IN RE ARBITRATION BETWEEN:

SEIU HEALTHCARE MINNESOTA

and

ALLINA HEALTH SYSTEMS/UNITED HOSPITAL

DECISION AND AWARD OF ARBITRATOR

FMCS 090804-59505-3

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July 19, 2010

IN RE ARBITRATION BETWEEN:

SEIU Healthcare Minnesota,

and

DECISION AND AWARD OF ARBITRATOR
James Koepke grievance
FMCS Case #090804-59505-3

Allina Health System/United Hospital.

APPEARANCES:

FOR THE UNION:

Roger Jensen, Miller, O'Brien & Cummins
Steve Sitta, Business Representative
James Koepke, grievant

FOR THE EMPLOYER:

Sara McGrann, Felhaber, Larson, Fenlon &Vogt
Jessica Marsh, Felhaber, Larson, Fenlon &Vogt
Samara Calderon, HR Generalist
John Zellmer, Facility Operations Mgr.
Rochelle Rasmussen, Parking Coordinator
Bill Anderson, Mgr. of Voice and Data Networks

PRELIMINARY STATEMENT

The hearing was held May 26, 2010 at the law offices of Felhaber, Larson, Fenlon & Vogt, 444 Cedar St., #2100, St. Paul, MN, Minnesota. The parties presented oral and documentary evidence at which point the record was closed. The parties submitted Briefs dated July 9, 2010.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from 2008-2012. The grievance procedure is contained at Article 7. The arbitrator was selected from a list maintained by the Federal Mediation and Conciliation Service.

ISSUES

There was a procedural arbitrability issue raised as well as the merits of the discharge. The issues to be determined are thus as follows:

1. Was the grievance properly and timely filed?

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

EMPLOYER'S POSITION

The Employer took the position that there was just cause for the termination of the grievant based on the theft of time. In support of this position the Employer made the following contentions:

1. TIMELINESS: The Employer first asserted that the matter was procedurally non-arbitrable as untimely. The Employer cited the following provisions of the grievance procedure in support of the claim that the Union failed to properly serve the appeal to arbitration:

> ARTICLE 7 - GRIEVANCE AND ARBITRATION PROCEDURE
>
> **(A) General Provisions.**
>
> Any claim of an employee arising out of the interpretation, application or adherence to the terms or provisions of this Agreement or arising out of disciplinary and discharge actions taken by the Employer shall be subject to the Grievance and Arbitration procedure. …
>
> **(C) Arbitration and Mediation Procedure.**
>
> In the event the grievance is not resolved, either the Union or the Employer shall have the right to appeal the grievance to Arbitration. All disputes referred to the Board shall be filed with the Director/Vice-President of Allina Labor Relations within thirty (30) calendar days after receipt of the Employer's written decision.

2. The Employer focused on the appeal from the Step 3 meeting and noted that it was held April 27, 2009 and that its response was served by e-mail on the Union on May 15, 2009. See Joint Exhibit 7. The letter indicated that it was sent both by US Mail and E-mail. There was no reason the Union should not have received that e-mail and no evidence that it did not other than the self-serving statement by the Union representative that he never received the e-mail. The Employer argued that the time began running of the 30 days referenced in the above cited contract provision on May 15, 2009. The Union's position that they never got the May 15th e-mail was, according to the Employer, not credible since several other e-mail were sent and received by the Union.

3. The Employer noted that it should not take more than a day to get a piece of mail from St. Paul to Minneapolis. The Employer asserted that the Union's response is timely only if it received the Employer's May 15, 2009 letter no earlier than May 19, 2009. The Employer asserted that it stretches the bounds of credibility to assume it took that long to get to the Union's office.

4. The Employer further asserted that there was no reason to assume that the one operative piece of e-mail that governs the timeliness of this issue was somehow "lost." The Employer asked that the arbitrator take into account that the Union representative has an incentive to fabricate the story about the lost e-mail because he acknowledged that if the Employer's appeal letter had in fact been received on May 15th the Union's appeal letter(s) were untimely.

5. The Union sent a series of procedurally incorrect messages back to the Employer beginning June 15, 2009 as well. The Union sent a letter dated June 15, 2009 to Mr. Tim Caskey, Joint exhibit 9. This was sent to the incorrect person and the Employer informed the Union of the procedural insufficiencies by letter dated June 17, 2009, Joint exhibit 11.

6. The Union's purported appeal letter was both late and sent to the incorrect person. The Employer noted too that its letter setting forth those deficiencies must have been received on June 17, 2009 because the Union sent a corrected letter date June 17, 2009, this time to the correct person within the Employer. This letter was dated June 17th but was faxed and received on June 18th by the Employer. Joint Exhibit 18. The Employer argued though that by this time it was too late and that the contractually mandated 30 day time frame had already passed. The response was due on June 14th; the Union's response was both late and sent to the wrong person.

7. The Employer further asserted that it immediately advised the Union that it would defend this case on procedural and timeliness grounds. Thus the matter is procedurally untimely and under the clear terms of the grievance procedure, it must be dismissed on that basis.

8. MERITS: The basis for the discharge was theft of time on the grounds that the grievant punched in and then parked his car on multiple occasions thus "stealing" many minutes of time. The Employer asserted that the grievant's admitted dishonesty should result in his discharge if he was compensated for even a single minute that he did not work due to his dishonest punches.

9. The Employer pointed to the provisions of Article 6 (A) of the labor agreement that provides as follows: "Employees who are … dishonest … shall be considered to have engaged in acts that are grounds for discharge." The Employer asserted that it need not be rigidly bound to a progressive discipline scheme and noted that there are certain types of misconduct where even a single occurrence warrants discharge. Theft has long been recognized as such an offense.

10. Moreover, the Employer cited multiple arbitration decisions that hold that theft, even for small amounts, are terminable offenses irrespective of progressive discipline. Theft and the resultant loss of trust in the employee, is dealt with severely also regardless of the "value" of the items stolen. The Employer indicated that the theft of time should be treated no differently than theft of anything else.

11. Here the Employer argued that the grievant acknowledged that he in fact punched in first and then parked his vehicle in the employee parking lot. As the result of an anonymous tip to the "integrity line," a secure way for employees to report waste, theft or other inappropriate behavior by other employees, the Employer commenced an investigation to determine which employees were in fact stealing time from the Employer. The grievant, along with 5 other employees were found to have punched in and then parked their cars, thus "stealing" time. All of the employees found to have engaged in this behavior were fired.

12. The Employer noted that in 2001 when employees were found to have been calling in to the Kronos time clock from their cell phones and thus punching in early, they were specifically told not to engage in this or any sort of similar behavior. The employees were thus all well aware of the severe consequences of abusing the time clock and were thus on notice that any further sort of time theft would be treated severely.

13. The grievant was given specific training on this very subject as a part of the 2008 compliance training, Employer Exhibit 10. In fact on page 152 of that training manual, as a part of the required training that used short vignettes to illustrate certain rules and violations, this exact scenario was posited to the employees. That page provides as follows: "In the morning one of my co-workers drives up to the building entrance, runs in to swipe her badge in the timekeeping machine, and then leaves to park her car in the parking lot. Is this against the rules? The page then calls for an answer – yes or no – and the page will not advance until the employee gives the correct answer. The clear correct answer is that it is against the rules to do this – and this is *exactly* what the grievant did. He was thus on clear notice that his actions were contrary to the rules and would be treated severely. Thus even though he was an otherwise "good" employee, his act of stealing time in this fashion cannot be ignored or overlooked.

14. The Employer countered the Union's defenses and asserted that they had little merit. The first defense was that another employee, a lead person, engaged in the same behavior. The Employer noted first that the other employee was also fired for his conduct, which was very much the same, as well. Moreover, that employee was not a true supervisor since he was also in the same bargaining unit; he was merely a lead worker and did not have supervisory powers. Third, simply because others did it too does not make it right. There was little question that the grievant knew this was wrong and simply thought he could get away with it.

15. Finally there was no lax enforcement of this rule because other employees were surreptitiously engaging in this conduct. Once management found out about this practice they took immediate steps to stop it and to punish those who had engaged in it.

16. The Employer next dealt with the argument that the clock was somehow inaccurate and that there is a rounding procedure in those allowing of up to 7 minutes of "lag time" between a punch and when the employee gets credit for working. The Employer asserted first that there is no more than perhaps 20 second difference between the time clocks and the parking swipe clock. Thus, any claim that the time clocks are inaccurate was simply unfounded.

17. Second, the question here is not whether the loss is small or large but rather whether the employee can be trusted. The Employer cited to cases involving thefts of very small items or where the items have de minimus value but where the employees involved were terminated because of the lack of trust created by even a "small" theft. Further, many of the instances noted for this grievant involved very large amounts of time, in some cases hours of difference, such that the Unions claim that there were "only a few minutes" lost was unsupported by the evidence.

18. The Employer further noted that while some of the instances wherein the grievant punched in and only later swiped his parking card were for a few minutes, others were many more than that. His explanation that some of these were when he was returning tools he had borrowed simply does not make sense and the Employer claimed that the time necessary to return a tool was nowhere near the amount of time involved in these discrepancies. Those times when he claimed he punched in and left to plow snow do not make sense either. In some of those instances there was less than one inch of snow and the grievant would not have been plowing or shoveling snow for the amount of time he claimed. These instances show a pattern of abuse of time that warrant termination.

19. The Employer also dismissed the Union's argument that the grievant is "owed' something because he worked off the clock on some occasions. First, Employer witnesses indicated that they were unaware of any employees working off the clock or "donating" their time. Further, such an argument cannot be credited under any credible theory of labor management relations. To allow employees to punch in and leave the job without working because they thought they were "owed" that due to the claim they worked a little extra the day before would result in industrial chaos.

20. Finally, while the remedy may seem harsh given these facts, the Employer argued that discharge is appropriate. As noted above many commentators and arbitrators upheld terminations for similar or even seemingly lesser offenses involving theft of even small items of little value. The loss of trust, coupled with the clear warnings given in training and in 2001 after employees were caught punching in by telephone, demonstrates that the employer cannot trust this employee and that discharge is appropriate in order to send a clear message that abuse of time or theft of any kind is treated most severely and cannot and will not be tolerated. The Employer noted too that even if some form of reinstatement is considered that there be no back pay since the grievant did not mitigate his losses and provided no evidence of appropriate job search or efforts to mitigate his losses. He claimed he tried a few outside projects that resulted in insubstantial income but there was a paucity of evidence on that question and the Employer should not have to bear the burden of paying a grievant who did not work or provide anything of value to the Employer after being fired for stealing time in the first place.

The Employer seeks an award denying the grievance and upholding the discharge.

UNION'S POSITION:

The Union took the position that there was not just cause to discharge the grievant on these facts. In support of this the Union made the following contentions:

1. TIMELINESS: The Union asserted that the matter was appealed in a timely fashion and is procedurally arbitrable. The Union acknowledged that the Step III meeting was held on April 27, 2009 and that the Employer's response was by letter dated May 15, 2009. The Union asserted however that it never received the e-mail transmittal the Employer claimed to have sent on May 15th.

2. The Union witnesses testified that they checked all appropriate electronic folders and other hiding places that e-mails go to in their offices and found no record of this particular letter or the e-mail cover transmission. It was not even accidentally deleted to a trash folder since they checked for that as well and found that it was not there.

3. The Union claimed that the first notification they received of the May 15, 2009 letter was by regular mail on May 20, 2009. The Union asserted that since there were multiple members fired in this matter, there were multiple letters sent in the same envelope and that only the top one was stamped as received by the Union and that occurred on May 20, 2009. The Union noted that May 15th was a Friday and that mail frequently gets delayed and may not be received for several days even though it is only coming from across the Mississippi River.

4. The Union noted the language of the grievance procedure, which requires that the matter to be appealed from Step III to the arbitration stage and which provides in relevant part as follows: All disputes referred to the Board shall be filed with the Director/Vice-President of Allina Labor Relations within thirty (30) calendar days *after receipt of the Employer's written decision*. (Emphasis added). The Union asserted most strenuously that it did not receive the Employer's Step III response until May 20, 2009 when it arrived by US Mail. Union exhibit 1. Thus, even though the Union's initial appeal letter was sent to the incorrect person that error was corrected in time and the Union's second letter appealing the matter to arbitration was sent in time.

5. The Union cited Arbitrator Befort's opinion on this very question. He was faced with the same argument and almost identical facts with another of the employees who were terminated for this conduct. There too the claim was that the matter was untimely because the letter the Employer claimed was sent on May 15th was not received by the Union until May 20, 2009. He ruled that the matter was timely and allowed the matter to proceed to the merits.

6. MERITS: The Union first noted that the employee has one of the most exemplary work records of any of the employees in this department and he has been with the Employer for virtually all his adult life. He began working there at age 17, in 1989 and has been there ever since. His work record is nearly completely clean of any disciplinary action, with one minor exception from an incident in 1992. The Union pointed to the grievant's employment evaluations, all of which show an excellent work record.

7. Further, while the Employer's main case against the grievant is based on his dishonesty and lack of credibility his own supervisor characterized Mr. Koepke as honest and credible and hard working. There is neither reason to believe that the grievant would intentionally steal anything nor any reason that he would lie about what he did or why. In fact he was quite forthright and open with the Employer during the investigation. He never tried to hide anything and acknowledged that on some occasions he did stop by the back door of the facility, run in quickly to punch in and then drove a block or so to the parking lot and parked his vehicle.

8. The Union asserted that several employees were involved in the same activity, including a lead worker. The grievant thus did not see it as a terminable activity since so many other employees were also doing it as well.

9. The Union also asserted that there is a possible discrepancy between the time clock used by employees to punch in and the clock in the parking lot to record when employees swiped in with their vehicles. While the Employer asserted that this was only a matter of a few seconds at worst, the Union asserted that the fact that there is a discrepancy at all throws considerable doubt on the Employer's entire argument and could significantly reduce the time differentials.

10. Moreover, the Union asserted that there is a built-in 7 minute rounding process whereby the time clock records to the nearest hour up to 7 minutes. Thus an employee who punches in at 6:07 a.m. will be given credit to 6:00 a.m. Likewise the employee who punches in at 5:54 will be recorded as having started at 6:00 a.m. Thus the Employer's argument that "every single minute" counts and that the "theft" of a single minute results in termination, must be totally disregarded since they already disregard 7 minutes per its own time clock.

11. The Union examined the individual entries on Employer Exhibit 1 and asserted that while some of these entries are for those times when the grievant punched in and immediately went to park his vehicle, many of them were not situations of dishonesty. The Union asserted that the "larger" time differentials were for times when the grievant punched in and left to do work related tasks and asserted that he did nothing wrong.

12. On some occasions he may well have punched in and driven to the maintenance warehouse near Lot E, see Employer exhibit 15, to perform maintenance duties on equipment. He did perform some duties of that nature even though his official job was as a painter. The Union noted that he was frequently asked to perform maintenance work on plows or other equipment in the maintenance garage and countered the Employer's claim that it was "not his job" – that may be but he did it and the Union asserted that on the days he performed that work he used this process to punch in.

13. The Union further asserted that it was far more efficient to punch in first and then drive rather than park his vehicle, walk back to the office, punch and then walk back to where he already was to start work. The grievant was not certain which days he did this because he never knew he would have to provide documentation for it but the Union asserted that it did happen and that it explains some of the times listed as the basis of the termination on Employer exhibit 1.

14. Further, the grievant was allowed to borrow tools and there were instances where he would punch in; return the tools and then park. These may well be the times where there is a 12 to 19 minute difference between the punch in times and the swipe in times on the parking clock.

15. For those instances where there were between 180 and 296 minutes difference, the Union argued that these were not situations where the grievant punched in and left to goof off but rather where he punched in and plowed snow. The Union provided weather information showing there had been snow either on those days or the day before. The grievant argued that when he was required to remove snow he would punch in and drive directly to the snow equipment. This was more efficient and saved the Employer time because he was where he needed to be to start snow removal duties.

16. There were also times when the grievant, who was a Union steward, may well have punched in and left to attend a Union related meeting. This would be the only reasonable way to explain a 296 minutes, i.e. nearly 5 hour difference, which occurred on January 27, 2009. There was no evidence to suggest the grievant would have ever left without some work related purpose.

17. There were also times when the grievant never parked his car at all in the employee lot. He runs a small business after hours and on occasions would tow a trailer so he could perform that work after he left. He had been instructed not to park his vehicle with the trailer in the employee lot so he parked on a side street near the facility. This of course explains the times when he would punch in but there was no corresponding swipe into the parking lot.

18. The Union noted that there were multiple instances where the grievant worked off the clock and while the Union acknowledged that this does not excuse improper punch in procedures, it was indicative of the laxity with which time is kept with this Employer. The Employer did not object when the grievant and his co-workers stayed for extra minutes to complete work tasks and it should not therefore be allowed to impose the industrial death penalty for minor transgressions of this nature.

19. Finally, the Union argued that termination under these circumstances is simply too harsh. The Union cited to the two other arbitrations that have already been decided involving these very same set of facts. Arbitrator Rutzick held that the employee in this case should be reinstated and Arbitrator Befort, who was faced with an almost identical set of facts, reinstated with a 20-day suspension. The Union urged that the arbitrator adopt the reasoning of those arbitrators and reinstate the grievant as well. The Union argued that it would be manifestly unfair to such a good employee to be terminated when others who were involved in the exact same activity were reinstated.

The Union seeks an award reinstating the grievant with full back pay and accrued contractual benefits.

MEMORANDUM AND DISCUSSION

TIMELINESS:

The issue of timeliness depends entirely on the reasonableness of the Union's assertion that it did not receive the e-mailed letter dated May 15, 2009 at all and whether it is further reasonable for the Union not to have received the letter by US Mail until May 20, 2009.

The contract grievance procedure clearly requires that the Union's appeal must be "filed with the Director/Vice-President of Allina Labor Relations within thirty (30) calendar days after receipt of the Employer's written decision." The question here is when "receipt" occurred.

The Union claimed that that it did not receive the e-mail that was purportedly sent to the Union office on May 15, 2009 and that it diligently searched for it to see if it had somehow gone into another folder in the Union e-mail system. The Union representative testified credibly that he looked for any message with the operative letter attached and did not find it. There was no countervailing evidence form the Employer on this question. There was, for example, no receipt provided that might have indicated that the message was received and /or opened by the intended recipient. Neither was there any other extrinsic evidence that the e-mail was received by the Union.

The Employer argued that this lack of evidence was all too convenient and that it would be easy to simply say "we didn't get it" in a situation like this where it was clear for other reasons, that the Union was not paying careful attention to the procedural requirements of the contract. The Employer noted that the initial appeal letter was not sent to the correct person so it would not be inconceivable that the message was received and either intentionally or negligently deleted in order to make it appear that the Union's appeal was timely.

On balance, the evidence established that for whatever reason the message was not received by e-mail on May 15, 2009 when the Employer claimed it was sent. The reality is that e-mails do disappear on occasions, just as letters in the US Mail do as well from time to time. These messages can go into cyberspace and no one on either end of the message knows that it has happened or why.

The question is whether it is reasonable for that to have happened here despite the fact that others were apparently sent and received from the same parties that same day. The evidence showed by a very slim margin that this could indeed have occurred and that the e-mail was not received.

The next question is whether the Union received the hard copy of the letter on May 20, 2009. The evidence showed that the Employer sent several letters dealing with this same incident in a large envelope together. This of course makes sense since the same response was sent about these same employees was sent on the same day it would eminently reasonable for them to have been sent in the same envelope at same time in order to save a little money.

It was clear that the Employer sent a letter dated May 15, 2009 dealing with Mr. Lukas, one of the other individual who was fired for this same conduct, and that is date stamped as May 20, 2009. As noted above, it is reasonable to infer that the letter dealing with the grievant was also sent at the same time and that the Union's claim that it did not date stamp that because Mr. Lukas' letter was apparently on top and the clerical personnel at the Union would not have date stamped each page but rather the top page of the whole packet of documents. They after all are not responsible for reading them but for date stamping when they arrive.

The next question is whether it is reasonable that a letter dated May 15, 2009 would take 5 days to travel from Minneapolis to St. Paul. Any one who has ever mailed a letter knows the answer to that question already – of course it is, even though it may take one day sometimes and several on other occasions. For one thing, May 15, 2009 was a Friday and there was no evidence about exactly when the letter was actually placed in the US Mail. If it had gone out slightly past the pick up time it is not inconceivable that the letter may not have been picked up until Saturday or even Monday the 18th. The date stamp was May 20, 2009 and there was no evidence to suggest that this was somehow forged.

The Union provided the original letter and the date stamp appears to be accurate – there was no indication whatsoever that it was altered or adulterated in some fashion. Obviously too, at the time it was received there would have been no reason to do so since the 30 days had not expired.

On this record for the reasons stated above and for the same sort of reasoning used by Arbitrator Befort in the matter that went before him on this very question, the matter is determined to be timely and will proceed to the merits.

MERITS:

The Employer is an acute care hospital located in St. Paul, Minnesota. The Maintenance Shop is located on the first floor of the "cloverleaf" building, which is adjacent to the frontage road of Highway 35-E. There is an employee parking lot, known as Lot E and is several blocks east of the Shop, on the corner of Smith Avenue and Kellogg Boulevard. See, Union Ex. 1. This is where the grievant parked his vehicle. The evidence showed that it took at least several minutes to walk from Lot E to the Shop.

The grievant is a painter and has worked for the Employer since 1989. The evidence showed that even though his main job was that of a painter, he performed other duties as well. These included maintenance of equipment as well as occasional snow removal duties in various parking plots and ramps maintained by the Employer. He has also served as a Union steward in the past.

In 2001 when the so-called Kronos time clock was introduced, the Employer became aware of a practice that allowed people to use their cell phones to call a certain number and essentially punch themselves in even though they were not at work. Once the Employer became aware of this practice it met with the employees and informed them that the practice was prohibited and had to stop and that anyone caught doing it again would face serious consequences, even be fired. The evidence showed that the practice did stop and that the grievant was one of the people who were informed of this. There was no evidence whatsoever though that he engaged in that practice at issue in 2001.

Significantly, even though the practice of calling in to punch in without being at work was every bit as inappropriate as was this practice, the Employer did not move to terminate those involved in 2001. Instead they admonished the employees not to do this and essentially warned them of the dire consequences of repeat offenses. There was no evidence that the practice continued after the warning in 2001 nor was there any evidence that this grievant engaged in the practice of calling to punch in.

Turning to the facts of this matter, the evidence showed that an anonymous caller who called in on the Employer's Integrity Line advised the Employer that employees were pulling up to the back door of the shop, running in to punch in and then driving the short distance to the employee parking lot, parking their cars and walking back to work. The Employer initiated an investigation and determined that at least 6 employees had engaged in this practice. The Employer compared the punch in times on the employee punch clock to the times when the parking lot clock showed that they had swiped their employee card into the parking lot.

It was clear that on some occasions the grievant engaged in the practice of driving up the back of the facility and punching in and then driving to the employee lot and parking his vehicle. As Arbitrator Befort noted, this was more of an attendance issue than a theft issue even though the grievant quite possibly knew that the Employer prohibited this practice.

As the Employer pointed out, in the training manual there is a vignette that was eerily similar to the very scenario presented by this case. The grievant claimed not to have remembered this case vignette, since there were almost 200 pages of that training manual, however the evidence showed that he was aware the practice was prohibited or at least frowned upon. The Employer also made the point that the grievant was a steward and as such should have been modeling appropriate behavior

On the other hand, the evidence showed that the grievant's lead person, as well as other co-workers, engaged in the same activity. This practice gave some credibility to the grievant's claim that he felt that the practice was condoned. This will be discussed more below in the discussion of the remedy but for now the evidence as a whole demonstrated that with respect to the times listed on Employer exhibit 1, where the discrepancies were 1 to perhaps 7 minutes, the grievant was doing precisely what the Employer claimed he was – punching in and then parking and returning to work.

It should be noted too that the evidence did not demonstrate that there was a material discrepancy between the two clocks. The Union claimed that there was a difference in time between the employee punch clock and the clock at the employee parking lot. The evidence showed that at most there is a few seconds difference; perhaps as much as 20 second, but that this did not materially alter the Employer's case

Turning now to the other dates and times listed on Employer exhibit 1 it was clear that the facts did not support many of the allegations of misconduct. There are the times where the differences are between 7 and 19 minutes. The evidence supported the grievant's claims that these were instances wherein he punched in and then returned tools or spent a few minutes doing some other tasks; although it was not clear whether that was work related or not, and then parked his vehicle. Thus, given the grievant's credibility and the evidence that he is honest, the record shows that this is at least plausible.

Finally there were those instances wherein the time discrepancy were quite large. Initially there was no evidence at all that the grievant would have punched in and left to either engage in non-work related activity (which would have clearly been a terminable theft of time). The Union's claims on these dates were quite plausible and supported by the evidence. The grievant was either plowing snow, despite there being some evidence that the snow fall was slight on those days.

The other significant pieces of evidence in this matter was not "evidence" at all but the results of the other two arbitration decisions between these parties for the other employees involved in this series of incidents. Apparently 6 employees were found to have engaged in the practice of punching in and then parking their vehicles. Three cases were resolved in some way, although it was not shown what the dispositions of those cases were, and three went to arbitration. This case was one of those arbitrations. The other two went before Arbitrators Rutzick and Befort. Their decisions were reviewed in some detail and indeed they were quite similar to the facts presented here.

The matter before Arbitrator Befort was over the termination of the lead person who was found to have engaged in the behavior some 66 times, as opposed to 21 here. That employee was also presumably in a position where modeling of appropriate behavior was important. He was reinstated subject to a 20-day suspension.

As Arbitrator Befort noted, the fact that the Employer simply warned the employees in 2001 was significant. There was no evidence to suggest that a similar approach would not have had the same result here as well. To be sure, the Employer does not have to warn people each and every time a new violation is found or some employee finds a new way to potentially cheat the system. Rules are in place and certain conduct can reasonably be determined to be covered by those rules – one warning can in many cases be plenty.

The Employer cited a large number of cases wherein employees were terminated for stealing sometimes very small items of nominal value. The point was that theft is theft no matter the size or value of the item and the loss of trust in the employee is the most important piece in such cases. These cases were reviewed in some detail. Most involved the theft or pilferage of sometimes very small but tangible items, none involved the theft of time as here, but there were clear warnings to the employees of the severe consequences of the theft of those items. In many others the Employer had very little control over the items being pilfered – some involved theft of food items, or small tools where there was an abundance of them and the loss of a few of them would hardly be noticed.

In those cases it is certainly understandable that the Employers would treat the theft very seriously since allowing such a practice to go unchecked could result in the widespread loss of a large amount of stock albeit one small item at a time. There was also the underlying sense that the employees could no longer be trusted.

Here, while the result in no way condones this practice or the theft of time either by fraud or by loafing, there was nothing to suggest that the grievant could not be trusted. In fact he was allowed to borrow tools which were sometimes of considerable value and he always brought them back. There was further no evidence whatsoever that he ever took any tools or other items from the Employer or that he ever would. Finally, as noted by Arbitrator Befort, there was considerable evidence that once warned in this fashion, the grievant will not repeat this behavior ever again.

Here as Arbitrator Befort noted, although the assertions by the Employer are "not without some merit, I find the Union's arguments in favor of a lesser penalty to be more compelling." He characterized the transgressions more about attendance than true theft and reduced the penalty based on that theory and upon the grievant's excellent work record. Here too the grievant has an excellent work record and there was evidence that a similar reaction to this as was demonstrated in 2001 would likely have served to halt the practice.

The remaining question is what remedy to impose. Arbitrator Befort reinstated the grievant in that case with a 20 day suspension. Arbitrator Rutzick reinstated the grievant in his without back pay.

Here the facts militate in favor of the same sort of remedy. To be sure the grievant should have known this practice was against the rules, the training manual, while large, should have tweaked something in the grievant's mind that what he was doing on those occasions where he did simply drive up to the back door of the facility, punch in and then park was against the rules.

However, this hardly qualifies as a terminable offense on this record for many of the same reasons outlined by Arbitrator Befort. Further, it would be manifestly unfair to impose a greater penalty than Arbitrator Befort did especially where the offense was almost identical and the employees are both well regarded by their supervisors. Accordingly, after consideration of the entire record it is determined that the grievant be reinstated with full back pay and benefits subject to a 20-day disciplinary suspension.

One final matter remains regarding the back pay. The Employer argued that the grievant should not be allowed to reap a windfall because he did not seek other jobs. Mitigation of damages principles do apply in this situation but on a record such as this for the Employer to prevail it would have had to show that there were actual offers or jobs available to the grievant that he turned down or was fired from for non-economic reasons in order to demonstrate a failure to mitigate damages. No such evidence was presented here. Further, the mere fact that the grievant as unable to secure another job does not constitute a failure to mitigate damages. He had every incentive to find alternate employment because he certainly did not know the outcome of this grievance. Finally, on this record attempting to grow his own personal business could well be exactly the sort of endeavor needed to mitigate damages; there is nothing that requires someone to work for someone else in order to demonstrate appropriate mitigation of damages. Self-employment and efforts to secure more work in that regard is certainly sufficient to meet that burden.

Thus the full back pay award, less the 20-day suspension, will be imposed but the grievant and the Union are to provide appropriate documentation regarding government unemployment or other wage replacement benefits, general assistance or other governmental benefits received and any and all wages or salaries the grievant earned in the interim between his termination herein and his reinstatement.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART as set forth above. The grievant shall be reinstated within 10 business days of this Award with full back pay and accrued contractual benefits less the 20-day suspension as described above. The grievant and the Union shall provide appropriate documentation regarding government unemployment or other wage replacement benefits, general assistance or other governmental benefits received and any and all wages or salaries the grievant earned in the interim between his termination herein and his reinstatement to calculate appropriate back pay.

Dated: July 19, 2010

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Jeffrey W. Jacobs, arbitrator

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