of Unsatisfactory and replaced it with Needs Improvement.)

Overall, the evaluations just referenced show that from 2008 until 2011, Ready's supervisors rated her work performance as Proficient or better.

In 2012 though, things changed, and Ready's job performance – at least as measured by her evaluation – declined. That year, she received an evaluation that was more negative than anything she had previously received. It's apparent from the ratings Ready received on her 2012 evaluation that Principal Loeffelholz thought Ready's job performance was slipping. One of Loeffelholz's written comments on Ready's 2012 evaluation said that Ready was doing tasks that were not her assigned tasks; Loeffelholz said that while Ready was working, she was not performing the work which the Employer needed her to perform at that point in time.

The ratings on Ready's 2013 evaluation were even lower. That year she was rated as Proficient in ten of the categories considered on her evaluation, Basic on nine of the categories and four categories as Needs Improvement. Additionally, Loeffelholz included the following written comments:

Evaluation Notes: Mrs. Ready has been able to build a good rapport with students at any grade level and her interactions have been positive. She assists in maintaining order in the classroom. There is some concerns with leaving the room without letting the classroom teacher know and following the expectations as outlined in the Teacher Guideline handbook. It is very important when supervising students that your attention is focused on the task at hand at all times.

* * *

The focus now shifts to Ready's disciplinary history with the District.

In March 2009, Ready received a letter of reprimand from Principal Jim Boebel for eating during direct instructional time and deviating from her scheduled lunch break. Ready did not file a grievance challenging that reprimand.

Rhonda Loeffelholz became the elementary school principal at the start of the 2009-2010 school year. After Loeffelholz became Ready's supervisor, she (Loeffelholz) gave Ready numerous verbal instructions and directives. One of the directives was that when Ready left a classroom for whatever reason, she was to notify the teacher of her (Ready's) whereabouts, so that the teacher was aware at all times of where Ready was (if she was not in the classroom). Another directive which Loeffelholz communicated to Ready on multiple occasions was that Ready's primary job was to assist students in the classroom. These instructions and directives were intended to keep Ready on task and change her work performance where Ready had not done things in conformance with Loeffelholz's expectations.

In January 2010, Ready received a written reprimand from Loeffelholz. This reprimand asserted that Ready failed to follow Loeffelholz's directive to get prior approval before she (Ready) made changes to her work schedule. The reprimand also asserted that Ready was dishonest in answering Loeffelholz's questions about why she (Ready) did not record her half-hour lunch. Ready did not file a grievance challenging that written reprimand.

In November 2012, Ready received a five-day suspension for what was characterized as her "continued pattern of noncompliance with work rules." The first charge was that she (Ready) failed to get Loeffelholz's prior approval before making changes to her (Ready's) work schedule. The accompanying written document asserted that Ready had previously received written directives to get prior approval before making changes to her work schedule. The second charge was that Ready failed to report to her scheduled duty as a crossing guard on November 21, 2012. As part of this discipline, the Employer also required Ready to pay the daily rate for her health

and dental insurance for the duration of her suspension. Before Ready could serve the five-day suspension, Loeffelholz added an additional one-day suspension to it. This happened after Ready failed to attend a scheduled meeting with Loeffelholz. Ready filed a grievance challenging the six-day suspension. The grievance was resolved with the District's agreement not to charge Ready for her health and dental insurance during her six-day suspension. In all other respects though, the discipline remained "on the books" and Ready served her six-day suspension.

* * *

The District's Employee Handbook outlines a progressive discipline process that the District can follow, but is not required to follow. As set forth in the Handbook, an employee's non-compliance with work rules is generally dealt with under a progressive discipline approach, but depending on the severity of the offense the District may impose greater discipline than the progressive discipline process outlines. The progressive discipline process includes the following steps: (1) verbal reprimand; (2) written reprimand; (3) suspension; (4) termination.

* * *

The warning letter which accompanied the six-day suspension referenced above includes the following admonition: "Any further violations of work-related rules will result in taking the Step 4 action listed in the Employee Handbook which is a recommendation for termination to the Board of Education."

FACTS

In November 2012, the teacher to whom Ready was assigned – Mrs. Brewer – directed Ready to teach a small group of students when Brewer was not present in the room. Ready objected to this assignment because she thought that she was not empowered to do that as an instructional aide. To buttress her view that she was not empowered to do that, she called the Wisconsin Department of Public Instruction (DPI) regarding same. She hoped that they would affirm her view that she was not empowered (as an instructional aide) to teach small groups of students when the classroom teacher was not in the room. That didn't happen though. Instead, what happened was that when Ready called DPI, she didn't talk with anyone directly, so she just left a voicemail message which posed the question of whether instructional aides are empowered to teach small groups of students when the classroom teacher was not in the room. Ready made this telephone call to DPI in a public area at the elementary school, and a substitute teacher overheard it. The substitute also heard Ready say – after making the call – that the reason she was doing it was to raise some hell over the matter. The substitute who overheard Ready's telephone call and statement was upset by it, so she told Principal Loeffelholz about it. Afterwards, Loeffelholz called DPI herself, and posed the same question to them that Ready had asked in her voicemail message. In response, a DPI representative told Loeffelholz that it did not violate any state law or DPI rule or regulation for an instructional aide to teach a small group of students when the classroom teacher was not present in the room. Loeffelholz subsequently told Ready – in two separate meetings – what the DPI representative had told her. Brewer was present at both of those meetings. Implicit in the DPI response was that Ready's objection to

Brewer's directive (for Ready to teach a small group of students when Brewer was not present in the room) lacked objective support from DPI.

* * *

About six months later, toward the end of the 2012-2013 school year, Ready was involved in the following four incidents. All occurred in 2013.

* * *

On April 10, Ready was supposed to be assisting special education students in Mrs. Holmes' classroom. That day, Mrs. Holmes complained to Principal Loeffelholz that Ready was not doing the work she was supposed to be doing (i.e. assisting the special education students). According to Holmes, Ready just sat at a table, did not interact or engage with the special education students, and wrote in her notebook.

The record reflects that teachers don't normally file formal complaints with the principal about an instructional aide. Thus, it was very unusual for Holmes to complain to the principal about Ready's work performance.

After Holmes filed her complaint with Loeffelholz about Ready's work performance, Loeffelholz went to Holmes' classroom on April 12 and observed Ready perform her work. While Loeffelholz was in the classroom, Ready did what she was supposed to do. Specifically, she participated in the activity and assisted students. Holmes subsequently told Loeffelholz that while Ready did what she was supposed to do while Loeffelholz was in the room, that changed after Loeffelholz left the room. According to Holmes, at that point, Ready reverted to not performing her assigned work. Holmes described that as Ready's "typical behavior."

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On April 19, Ready was supposed to be at the middle school study hall at 10:20 a.m. When Loeffelholz went to that room at that time, Ready was not there. Loeffelholz asked the library supervisor (Mr. Sanders) where Ready was, to which Sanders replied that he did not know where Ready was. Loeffelholz then walked around the school building looking for Ready. Loeffelholz subsequently found Ready in the computer lab, talking to another employee. At that time, Ready was not assigned to assist that employee, nor was Ready assigned to be working in the computer lab. Additionally, Loeffelholz observed that Ready was not assisting any students. Loeffelholz watched Ready leave the computer lab and go to the study hall at 10:35 a.m. Thus, Ready reported to her assigned area 15 minutes late.

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On May 13, Loeffelholz went to Mrs. Brewer's classroom at 9:35 a.m. because she knew that Ready was supposed to be working in that classroom at that time. When Loeffelholz arrived, Ready was not in Brewer's classroom as she was supposed to be. Loeffelholz asked Brewer

where Ready was, and Brewer replied that she did not know Ready's whereabouts. Brewer nonetheless speculated that Ready might be in the office making copies. Loeffelholz then waited in Brewer's classroom for Ready to show up. Ten minutes later, Ready walked into Brewer's classroom. When she did, both Loeffelholz and Brewer looked at Ready's hands to see how many documents she (Ready) had in her hands. Both observed that Ready had just a single document in her hand.

* * *

On June 3, Ready was supposed to assist six special education students in Mrs. Holmes' writing class. On that date, Holmes took her entire class to the computer lab. It can be inferred from the record that Ready knew she was to report to the computer lab. However, Ready was a no-show in the computer lab for ten minutes. While Mrs. Holmes waited for Ready to show up in her classroom, there were several special education students who had their hands raised and needed assistance. Holmes could not attend to those students though because she was occupied with other students. While Holmes was dealing with a student, she looked into the library via a window in the computer lab. When she did, she saw that Ready was in the library and was using one of the computers in the library. Holmes did not see any students near Ready, so Holmes inferred that Ready was not working with any students.

Later that day, Holmes reported the incident just referenced to Loeffelholz. When she did so, Holmes also told Loeffelholz that Ready was not providing attention and guidance to the special education students in her class, and this concerned her. Holmes subsequently put her comments / complaints about Ready's work performance in writing and submitted it to Loeffelholz.

* * *

The next day, June 4, Loeffelholz sent Ready an email with indicated that she (Loeffelholz) wanted to have a meeting to discuss several incidents wherein Ready had allegedly left the classroom and not accounted for her absence to her classroom teacher, or had not assisted students (as she was supposed to have done). Loeffelholz then opined in her email that these alleged incidents seemed to show a pattern of improper behavior. When Ready got this email from Loeffelholz, Ready was, in her words, "very shaken." She became emotional and cried. A student saw Ready crying and asked her what was wrong. Ready told the student that she was upset and said words to the effect of "some people don't think I'm doing my job." Some students then questioned Mrs. Brewer about the situation and why Ready was crying. Brewer subsequently reported the incident to Loeffelholz.

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Later that day, Ready met with Loeffelholz. In that meeting, Loeffelholz asked Ready about the work she had performed on April 10 and 19, May 13 and June 3 and 4.

With regard to the events of April 10, Ready said she didn't remember what students she was working with that day. When Loeffelholz asked Ready about writing in her notebook, Ready acknowledged that she was writing in her notebook. While writing in a notebook would seem to be an innocuous act, there was a context to it that was well known to Loeffelholz and Ready. The context was this: Ready kept a personal notebook at work wherein she made entries about teachers, students, lessons and what happened in the classroom. Ready made numerous entries in this notebook. Previously, another teacher had complained to Loeffelholz that Ready's writing in that notebook was getting in the way of the work Ready was supposed to be doing (i.e. assisting students). After receiving that complaint, Loeffelholz had specifically directed Ready to henceforth not do that (i.e. write in her personal notebook during class time when she was supposed to be assisting students). When Ready admitted that she wrote in her notebook during class time on April 10, that meant that she also admitted to violating Loeffelholz's previous directive to not do that.

With regard to the events of April 19, Ready told Loeffelholz that when she was in the computer lab, she was assisting a group of sixth grade students which she proceeded to name. After Ready had said that, Loeffelholz disputed Ready's contention that she was assisting a group of sixth grade students as she claimed, whereupon Ready repeated her contention a second time (that she was indeed assisting a group of sixth grade students in the computer lab on that date). Loeffelholz then responded that there were no sixth grade students in the computer lab at that date and time. To buttress her point, Loeffelholz then showed Ready a computer log which Loeffelholz averred showed that there were no sixth grade students logged onto computers in the computer lab on the date and time in question. After being confronted with this evidence, Ready said words to the effect of "OK, fine, I'm not going to argue with you."

With regard to the events of May 13, Ready said that the reason she was not in her assigned classroom at the designated time was because she was in the office making copies of a document. After Ready said that, Loeffelholz responded that she watched when Ready returned to the classroom that day, and when she (Ready) did, Ready had just a single sheet of paper with her. Loeffelholz told Ready that if Ready had been making copies as she said she was doing, it stands to reason that she would have brought them back to the classroom with her and she didn't.

When Loeffelholz asked Ready about the events of June 3, Ready replied that the reason she was not in the computer lab assisting Mrs. Holmes' students was because she was in the library helping two other students. Ready also said that as she walked through the library on her way to the computer lab, another student asked her a question and she answered it. When asked about the events of June 3, Ready initially did not say anything to Loeffelholz about being on a computer in the library. At that point, Loeffelholz showed Ready a computer log which showed that Ready was logged into a computer in the library for about four minutes. After being confronted with the computer log, Ready admitted that she was on a computer in the library. According to Ready, she was checking her work email.

Loeffelholz then asked Ready whether earlier that day (i.e. June 4), she had made a statement to the children in Brewer's classroom about why she was crying. Ready initially said she did not. Ready then admitted that she did, and that her statement to the children was to the

effect of “there are people around here who don’t think I’m doing my job.” After Ready admitted making that statement to the children, Loeffelholz told Ready that it was inappropriate for Ready to bring students into an adult situation and that it would not be tolerated. At that point, the meeting ended.

* * *

Loeffelholz met again with Ready on June 7. At this short meeting, Loeffelholz told Ready that she (Loeffelholz) was going to recommend Ready’s discharge to the School Board.

* * *

On June 10, Loeffelholz gave Ready a three-page, single-spaced letter which summarized the incidents referenced above. The last paragraph of that letter stated that Loeffelholz had followed “the progressive discipline procedures of the District in an attempt to improve your behavior relating to your job performance.” The letter went on to state that following the imposition of that progressive discipline, “you still struggle to follow work-related rules and responsibilities as related to students.” Finally, the letter stated: “instead of being cooperative and taking responsibility for your actions, you continue to be deceitful with me as documented in our subsequent meetings on June 4 and June 7.”

Before the School Board acted on Loeffelholz’s recommendation, Ready wrote a three-page letter to the Board which offered her reasoning why she should not be fired.

On June 19, the School Board accepted Loeffelholz’s recommendation and terminated Ready. Ready subsequently filed the instance grievance challenging her discharge.

Ready is the only employee Loeffelholz has ever recommended be suspended and / or fired. Insofar as the record shows, Ready is the first employee in the District to grieve a discharge since the implementation of Act 10.

* * *

At the hearing, Ready speculated that Loeffelholz targeted her for termination in retaliation for the voicemail message she left with DPI in November 2012. She further theorized that when Loeffelholz found out about her call to DPI, Loeffelholz was angry with her for doing that.

Ready testified that she thought the events of April 10 and 19, May 13 and June 3 and 4 involved “minor matters” that should not be considered dischargeable events. As Ready saw it, her work performance on those days was nothing out of the ordinary and was part of her normal routine.

With regard to the May 13 incident, Ready testified that the reason she had just one piece of paper in her hand when she returned to the classroom was because she left the copies she had made in the office.

With regard to the June 3 incident, Ready testified she was not absent from the computer lab for ten minutes as Holmes said, but rather for just five minutes. She further testified that even if it appeared to Holmes that she (Ready) was not working with any students in the library, she was working with two students. Ready testified that the two students in question were at a table that was an arm's length from her computer chair.

DISCUSSION

The Standard of Review

Since the District's grievance procedure does not define or specify a standard of review for the IHO to use to review the District's decision to terminate an employee's employment, it follows that that is the first question to be addressed.

Ready argues that the standard of review should be a just cause standard. While arbitrators and hearing examiners differ on their manner of analyzing what just cause means, one commonly accepted approach – and the approach the undersigned has applied in hundreds of cases – consists of addressing these two elements: first, did the employer prove the employee's misconduct, and second, assuming the showing of misconduct is made, did the employer establish that the discipline it imposed on the employee was commensurate with the offense given all the relevant facts and circumstances. Subsumed into this second element are the notions of due process, progressive discipline and disparate treatment. It should be apparent, just from a listing of these steps and / or hoops, that a just cause standard sets a very high bar for an employer to clear. For example, if an arbitrator or hearing examiner found some flaws in an employer's investigation, or found, say, disparate treatment, the arbitrator or hearing examiner could overturn the employee's discipline on that basis alone. Not surprisingly then, employees and their unions want discipline reviewed under a just cause standard because of the high level of protection it affords them.

While the just cause standard is commonly applied by arbitrators and hearing examiners, they haven't just plucked that standard out of thin air and applied it on their own volition. They have to have a basis to do so. Usually, the basis is either a statute or a collective bargaining agreement that specifies that employee discipline is to be reviewed via a just cause standard. In this case, it was in the collective bargaining agreement that previously existed between AFSCME Council 40 and the District which covered certain support staff employees. Pre Act 10, that collective bargaining agreement said that employee discipline was to be reviewed by an arbitrator using a just cause standard. Post Act 10 though, the collective bargaining agreement is gone. Along with it is the just cause standard that was specified therein. Since there is no longer a collective bargaining agreement which covers the Cuba City School District support staff employees, there also is no longer a contract provision which specifies that employee discipline will be reviewed under a just cause standard. Similarly, while some Wisconsin state employees

are still covered by a just cause standard, that's because there's a state statute that specifically grants them that protection. However, there is no state statute that specifically gives Ready, and other school district support staff employees like her, the protection of a just cause standard for employee discipline. Thus, the situation that exists here is that there is neither a state statute, nor a collective bargaining agreement, that specifies that a just cause standard is to be applied here. Finally, there is nothing in either the Employee Handbook (that covers Ready) or the Employer's grievance procedure that says that discipline will be reviewed under a just cause standard. Given the circumstances just noted, I have no basis whatsoever for applying a just cause standard. Were I to do so here, and apply a just cause standard, I would literally be plucking it out of thin air and applying it on my own volition. I decline to do that.

In this case, Ready's representative ably made all the arguments that are usually raised by employees and unions in just cause cases. Specifically, Ready's representative argued (1) that Ready's conduct on the days in question did not constitute workplace misconduct (as that term is used in the first element of the just cause standard); (2) that the Employer failed to conduct a fair and complete investigation into the matter; (3) that the Employer committed due process violations in that Ready was not given the opportunity to address the various incidents at the time they occurred, nor was she allowed to confront her accusers; (4) that Ready was subjected to disparate treatment vis-à-vis other teacher assistants; and (5) that even if Ready did engage in workplace misconduct, the level of discipline which the Employer imposed on her for that misconduct (i.e. discharge) was inappropriate and excessive given all the underlying circumstances.

If I was reviewing Ready's discipline under a just cause standard, I would review each and every one of those arguments in order to complete the record. Were I to do so, it's possible that I could have hung my proverbial hat on just one of those contentions and used it as the basis to overturn the discharge. However, that's not going to happen here because I'm not going to review Ready's discipline under a just cause standard. Once again, that's because I need a sound basis to apply that standard, and it is lacking here. It follows from that decision that none of the arguments just referenced are going to be addressed herein because all of those arguments relate to the just cause standard.

That decision pains me greatly. Here's why. I've been reviewing discipline as an arbitrator and hearing examiner for over 30 years. I've issued hundreds of decisions dealing with employee discipline. In practically all of those decisions, I applied a just cause standard. As was noted earlier, notwithstanding the difficulty that standard poses to employers to meet, that standard had become the norm in Wisconsin's public sector. As it relates to school district support staff employees, that changed after Act 10. While some of those employees are still subject to a just cause standard, that's because their employer adopted a just cause standard in their employee handbook or grievance procedure. That's not the case in the Cuba City School District.

Having found that I'm not going to apply a just cause standard to Ready's discharge, that still leaves the question of what standard is going to apply.

I've decided to introduce my answer to that question with the following discussion. The District contends that Ready is an at-will employee. Ready disputes that contention, and asserts that it is primarily private sector employees that are at-will employees. Ready points out that private sector at-will employees usually don't have the right to file a grievance challenging disciplinary action taken by their employer, nor do they usually have the right to have an unresolved grievance reviewed by an impartial third party. That's true; they don't. However, just because Ready – and all other school district support staff employees post Act 10 – have those two rights, that doesn't mean that Ready is somehow not an at-will employee. She is indeed an at-will employee. Simply put, her status is this: she is an at-will employee who has the two rights just noted (i.e. that she is covered by a grievance procedure and that grievance procedure allows her to appeal an unresolved grievance to an IHO, whose decision is then subject to review by the District's Board of Education). Building on the premise that Ready is an at-will employee with those two rights, it is further noted that Ready is no longer covered by a collective bargaining agreement. Additionally, there is no written contract or individual employment agreement that covers the terms under which her employment may be treated. Ready tries to turn this situation to her advantage by arguing that the absence of a standard for reviewing employee discipline in the Employee Handbook altered her at-will status and created an express employment contract subjecting her to termination only for just cause. I find otherwise. Here's why. The protection of a just cause standard is never granted implicitly. It has to be made explicitly, and that was not done here. There's no reference to "good cause" or "just cause" in the Employee Handbook or the Employer's grievance procedure. Post Act 10, the employer gets to decide the standard of review applicable to employee discipline. When the District drafted its Employee Handbook, it did not specify a standard for reviewing employee discipline. Additionally, there is nothing in the Employee Handbook that says the District was abrogating the at-will status of its support staff employees, or creating something other than employment at-will for its support staff employees.

In the absence of a written contract setting forth otherwise, it is well established in Wisconsin that employment is terminable at the will of either an employer or employee **without cause**. The reason I put the last two words in the last sentence in bold is because they are very important. Those two words mean that the employment relationship can be terminated by either party, at any time, for any reason or no reason at all. In this case, it was the Employer that decided to end Ready's employment relationship. Once again, under the employment at-will doctrine, it could do that (i.e. end Ready's employment) for a good reason, a bad reason, or no reason at all. The only exception to this is what has been called the "usual public policy considerations." This public policy exception protects those employees from discharge who refuse to do any act that is favored by public policy. While Ready argues that her conduct is covered by the public policy exception, I find that in this case, no "public policy considerations" are involved, so that means that the public policy exception does not apply. Thus, in this case, the District does not need to prove that it had good cause or just cause for Ready's termination. Similarly, the District does not have to prove that Ready engaged in misconduct or violated some rule by her conduct. Instead, it could fire Ready for any reason or no reason at all.

In the opinion of the undersigned, it's rare when employer imposed discipline won't pass muster under the standard just noted. Said another way, the employer imposed discipline will almost always stand and not be overturned. That's because the employer holds all of the

proverbial cards under this standard. The standard applicable to at-will employees gives them little in the way of protection, and doesn't come close to giving them the protection that a just cause standard does. While it pains me to do so, I will next review Ready's discharge under the standard applicable to at-will employment. Once again, that standard is that an employer can terminate an at-will employee for any reason or no reason at all (subject to the "usual public policy considerations" which don't exist in this case).

The Merits

I'm going to begin my discussion on the merits by addressing what happened on November 21, 2012. That's when Ready called DPI and left them her voicemail question asking whether she could teach small groups of students when the classroom teacher was not in the room. The reason that I'm starting with that matter is because Ready alleges that she was targeted for termination in retaliation for her call. I find that Ready's contention of retaliation is not supported by the record evidence. Aside from that, there's a timeline problem with connecting the DPI telephone call to Ready's discharge. The problem is this: six months had elapsed between the former (i.e. the telephone call) and the latter (i.e. the discharge). The record shows that the DPI telephone call occurred on the same date that Ready failed to report to her scheduled duty as a crossing guard. Later that same month (i.e. November 2012), Ready was given a written reprimand, as well as a six-day suspension for that and other matters. Before that discipline was imposed, Loeffelholz held a pre-disciplinary meeting with Ready and her representative. Since the DPI telephone call matter had just occurred, one would think that's when Ready would have raised it as a defense because the matter was fresh. However, that didn't happen, and neither Ready nor her representative raised the defense at that time that Ready had been targeted for discipline because of her DPI telephone call. Later, when Ready grieved her suspension, her grievance did not raise that contention either. It was only when Ready was fired that she raised the DPI telephone call retaliation claim. Once again, that was six months later.

Next, I'm going to comment on the following matters because they are important for the purpose of context.

First, the record shows that on multiple occasions prior to the end of the 2012-2013 school year, Principal Loeffelholz had spoken to Ready about two different work matters. First, Loeffelholz told Ready that she (Ready) was to communicate with the classroom teacher so that the teacher knew where Ready was at all times. Thus, if Ready left the classroom for any reason, she (Ready) was to tell the teacher where she was going to be. Second, Loeffelholz told Ready that her primary job was to help the students in the classroom that she was assigned to assist, and she should not spend her time doing other tasks or work. The point of these counselings was to get Ready to improve her job performance in those areas because Loeffelholz felt Ready's performance was deficient in those areas. As a result of those counselings, Ready knew what was expected of her. Additionally, the record reflects that these work directives were reasonable and legitimate expectations for a school district to have of a teacher's assistant.

Second, the record shows that when the incidents involved here occurred, Ready had previously received a variety of discipline. As just noted, she had received numerous verbal

counselings. Additionally, she had received several written warnings. Then, in November 2012, Ready served a six-day suspension. While that suspension was grieved, it was not overturned. Thus, it remained on the books for the purpose of progressive discipline.

Third, teacher assistants work closely with teachers. The record reflects that teachers don't usually complain to the principal about their teacher assistants. In my experience, that's not surprising, because employees are usually loath to try to get a coworker in trouble who they work with on a day-to-day basis. Obviously, such a complaint has the potential to create a difficult work environment. The record further reflects that it's even more unusual for a teacher to put their complaints against a teacher's assistant in writing. Notwithstanding what I just said, what happened here is that a teacher broke that taboo and complained to Loeffelholz about Ready's work performance. That complaint started the proverbial ball rolling in this matter.

On April 10, 2013, Holmes complained to Loeffelholz about Ready's work performance in her (Holmes) classroom. The specific complaint was that Ready was not assisting the students in Holmes' classroom or interacting with them as she was supposed to, but instead spent her time writing in her personal notebook.

Ready contends that after Holmes filed this complaint against her, Loeffelholz monitored her work closely. For the purpose of discussion, let's assume that's true, and Loeffelholz did indeed monitor Ready's work performance closely looking for evidence of poor work performance. Rhetorically speaking though, so what? Employers have the right to monitor employee's work activities. In doing that, employers sometimes put employees under the proverbial microscope. Employers can do that if they want. Oftentimes, it occurs after an employee gives the employer reasons to scrutinize their conduct. What happened here, of course, is that Holmes' complaint against Ready gave Loeffelholz a legitimate reason to scrutinize Ready's work performance. That complaint gave the Employer an objective, factual basis to probe further into Ready's actions / conduct looking for questionable behavior on her part. That's exactly what it did. What usually happens when an employee knows they are under the microscope is that they comport themselves accordingly. By that, I mean they keep their nose clean, so to speak, and don't give the employer anything more to work with. Ready did not do that. Instead, she gave the Employer some additional material to work with.

The next part of the discussion deals with what Loeffelholz discovered during her probe and chose to rely on.

On April 19, 2013, at 10:20 a.m., Loeffelholz went to the middle school study hall to check on Ready. Loeffelholz knew that Ready was supposed to be there at that time. However, Ready wasn't there, and the study hall supervisor didn't know where Ready was. Loeffelholz then went looking for Ready throughout the building. Loeffelholz found Ready in the computer lab talking to an employee. Loeffelholz then watched Ready leave the computer lab and go to the study hall. Ready reported to the study hall 15 minutes late.

Here are the problems with that. First, on that date, Ready was supposed to be at the middle school study hall at a certain time. She was a no-show at the study hall for 15 minutes. Obviously, that's problematic, because employees are supposed to show up at their assigned work location at a certain time. When they don't, the proverbial wheels come off. Second, if a teacher's assistant either leaves their assigned work area, or doesn't show up in the first place, they are supposed to have notified the teacher of their whereabouts. Ready knew that was the procedure because Loeffelholz had previously counseled her about it. Here, though, Ready failed to follow that procedure: insofar as the record shows, Ready did not have permission from the teacher to be gone, nor did the teacher know where Ready was. That was problematic from a class control perspective because the Employer had previously decided that it wanted two employees to be present in the study hall. While it was Ready's view that she could be in the computer lab talking with another employee, the Employer disagreed. Obviously, the Employer's view controls, not Ready's. Third, when Loeffelholz later asked Ready about being in the computer lab (instead of being in the study hall) on that date, Ready's proffered excuse was that she was assisting a group of sixth grade students in the computer lab at that time. However, that excuse doesn't hold up, because Loeffelholz personally observed what Ready did in the computer lab, and all she did was talk to another employee. Loeffelholz saw that Ready wasn't assisting any students at the time. That being so, Ready's proffered excuse to Loeffelholz (i.e. that she was assisting some sixth graders at that time) was not truthful. Ready being untruthful with Loeffelholz about this matter just made the situation worse, because it hurt Ready's credibility with Loeffelholz.

On May 13, 2013, at 9:35 a.m., Loeffelholz went to Brewer's classroom because she knew that Ready was supposed to be there at that time. However, Ready wasn't there, and Brewer didn't know where Ready was because Ready hadn't told her. This time, Loeffelholz just waited in Brewer's classroom, and Ready came into the classroom about ten minutes late.

Here are the problems with that. First, Ready didn't tell Brewer where she was going to be at the start of the class. She should have. Second, while Ready testified that the reason she was late to the classroom that day was because she was making copies in the office, it really doesn't matter whether Ready was or was not in the office making copies (as she said she was). That's because at 9:35 a.m., she was supposed to be in Brewer's classroom assisting students, and she was not.

The focus now turns to the events of June 3, 2013. On that date, Ready was supposed to be assisting Holmes in the computer lab. However, Ready was a no-show for ten minutes. During that time period, Holmes looked into the library (via a window in the computer lab) and saw Ready in the library at a computer. Ready admits that she was in the library (rather than the computer lab where she was supposed to be) and that she was on a computer. Ready testified that

she thought it was acceptable for her to be in the library on a computer at that time because she was checking her work email.

She was wrong on both counts. Here's why. First, she wasn't supposed to be in the library at that point in time; she was supposed to be in the computer lab assisting the students in Holmes' class. Second, her reason for being on a computer doesn't matter. Once again, at that point in time, she wasn't supposed to be on a computer; she was supposed to be assisting students in Holmes' class.

Ready also offered the excuse that while she was in the library, she assisted two students at a table nearby the computer she was at. The Employer expressly disputes Ready's contention that she was assisting any students in the library at that time, because Holmes told Loeffelholz that there were no students near Ready (when Ready was sitting at the computer). In weighing this conflicting evidence, it is noted that Holmes had no compelling reason to make up her statement to Loeffelholz, while Ready was trying to save her job. I find, just as Loeffelholz and Holmes did, that Ready was not assisting any students in the library as she claimed she was (while she was on the computer). Even if I'm just plain wrong on that point – and Ready was indeed assisting some students in the library – there's still a problem with that. It's this: at the hearing Ready said that the students she was assisting at the time were not students in Holmes' class. The reason that is problematic is because Ready was not empowered to decide which students she helped. The Employer gets to make that call, and it had previously decided that at that point during the day, Ready was supposed to be helping the special education students in Holmes' classroom. She didn't do that.

The next day – June 4 – Loeffelholz sent Ready an email setting up an investigatory meeting to discuss the instances referenced above. Upon getting that email, Ready became very emotional and cried. In my view, that reaction was understandable. That said, what Ready did next was not acceptable. What I'm referring to is this: when some children in Brewer's classroom asked Ready why she was crying, she responded by telling them “some people don't think I'm doing my job.” Under the circumstances, it can easily be inferred that Ready's reference to “some people” meant Brewer and Loeffelholz. By making that statement, Ready was essentially blaming them (i.e. Brewer and Loeffelholz) for her (Ready's) predicament, and implicitly inviting the children to take her side in a workplace dispute she was having with their teacher and their school principal. That conduct crossed the proverbial line and constituted inappropriate workplace behavior for a teacher's assistant.

Next, while the matters noted above might seem relatively minor to an outsider, the Employer considered these separate instances to be part of a bigger problem. The bigger problem was this: the Employer wanted Ready – like all teacher assistants – to perform certain work at certain times. Specifically, the Employer wanted her to assist specific students at specific locations. However, Ready wasn't doing that. Instead, she acted as a roving teacher's assistant

without portfolio. What I mean by that statement (without portfolio) is that Ready went where she wanted to go and helped the students she decided to assist. While Ready didn't think there was a problem with that, there was. The problem with Ready's actions were that Ready didn't get to make those decisions on her volition. Instead, her supervisor did, and Loeffelholz had repeatedly told Ready not to stray from her assigned classes and her assigned students. However, on the occasions noted above, Ready failed to comply with Loeffelholz's directives and instead did the work she wanted to do. Once again, the reason that was problematic is because it's the employer – and not the employee – that decides what work the employee is to perform.

I therefore find – just as the District did – that Ready engaged in inappropriate workplace conduct on the dates noted above.

When employees do not perform the work they are supposed to perform, or they perform it inadequately, employers have a variety of tools at their disposal to try to change the employee's behavior and work performance.

If I were applying a just cause standard, I would turn next to reviewing the actions that the Employer took, and decide if I thought Ready's discharge for poor work performance was warranted under all the circumstances.

However, as previously noted, I'm not going to do that here, because I'm not applying the just cause standard. Instead, I'm simply reviewing the discharge of an at-will employee. Under the standard applicable to same, the Employer holds all the cards and gets to decide what penalty to impose. Here, it decided that Ready's actions warranted discharge. Under the circumstances present here, where Ready was an at-will employee, that was the Employer's call to make. Consequently, the Employer's decision to terminate Ready is not overturned. Therefore, her discharge stands, and her grievance is denied.

In light of the above, it is my

DECISION

That the District's decision to terminate Margaret Ready is not overturned. Therefore, her discharge stands, and her grievance is denied.

Dated at Madison, Wisconsin, this 29th day of January 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones
Impartial Hearing Officer