BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of the Grievance of

DAVID BAGEMEHL

Under the Grievance Procedure of

SHEBOYGAN SCHOOL DISTRICT

Case 130
No. 72225
MM-6473

DECISION NO. 35068

Appearances:

Mark DeLorme, Staff Representative, AFSCME Council 40, 701 North 8th Street, Manitowoc, Wisconsin 54220, appearing on behalf of Grievant David Bagemehl.

Robert Burns, Attorney, Davis & Kuelthau S.C., Attorneys at Law, 318 S. Washington Street, Suite 300, Green Bay, Wisconsin 54301-4242, appearing on behalf of the District.

DECISION OF THE IMPARTIAL HEARING OFFICER

On August 16, 2013, the Sheboygan 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 David Bagemehl. Mr. Bagemehl was represented by AFSCME Council 40 as noted above. A hearing was conducted on March 12, 2014, in the offices of the Sheboygan School District, Sheboygan, Wisconsin. The hearing was transcribed. Thereafter, the parties filed briefs, whereupon the record was closed on May 9, 2014. 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 Grievant proposed the following issue:

> Did the District have just cause to terminate the grievant? If not, what is the appropriate remedy?

The District proposed the following issue:

> Whether the termination of the grievant was within the managerial discretion of the District?

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

BACKGROUND

In 1994, David Bagemehl applied for employment with the District. On his application, he disclosed that he was a convicted felon. In 1987, he had been charged with stealing money from his then employer. He pled guilty to the charge, was convicted, and was placed on probation until restitution was paid in full. When Bagemehl was hired, the law in Wisconsin was that an employer could not discriminate against a convicted felon. After Bagemehl submitted his application, he was hired by the District as a teacher's aide.

In the years that followed, Bagemehl worked in a variety of teacher aide positions. In 2002, he became an Educational Security Assistant. (NOTE: This job will be described in more detail later.) Prior to his discharge, Bagemehl had been working as an Educational Security Assistant at Tower Academy.

Tower Academy is a school that provides special education students identified with emotional behavioral disabilities that cannot fully function within a regular high school setting with the life skills necessary to be successful citizens in school, at home and in the community. School Principal Lisa Patton testified they deal with students with "very high needs" and the students need continuous supervision. The school day at Tower Academy ends at 3:00 p.m.

The Educational Security Assistants (hereinafter ESAs) at Tower Academy supervise the safety of the students, staff and people who enter the building. Simply put, they maintain order in the hallways and classrooms. If students go on a field trip, the ESAs would go along. The ESAs work from 8:00 a.m. to 4:00 p.m. They do not receive a lunch break, but rather work continuously during that time period.

* * *

In the 2011-12 school year, Bagemehl experienced a lot of stress in his life. Principal Patton was aware of same, and had many conversations with Bagemehl about the stress he was under and possible ways in which he could manage his anxieties.

In the spring of 2012, Patton and Peggy Corning (the District's Human Resources Coordinator) met with Bagemehl concerning various performance issues he was having. Shortly

thereafter, Bagemehl went on Family and Medical Leave Act (FMLA) leave for the remainder of the school year.

Following his FMLA leave, Bagemehl was cleared to return to work in the fall of 2012. Before he returned to work, Patton and Corning met again with Bagemehl and discussed various coping strategies he could use. They also addressed their work expectations of him for the upcoming school year. One of their work expectations was that even if he (Bagemehl) felt stressed, he was not to leave the building without approval.

On November 21, 2012 though, Bagemehl did just that. That day was the day before the Thanksgiving break. As such, it was a particularly chaotic school day. Bagemehl left the building about 2:00 p.m. that day on his own volition without approval from anyone and without telling anyone he was leaving. After his absence was noted, school staff tried unsuccessfully to locate him. The school secretary later reached Bagemehl on his cell phone. Bagemehl told her that he was at home and was not returning to work that day.

The timesheet which Bagemehl submitted for that week contained a discrepancy. Specifically, it listed his work hours for November 21, 2012 as 8:00 a.m. to 4:00 p.m. That was incorrect because he left work at 2:00 p.m. that day.

On the first workday following the Thanksgiving break, Patton had a face-to-face discussion with Bagemehl about his leaving the building early on November 21 without permission and without telling anyone he was leaving. Bagemehl responded that the reason he did so was because, in his words, he had had "enough" that day and needed to go home. Patton reiterated to Bagemehl that when he felt stressed, he was to come to her and he had not done so. Also, she reiterated to him that he was not to leave the building without authorization or approval.

On November 29 and December 5, 2012, Patton and Corning met with Bagemehl and counseled him on the following workplace matters. First, they told Bagemehl that he was not to leave the building during the day without authorization and without telling Patton he was leaving. Subsumed in that admonition was that he was not to run personal errands during the school day. Second, they told him again that if stressors occur, he was to talk to Patton about them. Third, they talked about a sick day Bagemehl took on November 30, 2012. On that day, he did not follow the correct call-in procedure. Therefore, they reviewed with him the procedure he was to follow when he called in sick. Fourth, Bagemehl was told that if he was going to be absent, he needed to communicate his absence because of the importance of transitioning students. Fifth, they spoke about the inaccurate timesheet which he had submitted for the Thanksgiving week (and, in particular, for November 21). Sixth, they discussed a comment Bagemehl had (allegedly) made to another staff member on November 21 that he was going to leave (the building) when the kids left (i.e. at 3:00 p.m.). They told him that he was not to leave the building when the kids left at 3:00 p.m., but rather had to wait until 4:00 p.m. to leave. Finally, they told Bagemehl that he was to attain and remain current on CPI training. Bagemehl had apparently let his CPI certification lapse.

On January 8, 2013, Corning gave Bagemehl a document entitled "Written Documentation – One-Day Suspension." It provided thus:

> SUBJECT: Written Documentation – One-Day Suspension
>
> DATE: January 8, 2013
>
> Dave, we met on Thursday, November 29, 2012 because you left work early on Wednesday, November 21, 2012 without permission and without communicating with an administrator or designee.
>
> Upon investigation, the following facts were determined:
>
> - On the afternoon of November 21, 2012 Casey called you regarding a student and asked where you were and if you were coming back. You told her you were at home and not coming back.
> - Lisa Patton talked to you on Monday, November 26, 2012 to understand your reasoning. She said you admitted that you had taken off because you'd "had enough." She reminded you that you were supposed to go to her when you were feeling stressed and you chose not to. You told her you were feeling anxiety about being criticized by staff.
> - January 2010. You admitted to improperly restraining a student and you received a written warning. As part of that discipline, it was specifically outlined that it was an expectation, **"that you will remain current with the CPI training that is required of staff members."** (Last 2-year certification February 23, 2010.)
>
> On December 5, we met with Lisa Patton, Barb Felde, and Dean Dekker.
>
> As part of a progressive discipline system, and based on your failure to comply with expectations, you should serve a one day suspension without compensation.
>
> In addition, we (Lisa and Peggy) feel it necessary to outline the following specific expectations:
>
> - You may not leave the building for any unscheduled reason without permission from the administrator or designee
> - You may not run personal errands during the school day

> - If you are unable to come to school, leave a message in the main office before 8:00 am in addition to calling the sub caller
> - You will attain/remain current with the CPI training that is required of staff members. It is your responsibility to promptly register for the training when e-mail notification of upcoming training is sent. You are responsible for contacting Human Resources in the case the class is full or you are not able to attend.
>
> Dave, the one day suspension without compensation will be waived and you will not be considered a notified employee at this time on a non-precedent setting basis with acknowledgment that you are further specifically and directly warned that any recurrence of conduct of an identical or related nature and/or failure to perform or ability to be effective in your position will result in further disciplinary action of at least a three day unpaid suspension and may be up to and including termination of employment. Please govern your actions accordingly.

* * *

As noted above, Corning had several meetings with Bagemehl about various work performance matters. When these meetings started, Corning (who was new to the District) did not know Bagemehl or his work history. In these meetings, Bagemehl made numerous statements to Corning to the effect that he was a good employee who had had no work performance problems in the past, had never been written up, and had received nothing but good evaluations over the years. In making these statements, Bagemehl used the words "always" and "never" repeatedly. As a result of these absolute statements concerning his past employment history, Corning reviewed Bagemehl's personnel file in detail.

In the course of doing so, she learned from Bagemehl's 1994 employment application that he was a convicted felon. As previously noted, the law in Wisconsin in 1994 was that an employer could not discriminate against a convicted felon. The law changed in 2011. Now, school districts have a special exception under the Wisconsin Fair Employment Act's arrest and conviction record provisions that permit school districts to refuse to hire or terminate convicted felons without establishing the "substantial relationship" between the job and conviction that would otherwise be required. This exception is found in Sec. 111.335(1)(d)2, Stats., which provides thus:

> Notwithstanding s. 111.322, it is not employment discrimination because of conviction record for an educational agency to refuse to employ or to terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony.

It is in that context that the following occurred.

FACTS

On March 21, 2013 (all dates hereinafter refer to 2013), several support staff employees at Tower Academy decided to attend a funeral wake later that day for a coworker's mother. Bagemehl was one of the employees. He offered to drive a coworker to the wake and did.

Before that happened though, Bagemehl decided that he had to perform two personal tasks: he wanted to put gas in his car and he wanted to let his dogs out (of his house). For reasons not identified in the record, Bagemehl further decided that he had to perform these two tasks during his work day (as opposed to doing them after his work day ended at 4:00 p.m.).

Bagemehl sought out Principal Patton, but he discovered that she was gone for the day.

At 3:10 p.m., Bagemehl went to the lead teacher in the school – Mr. Debbink – and asked him for permission to leave early. Debbink granted his permission. Insofar as the record shows, this was the first time Bagemehl asked Debbink for permission to leave early. Also, Debbink was unaware of the various matters referenced in the BACKGROUND section.

Bagemehl then left the building and did the two errands referenced above. First, he got gas for his personal car. Second, he went home and let his dogs out. He then returned to the school, arriving back at 3:50 p.m.

During the day, Kathye Sager (the other ESA at Tower Academy) learned of Bagemehl's plans to leave the building before 4:00 p.m. to run the two errands noted above. That upset her, because it had happened before, Also, it left the school's security solely in her hands. Sager and Bagemehl had a history of workplace conflicts, and Sager had previously complained to Patton about Bagemehl's leaving the building without permission during work hours and running personal errands. Because of that history, when Sager saw Bagemehl return to the building at 3:50 p.m., she expressed her frustration to Bagemehl by saying: "This is fucking bullshit; no one ever covers for me."

The next day – March 22 – Sager met with Principal Patton and expressed frustration over the lack of security support she got from Bagemehl. When Patton asked for specifics, Sager told Patton that on the previous day (March 21) Bagemehl had left the building at 3:10 p.m. to fill his car with gas and let out his dogs. Sager also told Patton that Bagemehl returned to the building at 3:50 p.m.

Patton then talked with Pauline Heyman about Bagemehl's leaving the building on the afternoon of March 21. Heyman was the person who rode with Bagemehl to the wake. Heyman told Patton that she and Bagemehl left the building at 4:00 p.m. Heyman also told Patton that she saw Bagemehl return to the building at 3:50 p.m. (from running his two errands).

Patton then reviewed Bagemehl's timesheet for the week in question. On that timesheet, Bagemehl had written that on March 22, he worked from 8:00 a.m. to 1:30 p.m. As noted previously, Bagemehl's regular work hours are from 8:00 a.m. to 4:00 p.m. Thus, he made an adjustment on his timesheet for March 22. With regard to March 21 though, Bagemehl wrote down that he worked from 8:00 a.m. until 4:00 p.m. that day. As a result of that entry for March 21, the District paid him that day for an eight-hour shift even though he did not, in fact, work for the District for eight hours that day.

After doing the foregoing, Patton turned the results of her investigation over to Corning.

Sometime prior to April 2 – the record doesn't identify when – Corning talked with Local Union President Dean Dekker about Bagemehl. In a short conversation, Corning told Dekker that she was going to terminate Bagemehl, and in doing so, she was going to hang her hat (so to speak) on what she characterized as the felony matter.

On April 2, Corning and Patton met with Bagemehl and Union Representatives Barb Felde and Dean Dekker. According to Bagemehl, the meeting started with Corning stating that on March 21, Bagemehl "left the building to run personal errands without permission and [as a result] you are fired." Bagemehl said he responded: "Actually, I did have permission to leave," and then he elaborated that he had gotten permission from Mr. Debbink to leave. After that topic was addressed, Corning raised the matter of Bagemehl's felony conviction. She told Bagemehl that a new law allowed school districts to terminate convicted felons. By his own admission, Bagemehl was flabbergasted and outraged that his 26-year old felony conviction was being used as a basis for discharge. He thought it was unfair for the District to rely on it. Sometime during that meeting – the record does not indicate when – Corning gave Bagemehl the following discharge letter which she had prepared prior to the meeting:

> SUBJECT: Written Documentation – Termination
>
> DATE: April 2, 2013
>
> Dave, we met on Thursday, November 29, 2012 because you left work early on Wednesday, November 21, 2012 without permission and without communicating with an administrator or designee.
>
> On December 5, we met with Lisa Patton, Barb Felde, and Dean Dekker. The following specific expectations were outlined:
>
> - You may not leave the building for any unscheduled reason without permission from the administrator or designee
> - You may not run personal errands during the school day
> - If you are unable to come to school, leave a message in the main office before 8:00 am in addition to calling the sub caller

> - You will attain/remain current with the CPI training that is required of staff members. It is your responsibility to promptly register for the training when e-mail notification of upcoming training is sent. You are responsible for contacting Human Resources in the case the class is full or you are not able to attend.
>
> You were further specifically and directly warned that any recurrence of conduct of an identical or related nature and/or failure to perform or ability to be effective in your position will result in further disciplinary action of at least a three day unpaid suspension and may be up to and including termination of employment.
>
> Subsequently, it was reported by two Tower staff members that you left school on March 21, 2013 to run personal errands and that you left the building without permission from the administrator.
>
> In addition, it has come to my attention that you are a convicted felon. You may be aware of the 2011 Senate Bill 86 otherwise referred to as Wisconsin Act 83 that permits an educational agency to refuse to employ or terminate from employment an unpardoned felon. The Act allows an educational agency to fire or to refuse to hire a person who has been convicted of a felony, whether or not the circumstances of the offense are substantially related to the circumstances of the job.
>
> Dave, based on this most recent incident, your recent pattern of behavior and the new conviction law, Sheboygan Area School District wishes to dismiss you as an employee. Your last day on record will be Friday, March 22, 2013.

Following that meeting, Corning talked with Debbink about Bagemehl's leaving the building on the afternoon of March 21. Debbink told Corning that Bagemehl asked him if it was okay if he left early, and he (Debbink) replied in the affirmative.

The next day, Bagemehl sent an email to the District Superintendent objecting to his discharge. In that email, he particularly objected to the District's decision to rely on his old felony conviction as a basis for his discharge.

After he was fired, Bagemehl filed a grievance challenging his discharge.

On April 22, Bagemehl and his union representatives met with Corning and Patton for the first step of the grievance procedure. In a subsequent memo memorializing that meeting, Corning wrote in pertinent part:

> After interviewing Jim Debbink it was agreed by all that Dave did ask permission to leave work early on Thursday 21, 2013 (sic).

On May 16, Bagemehl and his union representatives met with Patrick Flaherty (the District's Assistant Superintendent of Human Resources) for the second step of the grievance procedure. In a subsequent letter memorializing that meeting, Flaherty wrote as follows:

> We met in my office on Thursday, May 17, 2013 (sic) to discuss the grievance that you filed regarding your termination as an employee of the Sheboygan Area School District. Barb Felde, Dean Dekker, and Mark DeLorme were also in attendance. This was the second step in the grievance process.
>
> After reviewing the documentation and the notes from our meeting, I still believe that the termination is justified.
>
> You did ask permission to leave the building in the afternoon of Thursday, March 21, 2013. However, you also used the time to run personal errands during the school day. You had been specifically and directly warned not to run personal errands in a memo from the Coordinator of Human Resources, Peggy Corning, dated January 8, 2013. It stated, "You must not run personal errands during the school day."
>
> What most concerns me about the situation is that you turned in a timesheet for the March 21, 2013 date that documented that you had worked until 4:00 p.m. Misrepresenting your hours on a timesheet is an offense that warrants termination.
>
> Finally, Wisconsin State Law 111.335(d)(2) allows educational agencies to refuse to employ or to termination from employment an unpardoned felon. David, during our investigation it was revealed that (sic) did experience a felony conviction.
>
> We, the Sheboygan Area School District, believe on both grounds that termination of your employment is both legal and justifiable. Therefore, I am denying your grievance.

The timesheet misrepresentation matter that Flaherty referenced in the fourth paragraph above (i.e. the sentence which begins "What most concerns me about the situation …") was not referenced in Bagemehl's discharge letter. Flaherty testified that the reason the timesheet misrepresentation matter was not included in the discharge letter is because "AFSCME representatives" – whom he did not identify – asked Corning to delete it, and she deleted it at

their request. Dean Dekker testified that neither he nor Barb Felde asked Corning to delete the timesheet misrepresentation matter from Bagemehl's discharge letter.

DISCUSSION

Introduction

At the beginning of his brief, the Grievant raised a series of rhetorical questions which were directed to the School Board. The reason he did so, of course, is because the School Board will be the final decision maker in this matter. In those rhetorical questions, the Grievant essentially asked what kind of employer does the Sheboygan School District want to be. Specifically, does it want to be a fair and ethical employer? The Grievant avers that if the School Board answers those questions in the affirmative, then it should find that the decision to terminate him was unfair and should reconsider the decision to fire him.

The Standard of Review

Having made those introductory comments, I'm next going to address the standard of review which I'm going to use to review the District's decision to terminate Bagemehl's employment.

Bagemehl 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 Sheboygan 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 Bagemehl, and other school district support staff employees like him, 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 Support Staff Handbook (that covers Bagemehl) or the Employer's grievance procedure that says that discipline will be reviewed under a just cause standard. Said another way, there's no reference to "just cause" in either the Support Staff Handbook or the Employer's grievance procedure. That's important, because the protection granted to an employee by a just cause standard is never granted implicitly. It has to be done explicitly, and that was not done here. 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, Bagemehl's representative ably made all the arguments that are usually raised by employees and unions in just cause cases. Specifically, Bagemehl's representative argued (1) that Bagemehl's conduct on the day 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 because Corning didn't talk to any witnesses – including Bagemehl – before she decided to terminate Bagemehl; (3) that the Employer committed various due process violations, with one being that Bagemehl's discharge letter was already prepared at the time the Employer met with him on April 2 (to hear his side of the story) and another being that the discharge letter did not reference the timesheet misrepresentation matter (which Flaherty later characterized as the most egregious violation Bagemehl committed); (4) that the Employer improperly used Bagemehl's felony conviction from 26 years ago as a trump card and a bludgeon; and (5) that even if Bagemehl did engage in workplace misconduct, the level of discipline which the Employer imposed on him for that misconduct (i.e. discharge) was inappropriate and excessive given all the underlying circumstances.

If I was reviewing Bagemehl's discipline under a just cause standard, I would first decide whether Bagemehl committed misconduct. Assuming that the showing of misconduct is made, I would then determine whether the punishment of discharge was warranted. Subsumed into this second element are many of the contentions referenced in the preceding paragraph. I would review those contentions in order to complete the record. After doing so, I would have hung my proverbial hat on contentions (2) and (3) above and used them as the basis to overturn the discharge. However, that's not going to happen though because – as previously noted – I'm not empowered here to review Bagemehl'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 many of the arguments referenced in the preceding paragraph are not going to be addressed herein because they 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 Sheboygan School District for the support staff employees.

* * *

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

I've decided to introduce my answer to that question by noting at the outset that in his brief, the Grievant averred that "an employer must establish a standard of review" for the IHO to use when reviewing a discharge (page 2). While the applicable statute (Sec. 66.0509(1m), Stats.) says that the employer's grievance procedure shall specify "the process that a grievant and an employer must follow," it's debatable whether that means that the employer has to set a standard for the IHO to use when reviewing a discharge.

In any event, the District's grievance procedure does not expressly specify a standard of review which the IHO is to use when reviewing a discharge.

The Grievant implies that is odd because he points out that in an internet search of Wisconsin public employer grievance procedures, he found at least 18 municipal employers who have specified a standard of review in their grievance procedure. Building on that, he opines that "it is rare to see a public employer grievance procedure in which no standard of review is included." I have no reason to dispute that assertion. However, even if it's rare, some municipal employers have decided not to specify a standard of review in their grievance procedure. For example, that was the situation that existed in the Cuba City School District IHO decision which the Employer cited in its brief.

The Grievant then notes that those municipal employers who have specified a standard of review in their grievance procedure have not been uniform in the standard selected. Simply put, the standards selected are all over the proverbial map. Just to name a few, some specify an arbitrary and capricious standard, others a rational basis standard, others an abuse of discretion standard, while others a reasonableness standard. The Grievant also point out that all of these standards of review "have different levels of scrutiny of the decision to terminate." That's true, they do. What I mean by that is that it's possible for a decision maker to sustain a discharge under one standard, and overturn the same discharge under another standard.

While the Grievant didn't explicitly ask me to pick one of the standards I just referenced in the previous paragraph and apply it herein, I considered doing just that. However, I decided not to do so. Here's why. In my previous discussion on just cause, I said that if I was to apply a just cause standard when the grievance procedure did not specify same, "I would literally be plucking it out of thin air and applying it on my own volition." That would also be the case if I were to apply any of the standards which were noted in the previous paragraph. None of those standards are specified in the grievance procedure, so I'm not empowered to apply any of them either. While it's true that the District's counsel did use the phrase "arbitrary and capricious" in his opening statement, what he specifically said was that the Grievant's discharge "was not done in an arbitrary and capricious manner." In and of itself, that statement does not empower me to apply an arbitrary and capricious standard herein.

The District's Support Staff Employee Handbook contains an acknowledgement form which expressly recognizes that the employee's employment relationship with the District is "at-will" with no property interest in continued employment with the District. In Wisconsin, the general rule is that, absent an employment contract, at-will employment is terminable by either side with or without cause. See MacKenzie v. Miller Brewing Co., 2001 WI 23 (2001). While there is a limited public policy exception to this general rule, that public policy exception does not apply to this case.

Although the District did not expressly specify a standard of review for the IHO to use, a standard of review is subsumed into the employment at-will relationship. It's this: at-will employees can be terminated at any time, for any reason, or for no reason at all. The Support Staff Handbook mirrors this well-established principle when it provides in the "Preamble and Definitions" section that "employment may be terminated at any time, with or without cause … ," and when it provides in the "Discipline and Termination" section that employees may be "dismissed from employment at any time, for any reason related to their work performance or work related conduct which is determined to be unacceptable" by the District.

In this case, it was the Employer that decided to end Bagemehl's employment relationship. Under the employment at-will doctrine, it could do that (i.e. end Bagemehl's employment) for a good reason, a bad reason or no reason at all. Thus, in this case, there is no "cause" standard which needs to be analyzed. Similarly, the District does not have to prove that Bagemehl engaged in misconduct or violated some rule by his conduct. Instead, all the District has to show is that they concluded there were sufficient reasons for Bagemehl's dismissal.

Not surprisingly, Bagemehl strenuously objects to the IHO applying that standard. He asks rhetorically, "How can an employee demonstrate he was unfairly terminated in violation of the at-will employment standard?" The short answer to that question is this: he can't. It's rare when employer-imposed discipline won't pass muster under the standard of review 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 certainly 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 Bagemehl'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 public policy exception which doesn't apply to this case).

The Merits

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

In the fall of 2012, after Bagemehl returned to work following FMLA leave, Principal Patton gave Bagemehl the following work directive: he was not to leave the building during work hours without permission. Subsumed into that directive was that he was not to run personal errands during the workday. Obviously, there was some history on these matters, or Patton would not have counseled Bagemehl about them. The point of her counseling was to get Bagemehl to change what he had been doing. After being counseled, Bagemehl knew what was expected of him. Additionally, there's no question that these work directives were reasonable and legitimate expectations for a school district to have of an ESA.

On November 21, 2012, Bagemehl did not comply with these work directives. On that day – which happened to be the day before Thanksgiving break – Bagemehl just up and left work at 2:00 p.m. without telling anyone and without approval. It doesn't matter that the reason he left work that day was because he was stressed. Patton had specifically told him what procedure he was to follow when he felt stressed, and he failed to follow that procedure, as well as Patton's work directive, on November 21, 2012. Another thing that exacerbated this matter was that Bagemehl listed the time that he left work that day as 4:00 p.m. (rather than 2:00 p.m.). Listing an inaccurate time on a timesheet is a serious workplace violation because it can be construed as falsification of a timecard. That offense is often considered a cardinal offense, meaning it's an offense where an employee can be summarily discharged.

After that incident occurred, the Employer decided that Bagemehl was having recurring problems with a number of workplace issues. As a result of those concerns, it did what employers do when they have problems with an employee's work performance; it counseled the employee about the problem. On November 29 and December 5, 2012, Corning and Patton met with Bagemehl and gave him numerous directives. The directives which are germane to this discussion are the following: he was not to leave the building during work hours without authorization; he was not to run personal errands during the school day; he was not to leave the building when the kids left at 3:00 p.m.; and he was to make sure he submitted timesheets that accurately reflected his time worked. Following these two meetings, Corning put these work directives in writing on January 8, 2013, and suspended him for one day for the above-noted workplace misconduct. That letter specifically warned Bagemehl that any recurrences of similar misconduct would result in further disciplinary action, up to and including termination of employment.

* * *

It's in that context that the following occurred on March 21, 2013.

That day, Bagemehl and a coworker attended a funeral wake for a coworker's mother. They left for the wake after their work shift ended at 4:00 p.m.

Before Bagemehl left for the wake though, he decided he wanted to perform two personal tasks: he wanted to get gas for his car and he wanted to go to his house to let his dogs out.

I'm going to stop right there and elaborate further on the previous paragraph. What I just said was that Bagemehl had a couple of errands he wanted to run before he left for the wake. In and of itself, there's nothing surprising about someone deciding they have to run some errands before they do something or go somewhere. It happens all the time. What's germane to this discussion, though, is when those errands are performed. Specifically, are they performed before, during or after work? Generally speaking, the answer to that question is that employees perform errands before and after their work shift, not during their work shift. The reason for that, of course, is that most employers don't want hourly employees running personal errands during their work time because it interferes with, and distracts from, the work they are supposed to be performing. Building on that premise, I surmise that most employees know the drill (so to speak) and perform their errands before or after their work shift. By that, I mean that employees know they are supposed to perform their personal errands outside of their work hours. While certainly there are some employers that allow hourly employees to leave work on their own volition and run errands during the course of their regular workday, the record does not show that the Sheboygan School District is one of those employers. Instead, the record shows that in the Sheboygan School District, ESAs are expected to be at their building continuously during their 8:00 a.m. to 4:00 p.m. work hours.

Given those comments, it would be one thing if Bagemehl had shown that the reason he left work during his work hours was because it was some kind of emergency. However, that was not the case. Instead, he left work for the most mundane of reasons, namely, to get gas for his personal car and to let his dogs out. Both of those errands did not need to be performed when Bagemehl decided to perform them. What I mean by that is that Bagemehl could have performed both those errands after he got off work at 4:00 p.m. For unexplained reasons though, Bagemehl decided that his two errands could not wait until after his work shift ended, but rather had to be performed during his workday. That's surprising to me, given the repeated admonitions he had previously received **not** to run personal errands during his workday. Thus, he was on notice not to do that. Nonetheless, on March 21, 2013, Bagemehl did it anyway. By doing that (i.e. deciding that he had to run two personal errands during his workday), he rightfully exposed himself to discipline for failing to comply with a legitimate work directive.

As Bagemehl sees it, he did nothing wrong that day because he got permission from lead teacher Debbink to leave the building. However, the person who gave Bagemehl approval to leave the building (i.e. lead teacher Debbink) was unaware of the history that existed between Bagemehl and Patton concerning the topic of Bagemehl's leaving work early during work hours to run personal errands. Also, it's unclear exactly what Bagemehl told Debbink he was going to do (when he left the building). Furthermore, since Debbink was unaware of the history between Bagemehl and Patton regarding Bagemehl's leaving work during work hours to run personal errands, I think it can also be inferred that Debbink was unaware that his granting Bagemehl permission to leave the building – for whatever reason – caused a problem with Kathye Sager. That's because she had previously complained to Patton about Bagemehl's leaving the building

without permission during work hours and running personal errands. Thus, Debbink's granting approval for Bagemehl to leave the building exacerbated the conflict that existed between those two employees. Also, it's easy to see that from Sager's perspective, Bagemehl should not have left the building that afternoon – even though he got permission to do so from Debbink – because that left her without any security support on a day when Principal Patton was out of the building.

* * *

Independent of those comments, I find that Bagemehl's actions were problematic for the following reasons.

First, there's the length of time he was gone running his two errands. What I'm referring to is this: there's no question that Bagemehl got back to school after running the two errands at 3:50 p.m. The time he left school (to run those errands) is disputed, though, with two people saying it was 3:10 p.m. and Bagemehl saying it was 3:15 p.m. In my view, the five minutes in dispute does not matter. Either way, he was gone from the building for at least 30 minutes. When that amount of time is considered in the context of an 8-hour day, a half hour is not insignificant. During that time period, Bagemehl was not doing the work that the Employer paid him to do. Instead, by his own admission, he was pursuing his own personal interests.

Second, there's the timesheet misrepresentation matter. When Bagemehl subsequently submitted his timesheet for the week in question, he wrote down that on March 21 he worked from 8:00 a.m. until 4:00 p.m. (i.e. a full 8-hour day). That was just plain wrong because he was out of the building that afternoon running his two personal errands for at least a half hour. His timesheet does not reflect that. What's interesting about his timesheet for that week is that his entry for the very next day (March 22) lists his work hours as 8:00 a.m. to 1:30 p.m. (i.e. a 5½-hour day). Obviously, Bagemehl could have made a similar entry for March 21, but for unknown reasons, he did not do so. Instead, he represented to the Employer that he was on the clock (so to speak) for an 8-hour period on March 21. The problem with that, of course, is that it misrepresented his actual work hours on that date by a half hour. The Employer subsequently relied on the timesheet Bagemehl submitted and paid him for the half hour he was off site running his personal errands and not performing work for the Employer.

The Employer concluded that on March 21, 2013, Bagemehl engaged in the same type of misconduct that he had previously been counseled not to repeat. Specifically, he left the school building during the workday for the express purpose of running personal errands. Additionally, when Bagemehl filled out his timesheet for that date, he misrepresented the amount of time he worked for the Employer. He wrote down on that timesheet that he worked eight hours for the Employer that day. That was wrong, because for at least a half hour that day, Bagemehl was running personal errands.

The District concluded that the foregoing conduct constituted workplace misconduct. Based on the reasoning explained above, I concur with that conclusion.

* * *

Aside from the work performance matters just referenced, there's also a matter not related to Bagemehl's work performance that the Employer decided to rely on to support Bagemehl's discharge. I'm referring, of course, to Bagemehl's 26-year-old felony conviction. Corning discovered the existence of same when she was reviewing Bagemehl's personnel file looking to build a case against him. As Corning herself put it in her statement to local union president Dekker, she was going to terminate Bagemehl, and in doing so, she was going to hang her hat (so to speak) on the felony matter.

As was noted earlier in this decision, when Bagemehl applied for employment with the District in 1994, he disclosed on his job application that he was a convicted felon. At the time, the law in Wisconsin was that an employer could not discriminate against a convicted felon. In 2011, though, the law changed. Now, school districts have a special exception under the Wisconsin Fair Employment Act's arrest and conviction record provisions. This exception, which is found in Sec. 111.335(1)(d)2, Stats., permits school districts to refuse to hire or terminate convicted felons without establishing the "substantial relationship" between the job and conviction that would otherwise be required.

The District contends that it was within its legal rights to rely on this statute and use Bagemehl's felony conviction as an additional basis to justify his termination. In addressing this contention, I've decided to respond very narrowly. Specifically, all I'm going to say is that the District had the legal right to rely on that statute.

Having found that the District had the legal right to rely on that statute, that still leaves the question of whether the District should have used Bagemehl's felony conviction from 26 years ago as a basis to justify his termination. Bagemehl argues vehemently that the District should not have used his felony conviction as a basis for his discharge. He puts it this way in his brief:

> Putting the other issues used as a basis for termination aside, the manner in which the District used the felony conviction as a bludgeon is awful. For a 20 year employee to be treated with such contempt and lack of empathy is shocking. I hope the District, and specifically the School Board, consider how this particular issue was handled and the impact it had on David and his family. This was unnecessary cruelty just to play a trump card in the event David had the audacity to grieve his termination and "it becomes an issue." Nobody should be treated like this … .

I'm going to leave it to the School Board to weigh and consider those points, because they are going to be the final decision maker in this matter.

* * *

As I stated earlier, I'm not empowered here to apply a just cause standard to review Bagemehl's discharge. I'm not even empowered to apply any of the other standards of review that were previously mentioned. Instead, I'm constrained to apply the standard applicable to the discharge of an at-will employee. As noted earlier, that standard is that an employer can terminate an at-will employee at any time, for any or no reason. Obviously, the employer holds all the cards under that standard and gets to decide what penalty to impose. Here, it decided that Bagemehl's actions warranted discharge. Under the circumstances present here, where Bagemehl was an at-will employee, that was the Employer's call to make. Consequently, the Employer's decision to terminate Bagemehl is not overturned. Therefore, his discharge stands, and his grievance is denied.

In light of the above, it is my

DECISION

That the termination of the Grievant was within the managerial discretion of the District. Therefore, his discharge stands, and his grievance is denied.

Dated at Madison, Wisconsin, this 23rd day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones
Impartial Hearing Officer