

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

AFSCME COUNCIL 5, AFL-CIO

and

MINNEAPOLIS PARK AND RECREATION BOARD

Kalina Bourdeau Grievance

10PA0108

Appearances:

Ms. Laurie J. Johnson, Field Representative, AFSCME Council 5, 300 Hardman Avenue S., St. Paul, Minnesota 55075, appearing on behalf of the Union.

Rice, Michels & Walther, LLP, Attorneys at Law, by Ms. Ann E. Walther, 10 Second Street, N.E., Suite 206, Minneapolis, Minnesota 55413, appearing on behalf of the Employer.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, AFSCME Council 5, AFL-CIO, hereinafter referred to as the Union, and Minneapolis Park and Recreation Board, hereinafter referred to as the Employer, the undersigned was selected to serve as Arbitrator of the Kalina Bourdeau grievance. Hearing was held on December 9, 2009, in St. Paul, Minnesota, at which time the parties presented such testimony, exhibits and other evidence as was relevant to the dispute. At the conclusion of the hearing, the parties made oral argument in lieu of filing written briefs.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

STIPULATED ISSUE:

Whether the Park Board had just cause for the termination of the grievant?

If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 20 – EMPLOYEE DISCIPLINE AND DISCHARGE

Section 20.01 – Just Cause

Disciplinary action may be imposed upon an employee who has satisfactorily completed the initial probationary period only for just cause. Disciplinary investigations shall be completed and discipline imposed in a timely manner.

...

ARTICLE 12 – WORK RULES

Reasonable work rules will be formulated and posted. The Board will notify its employees and the Union of proposed changes to the work rules in advance of implementing the changes to provide the opportunity to meet and confer with the Union at its request.

FACTS:

Grievant Kalina Bourdeau was an employee of the Minneapolis Park and Recreation Board from the time of her hire in March 2007 until her termination effective March 18, 2009. She was a Customer Service Representative I (CSR I). She completed the standard six-month probationary period and, then, an extended six-month probationary period. The grievant's probationary period was extended because of issues relating to her contact with the public. More specifically, her tone and attitude in interacting with customers. Her work performance was otherwise deemed to be quite satisfactory (Union Exhibit 3).

As a CSR I, the grievant was responsible for numerous duties as outlined in Employer Exhibit 5, but her primary duty was the daily deposit of monies (cash/checks) collected during the day.

The work area where the grievant worked, consisted of two desks with locked drawers; file cabinets that could be locked; and a locked back room with locked file cabinets in the room

(Employer Exhibit 6). The Customer Service Department is open for business to the public from 8:30 a.m. to 4:30 p.m., but after hours the public has access to the area for meetings, etc. At all times material herein, there were three staff members working in this area. In addition to the grievant, there was Barbara Halverson, CSR I, and Annie Olson, Manager of Support Service. Olson was the grievant's immediate supervisor until November 1, 2008, when she went on maternity leave. In Olson's absence, Iris Pahlberg Peterson, CSR II, assumed her supervisory duties. Olson and Peterson reported to Dawn Sommers, the Public Information and Marketing Manager who, in turn, reported to the General Manager of Administration, Don Siggelkow.

The grievant was instructed of the step-by-step deposit procedure (Employer Exhibit 5). In short, the monies collected had to be recorded, reconciled and deposited. In addition to the money collected by the Customer Service Department, the grievant was responsible for the deposit of checks received by the Special Services Department. Special Services receive checks in the mail for the larger permits involving larger amounts of money than received by Customer Service. Shane Stencil is the primary person in Special Services that receives and records the checks in what is referred to as the "reserve master." Once that is completed, the checks are sent to the grievant who must reconcile the checks with the entry in the deposit report and then deposit the checks. If a check cannot be reconciled, the grievant voids the check, advises Shane of same and returns the check. The grievant was aware that checks had to be deposited daily, but if busy and checks cannot be deposited daily, they should be deposited within two or three days.

On October 28, the grievant received a number of checks from the Special Services Department. Thirteen of the checks, including six from Tim Fish,¹ could not be reconciled so

¹ Tim Fish is a concession vendor that leases from Minneapolis Park and Recreation Board. It submits checks on an on-going basis for utilities and lease.

they were voided (Employer Exhibit 9). The grievant, however, did not advise Shane of same or return the checks. Shane first became aware of the voided checks when they were brought to his attention by the grievant on December 22. Shane advised Sommers and Siggelkow of the situation. Sommers spoke with the grievant and advised the grievant that she considered this to be a serious matter and that the checks had to be deposited. The grievant assured Sommers that the checks would be deposited immediately.

On March 3, 2009, the Finance Department discovered that \$400 in cash was missing. The cash was from payments made by Schwick, Inc. for permits sold by their concession stand at Lake Harriett.² The Minneapolis Park Police Department was asked to investigate. Sergeant Mark Swanson conducted the investigation. He completed his investigation on March 11, 2009, and found no probable cause to believe that any employee of Minneapolis Park and Recreation Board had stolen the money. He did, however, make the following observations:

As we discussed the other day, I did find a few minor problems with the way money was taken in from vendors, and stored in the customer service area.

It is never counted or dated when it is received by staff there. So we never truly know when or how much money we have received, at the time it is dropped off at the Customer Service Window. No receipts are issued either.

Until the money etc. can be deposited; it is stored in the front area of the Customer Service Desk and locked in the drawer. The key is stored out of view, but on top of the file cabinet where the money is stored.

The above two things raise doubts about the security of the money, or even if the correct amount of money was ever received at the Customer Service Counter.

I still am going to sit down with staff and go through the Reserve Master system to see if I can gather more information about deposit records and see if / when they were ever entered into the system. This may take some time.

² Schwick, Inc., receives a 10% commission on all permits sold.

We did discuss maybe placing the money in a locked file or safe in the back room, which is a better secured area. And also better or different ways to receive money from vendors, i.e. only accepting checks from them, or counting up all monies or checks before the vendors leave, to be sure all money balances out.
(Employer Exhibit 16)

On March 12, 2009, Sommers, as a security measure, had Bourdeau, Halverson and Peterson read and sign the following regarding monies in the Customer Service area:

All cash, checks and credit card information must be locked in a safe and sound place in the Customer Service Area's secure back room at the end of each work day. Absolutely no cash, checks or credit card information can be left in your individual work areas, desks or file cabinets.

If you have any questions or are unclear about these procedures, please see me immediately.

Please sign and date the appropriate lines below, to confirm you have received and understand this information.
(Employer Exhibit 7)

Later that day, after all three had signed off, Peterson, who was still acting in a supervisory capacity in the absence of Olson, told Bourdeau and Halverson, as they were sitting at their desks, that they had to secure work in the back room. Bourdeau answered that she had already secured her work in the back room. Halverson put her remaining work in a folder and she Peterson and took her work to the back room. The sequence of events that followed was recorded by Peterson and presented to Sommers as follows:

At 4:30 PM. As Barb and I were unsuccessfully trying to lock a file in back, Kalina came to the back room to see what we were doing. I asked her if she would help us and try locking the file. She replied, "You don't want to know what I think about this procedure" and then she mumbled something under her breath and left for the day. Barb and I finally discovered that the desk in the back room had drawers that locked so we secured the work and the cash box in there.

Later, before I left for the day, around 5:15 PM, I decided to check the desk tops, counters and shelves of both Barb and Kalina's work stations, the parts of their work stations that would be easily accessible to anybody. I did not go through their drawers.

Barb's work station looked great; there was nothing out that shouldn't be and I had observed her taking great care to double-check her work station. However, as I glanced around Kalina's work area, I noticed a plastic shelf tucked under the counter to the left of her computer. I thought I saw a check peeking out from the papers so I shuffled through them and discovered numerous checks dating as far back as September 2008, totaling several thousand dollars. I immediately put these checks in a file folder. Then I saw permits on the plastic shelf on her side counter and knowing that some permits have the credit card numbers on them, I looked through them and indeed found some permits with credit card numbers which I put in a separate folder.

(Employer Exhibit 8)

The checks recovered from the grievant's desk referred to above, were from Tin Fish dating back to October 20, 2008, and totaled approximately \$28,000. Also found were permits containing sensitive credit card information. Olson was called back from maternity leave to help with deposits.

General Manager Siggelkow met with Sommers about the results of the investigation and the conduct of Halverson and the grievant. It was decided that the work performance of Halverson warranted a 90-day suspension and that of the grievant warranted termination. Siggelkow and Sommers determined that the grievant warranted a more severe penalty because she lied to Peterson when she stated that she had secured her work when clearly she had not. Further, she was rude and disrespectful to Peterson when she responded to Peterson's request for help. She answered that "you don't want to know what I think about this procedure." The grievant testified that she made the statement because she was frustrated. She admitted to making a mistake. In her testimony, the grievant denied lying; she explained that she was not aware there were checks at her desk.

Siggelkow and Sommers found Halverson, unlike the grievant, remorseful. She acknowledged she was not following the practice regarding monies collected and that she was aware that work had to be secured in the back room.

After a pre-disciplinary hearing held on March 17, 2009, the grievant on March 24, 2009, was advised of her termination, in material part, as follows:

Civil Service Commission Rule 11.03 A.1 – Failure to meet minimum standards.

- Deposits were not made nor were items secured in the backroom.

Civil Service Commission Rule 11.03 B.4 – Insubordination.

- On December 22, 2008 you did not make deposits as directed by management.
- On March 12, 2009 you failed to secure checks and credit card information in the backroom as directed.
- You told Iris you had secured all your work when you had not.

Civil Service Commission Rule 11.03 B.18 – Violation of department rules, policies, procedures or a city ordinance.

- On December 22, 2008 you failed to follow the required procedures for the timely deposits.
- On March 12, 2009 you failed to follow the required procedures for the timely deposits and secure any checks and private credit card information in the backroom.

Civil Service Commission Rule 11.03 B.20 – Other justifiable causes as specified.

- Your violations put the Park Board and its vendors' reputations at risk by failing to timely deposit funds entrusted to the Park Board.
- Your violations have resulted in the Park Board not realizing revenue in 2008.
- Your violations may result in the Park Board being unable to collect on some of the dated checks.
- Your violations have put at risk the private credit card information of individuals and businesses outside of the Park Board.

I have also determined that you violated the following and department procedures:

MRPB Customer Service Procedures – Regarding timely deposit of funds and maintaining security standards.

- You failed to make timely deposits of funds and maintain security standards.

For these reasons I have determined that termination is warranted due to violation of **Civil Service Commission Rules 11.03 A1, B4, B18, B20 and work procedures regarding timely deposit of funds.**
(Employer Exhibit 22)

Halverson's discipline was based on the same rule violations, i.e. Rules 11.03 A.1, 11.03 B.18 and 11.03 B.20. However, the grievant was also discharged for violating Rule 11.03 B.4, Insubordination.

POSITIONS OF THE PARTIES:

The parties made oral closing arguments detailing their positions and support thereof. The following is a brief summary of same.

Employer's Position

This case and the grievant's termination is all about trust. Her primary duty was to make daily deposits of monies received. The grievant claims she was ignorant of the fact that monies had to be secured. But she knew monies had to be secured as confirmed by Halverson's testimony. Olson, Sommers and Halverson all testified that it was known that the back room was where monies had to be secured. That was the purpose of the room. The grievant's file cabinet was relocated to the back room so, of course, she knew that is where cash and checks had to be held until deposit.

The evidence clearly establishes that the grievant was negligent in carrying out her responsibility for depositing checks. In October 2008, she requested that checks from Special Services be voided, but she did not follow up, as required, by contacting and returning the checks to Shane. Further, she did not deposit all of the checks received by December 28, 2008, as directed by e-mail dated December 8, 2008. On December 22, 2008, the grievant found checks from October 2008, and returned them to Shane. Shane advised Sommers and Siggelkow of the non-deposited checks. Sommers met with the grievant and told her that the checks had to be deposited. The grievant assured her they had even though the grievant had not done so. These were the checks discovered on her desk unsecured on March 12, 2009. This was the same day that she was given written instructions, which she signed, that monies had to be secured in the back room in a locked file cabinet. She neglected to do so and expressed to Peterson that she did not approve of the policy.

This case however is not just about lax security practices of the grievant. It is about trust. The grievant lied to Peterson when she was asked on March 12 if she had locked all of her checks. The grievant answered "yes." Clearly she did not. Checks totaling \$28,000, some dating back to October 2008, were found in a bin on her desk.

The Union argues that the grievant was treated differently and disparately than Halverson who for the same offense was given a 30-day suspension. But, the grievant's offense is much more serious because unlike Halverson she was not truthful and unlike Halverson she shows no remorse. Halverson admitted her wrongdoing and indicated she was truly sorry. The grievant did not.

Based on all of the above, it is the Employer's position that the grievant's conduct constitutes just cause for discharge.

Union's Position

The grievant's termination was the result of what began as an investigation into the disappearance of \$400. The investigation concluded that there was no guilt on the part of employees working in the Customer Services Counter. Sergeant Swanson who conducted the investigation noted that security was lax as it related to the handling of money and made suggestions in regard thereto.

In response to the investigatory report made by Sergeant Swanson, the Employer initiated a new work rule dated March 12, 2009. It required that all cash, checks and credit card information be locked in a cabinet in the locked back room. There was no notification to the Union of these changes in policy as required by Article 12 of the collective bargaining agreement. Further, employees were not forewarned of the consequences of violating the newly established policy. The grievant had no reason to believe that a first violation of the policy would result in discharge.

Further, the Employer found that the grievant and Halverson violated the same work rules by their work performance, but the grievant was terminated while Halverson was given only a 90-day suspension. Clearly the treatment of the grievant constitutes disparate treatment. The grievant's termination was grossly unfair.

Progressive discipline should have been used in this case. The grievant admits she made a mistake by not depositing the checks in question. She denies lying to Peterson as alleged; she simply did not remember that the checks were in a cubby hole on her desk. Progressive discipline would be corrective in this case. This is an employee with no previous discipline and with good evaluations. There is no reason to believe the grievant would not conform to the new policy.

Based on the above, the instant grievance should be sustained and the grievant made whole.

DISCUSSION:

Most of the material facts are not in dispute. It is undisputed that the grievant was aware that checks and cash had to be deposited daily or a short time thereafter;³ that by written directive on March 12, 2009, checks and cash had to be locked in the back room; that the grievant when asked on March 12, assured Peterson that she had secured her checks and cash in the back room; that shortly thereafter on March 12, checks totaling approximately \$28,000, some very old, were found in a bin within the confines of the grievant's desk.

The Union concedes that the grievant failed to deposit certain checks in a timely manner, but disputes the seriousness of the offense as claimed by the Employer. The Union argues that the grievant's termination was improper and without just cause because it was not a first time dischargeable offense; progressive discipline was not followed; and that the grievant was treated differently than co-worker Halverson who committed the same offense but was given a 90-day suspension.

As for the latter claim, equal treatment of employees committing similar offenses is one of the factors in determining just cause. However, the offenses must be the same or substantially similar and under like circumstances.

Here, at first glance, the grievant's conduct and Halverson's conduct appears to be similar if not the same. Both had stale checks that were not deposited timely. However, there are some striking differences.

³ The record establishes, and the grievant does not dispute, that she and others were told that deposits had to be timely made.

One very important and significant difference was that the grievant had checks totaling \$28,564.39 within the confines of her desk on March 12, 2009, even after being directed to secure all her checks and cash as well as credit card information in the back room. She did not do so. She was even asked after she received the March 12 directive if she in fact had locked her deposits. She said "yes."⁴ The grievant claims she did not remember having the checks in her possession. The Arbitrator finds it incredible that the grievant was not aware that the checks were at her desk. When seated at her desk, the bundle of checks was located right in front of her in an open bin right next to her computer screen.⁵ Significantly, most of these checks were the ones dating back to October 2008 and the ones the grievant was told directly, face to face, by Sommers to immediately deposit. The grievant assured Sommers that she would do so. This was after she had been instructed by e-mail dated December 8, 2008, that "all deposits and cash receipts should be received at MPRB Finance by 12/29/08 noon." The grievant did not do so and, again, some of the checks were ones that she had assured Sommers would be deposited immediately. To make matters worse and problematic for both the Board and its customers was that in a number of cases requests had to be made for re-issuance of checks and in one case the customer refused which resulted in the loss of revenue.

The grievant claims that when she was confronted by Peterson and asked if she had locked her work in the back room, she answered "yes," not remembering there was a bundle of checks located within her desk. Even if the grievant had forgotten the checks as claimed, the Arbitrator cannot find plausible that once prompted by Peterson that she would not remember that the checks in issue had not been deposited. Further, and importantly, the grievant did not

⁴ This was just after she told Peterson "you don't want to know what I think about this procedure" when asked for help in the back room.

adequately explain why it was that the checks remained at her desk, undeposited, for three months after being specifically instructed to deposit same. The Arbitrator understands that there was a practice of not necessarily making deposits on a daily basis and that supervision in this regard was lax, but that's a far cry from holding on to checks that were five months old. The grievant sat at her desk every day with the bundle of checks directly in front of her in a bin, yet she claims, apparently, that she did not notice the checks sitting there. She deposited other checks, but not those. The Arbitrator is aware that the grievant had other duties as a Customer Representative but her primary job duty, which she understood, was to make deposits.

Based on the above, the Arbitrator concludes that the offenses of the grievant and Halverson were not sufficiently similar and, therefore, the discipline imposed, a 90-day suspension for Halverson versus termination of the grievant, did not constitute disparate treatment. Halverson was honest and forthright and took responsibility for what she acknowledged as not following proper procedure in her handling of checks and cash and credit card information. The grievant was not. The grievant was directly told in December 2008 in no uncertain terms that she was to deposit checks that were received in October 2008. She did not. Unlike the grievant, Halverson did not disobey what amounted to a direct order by her supervisor. Halverson did not refuse to put her work in the back room, locked, per the March 12 written directive. The grievant did. Halverson did not tell Peterson that she had put her work in the back room when she didn't. The grievant did. Halverson was not cited nor disciplined for a violation of Rule 11.03 B.4 – Insubordination. The grievant was. In this regard, the grievant was charged with:

⁵ Employer Exhibit 6.

- On December 22, 2008, you did not make deposits as directed by management.
- On March 12, 2009, you failed to secure checks and credit card information in the back room as directed.
- You told Iris you had secured all your work when you had not.

The record evidence, as discussed and concluded above, supports the Employer's charges. Further, the Arbitrator finds that the grievant's conduct in this case and the offenses committed are serious enough to constitute just cause for discharge. Arbitrators in determining an appropriate remedy normally take into consideration mitigating factors. Here, there are none. The grievant had no prior discipline record, but she was a short-term employee with only two years of service with the Park and Recreation Board.

The Union, however, argues that the grievant was held accountable to a new rule issued on March 12, 2009, which was in violation of the contract because the Union was not notified of the rule change in advance of implementation as required by Article 12 of the contract.

First, the March 12 directive was not a change in what was the Employer's policy regarding safekeeping of checks, cash and credit card information. Although not closely monitored, the record establishes that employees were told that their work was required to be kept in the back room. In this regard, Halverson, in her interview during the investigation conducted by *Sergeant Mark Swanson*, stated that she knew that deposits should be kept in the back room for security reasons.⁶

Second, the March 12 directive is not really a work rule. Work rules pertain to governing employee conduct and behavior not directives, policies, instructions, etc., relating to job duties.

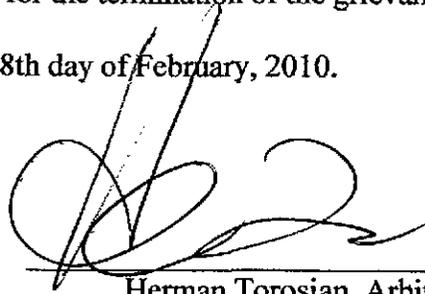
⁶ Employer Exhibit 27.

Based on the above facts and discussion thereon, the Arbitrator renders the following

AWARD

That the Park Board had just cause for the termination of the grievant.

Dated at Madison, Wisconsin, this 8th day of February, 2010.

A handwritten signature in black ink, appearing to read 'H. Torosian', written over a horizontal line.

Herman Torosian, Arbitrator