

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 33
 WEST DePERE EDUCATIONAL : No. 47129
 SUPPORT PERSONNEL ASSOCIATION : MA-7178
 :
 and :
 :
 WEST DePERE PUBLIC SCHOOLS :
 :

Appearances:

Mr. Lawrence J. Gerue, Executive Director, Northeast United Educators, on behalf of the West DePere Educational Support Personnel Custodial Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader, on behalf of the West DePere Public Schools.

Unit.

ARBITRATION AWARD

The West DePere Educational Support Personnel Unit, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide the instant dispute between the Association and West DePere Public Schools, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and David E. Shaw was designated to arbitrate in the dispute. A hearing was held in DePere, Wisconsin on April 16, 1992 before the undersigned. A stenographic transcript was made of the proceeding and the parties completed the post-hearing briefing schedule by June 24, 1992. Based upon the record and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to stipulate to a statement of the issues. The District would state the issues as follows:

Did Mr. Thyes violate Article 13, Subsection B, Subsection 2, by working overtime without authorization by his supervisor? And did he further violate Article 15-D by falsifying his time sheet for January 6th, 1992? If so, what is the appropriate remedy?

The Union states the issues as being:

Did the school district violate the contract when it elected to discharge Gary Thyes when it could have chosen to use a lesser form of punishment available through Article 15 of the Collective Bargaining Agreement?

The Arbitrator concludes that the issue to be decided may be stated as follows:

Did the District violate Article 15, Discipline, of the parties' 1990-1993 Collective Bargaining Agreement when it discharged the Grievant, Gary Thyes? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1990-1993 Agreement are cited:
1/

ARTICLE 4

MANAGEMENT RIGHTS

Board Functions: The School Board hereby retains and reserves unto itself, without limitation, all powers, rights, authorities, duties and responsibilities conferred upon and vested in it by the laws and the Constitutions of the State of Wisconsin and of the United States. These rights include, but are not limited by enumeration to the right to direct all operations of the school system, its properties, and facilities; to establish work rules and schedules of work; hire, promote, transfer, schedule and assign employees in positions within the system; suspend, demote, discharge or take other disciplinary action against employees, to relieve employees from their duties because of lack of work or any other reason not prohibited by law, lay off, including the decision as to the numbers and types of employees to be laid off and the impact upon those employees; reduce in hours; maintain the efficiency of the school system operations; take whatever action is necessary to comply with State and Federal law; to introduce new or improved methods or facilities; to contract out for goods and services; to determine the methods, means and personnel by which the school system operations are to be conducted; to take whatever action is necessary to carry out the functions of the school system in simulations of an emergency, to utilize temporary employees or volunteers, providing full time employees on lay-off are given first opportunity. The exercise of the foregoing powers by the Board, the adoption of policies, rules, regulations and practices and furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement.

. . .

ARTICLE 9

PROBATIONARY PERIOD

All employees shall receive a probationary period of one hundred and fifty (150) consecutive days from most recent date of hire. During the probationary period, the employee shall be subject to dismissal for

1/ Also cited in the District's initial brief but not set forth here are Article 1, Preamble, and Article 8, Grievance Procedure, of the Agreement.

any reason without recourse to the grievance procedure.
Upon completion of probationary period, the employee shall be granted seniority rights from the employee's most recent date of hire.

. . .

ARTICLE 13

HOURS OF WORK, OVERTIME AND CALL-IN PAY

. . .

B. Overtime:

- 1) Employees working in excess of forty (40) hours per week shall be paid at the rate of time and one-half in wages for such excess time.
- 2) Overtime shall not be worked without the prior authorization of the employee's supervisor or the supervisor's designee.

. . .

ARTICLE 15

DISCIPLINE

- A. Purpose: Appropriate discipline may be used by the employer for the purpose of notifying an employee of inappropriate and/or unsatisfactory conduct or alleged infraction of directions, orders, requirements, instructions, or written rules.
- B. Progressive Discipline: When discipline of a nonprobationary employee is to be utilized the following progression shall be implemented:
 - 1) Oral reprimand. Statement placed in employee's personnel file.
 - 2) Written reprimand with a copy placed in the employee's personnel file.
 - 3) Suspension without pay with notation placed in employee's personnel file. Suspension shall not exceed five (5) days.
 - 4) Discharge.
- C. A copy of all letters of suspension and/or letters of discharge shall be provided to the employee involved and to the Union upon its request. Such letter shall state the type of discipline being given and the reason for the discipline.

- D. If the employee's immediate supervisor and/or the District Administrator feels the employee's actions or nonaction so warrant, discharge or suspension may be carried out immediately with no warning notice necessary. Such action or nonaction shall be of a serious nature such as,
- 1) Dishonesty;
 - 2) Drinking on duty or drunkenness;
 - 3) Physical violence on the job;
 - 4) False reports of personnel records such as initial employment records or time sheets;
 - 5) Use of illegal drugs while on duty or on school property;
 - 6) Reckless conduct endangering to yourself, other employees or students
 - 7) Unauthorized absence;
 - 8) Insubordination.
- E. A nonprobationary employee who has been suspended or discharged, may use the grievance procedure by giving written notice to his or her steward and his or her department head within seven (7) working days after such discharge or suspension.

BACKGROUND

The District maintains and operates a number of school buildings. The Association represents the regular full-time custodians employed by the District. The Grievant, Gary Thyes, had been employed as a full-time custodian at Westwood Elementary School since September of 1979 until the time of his termination on January 17, 1992. The Grievant's immediate supervisor at Westwood was the Principal, Jane Paluch. At the time of the discharge, the District's Business Manager, Kevin Hanson, was responsible for supervising the District's support staff and previously that had been done by the Assistant Superintendent, Jerry Sauer.

The Grievant's normal work hours were 7:00 a.m. - 3:00 p.m. Monday through Friday while school is in session, and 7:00 a.m. to 3:30 p.m. during vacation.

On Friday, January 3rd there had been an unscheduled scrimmage of the seventh grade girls' basketball team with another school in the Westwood gym. When the Grievant arrived at the school a little after 6:00 a.m. on Monday, he found the benches in disarray, soda spills and tables disarranged. On January 6, 1992, the Grievant submitted a request to the Athletic Director, Dobkoski, for payment of 1/2 hour of overtime for work he claimed from 6:30 a.m. to 7:00 a.m. that same date. The Grievant had not obtained authorization to perform overtime on that date. Dobkoski is not a supervisor. There is a dispute as to whether he in fact performed any overtime work on January 6th, the Grievant claiming he cleaned and straightened the gym during that time and completed the job later after he finished some of his regular duties, and the District asserting that the Grievant admitted he had not performed any of the duties claimed.

On January 8, 1992, Hanson sent the Grievant the following letter:

To: Gary Thyes

Based on Article 15 of the Master Agreement between the West DePere Educational Support Personnel Custodial Unit and the West DePere Board of Education, you are hereby notified of our intent to utilize the Progressive Discipline Process based on your overtime request of January 8, 1991 (sic) and continued problems with items identified during your oral reprimand of May 31, 1991. If you choose to have a union representative with you, you must notify me by the close of business Thursday, January 9, 1992 to arrange a meeting time and date. In no case shall the meeting date exceed one week from the date of this letter.

Kevin J. Hanson /s/
Kevin J. Hanson
Business Manager

A meeting was held on January 17, 1992 between Hanson, the Grievant and the Association's representative. The Grievant was advised at the meeting that he was being terminated for submitting a false claim for overtime and for not obtaining prior authorization before performing the work. The Grievant received the following letter of termination dated January 17, 1992:

Mr. Gary Thyes
215 Nancy Lane Route 2
Pulaski, WI 54162

Mr. Thyes:

Upon completion of our investigation, we have found that you knowingly and deliberately submitted a claim for overtime compensation for specific services that were neither performed during the hours claimed nor previously authorized by your supervisor or your supervisor's designee as per Article 13 B2 of the Master Agreement.

As a consequence of this recent incident of dishonesty, your violation of Article 13 B2 as well as your previous history of disciplinary actions you are hereby discharged from employment as a custodian in the School District of West dePere. This action is consistent with the clear and irrefutable definition and intent of Article 15D and 15 D2 found in the Master Agreement between the West DePere Educational Support Personnel Custodial Unit and the West dePere Board of Education.

Sincerely,

Kevin J. Hanson /s/
Kevin J. Hanson
Business Manager

Jane A. Paluch /s/
Jane A. Paluch
Elementary Principal 2/

The Grievant subsequently grieved his termination. The parties were unable to resolve the matter and proceeded to arbitration of the dispute before the undersigned.

2/ The reference in the letter to Article 15, D, 2 was subsequently amended to Article 15, D, 4.

POSITIONS OF THE PARTIES

District

The District asserts that the Grievant violated the provisions of the parties' Agreement in submitting his request for overtime pay on January 6, 1992 and that these violations justified terminating his employment with the District.

First, the Grievant violated Article 13, Section B, Subsection 2, of the Agreement by attempting to complete overtime work without prior authorization. That provision of the Agreement provides, in relevant part, as follows:

ARTICLE 13

HOURS OF WORK, OVERTIME AND CALL-IN PAY

. . .

B. Overtime:

. . .

- 2) Overtime shall not be worked without the prior authorization of the employee's supervisor or the supervisor's designee.

According to the District, the language of that provision is clear and unambiguous that prior authorization before working overtime is required. Failure to follow that clear and unambiguous rule is an act of insubordination.

The record is clear, and the Grievant admits, that he submitted a request for overtime without prior authorization in violation of Article 13, Section B, 2, of the Agreement. As a matter of equity, the Grievant having failed to follow the mandates of the Agreement, he may not then invoke the protective provisions of the Agreement. Further, the record establishes that the Grievant had been consistently warned in the past about the need for prior approval before incurring overtime, citing the testimony of Hanson regarding the warning the Grievant received for his October 3, 1991 overtime request. That request also indicates the Grievant's lack of credibility in that it claims 19 minutes of overtime to replace light sockets when in fact he only changed light bulbs - approximately a five-minute job. Regardless of whether the Grievant did actually perform the alleged overtime work, he knowingly violated the Agreement. The Grievant admitted knowing he was to obtain prior approval for working overtime and yet he did not seek such approval other than from the Athletic Director, Dobkoski, whom he knew was not his supervisor. He also sought to have Dobkoski approve his request for the overtime after the fact. The Grievant's claim that it was "emergency" work is disproved by his own testimony that after seeing the state the gym was in, he was first going to read the newspaper and wait till 7:00 a.m. to start the clean-up. Thus, the Grievant knowingly violated Article 13, B,2 of the Agreement by not seeking prior approval for overtime.

The District also asserts that the Grievant falsified his time sheet by reporting that he performed work between 6:30 and 7:00 a.m. on the overtime - extra duty sheet he submitted to Dobkoski on January 6th. That falsification violates Article 15, Discipline, Section D, 4, of the Agreement. Hanson had previously warned the Grievant regarding the need for accurate time sheets in their discussion following the Grievant's request for 19 minutes of overtime on October 3, 1991 for changing a light socket when in fact he only changed a light bulb, a job taking only five minutes. Based on that prior experience

with the Grievant, the District was reasonable in believing he had falsified his request for overtime on January 6th. Further, Hanson asked the Grievant to explain the request for overtime for January 6th and in that discussion the Grievant admitted he had not performed the work before 7:00 a.m. Hanson further testified that the Grievant reinforced that statement several times during the various steps in the grievance procedure. The Grievant's testimony at hearing that he did clean up between 6:30 and 7:00 a.m. on January 6th should not be credited. Hanson has no reason to lie, as opposed to the Grievant's motive of trying to keep his job. Also, the Grievant came up with his theory that this was an emergency, but could not recall when he had mentioned this to any of the administrators. Also, by his own testimony, this had happened eight to ten times in the past yet he did not consider those prior occasions to be emergencies. Given the Grievant's prior history of leaving the building without authorization, not working when he was supposed to, or performing the work he was supposed to do, and his motive for lying in this case, the Grievant should not be credited over Hanson. Having admitted he did not perform the overtime work he submitted, the Grievant is subject to discharge under Article 15, D, 4 of the Agreement.

Next, the District contends that the record demonstrates that there was just cause for the Grievant's discharge due to his actions and his "persistent pattern of inability" to comply with the terms of the collective bargaining agreement. The District cites the "Daugherty Standards" 3/ for just cause and asserts that all of the tests have been met. The Grievant had been forewarned about working overtime without prior approval and the need for properly filling out time reports. The rules violated are set forth in the parties' Agreement and, therefore, not subject to question as to whether they reasonably relate to the efficient management of the operation. Hanson investigated the matter fairly and objectively, giving the Grievant the opportunity to present his version at the first step of the grievance procedure. In the course of the discussions, the Grievant admitted that he falsified the time report in that he did not do the work as indicated. Those admissions constitute substantial evidence of the violation. The District has enforced the rules even-handedly. The Superintendent testified that other employees have been discharged for violating the same provisions the Grievant is charged with violating. As to the seventh test, the District contends that discharge is appropriate for the violation due to the nature of its operation. All employees of the District must be held to a high standard of honesty so as to set an example for the taxpayers and the students.

Lastly, the District asserts the Grievant had been warned about his job performance in the past and that progressive discipline had been applied to the Grievant before this matter arose. The January 17, 1992 letter of termination cites as part of the basis for discharge the Grievant's prior history of disciplinary actions. The District cites a number of previous warning letters the Grievant had received including one in February of 1988 for leaving the building early without permission. In January of 1990 he received two oral reprimands for leaving the building without notifying an administrator. The Grievant was also disciplined informally by Hanson in October of 1991 about not getting prior authorization for overtime from the proper authority and the need for accurately reporting his time. Thus, progressive discipline was followed with the Grievant, although the District was not required to follow it in this instance as the Agreement provides for immediate discharge for falsifying time reports.

In its reply brief, the District responds that even if a just cause

3/ Enterprise Wire Co., 46 LA 359 (Arbitrator Carroll Daugherty, 1966).

standard applies, it has met that standard. The District disputes the Association's contention that the Grievant should receive a higher degree of protection because he was a non-probationary employe. Such employes are protected through the parties' Agreement while probationary employes are not provided with that protection. The District also asserts that the Grievant's testimony cannot be credited in light of the record as a whole and the wording of the Agreement. Further evidence of his lack of credibility is the fact that overtime is only paid for hours over 40 hours per week and the Grievant applied for overtime before he had even completed the first day of the work week.

Association

The Association first asserts that the "just cause" standard should be applied in judging the District's action in discharging the Grievant, despite the absence of such a provision in the Agreement. The Association cites a number of cases where arbitrators implied a just cause standard where the contract did not contain a just cause provision. Hence, the Association requests that the Arbitrator apply a just cause standard in this case.

Next, the Association notes that Article 9 of the Agreement establishes a probationary period and asserts that the parties "obviously recognize that greater job security and protection is owed" to an employe like the Grievant with 12 years of service. Such a distinction between probationary and non-probationary employes would not make sense unless there is an additional obligation to the latter. Further, unlike probationary employes, non-probationary employes may challenge their dismissal in grievance arbitration before a third party. Under Article 9 seniority rights are granted to all employes who successfully complete probation. Arbitrators have relied on the need to protect those seniority rights as the basis for implying a just cause standard absent it being specifically excluded.

Third, the Association asserts that the Agreement, at Article 15, Section B, requires that progressive discipline be followed for non-probationary employes. It was not followed in this case. The Grievant's disciplinary record is not as bad as the District paints it. In 12 years the Grievant received four oral reprimands and one written reprimand. The written reprimand predates the Grievant's discharge by four years. The Association notes the District's claim that it was not required to follow progressive discipline because the Grievant violated Article 15, Section D, 4, by knowingly submitting a false claim for overtime pay. The Association concedes the District might have a point if its claim was valid. However, the Association disputes the claim that the Grievant filed a false request for overtime because he did not perform the overtime work claimed. The Grievant's testimony was consistent with his statement on the overtime request that between 6:30 and 7:00 a.m. on January 6th he scrubbed part of the gym floor, cleaned the locker rooms, picked up empty soda cans and returned benches to their proper areas. Contrary to Hanson's testimony, the Grievant did not tell Hanson and the Superintendent that he did not perform any of the work before 7:00 a.m., rather, he admitted to them he did not do all of it then. The Association assumes there was some cleaning that needed to be done in the gym since the event on the preceding Friday was a last-minute "pickup" game and no custodian was hired to clean up after the game. Thus, there was some extra work to be done in cleaning the gym on Monday morning when the Grievant came to work and it is undisputed that the gym was clean and ready for classes at 8:20 a.m. Thus, the Grievant had to have done the work as claimed since no one else was there to do it. The Grievant testified he did most of the clean up before 7:00 a.m. until he had to start his normal routine. After completing his normal duties, he showed the Physical Education teacher the work that still needed to be done and then finished the rest of the work so that gym was ready for classes at 8:20 a.m. Whether he completed all of the work before 7:00 a.m. is

not important. It is clear he started work thirty minutes early to do the work and did not falsify the overtime request as the District claims. Hence, Article 15, Section D, 4 was not violated and there is no basis for bypassing progressive discipline and going to immediate discharge.

Regarding the charge that the Grievant did not obtain permission before working the overtime, the Association concedes that the Grievant should have called his supervisor first or at least explained what happened and asked his supervisor if she would authorize an overtime voucher. If she had said no, his best alternative would have been to forget it, but as the Grievant testified, this incident was "the straw that broke the camel's back." He was tired of doing other people's work and let his frustration over previously ignored incidents cloud his judgment. The Grievant testified he had had to clean up after the events 8-10 times and had left notes for the administration about it.

The Association asserts that the District simply could have denied the Grievant's overtime request, but instead tried to make a big thing of it. As to the prior "light bulb" incident, the Association contends that the Grievant had been given conflicting instructions over the years as to who did or did not have authority to give him instructions to do things. The prior Business Manager had told the Grievant "everyone" is his boss and both Ms. Paluch, his immediate supervisor, and the Superintendent have directed him in writing to act on requests from staff without waiting for someone from management to okay it. Further, his job description states "16.) Conducts emergency repairs and cleaning services as necessary." Thus, the Association concludes that although the Grievant erred by not obtaining prior authorization for the overtime, the discharge of such a long-term employe for doing extra work is too severe.

DISCUSSION

The Association contends that a "just cause" standard ought to be implied in this case even though the parties' Agreement does not contain such a provision. While the District contends that the just cause standard was met in this case, it also asserts that the Grievant filed a request for overtime work he had not in fact performed in violation of Article 15, Section D, 4 of the Agreement.

Article 15, Section D, 4 of the Agreement provides:

D. If the employee's immediate supervisor and/or the District Administrator feels the employee's actions or nonaction so warrant, discharge or suspension may be carried out immediately with no warning notice necessary. Such action or nonaction shall be of a serious nature such as,

. . .

4) False reports of personnel records such as initial employment records or time sheets;

The District correctly notes that the penalty for violating that provision may be immediate dismissal under that provision of the Agreement, without regard to progressive discipline.

There is no dispute that the Grievant did not receive prior authorization for the overtime he claimed. His defense that he considered it an "emergency" rings hollow in light of his testimony that this had been an ongoing problem following athletic events at the school. Thus, the question that must be decided first is whether the Grievant did file a false time report as the District alleges. If it is found that he did, the District had the right under Article 15, Section D, 4 of the Agreement to dismiss the Grievant without following progressive discipline. If it is found that he did perform the work as he claims, then the question of whether the progressive discipline requirement of Article 15, Section B were violated must be answered, as well as the issue of whether a just cause standard is to be applied. 4/

The District's Business Manager, Hanson, testified that the Grievant admitted he did not perform the work prior to 7:00 a.m. on January 6th when Hanson first asked him about the overtime pay request, and again later during discussions in the course of processing the grievance. The Grievant testified that he performed most of the clean-up between 6:30 and 7:00 a.m., leaving only half the benches and the cafeteria tables to be put away after 7:00 a.m. On cross-examination, he testified that he told the administration that he "did not do all of it" before 7:00 a.m., and that he did a mixture of his regular duties and the clean-up of the gym from 6:30 until 7:00 a.m. (Tr. 76.) However, on direct examination, the Grievant had testified as follows as to what he did between 6:30 and 7:00 a.m.:

(Gerue) Q All right. After observing the gymnasium area was in somewhat of a

4/ In light of the express wording of Article 15, D, 4, of the Agreement and the prohibition in the Agreement against the Arbitrator adding to, subtracting from or modifying the Agreement, just cause will not apply where Article 15, D, 4 applies.

disarray, what did you do?

(Grievant)

A I went into the boiler room, checked the panel, went and sat down in the school room. I was going to read the paper and I thought, oh, heck I might as well get going and clean the mess up. I'm the only one here. I've got to do it anyway. And I went to -- turned on the main gym lights and went to the custodial closet by the kitchen and got a pail of water and scrubbed up the soda that was spilled.

Q What time was this?

A It was approximately twenty to 7:00 when I got done with the scrubbing.

Q What time did you begin the cleanup of the gym area?

A It was right around 6:30 or right after 6:30.

Q Okay. Take us through the rest of the work that you did in the gym area. You said you did some scrubbing, cleaned up the soda spills and so forth, and that took about ten minutes according to your testimony?

A Yes.

Q Then what?

A Then I went to the locker rooms, checked them, and there was four-letter words with deodorant -- written with deodorant on the wall. I brushed that off the best I could saving the rest for later, the major cleanup, before the kids used it in the afternoon, and put the scrub pail away. By then it was five to 7:00 so I went -- about five to 7:00 so I went and opened the front doors which would be my normal duties.

Q And from there you proceeded to go through your normal morning routine --

A Yes.

(Tr. 63-64)

The Grievant's testimony as to what he did between 6:30 and 7:00 a.m. is

inconsistent. As noted in Elkouri and Elkouri, How Arbitration Works, in discussing credibility issues, "It seems clear that inconsistencies in the testimony of any witness will ordinarily detract much from the testimony's credibility." 5/ Another factor to consider is the interests of the witnesses giving conflicting testimony. In a discipline or discharge case the affected employe has an obvious incentive for denying the charge, as he/she stands to immediately gain or lose in the case. This of course does not create a presumption the employee is lying, but does require the testimony be scrutinized. On the other hand, absent a showing of ill will by the supervisor toward the employe, or reason to believe the supervisor is mistaken, there is no apparent reason to discredit his/her testimony. 6/ There is no indication of ill will toward the Grievant by Hanson and his testimony was as to what the Grievant had told him in discussing the matter. Further, the discharge letter of January 17, 1992 stated, in relevant part:

Upon completion of our investigation, we have found that you knowingly and deliberately submitted a claim for overtime compensation for specific services that were neither performed during the hours claimed nor previously authorized by your supervisor or your supervisor's designee as per Article 13 B2 of the Master Agreement.

It seems unlikely that Hanson would have simply assumed that the Grievant had not performed the work as claimed, had not the Grievant admitted it, as Hanson testified. Thus, Hanson's testimony that the Grievant admitted he had not performed the overtime work he had claimed in his overtime request is credited over the Grievant's testimony that he had only admitted he had not done all of it, referring to the work he performed, as opposed to when he performed it.

5/ Third Edition, p. 275.

6/ Ibid., at page 276.

For the foregoing reasons it is concluded that the Grievant did submit a request for overtime pay for time he did not work on January 6, 1992. As concluded previously, Article 15, Section D, 4 of the parties' Agreement permits the District to immediately discharge an employe for submitting a false time sheet, without having to follow progressive discipline. Therefore, the District did not violate Article 15 of the Agreement when it discharged the Grievant.

Based upon the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 30th day of October, 1992.

By David E. Shaw /s/
David E. Shaw, Arbitrator