

IN THE MATTER OF THE ARBITRATION BETWEEN

Jarrold Novotny,

Employee/Petitioner.

and

OPINION AND AWARD

Independent School District No. 721,

Employer/Respondent.

Veterans Preference Hearing
(Novotny Termination)

BMS Case No. 09-VP-1011

ARBITRATOR:

Janice K. Frankman,
Attorney at Law

DATE OF AWARD:

July 2, 2009

HEARING SITE:

ISD No. 721 District Offices
410 Central Avenue North
New Prague, MN 56071

HEARING DATE:

June 10, 2009

RECORD CLOSED:

June 22, 2009

REPRESENTING THE PETITIONER:

Jarrold Novotny
326 West 240th Street
Jordan MN 55352

REPRESENTING THE RESPONDENT:

James K. Martin, Esq.
Morrison Fenske & Sund, P.A.
5125 County Road 101
Minnetonka MN 55345

JURISDICTION

The hearing in this matter was held on June 10, 2009. The Arbitrator was selected to serve pursuant to the parties' agreement to select one arbitrator, and not a panel of three, as provided by the Veterans Preference Act at Minn. Stat. §197.46 ("the Act"). The parties submitted to arbitration an issue under the Act. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties provided oral argument at the close of the hearing. They were also provided an opportunity to brief the issue of exclusion of surveillance video-taping from evidence. They agreed to post briefing, to each other and the Arbitrator simultaneously, on or before June 19, 2009. The School District ("District", "Employer") submitted a Brief which was received by email attachment on June 19, and by regular mail on June 22, 2009, when the record closed and the matter was taken under advisement. The hearing was transcribed by Mary E. Piehl, AAA Reporting, 952-461-6766.

ISSUE

Did the School District ("Employer") have just cause to terminate Jarrod Novotny ("Veteran"), and, if not, what is the remedy?

Background and Summary of the Evidence

Jarrod Novotny was hired by the School District as Custodian five to six years ago.¹ The hearing record does not include his date of hire. Mr. Novotny has been an active member of the SEIU bargaining unit. His first position as custodian was at New Prague Middle School. He was promoted to Lead Custodian at Eagle View Elementary School when the School was opened three years ago. Mr. Novotny is an honorably discharged Veteran of the United States armed service.² On April 17, 2009, Mr. Novotny was provided with notice of proposed discharge and advised of his veterans preference rights. He received a second notice on April 22, 2009, which amended the first two notice letters. He requested this hearing in writing on April 17, and again on April 22, 2009. Mr. Novotny had received written warnings in 2006 and 2008.

The Incident and Proposed Discharge

On April 17, 2009, Mr. Novotny contacted District Building, Grounds and Transportation Director Craig Most,³ by telephone, to advise him that he may be receiving a call from Stephanie Torczon, teacher and media specialist at Eagle View

¹ Mark Soller, District Lead Building, Grounds and Custodial Coordinator, testified that he had supervised Mr. Novotny the entire time he had held his current position which is the past five or six years. Mr. Soller's employment with the School District began in 1988.

² The hearing record does not include the date of discharge or branch of service in which Mr. Novotny served.

³ Mr. Most was Mr. Novotny's direct supervisor for a time when he was Middle School Custodian. At the time of the incident, Mr. Novotny's direct supervisor was Mr. Soller who reports directly to Mr. Most.

School. He advised Mr. Most that he had picked up dog feces from the school lawn which Ms. Torzcon's dog had left the day before. He left a vinyl glove with the dog feces in it on her desk. He was annoyed because there is a rule that pets are not allowed on the school grounds, and she had had her dog in the school on an earlier occasion when it urinated on his shoe and the carpet. He called Mr. Most because he realized there would likely be repercussions. Mr. Most directed him to remove the feces from Ms. Torzcon's desk, which he did.⁴

On his way from removing the glove from the teacher's room on the second floor of the school, Mr. Novotny stopped by the kitchen area to check on workers doing repair work in the school kitchen. There is a desk at the entry to the kitchen where he set the glove down for a few minutes before taking it out to the dumpster down the basement corridor from the kitchen and out the back door across from his office.

Mr. Most sent an email to Eagle View Principal Joan Anderson at 7:34 a.m. on April 17, 2009, advising her that Ms. Torzcon's dog had left feces on the school lawn which Mr. Novotny was not happy about and had cleaned up. Ms. Anderson responded, "Enough said." at 8:04 a.m., copying Ms. Torzcon on the email. Ms. Torzcon responded to Ms. Anderson at 8:39 a.m. She included Mr. Most on her email which acknowledged that no one should be required to clean up after her pet, and she explained the occasion of her dog's visit to the school the day before. She closed suggesting, ". . . the next time Jay wants to leave a LAYTEX glove of my dog doo on my desk he should probably be told it should never have been in school to begin with." Ms. Anderson then sent two messages to Mr. Most, at 8:49 a.m. and 9:07 a.m.:

Craig, I will agree entirely that Staph (sic) needs to watch her dog. But Jay's response was inappropriate as well – to bring it in, put it on her desk in LATEX – to which she is allergic – as well as, some of the children – further sets us up for legal issues.

OK he informed me that the gloves were not latex but still – dog poop IN the school surely violates health issues.

District Exhibit 1

Mr. Most reported the incident to Mr. Soller after receiving Ms. Torzcon's email. He had concluded that Mr. Novotny had failed to follow his directive to immediately remove the dog feces and was insubordinate. He did not consider that she might have arrived at school earlier than usual and before Mr. Novotny had an opportunity to do it. The two men decided that Mr. Novotny's actions were very serious and inappropriate supporting a decision to discharge him.

Mr. Most then reported the detail of the incident, including the timeline, to Donna Friedman, Director of Human Resources. She supported their decision to terminate Mr.

⁴ Mr. Most was certain that Mr. Novotny had called him at 7:15 a.m. because, as was his habit, he looked at his atomic digital desk clock when Mr. Novotny called. Video tape, reviewed several days later by Mr. Most, reflects that Mr. Novotny left the teacher's room with the glove at 7:32 a.m.

Novotny, within minutes, after consulting with the School District Superintendent. Within ten minutes, she delivered a letter setting out Mr. Novotny's veterans preference rights which Mr. Most and Mr. Soller together delivered to Mr. Novotny at about 10:00 a. m. They did not provide Mr. Novotny the opportunity to discuss the matter because he had called in and reported the incident. Ms. Friedman's letter addressed Mr. Novotny's right to a hearing as a qualified veteran and advised that a written hearing request was required within 60 days. Mr. Most referred in his letter to his direction to immediately remove the feces from Ms. Torzcon's desk and that he was aware that she had seen the vinyl glove. He wrote as follows with regard to the basis for the decision to terminate his employment:

We have had numerous conversations regarding your inappropriate behavior within our school district in the past.

During those documented conversations, it was mentioned that future incidents could result in discipline and/or termination. This latest incident was completely out of line. It is not acceptable, and will not be tolerated. It is for this reason, coupled with your history of questionable behavior while on the job, that New Prague Area Schools has decided to terminate your employment effective immediately.

Joint Exhibit 3

Mr. Novotny left his written hearing request on Ms. Friedman's desk that afternoon.

On April 20, Mr. Most was contacted by a Union representative who advised him that Mr. Novotny had been denied his Weingarten rights and requested a Loudermill hearing. He requested a step one grievance meeting, and asked that Mr. Novotny be reinstated. Mr. Most refused all requests. He decided to do some further investigating in anticipation of the filing of a grievance. He requested video tape from three surveillance cameras placed in the entry to Eagle View School; in the downstairs corridor with a view of the doors to the kitchen, Mr. Novotny's office and the outside; and the second floor hallway with a view of the door to the Media Center.

Following Mr. Most's review of video for the time-frame 6:15 a.m. to 9:00 a.m. on April 17, 2009, he concluded that Mr. Novotny had taken more than 15 minutes to respond to his directive to immediately remove the glove from the teacher's room, and that his misconduct was made greater by taking the glove into the kitchen before disposing of it. He consulted once again with Ms. Friedman and she prepared a second notice letter which was delivered on April 22, 2009.⁵ The letter advised Mr. Novotny that the School District had re-confirmed its decision to seek his termination for three reasons:

1. On Friday April 17, 2009, you brought a plastic glove filled with dog excrement into Eagle View Elementary School and placed it onto a

⁵ The letter was hand-delivered at a meeting attended by Ms. Friedman, Mr. Most, Mr. Novotny and Union representatives Anderson and Schoenbauer.

teacher's desk. In order to do so, you walked the item through the common area of the school, up one of the primary staircases used by the school's students and staff, and through part of the media center.

2. After you called your supervisor to inform him you had placed the dog excrement on the teacher's desk and he instructed you to remove the item in a timely fashion. You did not seek to remove the item until you saw the teacher approaching the school building.
3. When you had removed the excrement from the desk, rather than place it directly into a trash receptacle, you walked into the kitchen area with the item in your hand and remained in the kitchen area for approximately two minutes.

Ms. Friedman repeated what she had written to him on April 17, with regard to his right to a hearing. She requested that he re-sign and re-date his earlier request for a hearing on the same notice he had provided to her on April 17. Joint Exhibit 5

At the hearing, the School District offered into evidence a CD of the video-taped time lapses from the three cameras which were viewed as Mr. Most testified. They are highlighted to note when Ms. Torzcon entered the building on April 17, 2009, and Mr. Novotny's arrival, approaches to Ms. Torzcon's room, entry into the kitchen and exit from the outside door to dispose of the glove. Mr. Novotny did not object to the receipt of the CD until later in the hearing when he requested that it be excluded from evidence based upon a case which he provided to Counsel for the School District and the Arbitrator. See, Colgate Palmolive Co. and Local 15, Chemical Workers, 155 LRRM 1034, 323 NLRB 515 (1997) The Arbitrator agreed to take the Motion to exclude the evidence under advisement. The School District first objected, consulted with regard to whether to continue the hearing or re-call witnesses then agreed to provide a Post-hearing Brief in support of its objection. The Arbitrator's decision to deny Mr. Novotny's Motion is addressed below within the Opinion and Findings at page 11.

Mr. Novotny was video-taped entering the teacher's room holding the glove with feces at about 6:45 a.m. and exiting at 6:47 a.m. Ms. Torzcon arrived at school earlier than usual on April 17, 2009. She was not asked what time she first arrived at the School. She testified she saw Mr. Novotny outside of the School mowing and weeding the lawn. The video tape shows her walking in the door at 7:27 a.m. She testified she checked her email when she came into her room then took the glove from her desk and set it out in the hallway. She reported she was in her room when he entered it to remove the glove, and they had a brief exchange in which she told him she would take care of the glove and he replied that he would. The video clip records him exiting her classroom carrying the glove at 7:32 a.m. He is then shown entering the kitchen at 7:34 and leaving at 7:36 a.m. to go outside with the glove.

Earlier Discipline

Mr. Novotny was viewed as a “fair” to “average” employee by his supervisors, Mr. Most and Mr. Soller. He received warnings on March 31, 2006, from Mr. Most, and on April 16, 2008, from Mr. Soller. Between the warnings, he received confirmation of counseling sessions with Mr. Soller on March 30, 2007, and October 15, 2007.

All custodians received a Memo from Mr. Soller dated April 3, 2008, which directed them to report any concern or problem with School District personnel to him, either directly or through lead custodians. The purpose was to avoid friction between custodial staff and others and to have problems be addressed only by supervisory staff.

Mr. Most’ March 31, 2006, warning followed reports of incidents at New Prague Middle School, where Mr. Novotny was Custodian, that he was engaged in inappropriate interaction with students including giving an eighth grade girl a flower and spending work time observing events and classes and playing basketball with students when he should have been working. Mr. Most wrote, “I would also remind you that these instances are very serious in nature. Further incidents will result in disciplinary action which could lead to suspension or termination of employment.” District Exhibit 6

Mr. Novotny reported directly to Mr. Soller as Lead Custodian at Eagle View Elementary School. Mr. Soller spoke with Mr. Novotny on three occasions concerning his interaction with students and the way in which he spent his time. Mr. Soller was responding each time to reports from Principal Joan Anderson. On March 30, 2007, he addressed inappropriate involvement with discipline and supervision of children as well as time spent watching children arrive on buses and walking around the building with a coffee cup in his hand rather than performing maintenance and custodial tasks. On October 15, 2007, he addressed lunchroom horseplay involving throwing of rags, joking with students and pounding on pails. He also addressed conduct of a custodian who reported to Mr. Novotny. On April 16, 2008, he addressed reports that Mr. Novotny had upset and frightened students through teasing and joking. One incident involved a blind student. In a Memo, Mr. Soller reported that he told Mr. Novotny his behavior was unacceptable and had to stop. He wrote, “This was not the first time I have had to talk to him about this. I also told him if this did continue I would have to remove him as lead person, and put him in another building on the night shift.” District Exhibit 5

Relevant Statutory Provision

Minn. Stat. § 197.46. VETERANS PREFERENCE ACT; REMOVAL FORBIDDEN; RIGHT OF MANDAMUS.

. No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for

incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

* * *

. . . . The veteran may appeal from the decision of the board upon the charges to the district court by causing written notice of appeal, stating the grounds thereof, to be served upon the governmental subdivision or officer making the charges within 15 days after notice of the decision and by filing the original notice of appeal with proof of service thereof in the office of the court administrator of the district court within ten days after service thereof.

Employer's Position

The Employer argues that Mr. Novotny's conduct was so egregious as to support his discharge. It argues the incident on April 17, 2009, alone provides just cause for its action. It asserts, in addition, that Mr. Novotny was insubordinate when he failed to immediately respond to Mr. Most' direct order to remove the dog feces from the classroom. It argues that he has provided no evidence to refute Mr. Most' testimony that he directed Mr. Novotny at 7:15 a.m. to remove the feces from the room and that he did not do it until about 15 minutes later.

The School District points to Mr. Novotny's admissions combined with "other evidence" and poor performance to support its case. It argues he improperly took it upon himself to enforce District policy concerning pets on the school grounds and that he continued inappropriate conduct notwithstanding warnings that it could result in severe disciplinary action. It points to his carrying the feces into the kitchen for two minutes where sanitary conditions are to be maintained.

The District responds to Mr. Novotny's assertion that his Weingarten rights and right to a Loudermill hearing were denied. It asserts that there is no jurisdiction to consider the arguments since this matter is convened under the Veterans Preference Act. It argues further that there was no need to provide him with union representation since he admitted what he had done; and, second, this hearing is much more than he would have experienced in a Loudermill hearing which provides "minimal due process".

Finally, the School District asserts the fact that Mr. Novotny did not know until April 22, 2009, that he was properly on administrative leave with pay and benefits is moot since he has been paid and experienced no loss in benefits, and the fact that his supervisor fired him, without advising him of his status as a veteran, was immaterial.

Employee's Position

Mr. Novotny has argued he was denied his rights as a bargaining unit member and veteran. He points to the School District's failure to provide Weingarten rights and a Loudermill hearing or to advise him until April 22, 2009, that he had been placed on paid leave pending this hearing. He denied that he believed what he had done was correct and admitted that he had attempted to become involved in enforcement of District policy

contrary to direction from his superiors. He asserted that he knew he had been wrong to do what he had and, therefore, reported it to his supervisor. He denied being insubordinate on April 17, in failing to follow Mr. Most's directive. He asserts that he went to Ms. Torczon's room right after talking to Mr. Most but could not avoid her seeing the dog feces since she was already in the room.

Mr. Novotny argued that Ms. Torczon continued to violate District policy relative to dogs and stapling paper to the walls of her classroom. He asserted that he had attempted to follow chain of command relative to the paper stapling issue to no avail. He admitted that he had not reported the earlier incident of Ms. Torczon's pet in the school corridor. He argued if he had, she should have been disciplined, and if she had not continued to violate Policy, he would not have been terminated.

In the course of his examination of District witnesses, Mr. Novotny noted that Principal Joan Anderson had been the source of reports leading to Mr. Soller's "write ups" of him. He argued that she did not like that he opposed a referendum, and that he had been falsely accused of removing related materials from a School lounge. He objects to the receipt of the CD with video excerpts and points to the lack of proof of the time when he called or when he left his office to go to Ms. Torczon's room after speaking with Mr. Most. He asserts he cannot prove the time because he does not own a watch.

Finally, Mr. Novotny argues he was improperly discharged from his position. He argues that progressive discipline has not been applied, and it is improper to discharge him following only written warnings.

Opinion and Findings

The record made in this matter supports a conclusion that the Employer did not have just cause to discharge Mr. Novotny from his position. A careful and close review of it also supports the conclusion that it is appropriate to reinstate him to his position and reduce discipline to reflect progressive discipline and the seriousness of the incident.

The School District has admitted that Mr. Novotny was denied both Weingarten rights and a Loudermill hearing prior to being placed on paid administrative leave required by the Veterans Preference Act. It has been acknowledged that he is a public employee and member of a collective bargaining unit. It has also been acknowledged that he may be entitled to a grievance hearing pursuant to the parties' Collective Bargaining Agreement. Nonetheless, the Arbitrator's jurisdiction is provided by the Veterans Preference Act which limits her consideration to whether the District has demonstrated just cause for its action. Arguments made with regard to application of other labor law, therefore, are distinct from the issues properly raised and decided here. In any event, a labor arbitrator considering a grievance most often has no jurisdiction to consider an unauthorized labor practice claim such as that raised by Mr. Novotny's Motion to exclude the video tape evidence.

Just Cause

In determining whether there was just cause for Mr. Novotny's termination, it is appropriate to consider whether he was afforded due process, whether a full and fair investigation supported the District's action, whether progressive discipline was appropriately applied and whether any mitigating circumstances exist to support his claim that he was improperly discharged. These are all well-recognized elements of a just cause analysis.

Due Process

By this hearing, due process has ultimately been provided. However, it is noteworthy that Mr. Novotny was terminated from his position without Union representation or even discussion of the incident which gave rise to the School District's action. Particularly since there is an acknowledged potential opportunity for a grievance hearing pursuant to the parties' CBA, it is inappropriate to base a decision here upon the pre-hearing due process issues raised by Mr. Novotny.

Fair Investigation

Investigation of the incident occurred largely after Mr. Novotny had been terminated. Clearly Mr. Most's decision, supported by Mr. Soller, and approved by Ms. Friedman, was importantly based upon his conclusion that Mr. Novotny was blatantly insubordinate in failing to "immediately" remove the feces from Ms. Torzcon's room. It is also clear that his decision was fueled by Principal Anderson's reference to concern for health issues including the use of a latex glove, a notion that was almost immediately dispelled. The chain of emails, detailed above, between 7:34 a.m. and 9:07 a.m. on the day of the incident and within less than three hours of Mr. Novotny's termination, are very telling.

After he was contacted by the Union that afternoon, Mr. Most decided to look more closely into the matter anticipating the filing of a grievance. The Arbitrator does not agree with the District's argument that what was learned on investigation only strengthened an otherwise right decision to discharge Mr. Novotny. Ms. Torzcon testified that she had seen Mr. Novotny working outside the building before she entered at 7:27 a.m., as the video reflects. He was captured on video leaving her room five minutes later, having spoken with her and removed the feces. Mr. Most testified he had no idea where Mr. Novotny was when he called him to report what he had done and to prepare Mr. Most for contact by Ms. Torzcon. His testimony that that Mr. Novotny called him at 7:15 a.m. stands alone in the record.

There is no dispute that Ms. Torzcon arrived much earlier than is customary for the teaching staff, a fact Mr. Most first learned several days after the incident when he reviewed the surveillance tapes. Mr. Novotny's assertion that he removed the feces directly after speaking with Mr. Most but not before she got to her room is credible. More important, Mr. Novotny's self-reporting upon reflection of what he had done and

expectation that he would be able to remove the feces before Ms. Corzcon arrived is supported by the record.

The video review revealed Mr. Novotny's two minute visit to the kitchen area to check on workmen before he disposed of the feces. Mr. Novotny's assertion that he did not take the feces into the kitchen proper is unrefuted. With regard to the nature of the incident which prompted the termination, the concern for health issues and the introduction of hazardous materials into the environment was not the focus. It was first mentioned in Ms. Friedman's April 22, 2009, re-confirming the termination action.

Progressive Discipline

Progressive discipline is a well-understood and accepted employment and labor law principle and tenet. Its application is not formulaic. It is dependent about the facts of a particular case including the employee's employment history including work performance and discipline record, the nature of the offense and mitigating factors. It is plainly a part of any determination of whether there was just cause for the discipline in question.

This record includes no formal performance evaluation and only cryptic reference to Mr. Novotny's work as average or fair. Although the hearing record contains a volume of testimony that touches upon performance linked closely with objectionable conduct, Mr. Novotny has received limited discipline over the tenure of his employment with the School District. He received a clear written warning from Mr. Most in early 2006, focused upon inappropriate interaction with students. Two years later, a verbal warning, confirmed in writing by Mr. Soller in mid-April, 2008, also discussed inappropriate conduct in the manner in which he interacted with students. In addition, there is evidence of counseling on those points.

Mr. Novotny also received a Memo from Mr. Soller dated April 3, 2008, to all custodians, which directed them to report any concern with regard to staff or the community to him or Mr. Most. Mr. Novotny knew that it was not appropriate to take matters such as enforcement of a no-pet policy into his own hands. His self-reporting, almost immediately after the incident, set the disciplinary wheels in motion. The manner in which Mr. Most first reported the incident to the Principal suggests that discipline was not first on his mind.

This incident is not similar to any earlier matter for which Mr. Novotny has been warned. By any standard, it is inappropriate to bring dog feces into the work environment, especially a school, where health and safety concerns are paramount and exemplary adult examples are expected. In addition, by his action, Mr. Novotny failed to follow his supervisor's directive to turn over to him for resolution, any matter of concern with school staff. It is a serious incident which supports commensurate discipline. In this case, the loss of his employment is not appropriate. There is no evidence which suggests Mr. Novotny is unwilling or incapable of responding positively to lesser discipline and constructive counseling.

Mitigating Factors

In addition to limited prior discipline over a relatively long employment tenure, Mr. Novotny's self-reporting of the incident and attempt to correct it are noteworthy. If he were oblivious to his wrong-doing and the incident had been reported to his supervisor by someone else, the result here might be different. While his explanation of frustration with Ms. Torzcon, including an earlier admitted encounter with her dog in the School, is understandable, it does not cure or excuse the error he made. It is appropriate to reinstate him to his position and reduce the discipline.

Motion to Exclude Video Excerpts

As noted above, the source of the Arbitrator's jurisdiction is the Veteran's Preference Act. Ruling on evidentiary motions is within the purview of the Arbitrator's authority and responsibility in conducting a hearing. It is appropriate to deny Mr. Novotny's Motion based upon the relevancy of the videotape evidence and the failure to provide any proper basis to exclude it.

The Colgate case, submitted by Mr. Novotny does not support his Motion. In that case the employer refused to negotiate installation of video cameras in the workplace and was sanctioned by the National Labor Relations Board. There was no issue of exclusion of videotape evidence. It was a case where the employer was charged with an unauthorized labor practice ("UPL").⁶

Finally, it is noted that the Veterans Preference Act, cited and quoted above at pages 6 and 7, provides for appeal by the Employee from this decision. There is no reciprocal provision in the Act which applies to the Employer.

AWARD

Mr. Novotny shall be reinstated to his position as Lead Custodian without loss of benefits or seniority. Discipline shall be reduced to a 15 day suspension without pay for the period April 17, 2009, through May 1, 2009.

Dated: July 2, 2009

Janice K. Frankman, Attorney at Law
Arbitrator

⁶ It is noted that, with rare exception, a labor arbitrator hearing a grievance matter brought under a Collective Bargaining Agreement has no jurisdiction to consider a UPL issue.