

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 2, MILWAUKEE DISTRICT COUNCIL 48,
AFSCME, AFL-CIO

and

WHITNALL SCHOOL DISTRICT

Case 50
No. 52133
MA-8850

Appearances:

Podell, Ugent & Cross, Attorneys at Law, by Ms. Nola Hitchcock Cross, appearing on behalf of the Union.

Quarles & Brady, Attorneys at Law, by Mr. David Kern, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the District or Employer, respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on April 5, 1995, at Greenfield, Wisconsin. The hearing was not transcribed. 1/ The parties filed briefs, and the Employer filed a reply brief, whereupon the record was closed on May 30, 1995. Based on the entire record, the undersigned issues the following Award.

1/ Section 8, D, 4 of the parties' labor agreement provides that:

There shall be a transcript prepared for each arbitration hearing and the parties shall share the costs equally, however, the parties may mutually agree to waive a transcript.

Notwithstanding the foregoing language that "there shall be a transcript prepared," the instant hearing proceeded without a court reporter being present. At the time of the hearing, neither side objected to same. It is held that by proceeding with the hearing without a court reporter being present, this provision was effectively waived by inaction.

ISSUE

The parties stipulated to the following issue:

Did the District have just cause to suspend Don Godec for one day?
If not, what should be the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1993-1995 collective bargaining agreement contains the following pertinent provisions:

3. SCHOOL BOARD FUNCTIONS:

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

...

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

...

FACTS

Grievant Donald Godec is a part-time custodial aide. His job includes, among other things, cleaning and sweeping the halls and performing other custodial work. On the evening of October 13, 1994, Godec was working at the high school. That night the high school was holding an open house and there were several hundred students and parents in the building. Each class had been allowed to decorate a certain portion of the building, and one class had chosen to decorate a hallway in the high school by distributing leaves on the floor.

As the evening progressed, several parents raised concerns that the leaves on the terrazzo floor were becoming unsafe and slippery. These concerns came to the attention of Interim Superintendent Joanne Kania. Kania then spoke to Nora Revoir, a high school counselor who

happened to be nearby at the time, about getting a custodian to sweep a pathway through the leaves to address this unsafe situation.

Revoir then went into the main office of the high school, which was adjacent to the hallway where the leaves were located, and found Godec. Revoir testified she told Godec that the leaves in the hallway needed to be swept up. Godec testified he does not recall Revoir asking him to sweep up the leaves. Revoir testified that Godec responded to her request (to sweep the leaves) by taking a broom from his cleaning cart which was nearby and handing it (i.e. the broom) to her. Godec testified he did not hand a broom to Revoir. Kania happened to walk into the office at that moment and see Godec's actions. Kania testified that when she walked into the office, she saw Godec offering a broom to Revoir. Kania then told Godec to clear a pathway through the leaves in the hallway. Godec responded by going out into the hallway and sweeping a pathway through the leaves. At some point in his sweeping Godec exchanged his broom for a mop in order to better clear a pathway through the leaves.

After Godec left the office to sweep the leaves in the hallway, Kania asked Revoir whether she had the same impression Kania did about what had just happened, specifically that by handing her the broom Godec was indicating that Revoir should sweep up the leaves. Revoir agreed with Kania that by handing her the broom, Godec wanted her (Revoir) to sweep up the leaves herself.

Later that evening, Kania called Ben Villarruel, the District's Business Manager, at home and told him what had happened. Villarruel indicated in response that a meeting would be arranged between Godec, Kania and other District and Union representatives in order to investigate the matter and get the facts.

That meeting was held October 31, 1994. The meeting began with Godec telling those in attendance that he could not recall any conversation with Revoir on the night of October 13. He also indicated he did not recall Revoir asking him to sweep the leaves. After hearing Godec's account, Kania asked Revoir to join the meeting, which she did. Revoir told those at the meeting that she had requested Godec's assistance to sweep the leaves, and that he had responded by handing her the broom.

The next day (November 1) Godec was suspended for one day for his conduct on October 13, 1994. The suspension letter read as follows:

Dear Mr. Godec:

On October 13th, you were made aware of a potentially dangerous situation by Nora Revoir. She told you there were leaves all over the floor near Dr. Akinsanya's office making the floor very slippery, and presenting a danger to the many parents and students

who were attending the Open House.

When Ms. Revoir told you about the leaves in the hallway, and asked about a broom to sweep it up, you indicated to her that she should take the broom and sweep it up. When you saw Dr. Kania, you immediately got the broom and went to sweep it up.

On October 31st when Mr. Keene, Mr. Goodman and I met with you to discuss the incident, you denied the fact that Ms. Revoir spoke to you about the leaves and that you indicated that she was to sweep it up. Upon calling Ms. Revoir to the meeting, she stated that she did indeed talk to you about the leaves in the hallway, and that you volunteered to give her a broom to sweep them.

After a review of your file, this is the 4th incident, where an administrator or professional staff member has made a reasonable request for your assistance, and you refused to comply with the request. In spite of written reprimands, you have demonstrated an unwillingness to change your behavior, therefore, I'm suspending you from work for one day without pay.

Any behavior of the same nature will lead to more serious consequences including suspensions and or termination.

Respectfully,

Joanne G. Kania /s/
Joanne G. Kania
Interim Superintendent

Richard Keene /s/
Richard Keene
Supervisor of Buildings &
Grounds

The Union grieved his suspension and the grievance was processed to arbitration.

The three previous incidents of uncooperativeness referenced in the next to the last paragraph of the suspension letter are as follows. In February, 1992, Godec did not respond to Kania's request for custodial assistance in connection with a PTO dinner. In June, 1993, Godec was uncooperative in connection with a food delivery for a special school luncheon. In June, 1994, Godec was asked by an administrator to turn on the air conditioning in the auditorium, and he (Godec) replied that it wasn't his job to do so. All three of these incidents were written up as formal reprimands.

The record indicates that in addition to the write-ups noted above, Godec has also received five other written warnings. He was written up for failing to follow directions in January, 1989; he was written up for negligence resulting in food spoilage in January, 1991; he was written up for failing to use good judgment in connection with locking the high school in May, 1991; he was written up for damage to food service equipment in November, 1993; and he was reprimanded for leaving his pager unattended in October, 1994. Godec was also suspended for one day in April, 1992, for removing District garbage bags for personal use. Insofar as the record shows, none of these reprimands or write-ups were grieved, nor was the suspension.

Godec testified at the hearing that he would not hand a broom to anyone out of his bargaining unit because it is his job to sweep the floors.

POSITIONS OF THE PARTIES

The Union's position is that the District did not have just cause to suspend the grievant. In the Union's view, there was no need to discipline Godec since he swept up the leaves in the hallway. It notes that in performing this task, he first used a broom and then switched to a mop so that he could do a better job. The Union contends that the matter involved here is nothing more than a misunderstanding. To support this contention the Union relies on Godec's testimony that he did not tell Revoir to use the broom nor did he hand her the broom. The Union suggests this misunderstanding arose when Godec had a broom in his outstretched hand and he "leaned over to get another broom," or perhaps "when he stretched the broom out to get a wide swath of leaves it appeared he was handing the broom" to Revoir. According to the Union Godec had no intention of ever handing the broom to Revoir. In support thereof, the Union relies on Godec's testimony that he would never ask that other employees do his work (i.e. sweep the floors). Next, the Union challenges Kania's credibility by dissecting certain parts of the suspension letter. Specifically, it notes that while Godec never verbally said anything to Revoir, the suspension letter says Godec "indicated" and "volunteered" that Revoir was to sweep up the leaves. It also notes that while Godec already had a broom on his cart, the suspension letter says that when Godec saw Kania, he "immediately got the broom . . ." According to the Union these inconsistencies between the suspension letter and the record evidence establish that "Kania is clearly talking out of both sides of her mouth." It contends that given these inconsistencies, Godec's testimony is more credible than Kania's. Finally, with regard to the level of discipline imposed, the Union asserts that Godec's prior discipline should not be considered. The Union therefore requests that the grievance be sustained and the suspension overturned.

The District's position is that it had just cause to suspend Godec for one day. In the District's view, Godec engaged in uncooperative behavior toward a fellow staff member on October 13, 1994, by indicating, upon a reasonable request for assistance, that the fellow staff member should perform the requested work. According to the District, Godec's actions violated management's reasonable expectation that he would sweep the leaves -- not Counselor Revoir.

The District argues that Kania's and Revoir's account of the October 13 incident should be credited. It makes the following arguments in support thereof. First, it notes that as the disciplined employee, Godec has much to gain by his failed recollection of Revoir's request to sweep the leaves and his non-verbal response to same. The Employer notes that in contrast, neither Kania nor Revoir has anything to gain by their testimony here. Second, the District asserts that the testimony of Kania and Revoir was consistent: both saw Godec, in response to Revoir's request to sweep the leaves, hand her the broom off the cart. The District submits that the fact that Godec pulled the broom back after he saw Kania come into the room, that the broom never changed hands, and that he swept the floor himself are all irrelevant in assessing Godec's response to this reasonable request to sweep the leaves. The District therefore contends that the Union's attempt to portray this incident as a "misunderstanding" is unavailing. In the Employer's view, no amount of dissection of the November 1 suspension letter can alter the conclusion that Godec failed to fulfill management's expectations by his actions on October 13, and that discipline was therefore warranted for this infraction. With regard to the level of discipline imposed, the District contends that a one-day suspension was appropriate. It makes the following arguments in support thereof. First, it relies on the fact that Godec had received three previous written warnings for uncooperativeness. The District notes that in these three prior incidents, Godec failed to cooperate with reasonable directives or refused to cooperate with management on the grounds that what he was being asked to do "was not his job." Thus, the District submits that Godec has a recurring pattern of uncooperativeness and has been repeatedly reprimanded for it. Second, the District asserts that a review of Godec's overall disciplinary record amply supports the imposition of a one-day suspension. It notes in this regard that Godec has received five other written reprimands (in addition to the three already noted for uncooperativeness) as well as a prior suspension. It therefore contends that the grievance should be denied and the suspension upheld.

DISCUSSION

Section 3, D of the parties' labor agreement contains what is commonly known as a "just cause" provision. It requires that the District have just cause to discipline employees. What happened here is that an employee, namely Godec, was suspended. Given this disciplinary action, the obvious question to be answered here is whether the District had just cause for doing so.

As is normally the case, the term "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely understood and applied analytical framework has been developed over the years through the so-called common law of labor arbitration. That analytical framework consists of two basic questions: the first is whether the Employer demonstrated the misconduct of the employee, and the second, assuming this showing of wrongdoing is made, is whether the Employer established that the discipline imposed was contractually appropriate.

As just noted, the first part of a just cause analysis requires a determination of the grievant's wrongdoing. Attention is now turned to making that call.

On October 13, Counselor Revoir asked Godec to perform a specific job task, namely sweep leaves in a hallway of the school. There is no question this was a reasonable request for Revoir to make. Additionally, there is no question that this was a job task Godec normally performed. Godec ultimately performed this job task and swept the leaves in the hallway.

The focus of inquiry here, though, is not what Godec ultimately did. Rather, it is what he initially did when this work request was made of him. In this regard Revoir testified that Godec responded to her request (to sweep the leaves) by taking a broom from his nearby cleaning cart and handing it (the broom) to her. Godec on the other hand denied handing her a broom. Obviously, their testimony conflicts on this point and cannot be reconciled.

After weighing this conflicting testimony, the undersigned credits Revoir's account for the following reasons. First, no proof was offered why Revoir would testify falsely against Godec. As a result, there is no apparent reason for Revoir to fabricate her account of what happened. In contrast though Godec is the disciplined employe and thus has something to gain by failing to remember the specifics of the situation. Second, Revoir's account was corroborated by Kania who testified that when she walked into the office, she saw Godec offering a broom to Revoir. Thus, the testimony of Revoir and Kania was consistent on this critical point. Insofar as the record shows, Kania, like Revoir, had no apparent reason to fabricate her testimony. Given the foregoing then, Revoir's and Kania's account of the incident is credited.

The Union contends that Revoir and Kania misunderstood what they saw Godec doing with the broom. The Union first submits that what they may have seen was Godec leaning "over to get another broom while the first was in his hand." The problem with this scenario is that the record evidence does not establish that there was a second broom on the supply cart that Godec was using that night. While the record does show that at some point in his sweeping Godec exchanged his broom for a mop, it (the record) does not show that the mop was on the cart. Consequently, the record evidence will not support such a conclusion. Next, the Union suggests that "when he (Godec) stretched the broom out to get a wide swath of leaves, it appeared that he was handing the broom" to Revoir. The problem with this scenario is that the extended broom incident did not occur in the hallway when Godec was sweeping leaves. Rather, it occurred in the office before any leaves were swept. That being the case, this scenario is not plausible either. Finally, there is nothing in the record which would support the conclusion that Godec's handing a broom to Revoir was an accident or was intended as a joke.

Having concluded that Godec handed a broom to Revoir, the next question is whether this was misconduct. I find that it was given the underlying circumstances. By handing the broom to Revoir after she asked him to sweep the leaves Godec was implicitly saying to her "you do it." In other words, he indicated by his actions that he wanted Revoir to sweep the leaves. It was not her

job though to sweep the leaves - it was his. Godec initially failed then to cooperate with a reasonable job request and instead indicated, by his actions, that Revoir should do the work. This was inappropriate conduct because employees are obligated to cooperate and comply with reasonable work requests and directives. Godec's conduct on October 13 therefore warranted discipline. The fact that Godec ultimately swept the leaves does not change this conclusion. Similarly, the fact that Godec's suspension letter contains some minor inconsistencies with the record evidence does not alter this conclusion either.

The second part of a just cause analysis requires that the District establish that the discipline imposed was contractually appropriate. Based on the following rationale, I conclude a suspension was contractually appropriate under the circumstances here. To begin with, this was not the first time Godec failed to cooperate with a work request. The record indicates he has received three previous written warnings for same, specifically failing to cooperate with reasonable work directives or refusing to cooperate with management on the grounds that what he was being asked to do "was not his job." These prior warnings put Godec on notice that further behavior of that sort would lead to further disciplinary action "including suspension." The next step in the normal disciplinary sequence is for warnings to be followed by a suspension. Since that is exactly what happened here, the Employer followed progressive discipline. Next, there is nothing in the record indicating that other unit employees engaged in similar uncooperative behavior and were not disciplined, or were not disciplined as severely as Godec. That being so, it does not appear that Godec was subjected to any disparate treatment in terms of the punishment imposed. Accordingly then, it is held that the discipline imposed upon Godec (i.e. a one-day suspension) was neither disproportionate to his offense nor an abuse of management discretion, but was reasonably related to the seriousness of his proven misconduct. The District therefore had just cause to suspend him for one day.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the District did have just cause to suspend Don Godec for one day. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 22nd day of August, 1995.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator