

IN THE MATTER OF ARBITRATION BETWEEN

SAINT PAUL PUBLIC SCHOOLS
INDEPENDENT SCHOOL DISTRICT
NO. 625

(Employer)

and

LOCAL UNION 844, DISTRICT COUNCIL 5,
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO

(Union)

DECISION
(Discharge Grievance)
BMS Case No. 10-PA-1585

ARBITRATOR: Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: October 6, 2010 at the Employer's Central
Administration Building located in St. Paul, MN.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely briefs as
of October 16, 2010.

APPEARANCES

FOR THE EMPLOYER:
Susan Gutbrod, Labor Relations
Manager
St. Paul Public Schools
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St. Paul MN 55102
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FOR THE UNION:
Jill Kielblock, Field Representative
AFSCME, Council 5
300 Hardman Avenue South
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JURISDICTION

The Parties stipulated that this Arbitrator has been selected and appointed in
accordance with the provisions of Article 19 of the applicable labor agreement
and thereby possesses the authorities and responsibilities set forth therein to
hear and resolve this dispute.

THE ISSUE

The Parties stipulated that the Issue is; Was the School District's action to terminate employee Julie Pedro on October 30, 2009 justified? If not, what shall be the remedy?

THE EMPLOYER

St. Paul Public Schools is the second largest school district in the State of Minnesota, serving some 38,000 students. The district educational system currently consists of some 250 learning sites, including 50 elementary schools, 8 middle schools and 7 senior high schools. The system is staffed by some 6,700 employees, most of whom are represented by various labor organizations and with whom the district has on-going contractual relationships.

THE UNION

The American Federation of State, County and Municipal Employees (AFSCME) is a nationwide labor organization representing some 1.6 million employees working in the public sector of the economy in positions such as corrections officers, nurses, sanitation workers, EMTs, school employees, etc. AFSCME Council 5 in Minnesota includes Local No. 844; which represents certain Clerical and Technical employees of the St. Paul School District, including the Grievant who is the subject of this matter.

COLLECTIVE BARGAINING HISTORY

The Employer and Union have had a continuing and on-going collective bargaining relationship dating back decades and this relationship has been reflected in a successive series of labor agreements during that period. The most recent labor agreement was effective July 1, 2008 and was scheduled to expire Jun 30, 2010. The Parties agree that this agreement is applicable to this matter.

BACKGROUND

The Grievant and subject of this matter is Julie Pedro (previously a/k/a Julie Mahoney). Ms. Pedro commenced employment with the Employer in about the fall of 1990 as a Clerk-Typist I. Over the course of subsequent years she worked in that capacity at a number of different school facilities within the District. In about 1994 she was promoted to Clerk-Typist II. By about 1998 she had risen to the position of Clerk-Typist III.

During the period from about 1991 until about May, 1997, a review of her Work Performance Evaluation Reports indicates very Satisfactory appraisals. Several of the reports specifically note her efficiency and enthusiasm for her work. However, in May of 1997 she received an Evaluation Report that noted tardiness and attendance problems. Ms. Pedro acknowledged those issues and assured her supervisors that she would take immediate action to correct those deficiencies.

However, in her Performance Evaluation Report for the period 12/7/1998 through 2/7/1999, Ms. Pedro received an Unsatisfactory performance rating. The report cited deficiencies such as 1) Failure to complete work assignments, 2) Failure to effectively complete her day-to-day job duties as a Clerk-Typist III and 3) General lack of support for other clerical support staff, para-professionals and guidance counselors at Arlington High School. Ms. Pedro disagreed with the report and the Unsatisfactory rating, but was subsequently demoted (disciplinary action) back to Clerk-Typist II and reassigned to a different school facility.

In her next Performance Evaluation Report in May, 2000, Ms. Pedro's performance rating returned to Satisfactory, but with notes to the effect that she should work on more positive interaction with her colleagues and that she needed to work at a faster and more consistent pace on some tasks and use her time more effectively. Pedro agreed with the report.

In her Performance Evaluation Report in May, 2001, her supervisor made mention of apparent health problems involving Ms. Pedro and members of her family that were causing some attendance issues and, again, her pace of work and use of time more effectively were also noted, but the rater did not note either of those items as Unsatisfactory – merely as deficiencies needing improvement.

In the fall of 2001 it appears that Ms. Pedro was assigned to the Benjamin Mays Magnet School as a Clerk-Typist III on probation. Over the course of the next four years, she received an ongoing series of Satisfactory and very positive Performance Reports in that position, with no deficiencies of any kind noted. In her Performance Evaluation in June, 2005, she was rated as Exceeding the performance standards for her classification, not just meeting them.

Ms. Pedro continued working at the Mays Magnet School during the period from 2005 to about December, 2007. During that period she continued to receive Satisfactory and positive Performance Evaluations. She also began upgrading and burnishing her work skills with the goal of eventually moving up to an Elementary School Clerk (a/k/a Head Clerk) position. Following some fits and starts and a stint as an "understudy" as a Head Clerk at Mays, she was assigned to Roosevelt Elementary School as the Head Clerk in January, 2008.

In about February, 2009 Ms. Pedro received an Unsatisfactory annual Performance Evaluation from her school principal, Scott Treggeseth. The

Evaluation involved deficiencies in her work performance involving her management of the school's finances.

The Position Description for the Elementary School Clerk specifically notes the following as among Typical Duties to be performed in the position:

“Establishes, maintains and balances school budgets and special funds records; maintains petty cash records, pays bills and balances checkbook; completes requests for payment; reallocates un-spent line items; maintains records of travel expenses and travel request reimbursements; audits budget reports and reconcile problems.”

Among the specific problems noted in her Performance Evaluation, 1) Failure to pay bills from vendors and staff members on time; 2) Failure to input and maintain accurate and timely financial information in the appropriate computer system and 3) otherwise failing to maintain current and up-to-date financial actions and records.

As a result of the Unsatisfactory Evaluation, in March, 2009, Ms. Pedro, with the assistance of a Union Representative, signed off on a detailed performance Improvement Plan intended to correct and rectify the noted problems and deficiencies, as quickly as possible. It is unclear from the record as to how much progress was subsequently made on the Improvement Plan.

In about May, 2009, Ms. Pedro, who was pregnant at the time, was advised by her physician to cease work because it was potentially jeopardizing her health and the pregnancy. She notified the District of the physician's order and arrangements were made to send in a temporary employee from an accounting temp agency to replace her for the few remaining weeks of the 2008-2009 school year. The temp employee reported in at the end of May and was able to spend several days working along side Ms. Pedro to get some orientation to her work duties. Ms. Pedro subsequently left work for bed rest on about May 22, 2009.

At some point in about early June, the temp employee notified District officials that there appeared to be problems with the finances and financial records at Roosevelt School. On June 16, 2009, the District informed Ms. Pedro that it was commencing an investigation into alleged work misconduct on her part and asked her to schedule a meeting to discuss the situation, as soon as her physician OK'd it.

On August 6, 2009 the District informed Ms. Pedro by letter that she was being placed on paid administrative leave effective August 10, pending the outcome of the investigation into her alleged work misconduct.

On October 12, 2009 the District notified Ms. Pedro, by letter, that it was being recommended that she be discharged for alleged serious and egregious

misconduct. The letter specifically set forth in detail the alleged misconduct allegations and invited Ms. Pedro to respond to the allegations by October 14, 2009.

On October 30, 2009 the District informed Ms. Pedro, by letter, that she was being discharged from her employment with St. Paul Public Schools as of that date. The letter went on to outline the specific reasons for her discharge, to wit:

1. *In your role as Elementary School Clerk at Roosevelt Elementary School you failed to follow directives and failed to follow basic and critical responsibilities of this assignment including, but not necessarily limited to the following:*
 - a. *You did not maintain and balance school budget records, nor audit budget reports, nor reconcile budget problems.*
 - b. *You did not pay numerous bills nor balance the school checkbook/ledger. In May, 2009, unpaid school invoices dated from June, 2008 through April 2009 were found in your desk drawer along with multiple Past Due notices from vendors. You did not process these invoices or past due notices. In addition, you wrote checks that could not be paid by the bank because you did not assure that sufficient funds were in the account to cover the checks you wrote. As a result, in the spring of 2009 the school incurred approximately \$110.00 in overdraft fees.*
 - c. *You did not maintain petty cash records.*
 - d. *You did not issue receipts for funds that you received nor did you record and get receipts to document the dispersal of school funds, nor did you regularly or properly deposit cash and checks that were given to you, as required by the St. Paul Public Schools Intra-schools Procedures for depositing cash and checks and recording revenue at school sites.*
2. *During the time that you were the Elementary School Clerk at Roosevelt Elementary School in the 2008-2009 school year, payments from students for field trips/school activities in excess of \$2,471.00 were submitted to you by various staff members. The majority of those payments were made in cash and you have acknowledged receiving cash from staff members for field trips and school activities during that period. You did not give receipts to the staff members who gave the money to you and you did not keep any records of what you received. You made specific bank deposits for the school on October 1, 2008; November 18, 2008; March 27, 2009 and May 5, 2009, but none of the deposits you made during all of the school year contained any cash. In addition, approximately \$2,115.00 of the cash submitted to you was subsequently determined to be missing and unaccounted for.*

You have stated that you were aware of cash missing at various times during the school year, but you did not take any steps at any time to

inform your supervisor, an administrator or anyone else in the School District about the missing funds.

Your conduct described above constitutes theft and violates federal and state regulations, as well as school district policies. Your conduct described above is an abuse of the trust and power placed in you by virtue of your position as he Elementary School Clerk. Your conduct described above is completely unacceptable for an employee of the St. Paul Public Schools and it cannot be tolerated.

Although you have claimed that you did not take any of the missing money, your above-described failure to take reasonable and responsible steps regarding the missing money constitutes very serious negligence and cannot be tolerated from any employee.

The Grievance

On or about November 5, 2009, Ms. Pedro and the Union filed a timely Grievance in protest of her discharge. In the grievance, it was alleged that she was discharged unfairly by the Employer on October 30, 2009. It specifically cited Article 17 of the labor agreement as the contract provision violated and indicated that the remedy sought was her reinstatement with full back pay and benefits.

The grievance was subsequently processed by the Parties in accordance with the appropriate Steps in Article 19 – Grievance Procedure, of the labor agreement, but no mutual resolution of the situation resulted. The Union subsequently notified the Employer that it was referring the issue to arbitration, per the contract.

Relevant Contract Language

The following excerpts from Article 17 – Discipline of the applicable labor agreement are worthy of note:

17.1 – Discipline will be administered for just cause only. Discipline will be in the form of the following actions. Such actions may be taken in an order different from that listed here, based on the specific employee action.

17.1.1 – Oral reprimand;

17.1.2 – Written reprimand;

17.1.3 – Suspension;

17.1.4 – Reduction;

17.1.5 – Discharge;

17.3 – Suspensions, reductions and discharges will be in written form.

17.4 – Employees and the Union will receive copies of written reprimands and notices of suspension and discharge.

17.6 – Preliminary review. Prior to issuing a disciplinary action of unpaid suspension, demotion or discharge, the supervisor will make a recommendation to his/her supervisor regarding proposed discipline. The supervisor will then meet with the employee prior to making a final determination of the proposed discipline. The employee shall have the opportunity to have Union representation present and will be provided the opportunity to speak on his/her behalf regarding the proposed action. If the employee is unable to meet with the supervisor, the employee will be given the opportunity to respond in writing.

Summary of Positions and Major Arguments of the Parties

The Union:

Ms. Pedro, in the course of her almost 20 years of employment with the Employer established herself as a dependable, valued and effective employee. Her Performance Evaluation Reports, with rare and limited exceptions, were Satisfactory or higher.

Ms. Pedro acknowledges that she knew the job and work duties of an Elementary School Clerk, prior to assuming those duties at Roosevelt Elementary in January, 2008. She had previously worked “out of title”, as the Elementary School Clerk at the Mays School during the 2004-2005 school year and apparently had done a creditable job there.

Ms. Pedro testified that upon reporting for duty at Roosevelt School, she determined that things functioned a bit differently from the system she had experienced at Mays. As a result, she spent some of her time during the 2008-2009 school year trying to organize things in a way that worked better for her.

She also noted that during the 2008-2009 school year, Roosevelt School lost a clerical position in her office and also a Parent Educator, due to a leave of absence. The loss of those positions resulted in her having to assume additional duties and responsibilities in the office.

She also testified that her relationship with the school principal - her immediate supervisor, Scott Treggeseth, was strained. She said he insisted on following certain practices and procedures within the office and school that she knew were incorrect and had pointed out to him that they were not in accord with District policy, but he essentially ignored her.

The Union is not going to disagree with the Employer that Ms. Pedro was struggling to meet or accomplish all of her job duties as an Elementary School Clerk in her assignment at Roosevelt.

The Union and Ms. Pedro also acknowledge that cash, in some amount, received mainly by Ms. Pedro was not properly deposited in the school bank account and remains unaccounted for. However, Ms. Pedro adamantly denies that she ever took any cash from the school for her own personal use during her employment with the Employer.

It is the Union's position that a 19-year valued employee of the District should not be discharged for time-management problems and a few bad decisions. Instead, Ms. Pedro should be given the opportunity to resume her Elementary School Clerk duties; get caught up and show that she can continue to be a good employee. Setting aside the issue of the missing cash for the moment, the Employer appears to have jumped from the March, 2009 Performance Improvement Plan for Ms. Pedro to a subsequent determination to discharge her, based on budgeting issues, unpaid invoices, bank overdraft fees, etc. and that discharge appears to be overly and unnecessarily harsh.

The Union would point out that according to the District, a school principal – in this case, Mr. Treggeseth – is ultimately responsible for monitoring and overseeing a school's finances and the School Clerk is responsible for the day-to-day financial activities and operations in the school. It is clear from the nature and scope of Ms. Pedro's Performance Improvement Plan, which was agreed upon in March, 2009, makes no mention of any of the financial problems that began to unfold about two months later. As noted, some of those problems went back to the previous 2007-2008 school year. The principal clearly failed in his oversight role with respect to the actual financial situation in his school.

The question relating to the budgeting issues, unpaid invoices and bank overdraft fees becomes whether or not progress was being made by Ms. Pedro with respect to her Performance Improvement Plan during the period from March 13, 2009; when she was placed on the Plan until May 22, 2009 when she left the school on medical leave. She testified that she felt she was making some progress toward the Plan goals; she had consulted other Elementary School Clerks about their processes and procedures and was also in contact with Accounting Technician Jeanne Gonzalez. What did not happen were any of the meetings with the principal that were also part of the Plan. Ms. Pedro testified that she tried to set up and schedule the meetings, but he inevitably had a reason for not being able to make the meetings. She also noted that it was during this period that she also heard that the District was not going to renew his employment contract for the following year. She said that after that he seemed to distance himself from the school's activities and schedules.

It is the Union's belief that Ms. Pedro was making a serious and concerted effort to comply with and successfully complete the March, 2009 Performance Improvement Plan and it believes that if she had not left on medical leave on May 22, she would have eventually caught up on her duties and responsibilities by the end of her duty year and she would have successfully moved on to the next school year.

The issues relating to the petty cash fund were not discovered until after Ms. Pedro had departed the school on medical leave. It was at that point that the District did their investigation into the financial situation at the school and ultimately decided to discharge her. Clearly it was the petty cash issue and not the other performance issues, as set forth in the March Plan, that triggered the District's real concern. That concern is very understandable, given the District's obligation to the students, the parents, the general public and other staff to insure that all funds are handled properly and appropriately. Both the Union and Ms. Pedro clearly understand this fiduciary responsibility of the District.

Neither the Union nor Ms. Pedro dispute the District's assertion that cash was received by her, was not deposited in the bank as is required by policy and procedures and that a notable amount of cash is missing and unaccounted for.

The Union would point out that, based on the financial records for the school that were entered into the record, it would appear that there was significantly less cash coming into Roosevelt school during the 2008-2009, March-November time frame than in the same period in the 2007-2008 period. Comparing the amount of checks deposited (no one alleges that any checks were missing, only cash) in the 2008-2009 period to those deposited in the 2007-2008 period; the checks accounted for only 20.78% of the amount deposited in '07-'08. Applying that percentage to the cash situation for those same periods would indicate that that perhaps only about \$851.84 in cash was missing. Obviously missing any cash is a serious matter, but it is important to compare the same time periods in an attempt to establish a suitable base.

The Union would also note that, in the hearing, it was clear from the testimony of a number of witnesses that many individuals in Roosevelt school, both employees and students knew exactly where the cash box was kept in the office area and that the office was routinely open to students, staff and the public throughout most of the day. It was also noted that the key to the cash box was routinely hanging at her desk and was generally available to anyone who wanted it. Therefore, to jump to the conclusion that Ms. Pedro was the only person with clear access to the petty cash box would be inappropriate.

Ms. Pedro also noted that she understood that cash payments from the cash box were not appropriate and she conveyed that to the principal. However, the principal chose to ignore her admonition and took cash from the cash box to buy student lunches, as rewards and also directed other employees, such as

Administrative Intern, Heidi George, to use cash from the cash box to make a purchase of flowers and bring in a receipt later. There is no accounting from the principal regarding how much cash he took from the box or for what purposes. If Ms. Pedro had challenged the principal on this practice, she could have been charged with insubordination.

In summary, the Union believes that the majority of the allegations raised by the District relating to Ms. Pedro's discharge are work performance issues that do not rise to the level of just cause, sufficient to bypass progressive discipline. While acknowledging that Ms. Pedro did not follow the proper procedures relating to the handling of petty cash, the Union believes that is insufficient to establish a preponderance of evidence that she actually stole any cash. The Union and Ms. Pedro are unable to provide specific evidence as to what exactly happened to the missing cash, but believe that the widespread knowledge of where the cash box and key were located in the office, together with the principal's insistence on routinely using cash from the cash box in spite of Ms. Pedro's admonition to him that the practice was inappropriate, raises doubt about the District's claims. Ms. Pedro adamantly denies that she took any cash from the school for personal use and does not understand how anyone would assume that she would throw away her career of some 19 years for the amount of money the District currently alleges was involved.

In view of the foregoing, the Union urges the Arbitrator to sustain the grievance and reinstate Ms. Pedro and make her whole for any lost wages and benefits.

The Employer:

The Employer firmly believes that it handled the issue of Ms. Pedro's discharge in full accordance with all applicable provisions of the current labor agreement and that, based upon the investigative facts and findings, her discharge was for "just cause".

The Union did not challenge or question the testimony of Joyce Victor, the District's Assistant Labor Relations Manager, who outlined the specifics of the investigation that was subsequently conducted, after the District learned of possible financial problems and discrepancies at Roosevelt Elementary School in about June, 2009. She also testified that the District regards "theft" as a capital offense for which immediate discharge is routinely the punishment. She noted that, as an example of how seriously the District treats theft offenses, the District had immediately discharged an employee who had stolen a quantity of sunflower snack seeds. The Union did not dispute that fact.

Marie Schrul, the District's Controller, testified that the District has very specific policies and procedures specifying how Elementary School Clerks, such as the Grievant, are to handle finances on a day-to-day basis in the schools. She said

that Ms. Pedro had sufficient knowledge of those policies and procedures. She noted that one of her staff members had specifically visited Ms. Pedro at her school (Mays) to assist her in making the transition to a new school (Roosevelt). She pointed out that at Roosevelt School, where a large number of the students qualify for free or reduced lunch, it would be typical that most of their parents would pay for field trips and fund raisers in cash, rather than checks. She said that it was obvious, when the District conducted its investigation and audit of the finances at Roosevelt in the summer of 2009, that cash had been stolen. The District reached that conclusion when the investigation established that during the period that Ms. Pedro was the Head Clerk at the school, January, 2008 to May, 2009, there had been only one cash bank deposit and that had occurred in March, 2008. There were no cash deposits during the September, 2008 – May, 2009 school year. Schrul noted that Ms. Pedro had routinely made bank deposits of checks, but only that single deposit of cash, during her tenure at Roosevelt. Finally, she testified that Ms. Pedro, as a long –term, experienced employee of the District, was well aware of her responsibility to immediately report any problems, such as missing cash, to the District right away. The Union did not refute or challenge Schrul's testimony.

Heidi George, who worked as an Administrative Intern at Roosevelt School during Ms. Pedro's tenure there, testified that Pedro had ample opportunity during the course of her work day to move to secure location within the office area to count cash. She also noted that during her tenure at Roosevelt, it was typical for most parents to pay for school activities with cash, rather than checks. She noted that there were 2-3 field trips per month and that cash and checks were routinely collected throughout the school year and turned in to Ms. Pedro. She personally recalled turning over fistfuls of dollar bills to Pedro during the course of a fundraiser and handing the cash over to Ms. Pedro.

Jeni Alcakovic, a 5th Grade Teacher at Roosevelt during the 2008-2009 school year, testified that she had kept track of monies collected from her student for two field trips. Her tallies clearly show that in each instance, hundreds of dollars were collected and most of it was cash. She showed where she turned the money over to Ms. Pedro and that Pedro had counted the money at her desk and had signed off on the tallies.

The bank deposit records for the Roosevelt School account, as presented in the hearing, showed that during Ms. Pedro's tenure at Roosevelt, January, 2008 – May, 2009, there was only one bank deposit of \$217.12 in cash. During the preceding eight months, prior to Ms. Pedro's arrival at Roosevelt, \$5,142.78 in cash was deposited in the bank by the previous Head Clerk. Documentation also clearly showed that Ms. Pedro had failed to timely pay bills and invoices, i.e. one unpaid vendor invoice from June, 2008 was found in her desk in May, 2009.

After Ms. Pedro left the school on about May 22, 2009 on medical leave, the temporary employee, who replaced her, took in and deposited some \$673.64 in cash during the few weeks remaining in that school year.

A review of Ms. Pedro's hearing testimony indicates numerous instances where she was clearly not credible:

- She asserted that she received very little cash during her tenure as Head Clerk at Roosevelt.
- She asserted that she was unable to leave her desk and move to a secure location to count cash.
- She asserted that most parents at Roosevelt paid for field trips and fund raisers with checks, rather than cash.
- She asserted that the educational assistant at the school was not able to handle the office in her absence.
- She asserted that during the course of her tenure with the District, she had never received any negative feedback from her supervisors on her Performance Evaluation Reports.
- She acknowledged that it was very important to keep monies collected in a locked and secure place; but she also acknowledged that she allowed access to the cash box by numerous staff members.
- She asserted that the school principal required her to keep at least \$500 in cash in the lock box at all times; although she clearly was aware that this was a violation of standing policies and procedures for the handling of cash in the schools.

In summary, the School District believes that it has met its burden of proof, as well as upheld just cause standards, in its decision to discharge the Grievant and the Arbitrator is requested to deny the subject grievance and sustain the District's disciplinary decision.

ANALYSIS, DISCUSSION AND FINDINGS

As an Arbitrator, I am keenly aware that discharge cases are among the most important situations that I am called upon to determine. Discharge decisions have significant psychological, economic and legal effects on all parties involved.

As is typical in most labor contract situations, this labor agreement conditions Discharge or Termination upon "...*just cause*" and like most labor agreements, this one contains no other statements, standards or definitions as to what constitutes "*just cause*".

Despite of the absence of a definition of "just cause" within the labor agreement itself, one would expect that - given the myriad of discharge cases that labor

arbitrators have had to deal with over the course of many decades - the labor arbitrators themselves would have certainly reached a clear consensus as to the meaning of those terms. Wrong! The situation was aptly explained by a seasoned, veteran labor arbitrator who observed that neither he nor his esteemed colleagues have ever been able to reach agreement on an universally accepted definition of the term “just cause”, but he noted that he and every other labor arbitrator could readily recognize the presence or absence of “just cause” in any particular case.

There have been a number of attempts and efforts, over the years, to define, codify or systematize the term and concept of “just cause”; unfortunately, none have found universal acceptance. Personally, I find that at least two of them do help me to organize information and also provide at least a basic analytical framework for looking at Just Cause issues.

In 1966 Arbitrator Carroll R. Daugherty, in an appendix to one of his Decisions, suggested that there is a consensus or “common law” of “just cause”. Enterprise Wire Co., 46 LA 359 (Carroll R. Daugherty, 1966) He articulated what has become known as the “The Seven Tests of Just Cause”. According to Daugherty, a “no” answer to one or more of the following questions normally signifies that just and proper cause did not exist:

1. *Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?*
2. *Was the company’s rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company’s business and (b) the performance that the company might properly expect of the employee?*
3. *Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?*
4. *Was the company’s investigation conducted fairly and objectively?*
5. *At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?*
6. *Has the company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?*
7. *Was the degree of discipline administered by the company in a particular case reasonable related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?*

I, personally, find Daugherty’s “Test” to be a useful tool in organizing and analyzing the facts and evidence that come to the fore in discipline cases. However, like many arbitrators, I find that it is rigid and overly mechanical in its application as a true test of “just cause”; in that it fails to recognize and allow for

the weighing of the myriad of factors and nuances that are involved in a typical discipline situation.

An alternative view of the “just cause” situation was set forth by Roger I. Abrams and Dennis R. Nolan in “*Toward a Theory of ‘Just Cause’ in Employee Discipline Cases*”, 85 Duke Law Journal 594 (1985). The authors begin by setting forth what they refer to as “The Fundamental Understanding” in the employment relationship:

A potential employer is willing to part with his money only for something he values more highly, the time and satisfactory work of the employee. The potential employee will part with his time and work only for something he values more, the money offered by the employer.

The Fundamental Understanding can be and is modified by collective bargaining agreements and the congruent interests of unions and employers. From the point of view of employees, collective agreements can correct what they perceive to be the major flaw of the Fundamental Understanding – the insecurity of the employment relationship. Thus, the main addition to the Fundamental Understanding that unions seek in collective bargaining agreements is job security through limitations on the employer’s power to discipline and discharge employees. Therefore, the basic Fundamental Understanding is modified by a particular collective bargaining agreement, as follows:

Employees will provide ‘satisfactory’ work, in return for which the employer will pay the agreed wages and benefits, and will continue the employment relationship unless there is just cause to terminate it.

This modification of the Fundamental Understanding obviously limits the employer’s power to discipline and discharge pursuant to the common law concept of “Employment at Will”, which essentially permits the employer to discipline or discharge employees for any reason or for no reason whatsoever.

Under the modified Fundamental Understanding employee discipline should only be used to fulfill one or more of management’s rational interests; 1) rehabilitation – the objective being to cure a specific problem and restore the employee to “satisfactory” work, 2) deterrence – the objective being to deter the errant employee from repeating a certain error by imposing one penalty and threatening to impose a harsher one in the future and 3) protection of profitability – certain employee conduct, though perhaps not prohibited by a specific rule, may still interfere with the employer’s operation of the enterprise. This category is something of a catch-all and many of the situations falling within its confines involve off-duty conduct by employees.

Like management, unions also have certain interests and expectations with respect to discipline and discharge of employees. A rational union acknowledges

that an employee's failure to meet his or her obligations works to the detriment of other employees as well as the employer. In the short run, an unsatisfactory employee simply makes the jobs of co-workers more difficult. In the long run, continued tolerance of substandard work performance by an employee will endanger the employer's competitive position, and that, in turn, will threaten the wages and even the jobs of the rest of the workforce. Therefore, the economic welfare of the workers, the union and management is interdependent.

The primary interest of the union and the employees in disciplinary matters is fairness. First, they seek fairness in disciplinary procedures; that is employees must have actual or constructive notice as to their work obligations. Secondly, they seek fairness in the administration of discipline. Disciplinary measures must be based on facts; management must ascertain what actually happened before it imposes discipline and must give the employee an opportunity to explain his or her view of the situation and must allow union representation during the investigation if the employee so requests. Thirdly, discipline should be imposed in gradually increasing degrees, with the exception of certain "capital offenses" and, finally, proof by management that just cause exists for the discipline.

The foregoing concerns for procedural fairness in discipline situations might be termed "Industrial Due Process".

The employee is also entitled to "Industrial Equal Protection" which requires like treatment of like cases. But, related, is the requirement that an employee is entitled to individualized treatment. Distinctive facts in the employee's record or regarding the discipline must be given appropriate weight.

Like Daugherty's "Test", the Abrams & Nolan theoretical construct for Just Cause serves as a useful analytical tool for organizing, assessing, evaluating and considering the numerous facts and pieces of evidence involved in a typical discipline or discharge situation.

Applying these tools to the instant matter and based on the record evidence, testimony and briefs:

My first challenge in this situation is to sort the "wheat" from the "chaff". No arbitrator expects that s/he is going to obtain a totally true, complete and accurate picture of what exactly transpired in a discharge situation, based upon a day or two of testimony and evidentiary presentations. Accordingly, I need to focus on the core elements of the situation and Issue.

I have carefully reviewed and examined the contractual requirements (Article 17, as noted previously) concerning the administration of Discipline and have assessed them against the analytical constructs articulated by Daugherty and Abrams and Nolan. I am fully satisfied that the Employer's actions in this situation fulfilled all the contractual and procedural requirements and the

standards outlined in the noted constructs. I also note that neither Ms. Pedro nor the Union raised any questions or issues to allege that she was not afforded full “due process” in this situation. Accordingly I find that the Employer did fulfill the required proper and logical procedures in carrying out the disciplinary process with respect to Ms. Pedro.

Having found that the Employer’s disciplinary action and process meets the standards of both the contract and generally accepted principles for establishing “just cause”; let’s turn to the thrust of the Union’s arguments and position in this matter.

Essentially, the Union is arguing that the Employer’s discharge penalty is overly harsh and not justified, based on the facts of the situation, to wit:

- The Employer failed to acknowledge or recognize that Ms. Pedro was not the only person in the school who had access to the cash box. Therefore, it is not appropriate to accuse her of the theft of the money.

As I noted in the hearing, the level of proof that the Employer must meet to sustain a disciplinary action is “preponderance of evidence”; that is, *Is it more likely than not that this is true, rather than that.* This is a significantly lower standard than the “Beyond a reasonable doubt” standard that applies in criminal proceedings, where a defendant may face incarceration or worse.

It is clear from the record evidence that Ms. Pedro was well aware that she was personally and directly responsible for the security of all funds brought to her and entrusted to her care in her capacity as the school’s Head Clerk. It is also clear that she knowingly and willfully ignored and/or violated the policies and procedures of the District intended to insure the safety and security of such funds, thereby leaving her directly responsible for the missing cash. Therefore, the burden of proof shifts to her to establish that another specific individual is responsible for taking the cash, not her. Obviously, neither she nor the District has been able to determine who, other than her, took the cash. Accordingly, she is left “holding the bag”, so to speak.

Additionally, it is noted that the District declined to renew the principal’s contract at the end of the 2008-2009 school year; effectively discharging him.

Accordingly, I find that this Union argument is insufficient to impact upon the discharge decision.

- The school principal, who was responsible for directly overseeing and monitoring Ms. Pedro’s activities as the Head Clerk, clearly failed to properly carry out those responsibilities because, 1) he failed to detect any problems with Ms. Pedro’s handling of the school’s finances until about February, 2009; 2) he failed to fulfill his commitments to her Performance Improvement Plan and thereby contributed to the serious situation that unfolded at the end of May, 2009; 3) he specifically ordered her to ignore

or violate specific District policies and procedures concerning the handling of funds by the school Head Clerk. Accordingly, he bears some of the responsibility for the financial situation at the school.

Assuming, *arguendo*, the complete validity of the Union's allegations, as above, my question is "how does that help or absolve Ms. Pedro's conduct?" Regardless of the principal's actions or lack of action, Ms. Pedro knew or reasonably should have known that she, alone, was ultimately responsible for the day-to-day financial situation in the school. If the principal was impeding her and/or not abiding by proper District policies and procedures, she was personally responsible for reporting the situation to higher authority and seeking assistance or relief. If she was concerned about directly reporting to "headquarters", she also had the obvious option of invoking the assistance of the Union, either formally or informally. Unfortunately, she chose to not to utilize those options and, instead, "followed orders", even as she knew those orders were wrong. We know that the post-World War II Nuremberg War Crimes Trials effectively rendered the "Just followed Orders" defense as non-viable as a justification or excuse for improper or immoral behavior.

Finally, as she chose to ignore or violate what she knew were required policies and procedures, she well knew or reasonably should have known that, eventually, the situation was going to "blow up" and she would be held accountable for her actions as the Head Clerk.

Accordingly, I find that this Union argument is insufficient to impact upon the discharge decision.

- Ms. Pedro was making progress with respect to the Performance Improvement Plan that she signed off on March 13, 2009 and the Union believes that, but for the fact that she had to go on unexpected medical leave on May 22, 2009, that given additional time and support, she would have successfully rectified all the noted deficiencies by the start of the next school year in the fall of 2009. Additionally, the Union believes that Ms. Pedro's work problems were essentially performance problems that should have been addressed via corrective, progressive discipline, rather than discharge.

In reviewing the record, I find no specific or definitive evidence or facts to indicate that Ms. Pedro made any notable changes in her work performance and behavior from March 13, when she signed off on the Performance Improvement Plan to May 22, when she left on medical leave. One item I examined was her bank deposit history at the school, after March 13, 2009 and up to May 22, when she left on medical leave. The record shows that she made a total of four (4) deposits during the period 3/13 - 5/22, but none of those deposits included cash. Interestingly, the temporary accounting employee, who replaced her on and after May 22, made a total of

thirteen bank deposits during the period 6/5-6/17 and those deposits included over \$600 in cash. If Ms. Pedro was making corrections in her work performance after March 13, 2009, the proper handling of cash receipts at the school wasn't one of them.

With respect to the Union's assertion that Ms. Pedro's work problems were essentially "performance" problems that would be better addressed by progressive discipline, the Employer obviously didn't agree with that perception. In its communications with her and the Union, during the course of and after the completion of its investigation, the District made it quite clear that their concern and focus was on the missing money. They specifically alleged that, based upon their investigative findings, Ms. Pedro was believed to have stolen the missing cash – absent any evidence to support a credible alternative explanation.

Most telling on the situation was the obvious fact that the St. Paul School District regards its role, as a public institution, and that of its employees, as one of Stewards of the Public's Trust. Accordingly, it makes no bones about or apologies for treating theft by employees as a "capital offense"; where progressive discipline is never appropriate. I note that the Union was unable to offer any examples of differing penalties or disparate treatment by the District with respect to disciplinary actions involving theft. When the District pointed out that it had discharged an employee for stealing some sunflower seeds, the Union did not question or challenge that statement in any manner.

As an indication of how serious theft allegations can be, I note that according to Minnesota Statute 609.54 (1) – Embezzlement of Public Funds, an individual convicted of stealing \$2500 or less may be sentenced to not more than five (5) years in prison and/or fined not more than \$10,000.

Accordingly, I find that this Union argument is insufficient to impact on the Discharge decision.

- Ms. Pedro is a veteran employee of the School with 19 years of credible service and work performance record that, but for a couple of limited and relatively isolated situations that occurred over five years ago or more, has been consistently Satisfactory or better. Her past service and performance record should merit a chance to return to work, correct her past performance deficiencies and continue her service to the District.

Like virtually all of my arbitrator colleagues and as noted by both Daugherty and Abrams & Nolan, I believe that an employee's past history and work record should be relevant considerations in determining the nature and scope of potential disciplinary action. I presume that the Parties herein engaged in extensive discussions during the course of this situation as to whether her service record merited an alternative to discharge. Obviously, the Employer didn't think so.

As I examine and review the situation, what argues most loudly against considering mitigating the discharge penalty is the fact that Ms. Pedro didn't just engage in a single, isolated incident of egregious behavior or capital offense, but made one bad decision after another over the course of up to seventeen months and allowed the situation to continue as she walked out the door on medical leave on May 22, 2009. She could have made some effort, on her own volition, to stop the situation and correct it or to report the situation to higher authority and seek assistance, before the situation progressed as far as it did, but she did not.

As I noted previously, because she was a veteran employee with a long record of service in the District, she had to know or reasonably should have known that the financial problems at her school and for which she was responsible, were going to eventually come to the fore.

I'm left to scratch my head when I contemplate what was going through Ms. Pedro's mind when she learned in May, 2009 that she would have to leave work on medical leave and, thereafter, the temporary accounting employee showed up to replace her.

Finally, there is the issue of "Trust". In her capacity as the Elementary School Clerk at Roosevelt School, she accepted a fiduciary duty to properly secure, manage and properly account for the funds entrusted to her. Obviously she breached and violated those duties. Even assuming, *arguendo*, that she did not personally steal any money, her improper actions and behavior as the school's Head Clerk resulted in a direct estimated loss of some \$2100.00 in cash and \$110 in unnecessary bank overdraft fees. In addition, she also failed to properly pay a number of vendors on time, causing the school to have a less than stellar financial reputation among those parties for paying its bills on time. That situation has caused a loss of Trust in her capabilities and judgment among all who had knowledge of or suffered the effects of her financial mismanagement. I believe that Trust, as a characteristic, is not on a continuum, but is discrete – one is either trustworthy or not trustworthy. Also, Trust - like Integrity - once lost is extremely difficult to retrieve or reestablish. The District's loss of trust in Ms. Pedro makes any sort of reinstatement consideration impossible, as she has essentially rendered herself unfit to return to that same employment system in any effective manner.

In view of the foregoing, I find that is no meritorious basis that would warrant or justify mitigation or modification of the Employer's discharge decision. In fact, to do so may result in an indefensible instance of disparate treatment.

CONCLUSIONS

In view of my analysis, discussion and findings above, I conclude that the Employer did have "just cause" to discharge employee Julie Pedro on October 30, 2009 and that the discharge was in full conformance with the provisions of the applicable labor agreement.

DECISION

Having concluded that the Employer did not violate the applicable labor agreement, as alleged by the Union in its Grievance of November 5, 2009, that grievance is hereby denied and dismissed. Concurrently, the Employer's discharge decision with respect to Julie Pedro is hereby sustained.

Dated at Minneapolis, Minnesota, this 12th Day of November, 2010.

/s/ Frank E. Kapsch, Jr.
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of fourteen (14) calendar days from the issuance of this Decision to address any questions or problems related thereto.