

IN THE MATTER OF THE ARBITRATION BETWEEN:

**Minnesota Association of Professional
Employees**

-and-

**ARBITRATION OPINION
AND AWARD**

**Office and Professional Employees
International Union, Local 12**

BMS Case No. 13RA-0075

Arbitrator

Richard A. Beens

Appearances

For the Employer:

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Date of Award

May 4, 2013

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between the Minnesota Association of Professional Employees (“MAPE” or “Employer”) and Office and Professional Employees International Union, Local 12 (“Union”). Sheila Pokorny (“Grievant”) was employed by MAPE and a member of the Union.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render an arbitration award. The hearing was held in St. Paul, Minnesota on April 30, 2013. Neither party raised procedural objections. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. After final, oral arguments, the record was closed and the matter deemed submitted.

ISSUE

The parties stipulate that the issue before the arbitrator is:

Did the Employer have just cause to terminate the Grievant and, if not, what is the proper remedy?

FACTUAL BACKGROUND

MAPE is a union representing public sector professional and supervisory employees throughout the State of Minnesota. The Union represents all MAPE staff workers with the exception of its supervisors and temporary employees.

Grievant worked 17 years for MAPE as a business agent. In that capacity she handled contract negotiations and grievances for various local units throughout the state.

¹ Joint Exhibit 1.

At the time of her termination, Grievant was the Employer's senior-most business agent and received additional pay as "lead" agent.

During the summer and fall of 2012 the Employer and Union were engaged in increasingly contentious contract negotiations. While not a formal member of the Union bargaining team, Grievant attended some negotiating sessions to provide "historical perspective." By late fall, the negotiations had reached an impasse and tensions were running high. As a consequence, the Employer notified the Union on November 27th of its intent to implement its last, best and final offer on December 8th. In response, the Union immediately filed both a grievance and unfair labor practice. At this point, the MAPE Executive Director, Jim Monroe, sought advice from outside legal counsel. Grievant played a small, but critical, part in the events that followed and led to her termination.

Monroe asked MAPE's outside legal counsel how the Employer should respond to the Union's grievance.² The lawyer sent Monroe a three-page letter with legal analysis of his client's position and recommended responses on December 7, 2012.³ Although the letter was not stamped, "Personal" or "Confidential" it was on counsel's legal letterhead and addressed solely to Monroe. No one else was copied.

The letter arrived at MAPE's St. Paul office on Monday, December 10, 2012. A receptionist, C.N.⁴, opened the letter and, realizing that it dealt with Employer-Union

² Employer Exhibit 3.

³ Employer Exhibit 1.

⁴ Four MAPE staffers who were also all OPEIU Local 12 members were given the option of resigning or being terminated as a result of this incident. Three chose to resign. I have chosen to only use their initials in this Opinion. Grievant would not resign and was terminated.

negotiations, showed it to fellow Union member, P.F.⁵ Even though she knew the letter was a legal opinion addressed solely to Monroe, P.F. thought, “*..it was important our bargaining team knew about this.*”⁶ She made a Xerox copy of the letter and gave the original back to C.N.

During the week of December 10th, Grievant had a chaotic schedule. In addition to helping her elderly father, she was preparing for a grievance arbitration to be held on the 13th. Sometime between 2:00 and 3:00 PM on the 11th, Grievant was working in her MAPE office. P.F. knocked, entered the office, and closed the door behind her. She told Grievant, “*I have something you might find interesting -- I trust you.*”⁷ Whereupon, P.F. pulled the copy of the opinion letter from under her shirt. Grievant perused the letter and found it “interesting.” She placed it on her desk as P.F. left.

Later the same afternoon, Grievant heard K.M., the OPEIU Local 12 shop steward, next door. Grievant testified she went to K.M.’s office, handed her the letter, and said, “*You might find this interesting -- you don’t know where you got it from.*” Nothing further was said and Grievant left K.M.’s office.

On the following evening, December 12th, OPEIU Local 12 held a business meeting at a local bar. Grievant attended the first part of the meeting. As she left, she saw K.M. briefly, but only exchange greetings. During the meeting, K.M. gave the letter to Tom Lonergen, the Local 12 business agent. The letter was read and discussed in the course of the meeting.

⁵ Employer Exhibit 2.

⁶ Employer Exhibit 2.

⁷ The italicized quotes in the following paragraphs are taken directly from Grievant’s testimony at the arbitration hearing.

MAPE management learned of the incident shortly thereafter. On the morning of December 14, 2012, Executive Director Monroe called for an investigation into the matter. Later that morning, another staff member told Grievant K.M. was being investigated for producing the lawyer's opinion letter at the Union meeting. At that point Grievant exclaimed, "*Where the f**k do you think she got it from?*" When the staff member opined that it wasn't a big deal, Grievant responded, "*It's a big deal!*"

Following a management investigation which revealed the facts set out above, C.N., P.F., and K.M. chose to resign rather than be fired from the MAPE staff. Grievant refused to resign and was involuntarily discharged.⁸ She grieved the discipline and appealed to the MAPE Executive Committee. They denied her appeal on January 23, 2013.⁹

APPLICABLE CONTRACT PROVISIONS

ARTICLE VIII¹⁰

DISCIPLINE AND DISCHARGE

Disciplinary action may only be imposed upon a staff member with due process and for just cause. Progressive discipline shall be followed, except in cases of gross misconduct.

.....

Section 4. Discharge for Just Cause.

A. The Association shall not discharge any employee without just cause.

OPINION

It is well established in labor arbitration that, where an employer's right to discipline an employee is limited by the requirement that any such action be for just

⁸ Employer Exhibit 4.

⁹ Employer Exhibit 5.

¹⁰ Joint Exhibit 1.

cause, the employer has the burden of proof. Although there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a “preponderance of the evidence” standard. That standard will be applied here.

A “just cause” consists of a number of substantive and procedural elements. A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee, express or implied of the relevant rule or policy, and a warning about potential discipline? A third factor for analysis is whether the disciplinary investigation was thoroughly conducted. Were statements and facts fully and fairly gathered without a predetermined conclusion? Did Grievant actually commit the act alleged? Finally, if just cause is found, does the punishment fit the offense?

Did the Employer rely on a reasonable rule or policy and was the Grievant aware of it? This case brings into focus fundamental principles of healthy labor-management relationships. While these relationships certainly have adversarial aspects, to be successful they ultimately must share a bedrock of mutual trust. Each must trust that the other is honestly and fairly working to balance their competing interests. No written contract or rule can compel the parties to do this. It must be in their DNA. This trust is best earned by dealing honestly and openly with each other. In the present case, no written clause or policy forbade purloining management’s mail. Rather, the rule in question is unwritten. A Canadian case quoted in the 1993 Proceedings of the National Academy of Arbitrators (p. 222) best describes the principles I believe applicable:

A rule against untrustworthiness and conflict of interest need not be promulgated

by an employer. Like honesty, it is assumed to be part of the foundations of the relationship. In some relationships the element of trust that goes with the work situation is minimal, but in every case the employee is expected to be honest so that the workplace need not become a prison but can be a place that fosters co-operative labor relations and industrial democracy.¹¹

It is entirely reasonable for any employer to expect employees to be honest and trustworthy. It is equally reasonable to believe all employees have a universal understanding of this simple expectation.

Grievant's testimony amply affirms that she knew it was wrong to possess and pass on a written legal opinion that was intended only for the eyes of the MAPE Executive Director. Her statement when passing it to K.M., "...you don't know where you got it from," demonstrates guilty knowledge at that very moment. Similarly, her exclamation, "...It's a big deal!," when informed of the pending investigation shows an understanding that a major wrong is about to be exposed. Grievant's testimony that, in retrospect, she should have destroyed the document is the ultimate acknowledgement that her conduct did not meet expected standards.

The Union and Grievant do not question the fairness of the Employer's investigation. Further, they do not dispute that Grievant committed the acts resulting in her discharge. The only remaining issue is whether or not her misconduct rises to the level of just cause for a discharge.

The Union argues that termination is an unduly harsh punishment given the overall circumstances of this case. While an arbitrator has the power to determine whether or not an employee's conduct warrants discipline, his discretion to substitute his

¹¹ *Re Wosk's Ltd.*, 13 L.A.C.3d 64 (Dorsey, 1983).

or her own judgment regarding the appropriate penalty from management's is not unlimited. Rather, if an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, he or she should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he or she must conclude that the employer exceeded its managerial prerogatives and impose a reduced penalty. In reviewing the discipline imposed on an employee, an arbitrator must consider and weigh all relevant factors.

The Union, while not condoning her conduct, raises several arguments to support mitigation of Grievant's discipline: The letter wasn't materially helpful to the Union or harmful to the Employer; One mistake should not destroy management's ability to trust Grievant; There are gradations of fault among the four staffers involved and Grievant is less culpable; The punishment is unduly harsh for a 17-year employee with an otherwise spotless record.

It is probably true that the letter didn't materially help or harm either party. However, I find the argument specious and just another way of saying a good end justifies a bad means. Focusing on the effect of the act is simply a way of deflecting our vision from the gravity of the offense. This was a confidential legal opinion that Grievant had no right to possess or pass on to the Union. Grievant was aware that, in prior cases, she needed permission to show similar opinions to MAPE's adversary, the state. Even though the opinion letter was not stamped, "Personal and Confidential," it strains credulity to believe Grievant thought she had the right to possess it or pass it on without

explicit permission. Finally, one cannot believe a business agent with Grievant's vast experience is unfamiliar with the concept of attorney-client privilege. She had to know that neither she nor the Union were the clients being advised by the letter. Again, her own testimony indicates guilty knowledge.

Perhaps one mistake shouldn't shatter an employer's trust in an employee. However, the Employer's reaction will depend on the magnitude of the mistake. This is not a case of a trusted employee being tardy for work or who was found using a sick day to attend a Twins game. This misconduct goes to the very heart of the employer-employee relationship. The letter was passed on to give the Union an illegal and unearned advantage in contract negotiations. Grievant was a "lead business agent," a position created especially for Grievant because the Employer had a special trust in her abilities. Seriously violating that level of trust is bound to provoke a commensurate reaction.

I do not see significant gradations of culpability between the four Union members involved. Each was a critical link in the chain of events. If any one of them had done the right thing and returned or destroyed the letter, this arbitration would not have been necessary.

A seventeen-year spotless work record would ordinarily carry great weight when considering levels of discipline. There is no doubt Grievant was a highly valued employee who previously did excellent work for the Employer. On the other hand, vast experience can also cut the other way. Based on her seventeen years as a business agent, contract negotiator, and grievance advocate, Grievant was in the best position to recognize the magnitude of the misconduct. Grievant's assertions that she, "just wasn't

thinking because she was so busy,” ring hollow. The ultimate test of character is doing the right thing even when you believe no one is looking. In this instance, Grievant failed that test.

Finally, did Grievant's actions constitute “gross misconduct?” While there is no uniform definition of the term, most would agree with a District of Columbia Judge, who defined it as,

“An intentional act which disregards the standard of behavior which an employer has a right to expect from its employee.”¹²

Grievant's misconduct clearly fits within these parameters.

Based on the facts before me and the reasoning outlined above, I see no compelling reason to revisit the Employer's decision to terminate Grievant. I find that Grievant committed an act of gross misconduct and that the Employer had just cause to terminate her employment.

AWARD

The grievance is DENIED.

Dated: _____

Richard A. Beens, Arbitrator

¹² *Giles v. District of Columbia Department of Employee Services*, 758 A.2d 522 (D.C. 2000)