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IN THE MATTER OF THE ARBITRATION BETWEEN

THE AMERICAN FEDERATION
OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES,
COUNCIL 5,

Union,

and

INDEPENDENT SCHOOL DISTRICT
NO. 625 (SAINT PAUL),

Employer.

DECISION AND AWARD
OF
ARBITRATOR

APPEARANCES

For the Union:

Jeff Fowler
Field Representative
American Federation of
State, County and
Municipal Employees,
Council 5
300 Hardman Avenue South
South St. Paul, Mn 55075

For the Employer:

Wayne Arndt
Labor Relations Manager
Independent School District
No. 625
360 Colborne Street
St. Paul, MN 55102-3299

On January 14 and 15, 2009, in St. Paul, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the

Employer violated the labor agreement between the parties by discharging the grievant, John E. Southward.

FACTS

The Employer operates the public schools in St. Paul, Minnesota. The Union is the collective bargaining representative of the non-supervisory employees of the Employer who occupy clerical, administrative and technical classifications, including those classified as Distribution Workers.

The grievant was hired by the Employer in 1998. He worked as a Distribution Worker until his discharge from employment on June 30, 2008. He delivered food, supplies and equipment by truck to schools operated by the Employer.

On June 30, 2008, Jean Ronnel Director of Nutrition and Commercial Services, issued a notice of discharge to the grievant, parts of which are set out below:

You are hereby informed that you are discharged from employment with the Saint Paul Public Schools effective July 1, 2008, for the following reasons:

1. Between approximately 7:35 a.m. and 7:45 a.m. on April 10, 2008, you removed a case of sunflower seeds from another person's route truck and placed it in your route truck, and you had no permission or authorization to do so. The records show that only one case of sunflower seeds had been ordered that day, it was ordered by a school that is not on your route, and the school that ordered the case reported it as not received (shorted). In addition, our inventory records show that only one case of sunflower seeds was issued that day.

The conduct described above constitutes theft of school district property and is an abuse of the trust placed in you by virtue of your position and duties. Such conduct is completely unacceptable for an employee of [the Employer] and is also a violation of Civil Service Rule 16.B, points 2 and 5:

- [2. Commission of an immoral or criminal act;
- 5. Conduct unbecoming a City employee].

- 2. On March 19, 2008, you turned in the GPS cell phone you were issued during the week of October 22, 2007, stating that it was broken. It was found to be severely damaged while in your possession. According to Sprint's service repair report, the cause was extreme physical pressure of several hundred pounds. In addition, you left your GPS cell phone turned off on the days you worked until May 12, 2008, the day of the investigative meeting. All drivers are required to have their cell phone on during work hours.

The conduct described above constitutes failure to take reasonable care of school district property and insubordination, as you have been specifically directed to use the cell phone issued to you. This conduct is unacceptable for an employee [of the Employer] and it cannot be tolerated. The conduct described above also violates Civil Service Rule 16.B, points 5, 6, 9 and 12:

- [5. Conduct unbecoming a City employee.
- 6. Violation of or failure to obey any lawful and reasonable rule or order where such violation amounts to insubordination or a serious breach of proper discipline, or might reasonably be expected to result in loss to the City.
- 9. Commission of an act of insubordination or disgraceful conduct.
- 12. Carelessness or negligence with City property.]

The conduct in the above described incidents is a continuation of prior serious problems you have had, about which you have been warned and directed and for which you have been disciplined. Due to the seriousness of this conduct, discharge is the appropriate and necessary action that must be taken. . . .

The Civil Service Rules of the City of St. Paul apply also to employees of the Employer.

On July 3, 2008, the Union brought the present grievance alleging that the grievant was unfairly discharged and that the discharge violated Article 17 of the parties' labor agreement, Section 17.1 of which is set out below:

Discipline will be administered for just cause only. Discipline will be in the form of the following actions.

Such actions may be taken in an order different from that listed here, based on specific employee action.

- 17.1.1 Oral reprimand;
- 17.1.2 Written reprimand;
- 17.1.3 Suspension;
- 17.1.4 Reduction;
- 17.1.5 Discharge.

Monica S. Bunde, the Employer's Manager for Distribution, testified as follows. The Employer serves about 40,000 meals per school day to the students attending the sixty-nine schools operated by the Employer. The Department of Nutrition Services operates a Distribution Center, a large building, where food-stuffs are received in inventory, stored in its warehouse and then distributed daily by truck to the schools. In addition, the Distribution Center warehouses supplies and equipment for distribution to the schools. The Employer employs ten Distribution Workers, seven of whom drive seven trucks used in daily deliveries on seven routes. Some are assigned to drive the same truck every day. Some Distribution Workers rotate between driving a truck and working in the warehouse, where, during the day previous to delivery, they prepare pallets of the products ordered by each school, which are then stored overnight in a cooling room. The pallets are loaded onto the appropriate truck the next morning for delivery by the Distribution Workers who drive the trucks.

The Distribution Center's loading dock has positions that are numbered one through seven to match the number given to each truck and each truck route. The schools served by each truck are the same each day.

Bunde testified that, in the morning of April 10, 2008, Brian J. Paulsen, a Distribution Worker who had prepared pallets

the previous day and who loaded trucks on the morning of April 10, came to her and reported that he had seen the grievant take a case of sunflower seeds from Truck 6 and place it on Truck 4, the truck the grievant was permanently assigned to drive during the 2007-2008 school year. According to Bunde, Paulsen told her that he and Peter Matthew, another Distribution Worker, had loaded Truck 6 and that they had placed on Truck 6 a pallet with a case of sunflower seeds on top. Bunde testified that Paulsen said he was reporting the grievant's conduct because he did not want to be blamed for the shortage of the case of sunflower seeds he and Matthew had loaded on Truck 6.

At about 8:45 a.m., on April 10, 2008, Bunde asked Dennis Schaffhausen, a Distribution Center Supervisor, to take an inventory of the sunflower seeds in the warehouse, thus starting an investigation to determine whether a case was missing. Schaffhausen's investigation showed that the Farnsworth school, one of the schools on the route of Truck 6, had ordered a case of sunflower seeds for delivery on April 10, 2008, but did not receive it. A count of the sunflower seeds in inventory in the warehouse was completed by April 25, 2008. It showed that one case of sunflower seeds was missing from the warehouse and not otherwise accounted for by delivery to a school.

Bunde testified that, at the direction of the Employer's Human Resources Department, she conducted an interview of Paulsen on April 30, 2008, to obtain a more detailed description of what he saw the grievant do on the morning of April 10, 2008. At her request, Paulsen drew a diagram showing where he

was when, allegedly, he saw the grievant take the sunflower seeds from Truck 6. Below are set out relevant parts of the notes Bunde took as she interviewed Paulsen on April 30, 2008:

[Bunde:]

On Wednesday April 10th you report seeing [the grievant] go into route 6 truck and remove a case of sunflower seeds?

[Paulsen:]

I saw [the grievant] stepping from the yellow dock plate from the route 6 truck cutting across towards his truck away from route 6 truck past route 5 trucks area and then into his truck. [He] was holding a box of sunflower seeds close to his chest. I saw [the grievant] walk into his truck with the sunflower seeds and then walk out with empty arms. When I came back from the rest room [the grievant] was standing around Mike Conrin talking. His truck was closed.

[Bunde:]

How far away were you from [the grievant]?

[Paulsen:]

About 6 - 8 feet. (see diagram as needed)

[Bunde:]

Did anyone else see this occur?

[Paulsen:]

No, the dock was pretty empty.

[Bunde:]

How was [the grievant] carrying the sunflower seeds?

[Paulsen:]

[He] was holding it close to his chest. He had one arm sort of wrapped around the box. I think when he stumbled he used both arms and held the box close to his chest.

. . .

[Bunde:]

Prior to this incident which was reported to me on 4/10, how has your working relationship been with [the grievant]?

[Paulsen:]

We don't talk. Something a while back occurred. He doesn't even say hi.

. . . .

Bunde testified that in about mid-March of 2008 she had issued an oral reprimand to Paulsen and Dennis From, another Distribution Worker, for the use of abusive language toward each other, after Paulsen made a complaint that From had been harassing him. As I note below, the grievant, who denies the theft, attributes Paulsen's allegation against him to his belief that the grievant helped From in the disciplinary investigation of that dispute.

On May 6, 2008, Bunde interviewed Matthew, and he confirmed that he and Paulsen had loaded a case of sunflower seeds on Truck 6 during the morning of April 10, 2008. Matthew said that he did not see whether the grievant took the sunflower seeds from Truck 6.

On May 13, 2008, Bunde interviewed the grievant in the presence of Jeff Fowler, a Union Field Representative, Rick Ross, Lead Distribution Worker, and Kristin M. Krinke, a Union Steward. Bunde testified that she did not interview the grievant earlier because she wanted to check Paulsen's account of the grievant's conduct before accusing him. During her interview of the grievant on May 13, 2008, she asked him about Paulsen's allegation that, on April 10, 2008, he had removed sunflower seeds from Truck 6. The grievant denied that he had done so. He said that he did not go into Truck 6 that morning. Bunde's notes of this interview with the grievant show the following:

[Bunde:] Do you recall if anyone made any statements on 4/10 or 4/11 regarding being in the back of route 6 truck?

[The grievant:] No Route 6 is gone by the time I come in.

Truck 6 usually leaves between 7:45 a.m. and 7:50 a.m. Bunde testified that on April 10, 2008, she had seen Truck 6 on the dock at about 7:35 a.m. and saw it leave at about 7:45 a.m.

Bunde also testified that during her interview of the grievant on May 13, 2008, she asked him about his use of the cell phone assigned to Truck 4, the truck he had driven since the start of the 2007-2008 school year. She testified that, after she became Manager for Distribution in February of 2008, she decided to introduce a new system of monitoring the trucks. She would assign to each truck a cell phone equipped with global positioning system ("GPS") technology. Each truck would have the same cell phone permanently assigned to it, with a label permanently attached showing the truck to which the phone was assigned. Each truck's assigned dock position would have a charging station where the phone assigned to that truck could be re-charged at night. When plugged into the charging station, information from the cell phone would download into the Employer's computer system. The Distribution Worker would be required to keep the phone assigned to his truck turned on during the work day so that the position of the truck could be monitored as the truck proceeded on its route. When the truck returned to the dock after completion of its route, its driver would be required to plug it into the charging station at the dock position assigned to that truck.

In August of 2008, Bunde introduced this system, starting with a series of training sessions to inform the Distribution Workers how to use the system. The first training session, in

August, was attended by all the Distribution Workers. They received the new cell phones on October 7, 2008. After that, one-on-one trainings were given to all Distribution Workers, including the grievant. They were told that they were required to leave the phones turned on during the entire work day and that they were required to use the phone assigned to the truck each was driving with no exchange of phones from truck to truck permitted. The Employer's records show that, until about February of 2008, the cell phone assigned to the grievant's truck was usually not turned on during the work day -- though, when the grievant was off work because of illness and another Distribution Worker filled in for him on Truck 4, the cell phone assigned to Truck 4 was turned on.

Bunde testified that on about March 18, 2008, the phone assigned to the grievant's truck was found severely damaged, and it was taken for repair to the facility run by Sprint, the operator of the cell phone system. The Employer presented the testimony of Steven A. McCluskey, a Sprint Technician, that the damaged cell phone was designed to meet military specifications, that it was "very tough," and that it had been subjected to several hundred pounds of pressure, making it inoperable.

I summarize Paulsen's testimony as follows. One of the pallets he and Matthew prepared for Truck 6 on April 9, 2008, was made up entirely of boxes of oranges and apples, except that they placed a case of sunflower seeds on top of the fruit boxes. The case of sunflower seeds was about eighteen inches to

twenty-four inches long, about twelve inches wide and about three inches thick. It contained about fifty bags of sunflower seeds. Paulsen and Matthew shrink-wrapped the pallet in plastic film around its perimeter; the shrink-wrap process leaves the top open, so that the case of sunflower seeds on the top was accessible. He and Matthew loaded all of the trucks except Trucks 3 and 4 on the morning of April 10, 2008, and had finished the loading work by about 7:30 a.m. Paulsen testified that, after he finished the loading, he was walking toward the rest room when he looked over and saw the grievant carrying a case of sunflower seeds from Truck 6 toward Truck 4. The only sunflower seeds ordered for that day were those on Truck 6. When Paulsen returned from the rest room about two minutes later, he saw the grievant talking to Michael J. Conrin, the Distribution Worker who drove Truck 3. According to Paulsen, Conrin had been loading his own truck at the time that Paulsen was walking toward the rest room. Paulsen testified that he and the grievant usually did not talk much to each other, but he denied any discord between them.

Conrin testified as follows. On the morning of April 10, 2008, Conrin was driving Truck 3, which is docked next to Truck 4, the grievant's truck. Conrin testified that some Distribution Workers who are scheduled to drive also help with the loading and that he loaded Truck 4 that morning. The grievant does not load either his own or other trucks. Conrin testified that he first saw the grievant between 7:30 a.m. and 7:40 a.m. when the grievant was walking near Docks 6 and 7 toward Dock 4

Conrin also saw Paulsen between 7:30 a.m. and 7:35 a.m. as Paulsen was walking near Docks 6 and 7. Conrin testified that when he saw the grievant, he was not carrying anything. Conrin did not see a case of sunflower seeds on Truck 4.

Conrin also testified that, in early March of 2008, he heard Paulsen threaten the grievant, saying "I know how to get even" and "I'll get you." Conrin also testified that the dock area is open and accessible to the public. He testified that he had had trouble operating the cell phone assigned to his truck and that several times when he thought it was turned on he was told that it was not.

Kristin M. Krinke, a Union Steward, testified that at a grievance processing meeting on August 29, 2008, the Employer's Labor Relations Manager, Wayne Arndt, conceded that, if the only allegations against the grievant were those involving his cell phone, the grievant would not have been discharged.

The grievant testified as follows. He corroborated the account given in Conrin's testimony of his arrival for work on the morning of April 10, 2008 -- that he arrived between 7:30 a.m. and 7:40 a.m. He denied taking the case of sunflower seeds from Truck 6. He attributed Paulsen's accusation against him to a motive to get even with him. He testified that in March of 2008, when Bunde had conducted a disciplinary investigation of a confrontation between Paulsen and From, she had taken a statement from him. He told her that he did not hear anything about the argument until the end of it when he heard Paulsen say to From, "I'm going to kick your ass." According to the

grievant, when Paulsen heard that the grievant had given this statement to Bunde, he began to make harassing comments to the grievant, calling him "asshole" and saying that he would pay him back.

The Employer presented evidence that the grievant has been previously disciplined. He received a written reprimand in 2003 and a three-day suspension in 2004 for conduct not directly relevant to the present case.

DECISION

The Union argues that the evidence relating to the allegation of theft is not sufficient to show that the grievant took the case of sunflower seeds. It argues that no evidence except Paulsen's accusation supports that allegation. It urges that Paulsen's account should not be accepted because he had a motive to accuse the grievant falsely.

The Union also argues that, even if, arguendo, the allegations relating to the grievant's use of his GPS cell phone are accepted as true, they do not establish just cause for discharge, but, at most, merit a disciplinary suspension.

The Employer argues that I should accept Paulsen's account of the grievant's theft, which he gave both in his testimony and in his statement to Bunde during the investigative interview on April 30, 2008. The Employer urges that Paulsen's credibility is supported by the detail of his account. According to the Employer, his account is the only available explanation for uncontested facts -- 1) that, as Paulsen and Matthew both testified, they placed a case of sunflower

seeds on Truck 6 on April 10 for delivery to the Farnsworth school, 2) that the case of sunflower seeds loaded onto Truck 6 was missing from the items to be delivered to the Farnsworth school, which is the first stop on the Truck 6 route, and 3) that an inventory of the warehouse showed a case of sunflower seeds missing.

The Employer also argues that the grievant's denial is marked as false by an obvious inconsistency. According to the Employer, the grievant told Bunde that Truck 6 was gone from the dock when he arrived for work on the morning of April 10 -- a statement contradicted directly by Bunde and Paulsen and impliedly by Conrin.

I reach the following conclusions. First, I agree with the Union's argument, which, the evidence shows, the Employer has accepted, that the allegations relating to the grievant's use of his GPS cell phone are insufficient, standing alone, to justify discharge.

Second. I find that the evidence is sufficient to establish the allegation of theft. Only one case of sunflower seeds was ordered for delivery to schools on April 10, 2008. Paulsen and Matthew both testified that it was loaded onto Truck 6 that morning. The evidence shows clearly that it was not delivered to Farnsworth school and that it was missing from Truck 6. Paulsen's direct evidence -- his testimony that he saw the grievant carry the case of sunflower seeds from Truck 6 to Truck 4 -- explains why it was missing. The evidence includes no other suggestion why the case was missing. I find that

Paulsen's detailed testimony was credible, notwithstanding the Union's suggestion Paulsen made up the accusation to take revenge on the grievant after the grievant was questioned by Bunde during her investigation of Paulsen's confrontation with From a month before. That investigation led to an oral reprimand of Paulsen and of From, the least serious kind of discipline. It is unlikely that Paulsen, who had no previous dispute with the grievant, would fabricate an accusation of theft, dischargeable conduct, to get even after Paulsen received an oral reprimand.

Moreover, the Union's argument that Paulsen made up the accusation that morning would require not only a determination that Paulsen lied when he told Bunde that he saw the grievant carry the case from Truck 6 to Truck 4, but that, when Paulsen made the accusation, he knew that the sunflower seeds would later prove to be missing. Presumably, Paulsen could not have known that unless he himself removed the sunflower seeds from Truck 6 after he and Matthew placed them there. Nothing in the evidence suggests either that Paulsen did so or that he had the opportunity to do so.

Accordingly, I find that the evidence substantiates the allegation that the grievant took the case of sunflower seeds for his own use.

I note that, in making this determination, I do not rely on one of the arguments made by the Employer -- that the grievant falsely stated that Truck 6 was gone from the dock when he arrived for work on April 10, 2008. As I understand the

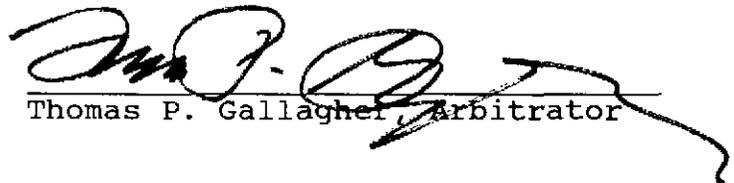
notes Bunde made during her interview of the grievant on May 13, 2008, the grievant did not say that Truck 6 was gone on the particular morning of April 10, 2008. Rather, the notes say, referring to Truck 6, "No Route 6 is gone by the time I come in." I interpret that comment in Bunde's notes as a general statement that Truck 6 usually "is gone" when the grievant arrives.

Nevertheless, for the reasons described above, I find that the grievant converted the case of sunflower seeds to his own use. An employer must be able to protect itself from theft, especially in operations such as those in which the grievant was engaged -- the daily handling of many small items that are susceptible to conversion. Unfortunately, the only assurance an employer can have that such serious misconduct will not be repeated is to end the employment relationship. Accordingly, I conclude that the Employer had just cause to discharge the grievant.

AWARD

The grievance is denied.

April 17, 2009


Thomas P. Gallagher, Arbitrator