

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 65**

and

FAIRVIEW RANGE REGIONAL HEALTH SERVICES

DECISION AND AWARD OF ARBITRATOR

BMS 08-RA-0368

JEFFREY W. JACOBS

ARBITRATOR

March 19, 2008

IN RE ARBITRATION BETWEEN:

AFSCME Council 65,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 08-RA-0368
Susan Houle Grievance matter

Fairview Range Regional Health Services.

APPEARANCES:

FOR THE UNION:

Teresa Joppa, Attorney for the Union
Mark Mandich, Staff Representative
Susan Houle, grievant
Ann Drazenovich, Union Steward
Tina Bye, Union Steward

FOR THE EMPLOYER:

Jeffrey Folmer, Attorney for the Employer
Mitch Vincent, Vice President of Human Resources
Lynn Hachey, HR Generalist
Kim Johnson, Manager of Nutrition Services
Ramona Berklich
Judy Lautizi
Amy Rancourt

PRELIMINARY STATEMENT

The hearing in the above matter was held on February 12, 2008 at AHEC Room 1-A at the Range Regional Hospital in Hibbing, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated February 29, 2008 at which point the record was closed.

ISSUE PRESENTED

Did the Employer have just cause to terminate the grievant? If not, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from February 1, 2007 through February 28, 2010. Article 18 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

EMPLOYER'S POSITION:

The Employer's position was that there was just cause to terminate the grievant for theft stemming from the incidents of August 15, 2007. In support of this position the Employer made the following contentions:

1. The Employer argued that the grievant stole food items, namely two chicken breasts and a sleeve of French toast from the kitchen at the workplace on August 15, 2007.

2. The Employer introduced witnesses who testified that one of them saw the grievant place these food items in her personal lunch pail, a small nylon insulated type of lunch pail, at around 12:30 to 12:40 p.m. on the day in question. The grievant was then observed placing the lunch pail in the employee refrigerator in the kitchen. She then left a few minutes later to go gather carts

3. Two other employees then inspected her lunch pail while the grievant was upstairs and saw the chicken breasts and toast in the pail. They then replaced the pail in the employee refrigerator.

4. The grievant did not follow the approved procedure for purchasing food items from the kitchen. The Employer introduced evidence that an employee must first go to the supervisors to find out whether the food can even be sold to them since there may not be enough to spare until more arrives. In addition, the supervisor must then advise the employee of the wholesale price for the food items. The employee must then pay for the food at the cashier, get a receipt and log the purchase on a log sheet kept in the supervisors' office. The Employer asserted that the grievant did not follow this procedure and that she admitted this in the investigation.

5. The grievant was later observed marking a box of chicken with a marker of some sort but was not seen placing anything in the box. The grievant left with her lunch pail. The Employer asserted that she was never observed placing the chicken and French toast back in the main freezer and presumably left with the items in her possession. She never paid for them and never contacted the supervisors or the cashiers to do so. The only reasonable conclusion according to the Employer is that she stole the items.

6. The three kitchen employees decided to report this to the Manager of Nutritional Services, Ms. Kim Johnson. When she was advised of this she immediately began an investigation. Ms. Johnson contacted the grievant simply to tell her to report at a meeting with her and HR personnel. She did not mention what was being investigated nor did she mention the allegations of theft. The grievant asked if the meeting could be moved sooner. Ms. Johnson then called her back to advise her it could not be moved and that the meeting would occur on Monday. The grievant then asked, “who NARC’d on me?” The Employer asserted that this curious statement indicated that the grievant must have known that she had been caught doing something quite serious and that someone had reported it.

7. Moreover, when the grievant and her Union representative appeared for the meeting, the grievant blurted out that someone had stolen \$8.00 from her the week before and that she had no money to pay for the food items. This was before the meeting even started and before any allegations of theft had been discussed.

8. The Employer also asserted that the grievant’s story has changed several times in material ways. At first she said she placed the food items in her pail at 1:30 p.m. that day and replaced it 10 minutes later at 1:40. She repeated this several times at the investigatory meeting. Later she said she placed it there at 1:15 and finally at the arbitration hearing she stated that she placed the food in her lunch pail at 1:00 and replaced it at 1:40. The Employer pointed out that these times changed and that significantly, the time she stated at the hearing was before she went upstairs with another employee to retrieve the food carts. While these time changes may seem insignificant, the Employer asserted that they are quite important and show that the grievant is simply not telling the truth.

9. She alleged that she put the items back but no one saw her doing that at a time when the kitchen is quite busy. Further, her story that she could not find the supervisors is not believable. The supervisors are around almost all the time and she could have easily found one. The supervisors take lunch from 12:30 to 1:00 p.m. every day and have for years. Further, at no point did the grievant ever contact them.

10. Further, the Employer asserted that the grievant never alleged or reported that anyone had stolen money from her until immediately before the investigatory meeting. The Employer asserted that the grievant's personality was such that she would certainly have mentioned this to someone if she really had found money missing from her lunch pail. No such report was made until days later even though the grievant had two conversations with Ms. Johnson the week before. Moreover, the grievant stated to her manager that it was "her fault that she took food" when she came to pick up her final paycheck. The Employer argued that this was tantamount to an admission.

11. The Employer asserted that it did a full and thorough investigation and made the determination that the grievant's story simply was not credible given the changes in it and the credible assertions of the other witnesses in the matter.

12. The Employer asserted finally, that theft is a very serious matter and is not only excluded from the normal progressive disciplinary language in the collective bargaining agreement it is well known that theft is punishable by discharge. The Employer pointed out that it has discharged similarly situated employees for the same offense in the very recent past and even for theft of items of lesser value. The value of the item is not the question. The Employer asserted that it must be able to trust its employees. The grievant's action breached that trust and termination is the only option here.

Accordingly the Employer seeks an award of the arbitrator denying the grievance in its entirety and upholding the discharge.

UNION'S POSITION

The Union's position was that there was not just cause for the termination and that the Employer's action was too harsh under these circumstances. In support of this position the Union made the following contentions:

1. The Union contended that the grievant is a long-term employee with no disciplinary problems whatsoever. Her evaluations have all been good and there has never been any allegation of improper conduct or theft in the past.

2. On the date in question, the grievant placed two chicken breasts and a sleeve of French toast in her lunch box. She always intended to pay for them pursuant to the Employer's policy allowing employees to purchase food and never intended to take them without paying for them.

3. The Union also pointed out that there is a policy allowing the purchase of these types of food items by getting permission to buy them, in case the kitchen needed them for patients or other purposes and could not spare them. The person seeking to buy the items must then pay for them, get a receipt and then place the items with the receipt in the freezer. The Union acknowledged that the grievant did not follow this exact procedure but argued that there is no clear policy requiring strict adherence to the process outlined above.

4. The grievant then searched for a supervisor to determine if she could buy these items but was unable to find one. She then returned to her duties with the intention of finding a supervisor to determine if she could buy these items and to determine a price for them.

5. The Union argued that the simple fact that she placed the food in her lunch box before talking to a supervisor does not show intent to steal and in fact is consistent with her story that she put it there with every intention of buying it until she found her money stolen. Neither was there any violation of policy nor any theft because she placed the lunch box in the employee refrigerator before finding a supervisor. She simply placed it there to keep it cold and continued working. The Union asserted that the other employees could have mentioned something to the grievant about this but instead snooped in her lunch box and this further implied that these employees could have taken the grievant's money.

6. Moreover, when the grievant determined that she could not find a supervisor she went to find her money, which was also in the lunch box and found her money gone. The grievant then placed the food back into the freezer. The grievant thus never took the food but in fact returned it when she discovered that her money had been stolen.

7. To corroborate this, the Union noted that even the Employer's witnesses testified that they saw the grievant with a box of chicken after the food had been placed in the lunch box. The Union contended that the grievant never left the kitchen area with the food items but in fact placed them back in the freezer.

8. The Union went through the elements of theft and noted that the key element of intent is not present here. The grievant never intended to steal the items and the Employer never proved any such intent.

9. The Union further argued that the most important element of theft is – theft. There was no proof that the grievant took the food items out of the kitchen She claimed and has always claimed that she returned the items when she discovered that her money had been stolen. Without that evidence there is no proof of theft here. The Union noted that the layout of the kitchen is such that there is not much you can hide and the grievant never made an attempt to secret her intentions; she placed the food in her box in plain sight of everybody. Later she took out the box of chicken and even the co-workers saw her with that box. The Union claimed that this is when the food was replaced.

10. The Union also noted that the grievant and the steward did know that there was an allegation regarding theft prior to the investigatory meeting with Ms. Johnson and that the grievant wanted to make it clear what happened. While she did not know why she was being summoned to the meeting during any of the phone calls made the week before, by Monday she did. Moreover, the grievant has a learning disability and frequently blurts things out that she does not truly mean.

11. The Union also asserted that the Employer's investigation was flawed since the Vice President of the Hospital never interviewed the grievant personally. He interviewed the 3 witnesses for the Employer's side of the story but never saw fit to speak to her, relying instead on what others had said about her testimony. Had he done a more thorough investigation and gotten her side of the story before terminating her, he may well have decided that the grievant was credible and that her story did hang together and would have decided on a lesser form of discipline or no discipline at all.

12. The essence of the Union's claim is thus that there was no theft and no showing of any intent to commit theft. The Employer has failed to prove by a preponderance of the evidence that the grievant stole anything.

The Union seeks an award of the arbitrator sustaining the grievance, overturning the discharge and making the grievant whole for any lost time or accrued benefits.

DISCUSSION

Cases such as this are exceedingly difficult to determine since they by definition must mean that someone is not telling the truth, the whole truth and nothing but the truth. Here the grievant maintained her innocence from the very start and seemed very sincere at the hearing. Frankly too, anyone faced with this type of charge and with the loss of a job usually is, and had better be, to have any chance at all of reinstatement. However, the evidence and the reasonable inferences to be drawn from that evidence are what govern the result. Emotion rarely does and probably never should.

The Employer is a health care facility located in Hibbing Minnesota. The grievant worked in the hospital cafeteria kitchen as a cook. She is a 26-year employee with a clean disciplinary record except for this allegation.

The events leading to her termination occurred on August 15, 2007. The evidence showed that the grievant was working that day and that sometime around 12:50 p.m. the grievant placed food items, namely two chicken breasts and a sleeve of French toast in her lunch pail. The lunch pail was a soft-sided insulated lunch container. At least one of her co-workers observed her doing this and found it somewhat odd.

The evidence further showed that the Employer has a policy regarding purchase of food items from the kitchen. Employees are allowed to buy food at wholesale prices from the kitchen however the evidence showed that the grievant had apparently never done that in the past.

The kitchen is relatively small and an on-site observation revealed that anyone in the kitchen can see virtually everything that goes on in the kitchen.

The evidence further showed that the grievant did not follow the standard procedure for purchasing food. The process is that an employee wishing to buy food must first find a supervisor to determine whether the food can even be purchased. The Employer may not have enough to spare or must use the food for a particular use either for the menu for the general public or the patients and may not in fact be able to sell a particular food item that day. Next the employee must consult with a supervisor to find out the price to be paid for the item. The line employees do not have access to this information and must therefore talk to a supervisor to get the price.

After determining the price the employee must then pay for the food at the cashier station and get a receipt which is then placed on the food item and only then should the food be removed from the freezer and placed into the employee's lunch box or other personal container and placed in the employee refrigerator. The employees have a small refrigerator located in the kitchen that they may use for their own personal food items.

The evidence was clear that the grievant did not follow this procedure. She placed the food items referenced above in her lunch box with out getting prior approval to do so and without paying for the items.

The employee who observed the grievant place the food in her lunch box approached other employees in the kitchen about this and raised a concern that the grievant had not followed the procedure in buying food. When the grievant went upstairs to retrieve food carts these employees opened the grievant's lunch box and found the food. They then closed the box and replaced the lunch box in the employee refrigerator.

The grievant claimed that she was not able to find a supervisor to discuss the purchase of the food and the price. The evidence did not support this claim however. The preponderance of the evidence showed that the supervisors take their lunch break very consistently between 12:30 and 1:00 p.m. and that while they take lunch outside of the kitchen they would have been back in the kitchen area when the grievant claimed she placed the food in her lunchbox.

The supervisor's office is very near the kitchen and the grievant could have easily checked to see if they were there. Moreover, the evidence showed that the supervisors are rarely out of the kitchen except for their breaks except for very short periods. The claim that the grievant was unable to find a supervisor at any time during all of this, even assuming her version of the times are accurate simply did not find support in the evidence.

The evidence further showed that the grievant never paid for the items. Testimony adduced at the hearing showed that the grievant never approached the cashiers to pay for the food nor did she ever pay for the food items she placed in her lunch pail.

There was considerable dispute about the operative fact here – i.e. whether the grievant placed the food back in the freezer when she claimed she found that \$8.00 dollars was missing from her lunch box. The grievant claimed that she came back from getting the carts and again could not find a supervisor and that she went into her lunch box to find her money to pay for the food. She then claimed that she noted that the money was gone and knew then she could not pay for the food. She decided to return it. No one saw her return the food. The grievant claimed that she got a box of chicken out and returned it but that was frankly not what the other witnesses saw her doing. They claimed they saw her marking the box with a pen or marker of some sort but that they never saw her place anything in the box. Moreover, there never was any testimony about replacing the French toast and it seems incongruous that she would have placed French toast back in a box full of frozen chicken.

The Union asserted that the 3 witnesses who provided the most damning testimony against the grievant had longstanding disputes and personality conflicts with her. The grievant could not articulate what these were and indicated that one went back some 10 to 12 years but that it was resolved somehow then. Most importantly, there was no suggestion whatsoever that these three employees would steal the grievant's money, lie to management investigators and then perjure themselves before an arbitrator in order to get the grievant fired. Even the union steward acknowledged that this sort of nefarious conspiracy did not occur.

Equally as important in assessing the plausibility and credibility of various versions of this story is the fact that the three Employer witnesses did not change their story much even though they were interviewed separately and testified separately at the hearing of this matter.

Certainly people “can” their testimony and compare stories to tell the same story over and over, but this tends to break down upon cross examination and the details get inconsistent over time when the individuals are asked about a scenario multiple times. If people are truly lying to cover something up, their stories tend to unravel, just as Shakespeare predicted when he wrote about a tangled web. Here that did not happen to the management witnesses but it did to the grievant’s story. This alone does not mean that the grievant is necessarily lying. As one commentator put it, “Anyone driven by the necessity of decision to fret about credibility, who has listened over a number of years to sworn testimony, knows that as much truth must have been uttered by shifty-eyed, perspiring, lip-licking, nail-biting, guilty looking, ill at ease, fidgety witnesses as have lies issued from calm, collected, imperturbable, urbane, straight-in-the-eye perjurers.” *Problems of Proof in the Arbitration Process*, Edgar Jones Jr. 19th Annual meeting of the NAA (1966). Arbitrator Jones’ observations are as true now as when he uttered them more than 40 years ago but the facts here certainly tend to undercut the grievant’s version of the facts and support the Employer’s.

The question then is whether the grievant’s story that she put the food back is supported by the evidence. The Union points out that the Employer bears the burden of proof and that if equally plausible inferences can be drawn from the same set of facts, the employer cannot carry its burden.

Certainly, the Employer’s case is based upon both direct evidence and circumstantial evidence. Clearly, all agree that she placed the chicken in her lunch pail and that she did not find a supervisor, did not pay for the items and did not follow the accepted procedure for purchasing food. It was clear that she did not pay for any food items that day and that she was not seen replacing the food by the three employer witnesses. There was no evidence to suggest they were lying as noted above. The grievant was observed leaving with her lunch pail in hand.

Certainly too, there were material inconsistencies in her story and troubling statements made during the investigation. The telephone conversation wherein the grievant immediately asked Ms. Johnson “who Narc’d on me” was a curious statement to make before she even knew what the meeting was about or why she was being asked to be there. Moreover, the fact that she did not report her money missing that day was troubling and severely undercut her claim that it was even gone or that she intended to use it to pay for her food. Her testimony that she panicked when she saw it gone and did not report it because she did not think anyone would believe her did not support her story much either.

The Union asserted that much of the employer’s case against the grievant is circumstantial. No one but the grievant could confirm that she lost her money. No one but the grievant was able to confirm that she replaced the food or corroborate her claim that she never left with it and never stole anything. The Union claimed that the case must fail since nobody stopped her as she left the building and searched her lunch box and argued that due to this there was no actual irrefutable evidence of theft.

As professors Sinicropi and Hill note in their work, *Evidence in Arbitration*, BNA, 1980, circumstantial evidence is evidence from which an “inference with respect to some fact other than the testimony which is offered as evidence to the truths of the matter asserted.” *Evidence in Arbitration*, at p. 4. They note that circumstantial evidence can be in appropriate cases equally as probative if not more probative than so-called direct evidence.

Further, as Elkouri notes in discussing circumstantial evidence and the weight to be accorded to it, “the question, therefore, is not whether circumstantial evidence is valid, but what reasonable inferences may be drawn from the circumstantial evidence presented. It is not sufficient that the circumstances give rise to mere suspicion or speculation; the circumstances must lead to inferences and factual conclusions based on reasonable probability ... The reasonable inference sought to be reached must be more probable and natural than any other explanation, *although it is not necessary to be adequate that circumstantial evidence exclude every reasonable theory except guilt.*” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p 384. (emphasis added).

The real question is whether the grievant's story is more or even equally as plausible as that put forth by the Employer. On these facts it simply is not. For the reasons stated above, there was considerable direct evidence that she put food into her lunch box and did not pay for it. There was no evidence that she never put it back and that she left with the lunch pail that credible witnesses testified contained the food only a few minutes before she left with the box.

Further the Union raised the question of whether the grievant intended to steal and pointed to the criminal law for support of that argument. In the criminal context prosecutors must prove mens rea, or intent, to establish that theft occurred. That is not strictly required in grievance arbitrations. Further, it seems that the best way to look at the circumstances of a given case is not to determine whether the grievant had the mental intent to steal but whether the circumstances exonerate or incriminate the grievant. It is difficult if not impossible to know a grievant's motivation or just exactly what was swirling around in the grievant's mind at the time. Here, as noted herein, the facts and circumstances of this case show that the item was taken without being paid for. As one very venerable educator put it, the difference between borrowing and stealing is the giving back part. The evidence showed that the latter portion of that equation did not occur here.

Finally, given the size of the kitchen and the number of people milling about at the times relevant here, it is highly unlikely that she could have replaced the food without anybody seeing her. Moreover, there can be no plausible assertion that she somehow forgot the food was there since she claimed that she noticed her money missing within a few minutes of her leaving and testified that the food was there when she noticed her money was gone.

The "truth" is sometimes an elusive concept in cases like this and must be based on whatever logical and plausible conclusions can be drawn from the available clear or undisputed evidence. Here the greater weight of the evidence supports the employer's claim that the grievant took the food without paying for it with the intention of not paying for it.

Having said that there remains the discussion of the appropriate level of discipline. This was very troublesome indeed here since we have a 26-year employee with an otherwise good work record who stole a small amount of food. The Union did not raise the argument that the grievant should be reinstated even if it was determined that she took the items without paying for them anyway. This would be tantamount to saying that a “little” theft is somehow OK.

Certainly a long and unblemished record is a factor to be considered and must be taken into account in any case involving termination, especially for a serious offense. Arbitrators and commentators alike are split on the question of whether longevity should mitigate a serious offense. There are cases where an offense once proven against a long time employee might result in a suspension or mitigated penalty whereas the same offense proven against a short-term employee or one with a bad work record might not. Theft is treated differently though and is one of the offenses noted in the literature as justifying termination even on a first offense and even for a relatively small amount. Offenses are of two general classes: (1) those extremely serious offenses such as stealing, ... which will usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline ... See Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p 964, citing *Huntington Chair Corp*, 24 LA 490, 491 (McCoy 1955).

Obviously this case would have been much easier if the employee had been with the hospital for 2 years or had a very poor disciplinary record. The Employer put on a convincing case that pilferage would be a major problem if it were not severely punished and that trust is a critical piece of the workplace.

With the determination on the facts set forth above, the grievant’s changing story and the somewhat transparent attempts to divert guilt were compelling pieces of the overall puzzle here. Accordingly, taking the evidence as a whole, the discharge must be upheld and the grievance denied.

AWARD

The grievance is DENIED.

Dated: March 21, 2008

AFSCME and Range Regional Hospital.doc

Jeffrey W. Jacobs, arbitrator