

**IN THE MATTER OF ARBITRATION
BETWEEN**

**AFSCME, AFL-CIO, MINNESOTA COUNCIL
65 LOCAL No. 456,**

Union

and

**INDEPENDENT SCHOOL DISTRICT No. 316,
(Greenway), Coleraine, Minnesota**

Employer

**ARBITRATION DECISION
AND AWARD**

BMS Case No. 06-PA-181

Arbitrator:

Andrea Mitau Kircher

Date and Place of Hearing:

January 26, 2006
Coleraine, Minnesota

Date Record Closed:

April 10, 2006

Date of Award:

May 10, 2006

APPEARANCES

For the Union:

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INTRODUCTION

Independent School District No. 316, Greenway Public Schools (“Employer” or “District”) includes schools in Coleraine, Minnesota. The American Federation of State, County and Municipal Employees, (“AFSCME”), AFL-CIO, Minnesota Council 65, Local No. 456 (“Union”) represents all public employees of Independent School District No. 316, except supervisory, confidential and instructional employees. The parties are signatories to a labor

agreement (“Contract”) specifically effective from July 1, 2001 to June 30, 2003. The incident that gave rise to this grievance occurred May 4, 2005. According to Article XXVIII, Duration of Agreement, the Contract remains in effect until a new settlement is reached, and a signature page dated March 30, 2005, apparently acknowledging the continuing nature of the Contract, is appended. The Contract is Joint Exhibit 1, and from these facts I assume it applies to the dispute.

This case arises from the discharge of Janet Casey (“Grievant”) on May 4, 2005. The Grievance was filed; a Hearing Committee met to review the case; and the parties proceeded through steps of the Grievance process, but were unable to resolve the dispute, and the matter was referred to arbitration. The parties selected a neutral arbitrator from a list provided by the Minnesota Bureau of Mediation Services.

A hearing was held at the Coleraine School District Offices, Coleraine, Minnesota, on January 26, 2006. At the hearing, the arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties wished to address two procedural issues as well as the merits of the case in post hearing briefs and reply briefs. Briefs were to be postmarked March 10, 2006 and reply briefs on April 7, 2006. The record closed upon receipt of the final brief, April 10, 2006.

ISSUES

1. Was the grievance filed in compliance with the timelines of the Contract?
2. Should certain evidence offered by the Employer be excluded from consideration?
3. Did the Employer violate the collective bargaining agreement when it terminated Janet Casey from employment? If so, what should be the remedy?

ISSUE No. 1

Was the grievance filed in compliance with the timelines of the Contract?

CONTRACT PROVISIONS RELEVANT TO FIRST ISSUE

ARTICLE VIII, SUSPENSION AND DISCHARGE

Section A.

The employee shall be notified of the reason (s) of his/her suspension or discharge in writing at the time of suspension or discharge. If the employee feels he/she has been suspended or discharged without good reason or that the period of suspension is unwarranted, the employee shall have the right of appeal by invoking the normal grievance procedure within fourteen (14) working days of the date of suspension or discharge... (Emphasis supplied.)

ARTICLE IX, GRIEVANCE PROCEDURE

Section A.

A duly authorized grievance committee representing the Union shall be named by the Union, and a list of names of members of the committee will be submitted to the Superintendent of Schools and the Chairman of the Board of Education by March 15 of each calendar year.

Definition of Grievance: A grievance shall mean an allegation by an employee resulting in a dispute or disagreement between the employee and the School District.

Note: A Hearing Committee shall be established to screen employee problems before the first step of the Grievance Procedure of the Agreement with Local 456. The members of the Committee shall be the President and two other members of Local 456, one School Board member, and the employee's supervisor. The fourteen (14) days referred to in Article IX, Section B, paragraph 2, will commence after the Committee reaches a decision regarding the employee's problem. (Emphasis supplied.)

Section B.

1. The Employer and the Union shall attempt to adjust all grievances which may arise by virtue of these regulations or otherwise in the following manner.
2. All grievances must be filed and submitted in writing within fourteen (14) working days from the date of infraction. Commencing with the first step of this procedure, if an employee or the Union fails to comply with the above time limits, the grievance shall not be valid and shall not be processed through this procedure.

...

FACTS

The Grievant was discharged May 4, 2005.¹ It is undisputed that neither she nor any Union representative filed a grievance disputing the reasonableness of the discharge within 14 days of May 4. However, a Grievance or Hearing Committee was convened at the request of Karen Burthwick, Staff Representative for the Union,² and it heard the matter on August 22, 2005.³ On August 30, 2005, within 14 days of the Hearing Committee meeting, an official grievance was filed.⁴ The Grievance was denied in the next two steps, and the Superintendent waived Step C (a hearing) and agreed to proceed to step D, the arbitration process.⁵ Ms. Burthwick has represented Union employees in the District for 18 years. She testified that labor disputes have always gone first to a Hearing Committee and that the 14 day deadline has always commenced after the Committee meets and reaches a decision.

UNION POSITION

The Union argues that the grievance was timely filed because the Contract provides for a Hearing Committee meeting to screen all grievances, and that the grievance was filed within 14 days of that meeting in compliance with Article IX, Section A, as set out above. The Union also argues that the Employer raised the timeliness issue too late for it to be considered, because the first time it was argued was at the arbitration hearing.

EMPLOYER POSITION

The Employer argues that Article VIII applies, not Article IX, because this is a discharge case and Article VIII is more specifically about discharge. When neither the Grievant nor the Union filed a grievance by May 24, 2005, the deadline was missed and no further consideration

¹ Union Exhibit ("U") 8

² U-2a

³ U-2c

⁴ U-2d

⁵ U-2c

should follow. The Employer also claims that filing a grievance pursuant to Article VIII “invokes Article IX of the Grievance Procedure” which does not become activated until the Grievance is filed. The Employer maintains that the grievance must be dismissed for lack of timeliness.

DISCUSSION

The timing issue requires interpretation of the collective bargaining agreement. Arbitrators typically resolve such disputes by analyzing the language of the contract to ascertain the intent of the parties. If the contract language is clear and unambiguous, that language should control. If that is not the case, the arbitrator should look to other indicia of the parties’ intent such as bargaining history and past practice. See, Elkouri & Elkouri, How Arbitration Works, Ch. 9 (5th ed. 1997).

Articles VIII and IX of the Contract are not models of clarity, especially when read together to give meaning to both. The Employer argues that grievances concerning employee discharge are covered by Article VIII which requires a grievance be filed within 14 days of the discharge. Yet the Article IX definition of “grievance” is “an allegation by an employee resulting in a dispute or disagreement between the employee and the School District.”⁶ This broad definition covers a dispute where an employee claims that her discharge was unjust, so the Article IX Hearing Committee should review the grievance as it must review all “grievances”. Reading the two provisions together, but ignoring the section entitled “Note” as suggested by the Employer does not solve the timing problem, as it would appear to require the same grievance to be filed twice, once within 14 days after the discharge, and again within 14 days after the Hearing Committee decision. The Note more likely expresses the intent of the parties that the Hearing Committee process tolls the requirement that the written grievance must be filed within

⁶ See, Article IX

14 working days from the date of infraction, and provides that the 14 days commences after the Hearing Committee decision.⁷

Because the language is not clear, evidence of any past practice is relevant. Ms. Burthwick stated that she had represented employees in this District for 18 years. Her recollection is that grievances always proceeded through a Hearing Committee and that the 14 day deadline for filing grievances commenced after the Committee reached its decision. Another fact lending support to the Union's position is that the practice appears to have been accepted by both parties. Superintendent Thompson arranged the Hearing Committee meeting without complaint⁸, as if the usual process for grievances was to schedule a Hearing Committee meeting at a convenient time even though no grievance had yet been filed. These facts lend support to the Union's position that the grievance is not time barred. The Employer argues that since this is the first discharge to arise between the parties, the usual practice should not apply because it was relevant only to other types of grievances.

The Employer presented an impressive array of arbitration cases as examples of strictly construed time limits. None of these cases, however, were based on contract language similar to the language in this labor agreement. The time lines set out in Articles VIII and IX are ambiguous at best when applied to the facts of this case. Where, as here, the contractual time limits are unclear or ambiguous, "all doubts should be resolved against forfeiture of the right to process the grievance."⁹ The grievance is not time barred.

ISSUE 2

Should certain evidence offered by the Employer be excluded from consideration?

⁷ Compare, Article IX Section B (2) and Note, last sentence.

⁸ U-2 (a), 2 (b) and 2 (c).

⁹ Elkouri & Elkouri, How Arbitration Works, (BNA, 6th ed. 2003) at 221.

BACKGROUND AND ARGUMENTS OF THE PARTIES

At the hearing the Union objected to the admission of a number of Employer Exhibits. The parties were given the opportunity to make their arguments concerning evidentiary objections in their post-hearing and reply briefs.

The Union argues that a number of the exhibits the Employer offered were personnel data by definition. The Union claims that these documents were not given to the Grievant in response to her numerous requests for personnel data, and thus, violated Article V and Minn. Stat. §§ 181.961 Subds. 2(c) and 2(d). If personnel records are not provided to the Grievant in response to her request, those records are subject to exclusion from arbitration proceedings pursuant to Minn. Stat. § 181.963. Further, the Union argues that some of the documents were produced after the Grievant's termination for the Unemployment Compensation hearing and should not be admitted as evidence unless Union can introduce such exhibits as well.

The Employer, in its post-hearing brief, agrees that Employer Exhibits 3, 5, 6, 8, 9, 12, 13, 14, 17, 18, 20, and 21 need not be part of the hearing record because it has substituted the testimony of witnesses for the documents themselves.¹⁰

CONCLUSION

The Union's objection to the documents listed above is sustained. They will be excluded from the hearing record.

ISSUE 3

Did the Employer violate the collective bargaining agreement when it terminated Janet Casey from employment? If so, what should be the remedy?

CONTRACT PROVISIONS RELEVANT TO THIRD ISSUE

ARTICLE VI, RIGHTS OF MANAGEMENT

¹⁰ Employer's Post-Hearing Brief, at 11

...

Section B.

All non-instructional employees who are in good standing and who have satisfactorily fulfilled the period of probation shall be subject to discharge for cause and due process of law. [Sic.]

In dealing with the following points, Article VI, Section B, shall apply:

...

5. Insubordination, including gross disobedience of orders of a supervisor, or refusal to perform assigned duties.
6. Gross incompetence and workmanship in performance of duties provided employee has been given proper notice and counseling relative to such inadequate performance of duties.

...

Section C.

Other infractions of established rules will be dealt with:

1. Written warning
2. Corrective layoff or suspension (one to five days, depending upon the seriousness of the infraction).

...

Also, See Article VIII, Suspension and Discharge, set out on page 3 above.

LEGAL STANDARD

The Arbitrator's decision must draw its essence from the Contract. This Contract provides that an employee can be fired for "good reason" (Article VIII) or "for cause and due process of law" [sic.] (Article IX, § B). The Employer argues that the appropriate standard is "good reason" not "just cause. I find no substantial difference in these two concepts. Despite the awkward language of the Contract, the relevant provisions cited above appear to follow the general rule, that for a discharge to be upheld, the Company has the burden of establishing that the employee's discharge was either for a single incident of very serious misconduct or that it was the final step in the progressive discipline process.¹¹ "Just cause" also requires the employer to show that it acted in a fair and reasonable manner in terms of due process rights as well as that its attempts to utilize progressive discipline have not been successful.

¹¹ See, Discipline and Discharge in Arbitration, Norman Brand, ed., ABA Section of Labor and Employment Law, BNA, 1999, at 68. Citations omitted.

FACTS

Janet Casey began working for the District as a kitchen aide in the High School in 1997.¹² Sometime during the 1997-98 school year, she became a head cook at Vandyke Elementary School (“Vandyke”). In the morning, she worked as a cashier at breakfast for one hour, and in the afternoon she worked as a part time custodian at Vandyke. The Cook position was a three hour job per day during which two kitchen employees prepared and served lunch to approximately 300 elementary school children.

For the past 15 years Sandy Dwyer, the Grievant’s supervisor, has worked as the Food Service Director for the District. She has been with the District for 25 years and previously worked as head cook at Vandyke.

The Grievant believed that to accomplish her assigned tasks, she and the other employees in the kitchen needed to work from 15 to 30 minutes longer than the three hours allotted, and more than once she asked for overtime. Ms. Dwyer denied the overtime requests because she believed that if Ms. Casey were more efficient, the job could be done in three hours, and there was no money in the budget for overtime.¹³

Tim O’Gorman, Head Custodian at Vandyke since 1993, observed that the previous head cook, Dolores Henderson, regularly worked extra hours with no pay to accomplish the job. Ms. Henderson did not complain to her supervisor or the school principal about time worked without pay. Ms. Henderson is now the Head Cook again.

Ms. Dwyer testified about problems in the workplace for which she held Ms. Casey responsible. In November 2000, Ms. Dwyer received a letter from the Vandyke leadership team, which included several teachers and the Vandyke Principal Jolene Landwer. The letter, written

¹² Testimony of witnesses will not be identified by footnotes.

¹³ Superintendent Rod Thompson testified that the District was bankrupt.

by Principal Landwer, complained of dissatisfaction with the kitchen staff. The complaints were numerous:

- They are slow
- They stand and talk and eat and keep kids waiting
- They shove plates at the kids and tell them to hurry up and then huddle at the back of the kitchen area to visit and eat
- They are crabby
- They are generally not respectful towards the kids
- They yell
- The overall attitude is that they are not kid friendly.

In response to this letter, Ms. Dwyer met with the Vandyke kitchen staff and discussed these issues and suggested improvement. No disciplinary action was taken against Ms. Casey or either of the other two kitchen employees as a consequence of this letter. The Employer counts this as one of six written warnings to Ms. Casey.¹⁴

Approximately two years later, Susan Castellano, an employee who did not appear at the hearing, persuaded Ms. Dwyer that Ms. Casey had caused sufficient mental stress in the work place in the few days Ms. Castellano worked at Vandyke that she refused to continue working there. Ms. Dwyer held Ms. Casey responsible for Ms. Castellano's departure. No disciplinary action was taken as a result of this incident.

Approximately one year after that, Joanne Apitz, a Clerk who oversees Cashiers, told Ms. Dwyer that Ms. Casey's grandson was sitting with her at the cashier's computer playing with the keyboard during Ms. Casey's morning stint as cashier. Ms. Apitz told Ms. Casey this was inappropriate. Testimony differed as to whether the grandchild ever came again. Ms. Apitz also noted a \$1.35 mistake in Sept. 22, 2004, but admitted that the lunch cashier could have made the error, not Ms. Casey. Also, Ms. Apitz complained that Ms. Casey expected the cashier to do more kitchen work than cashier work. She explained that the cashier felt that Ms. Casey had

¹⁴ Post-hearing Reply Brief of District, at 8.

been rude. Ms. Apitz testified that she worked with Ms. Casey to help her improve in the cashier job, and that she did improve.

Principal Landwer was actively involved in trying to change Ms. Casey's conduct and attitude even though she was not her direct supervisor. She testified that Ms. Casey was unhappy, made a lot of complaints, did not direct the staff properly, that she was slow, not friendly to the children, that she did not set up the serving table the way Principal Landwer wanted, that Ms Casey did not follow her suggestions to make a list of her duties, that Ms. Casey slammed things around in the kitchen in anger, that she had problems with her coworkers, and didn't pay enough attention to her supervisor, Ms. Dwyer. She believed that Ms. Casey was inefficient and the kitchen was an unhappy "dysfunctional" place. Principal Landwer believed there were no problems at her school, that it was a happy place except for the kitchen under Ms. Casey.

On September 8, 2003, Principal Landwer held a meeting to "listen to concerns regarding Janet Casey and the lunch program at Vandyke, and to develop a corrective action plan." The meeting was also attended by two Union representatives, Ms. Casey, Ms. Dwyer, and Ms. Apitz. As a result of the meeting Ms. Casey was given a Corrective Action Plan dated September 17, 2003, with specific performance standards listed. The document concludes with a warning that failure to meet these standards could result in dismissal, citing Article VI, Section A and Section B, numbers 5 & 6.¹⁵ The document also calls for monthly performance reviews with Ms. Dwyer and Principal Landwer throughout the 2003-04 school year. These meetings did not occur in November, December, January, March, April or May. In February when a meeting did occur, the reviewers stated that it appeared as though Ms. Casey was following the plan as directed, and that things were OK among the kitchen staff.

¹⁵ Employer Exhibit 7.

Despite the apparent improvement in Ms. Casey's conduct, Ms. Dwyer wrote a letter to Ms. Casey dated March 2, 2004. Ms. Dwyer complains that she has made suggestions for unspecified change with which Ms. Casey did not comply, and that some problem existed at Vandyke. She concludes that "attitude is 99% of the problem" and gives Ms. Casey a deadline of March 15 to make "changes" by following "suggestions that I have laid down."¹⁶ These suggestions were not specified in the letter. The deadline was then extended to March 30 and specific duties spelled out as well as the three hour work schedule. These duties are not new, and no discipline is mentioned. The Employer took no action after the March 31 deadline. Dwyer's recollection is that nothing improved, that she visited the Vandyke kitchen regularly and felt she was getting inadequate responses from Ms. Casey, and that Ms. Casey was rude and sarcastic. At one point Ms. Casey left in tears while Ms. Dwyer was giving her directions. Ms. Dwyer concluded Ms. Casey was insubordinate and had a bad attitude.

On October 26, 2004 a two page single spaced letter signed by Ms. Dwyer was sent to Ms. Casey. The letter was actually drafted by Principal Thompson and was entitled a "Written Notice of Improvement". The letter describes over 25 alleged general deficiencies and directives, many of them phrased in obscure terminology which the Grievant testified she did not understand. (*i.e.*, "must effectively and appropriately demonstrate and display productive assertiveness;...Must identify and understand personal values of superiors, subordinates, peers and others;...Must keep management informed on questions of policy;...Must respect ...management prerogatives...") The letter also states that Ms. Casey was not to retaliate in any way against "any of the persons referred to in the letter" or "persons giving information relative to any deficiency listed". The letter threatened demotion or transfer as well as discharge if these

¹⁶ E-10

deficiencies were not corrected or if she retaliated in any way. No persons were referred to by name in the letter except Ms. Landwer who was to be available to work with the Grievant.

Ms. Casey did not understand this document to be a disciplinary action and the Union did not grieve it. The Contract does not include provisions for documents entitled “Written Notice of Improvement”.

After October 26, the Employer took no further documented actions against Ms. Casey for the rest of the 2004-2005 school year until May 4, 2005 when the discharge occurred. On or about May 3, Ms. Casey telephoned a School Board Member, Shelly McCaulley, who did not testify at the hearing. Ms. Casey told her that she had tried to reach the Superintendent and he did not return her call. Ms. Casey admitted that she told Ms. McCaulley that things weren’t going well with her supervisor, and that if someone doesn’t “get her off my back, I’ll have no other choice but to file harassment charges.” Ms. Casey also told the Union representative, Mr. Hongo. He told Ms. Dwyer that Ms. Casey was going to sue her. Ms. Casey was fired the next day. Superintendent Thompson stated he terminated the Grievant for threatening to sue Ms. Dwyer which he characterized as retaliation in violation of the previous October’s Notice of Improvement.

The Union called 6 District Employees to testify:

1. Kitchen aide Sophie Bolles, now retired, testified convincingly that while she worked with Ms. Casey, she thought her very well organized and very efficient. She believed Ms. Casey had a positive attitude, was good with the students, and did extra work for teachers, and Ms. Bolles never heard complaints. Ms. Bolles believed that Ms. Dwyer was an overwhelming person who made unreasonable demands on Ms. Casey, treated her as incompetent, and belittled her.

2. Louella Anderson worked in food service since 1999. She worked with Ms. Casey for three years on and off. Ms. Anderson is now head cook at Marble school. She believes that the necessary work, ordering, preparation, cleaning and cashiering take longer than the time allotted. She puts in unpaid time because overtime is not allowed.

When Ms. Anderson worked with Ms. Casey as her helper, she found Janet to be efficient, organized, and polite and kind to the kids. She claims that they would try out Ms. Dwyer's suggestions, such as turning the table, but it was messy and did not get the kids through the line faster. Ms. Anderson believed Ms. Dwyer used a loud, hurtful tone of voice with Ms. Casey. She also used a "suggesting" tone of voice as compared to a direct order.

3. Bonnie Schroeder worked in the Vandyke kitchen as Ms. Casey's kitchen aide in 2001-2002. She also believed Ms. Casey to be organized, efficient and beloved by the children. She believed that her relationship with teachers was good too. During the time Ms. Schroeder worked there, there was an increase in enrollment and it became harder to get the job done in time. Ms. Schroeder worked extra time for which she was not paid. Ms. Dwyer told her that they must donate the extra time to save their jobs.

Ms. Schroeder believed that Ms. Dwyer tried to avoid meetings with them to try straighten things out. If there was stress in the kitchen it was because Ms. Dwyer did not provide that the right amount of food was delivered. She came over to the kitchen and used a loud rude voice to Ms. Casey, but not to others.

4. Penny Watts worked with Ms. Casey as a kitchen aide substitute for three weeks in April and May of 2005. She found her to be very professional and courteous to children and teachers. She was organized and efficient. Ms. Watts testified for Ms. Casey at the

pre-grievance hearing, and has never been called back to work for the District. She believes this was retaliation because of her testimony.

5. Tim O’Gorman, the head custodian, observed Ms. Casey in the lunch room setting up and cleaning up. He sometimes worked closely with the kitchen staff. Mr. O’Gorman never saw her behave rudely to the children in the four years she was there. She also seemed organized and efficient. Ms. Casey did not work as much unpaid overtime as Dolores. Mr. O’Gorman also opined that there have always been problems in the kitchen, and that Ms. Casey got a “raw deal.”
6. John Peterson, a third grade teacher at Vandyke who has worked 34 years for the District, also testified. He brought his class to lunch every day and never observed Ms. Casey being rude to children or teachers or any yelling. She appeared to be organized and efficient and helped create a positive image for the school.

POSITIONS OF THE PARTIES

The Employer claims that it had just cause to terminate the Grievant for the reasons set out in its letter of discharge. It argues, essentially, that the Grievant’s behavior was so seriously insubordinate, incompetent, etc. that progressive discipline was unnecessary. It also argues, in the alternative, that Ms. Casey threatened to sue Ms. Dwyer and that was the last straw in a series of incidents for which discharge was appropriate. The Employer claims that progressive discipline was utilized and did not solve the problem.

The Union maintains that Ms. Casey had a hard time trying to please her supervisor and was unable to meet her supervisor’s relentless demands. The Union claims that the Grievant did not engage in gross disobedience, insubordination, and was not grossly incompetent. There was no poor performance review, no disciplinary warnings and no suspensions for cause. The

Grievant was fired for calling a School Board Member and complaining about the Superintendent's lack of response and the supervisor's harassment. The Union claims the Employer failed to prove that it had just cause to terminate the Grievant.

DISCUSSION AND DECISION

Due Process

Just cause for termination requires the public Employer to establish that due process safeguards were met. Due process requires fair warning to the Grievant that certain conduct must be corrected or discipline will result. The Employer argues that the Grievant was given sufficient warning that her work was unsatisfactory and understood how to proceed to correct the problems alleged. It claims that it issued six written warnings, but most of the documents cited are not disciplinary warnings consistent with due process requirements.

The first document, the letter dated November 16, 2000, quoted on page 10 above, is not a written warning because Ms. Casey's name was not mentioned in the letter, nor does the letter contain any "warning" language. No disciplinary action resulted, and the complaints are five years old.

The second "written warning" a letter dated September 17, 2003¹⁷ and drafted by Principal Landwer, was helpful in that it spelled out the Grievant's job duties specifically, but it does not say what exactly the Grievant has not done or has done wrong. One can infer from the language that the drafter thinks the Grievant was not paying proper attention to her supervisor's way of doing things, but it concludes that the Grievant herself should "find a way that works best for her in her food service duties, and make it work on a daily basis." It is not unreasonable for the Grievant to have believed that she need not follow her supervisor's suggestions, because the letter merely asks that she "listen to suggestions being given by her supervisors". There is little

¹⁷ Employer's Exhibit 7

evidence that she did not listen sufficiently thereafter. The Employer either failed to follow up on her work performance during the rest of that year or her work improved, because monthly work performance reviews did not take place. This document is not labeled as a warning, but as a corrective action plan, and the Grievant may not have understood the Employer's intentions due to both lack of direct orders and Employer follow-up.

The next letter, dated March 2, 2004¹⁸ was not useful because it did not specify what Ms. Dwyer's concerns were. We only learn that the Supervisor does not like the Grievant's "attitude" and that Ms. Dwyer thinks the kitchen is "dysfunctional". She asks the Grievant to follow her unspecified oral "suggestions" by March 15 or "appropriate action" will be taken. The next letter dated March 15, 2004 changes the deadline to March 31, and once again specifies the Grievant's duties. It does not specify what the Grievant has done wrong and as such, does not serve as a warning meeting the requirements of due process. No action was taken on March 31.

During the next school year, the Supervisor sent the Grievant a letter concerning five "Positive Points" on October 12, 2004.¹⁹ This is certainly not a written warning, but a set of platitudes ("Put on your happy face everyday as you work with the children.") apparently designed to encourage the Grievant to be more cheerful and efficient. This is not the same thing as a disciplinary warning.

The letter of October 26, 2004,²⁰ entitled Written Notice of Improvement, is addressed to the Grievant, and appears more like a written warning than the other documents. It discusses some general topics which the Employer believes are deficiencies. It contains paragraphs entitled Communication Skills, Cooperation, Interpersonal Skills, and Leadership Ability as

¹⁸ Employer's Ex. 10

¹⁹ E-15

²⁰ E-16

areas needing improvement and elaborates in academic terminology upon what the Grievant is expected to do. The Grievant testified that she did not understand many of these terms (*i.e.* “productive assertiveness”, “management prerogatives”). In the two page single-spaced explanation, the author insists the Grievant “Must convey a positive personal image”. When asked at the hearing if she understood and accomplished this task, she replied, “I have to do the best I can”, which seemed to be a reasonable response. On the whole, this document accomplished some of the purposes of a written warning, but was marred by its inscrutable verbiage. The Employer included a warning in the letter against “retaliation...against any of the persons referred to in this written Notice of Improvement or persons giving information relative to any deficiency listed above.”²¹ No persons are referred to by name in the letter as having given such information. Thus, it is not surprising that the Grievant did not understand she had been ordered not to complain about her supervisor to a School Board member, and that if she did so, she would be fired. The Employer failed to provide clear, constructive due process warnings and progressive discipline in compliance with their Contract and labor relations standards.

The Merits of the Discharge

On May 4, 2005, the Grievant was discharged for the following reasons set out in a letter of that date written to her by Superintendent Thompson:

1. Insubordination.
2. Gross disobedience of orders of a supervisor
3. Refusal to perform assigned duties.
4. Gross Incompetence and workmanship in performance of duties following proper notice and counseling relative to inadequate performance of duties.
5. Disruption of the Food Service department via your conversations with ISD #316 staff members and Board members regarding your perception of your supervisor’s lack of abilities and talents.
6. Making unfounded and meritless allegations against your supervisor.

²¹ E-16 at 1.

The evidence presented at the hearing did not establish that most of the wide-ranging charges set out in the May 4th letter were true and cause for dismissal. For example, insubordination or “disobedience” cannot be established unless the Employer shows that the Grievant violated a direct order. There were any number of examples of supervisory disagreements and suggestions, but very little concrete information about a particular direct order that was violated. As to competence, Ms. Dwyer may have been unable to change the Grievant’s behavior to suit her, but there is little evidence that the kitchen work was not being performed properly at the time of the dismissal. The recollections of employees who worked with the Grievant on a day-to-day basis does not support the Employer’s view, leading me to believe that the Grievant did not routinely have difficulty accomplishing her kitchen duties, despite the lack of supervisory support.

Problems in the kitchen were exacerbated by inadequate staff time allotted for the job. The Employer expected that kitchen staff would put in unpaid time to accomplish the necessary tasks, and those who did not complain about unpaid work got along better in the system than the Grievant who believed that all of the kitchen staff’s work time should be paid. The Grievant’s belief is not unreasonable and is in accordance with the Fair Labor Standards Act.

At the time of discharge, the Grievant believed that her supervisor was unfairly harassing her. Because the District apparently had no administrative staff between the supervisor and the Superintendent, such as a Human Resources professional, she tried to complain to the Superintendent about the situation. He did not return her phone call.²² Frustrated in her attempts to resolve this problem, she called Board Member McCaulley. But for the continued lack of effective attention to these issues, it is unlikely that this phone call would have been made.

²² The Superintendent stated he did not receive the message, so did not return the call.

The Employer argues that the Grievant's call to Board Member McCaulley was a retaliatory threat against Ms. Dwyer in violation of the October 24, 2004, Notice of Improvement, and thus, a direct violation of an order. The six month time lag between the alleged "order" in the written Notice of Improvement and the Grievant's call to School Board Member McCaulley diminishes the force of this argument. The Grievant's actions were more a call for help than retaliation. In February of 2005, the Grievant was so distraught by discussions with her supervisor that she collapsed at work and went to the emergency room in an ambulance complaining of chest pain.²³

The Employers reliance on Stroup v. Independent School District No. 152, 2000 WL 1182609 (Minn. App.) to support its retaliation theory is misplaced. Stroup concerns a high school teacher who was discharged for cause and later filed ethics complaints against four of the teachers who testified against him. The Court decided that Stroup's action constituted insubordination which would have a lasting ill effect on the school. In the present matter, the Grievant did not file charges against anyone and whatever she said that was perceived as a threat is not clear, because Board Member McCaulley did not testify; nor did Union President Hongo, who allegedly informed Ms. Dwyer of the "threat". Further, in contrast to Stroup there is no evidence that Ms. Casey's phone call would have a long lasting adverse impact on the public interest. The facts presented are not substantial evidence of retaliation in violation of the October order.

CONCLUSION

The Employer did not meet its burden of establishing that the Grievant was discharged for a single incident of very serious misconduct or that the discharge was the final step in the progressive discipline process. Further, based on the reasons set out above, the Employer did not

²³ U-15(a) and (b)

meet its due process obligations to this employee in the disciplinary process. Inconsistent and erratic efforts were made to correct the Grievant's behavior so that the Grievant did not have sufficient understanding of what was expected. Except in the most severe cases, the Contract appears to require progressive discipline in the form of written warnings and suspensions, and the Employer's efforts do not meet the necessary level of clarity under the facts of this case.

AWARD

The Grievance is sustained. Ms. Casey shall be reinstated to her former positions and pay retroactive to the date of discharge, less unemployment paid to her and be made whole for all retrievable lost rights and benefits.

Dated: May 10, 2006

Andrea Mitau Kircher
Arbitrator