

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

THE SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 284

Re: Procedural Arbitrability/
Employee Discipline

-and-

B.M.S. No. 06-PA-644

INDEP. SCHOOL DISTRICT 281
ROBBINSDALE, MINNESOTA

Before: Jay C. Fogelberg
Neutral Arbitrator

Representation-

For the Employer: Anne C. Becker, Attorney

For the Union: Konrad J. Stroh, President

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article IV, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. A formal complaint was submitted by the Union on behalf of the Grievant on November 18, 2005, and eventually appealed to binding arbitration when the parties were unable to resolve the matter to their mutual satisfaction during discussions at the intermittent steps. The undersigned was then selected as the Neutral Arbitrator to hear evidence

and render a decision from a panel provided to the parties by the Minnesota Bureau of Mediation Services. Subsequently, a hearing was convened in Plymouth, Minnesota on April 26, 2006. There, the parties were afforded the opportunity to present position statements, testimony and supportive documentation. At the conclusion of the proceedings, each side indicated a preference for submitting written summary statements. They were received on May 30, 2006, at which time the hearing was deemed officially closed. While the parties did not stipulate to a precise statement of the issue(s), the following is believed to constitute a fair description of the questions to be considered.

The Issue-

- A) Is the grievance arbitrable?
- B) If so, did the Employer have good cause to first suspend the Grievant, Robert Schill for five work days and then demote him?
- C) If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The adduced evidence indicates that prior to the disciplinary action at issue here, the Grievant worked for Independent School District 281 (hereafter "City", "Employer" or "Administration") as a Head Custodian at its

“FAIR” School, which is a fine arts magnet school shared by approximately eleven school districts in the West Metro Area.¹ In that capacity, he is a member of a collective bargaining unit represented by the Service Employees International Union, Local 284 (“Union” or “Local”) who, together with the Administration, has negotiated and executed a labor agreement (Joint Ex. 1) covering terms and conditions of employment for the personnel that comprise the bargaining unit.

On Friday, January 24th of last year, Randy Scott, Program Director of Custodial Services for the District, became aware of a complaint lodged against Mr. Schill involving allegations that he had violated the Employer’s “Nondiscrimination Policy (Joint Ex. 4) when he publicly referred to the FAIR School’s Principal, and his supervisor, as a “fucking lesbian.” Subsequently an investigation into the matter was conducted, and a meeting held with the Grievant and his representative to discuss the allegations on January 28, 2005 (Employer’s Ex. 24). At that time, Mr. Schill denied making such remarks. In addition, the District hired an outside attorney, Susan Hansen, to conduct an independent investigation into the matter. Her findings were consistent with the Administration’s own conclusions, and were discussed with the Grievant again on or about February 11, 2005 (Employer’s Ex. 25).

¹ “FAIR” is an acronym for Fine Arts Interdisciplinary Resource School.

Accordingly, on that same date, the Administration issued a letter to Mr. Schill indicating that he was being suspended without pay for five working days, and thereafter demoted to a Maintenance Technician position at Plymouth Middle School (Joint Ex. 3).

Subsequent to the disciplinary action, Mr. Schill, in March of 2005, sought the tapes made in connection with Ms. Hanson's investigation (District's Exs. 2 & 3). They were provided to him, but not until December of last year, after his formal grievance was submitted on November 18, 2005 (Joint Ex. 2). His complaint alleged a violation of Article VII (Discipline) of the parties' Labor Agreement, grieving the Employer's failure to provide the investigatory data in a timely manner, and that the decision to demote and suspend him lacked sufficient cause. Eventually, the matter was appealed to binding arbitration, when the parties were unable to reach an amicable resolution to their dispute.

Relevant Contractual and Policy Provisions-

From the Labor Agreement:

Article IV Grievance Procedure

* * *

4-3-1 Time Limitation & Waiver

Failure to file any grievance within the time period thereafter provided shall be deemed a waiver thereof. Failure to appeal a grievance from one level to another within the time period hereafter provided shall constitute a waiver of the grievance....

4-3-2 Step 1

All effort shall be made to resolve any conflict by the service employee with the supervisor or administrator directly involved. The grievance shall be orally presented within thirty (30) days from the date of the occurrence alleged to be a grievance....If a satisfactory settlement cannot be reached within ten (10) days, the second step may be initiated within five (5) days thereafter. For the purpose of this Article, "days" shall be defined as calendar days.

Article VII Basic Schedules & Rates of Pay

* * *

7-3-2 Steps of Discipline

Normally, the following types of discipline may be imposed:

- 1) Oral reprimand (shall not be grievable)
- 2) Written reprimand

- 3) Suspension with or without pay
- 4) Discharge

From the District's Nondiscrimination Policy:

Sexual, Religious, Racial Harassment,
Violence & Offensive Behavior Policy

It is the policy of Robbinsdale Area Schools that no employee or student of the district shall be subjected to offensive or degrading remarks or conduct. Such behavior includes inappropriate remarks or conduct related to an employee's or student's.....affectional orientation.....

Positions of the Parties-

Initially, the **DISTRICT** takes the position in this matter that Mr. Schill's grievance is not arbitrable. In the alternative, they assert that their decision to suspend and demote him was entirely justified. In support of these claims, the Administration contends that the language in the parties' Labor Agreement, in Article IV, is clear and unambiguous. In no uncertain terms it mandates that an employee must present his/her complaint to the supervisor directly involved within thirty calendar days. Failing to do so - or failing to appeal the complaint to the next step - constitutes a waiver of the grievance. In this instance, Mr. Schill had notice of the Administration's proposed discipline when he received the letter from Executive Director of

Administrative Services, Thomas Walerius, dated February 11, 2005 (Joint Ex. 3). Yet in spite of this, and Mr. Schill's verbal claim that he was going to file a grievance over the action, no formal written complaint was submitted until nine months later when Joint Exhibit 2 was received. In the interim there was no request for a waiver of the time constraints and penalties set forth in Article IV by either the Grievant or his representative. Not only is the forfeiture language clear, the well-settled practice in the District has been to enforce the forfeiture clause with few requests for a waiver ever being honored. Further, the District argues that Mr. Schill was familiar with the grievance process, as he had filed a complaint the previous year in a timely manner. Finally, with regard to their procedural position, the Employer maintains that the first part of the grievance ultimately submitted is improper as it alleges no violation of any provision in the Master Agreement.

Substantively, the Administration contends that their decision to suspend and demote Mr. Schill was justified as he was found to have made derogatory remarks concerning his supervisor to his co-workers on several occasions to his co-workers while in the presence of students. In light of his overall poor work record, and considering the fact that he had been notified about and trained with regard to the District's policies prohibiting

such conduct, the penalty imposed was fair and reasonable. Accordingly, for all these reasons, they ask that the grievance be denied in its entirety.

Conversely, the **UNION** takes the position that the formal grievance submitted by Mr. Schill was timely under the circumstances, and moreover, that the discipline issued was not for good and sufficient cause. In support of these claims, the Local argues that because the Administration consistently refused to provide him with the necessary data to formulate his defense, he was precluded from filing his formal grievance until November of last year. In the interim, Mr. Schill made repeated requests to be provided the data in order that he might properly respond to the accusations, but was met with resistance each time, or otherwise was subjected to the Employer's stall tactics. Indeed, not until he filed his formal complaint, did the Administration comply with his request for the information. In addition, the Union argues that the Employer cannot now argue that because Ms. Hanson was not an employee of the District, they had no control over the release of the data to him. In point of fact, she was an agent of theirs, specifically hired to conduct the investigation.

With regard to the substantive issue, the Union maintains that at no time did Mr. Schill ever utter any derogatory remarks to his fellow employees concerning his supervisor's sexual preferences, or tell anyone in the

workplace that he could not work with her as a consequence. The Grievant did not make any derogatory comment to anyone labeling the principal as a “lesbian dictator” or anything similar to that. The only time he made any remark that could even be remotely considered derogatory was when he sang part of a song in the presence of fellow worker Ed Walker, and this was while the two of them were cleaning the cafeteria with no others present. Accordingly, for these reasons the Local seeks the return of the Grievant to his former assignment as Head Janitor at FAIR School; that the suspension be reversed, and; that he be made whole for all lost wages and related benefits as a consequence of the Administration’s inappropriate actions.

Analysis of the Evidence-

At the outset, the Employer’s procedural objections regarding the timeliness of Mr. Schill’s complaint must first be considered for if, as they maintain, the grievance is untimely – and therefore not arbitrable – there can be no examination of the substantive evidence placed into the record, as I would necessarily be precluded from such an analysis for lack of jurisdiction.

In connection with this aspect of the dispute, the record developed

during the course of the proceedings established a number of salient facts that bear directly upon the outcome. Pared to their essentials, the evidence shows:

- That the Grievant was first informed of the discipline that was to be imposed by the Administration at a meeting on February 11, 2005 (Testimony of Custodial Director, Randy Scott; Employer's Ex. 25).
- At that same meeting he was informed that the disciplinary action was to become effective February 22nd.
- That on February 11th, upon hearing of the District's decision, Mr. Schill responded by stating, "I will grieve this" (Testimony of Messrs. Scott and Schill; District's Ex. 25).
- That sometime in March of last year, the Grievant requested certain data (tapes) produced in the course of the investigation conducted by Ms. Hansen. However, the information was not provided to him until early December.
- That no formal written grievance was filed until November, 18 2005, some eight months after the "occurrence" giving rise to the complaint, and approximately seven months after the thirty day deadline established in Section 4-3-2 of the Contract.

The foregoing serves as a backdrop against which the language in the Collective Bargaining Agreement must be examined.

Article IV contains the grievance procedure crafted by the parties. Referenced previously, Section 4-3 is most relevant to the Employer's procedural objections. More particularly, 4-3-1 contains a forfeiture clause. In clear and explicit language it states that an employees' "...[F]ailure to

file any grievance within the time period thereafter provided *shall be deemed a waiver thereof*" (emphasis added).² Not only is the wording clear and unambiguous, the parties have indicated the importance placed on filing timely complaints through the use of the mandatory verb "shall," as opposed to the more permissive "may." Indeed, there can be no question but that the intent was to provide for the prompt resolution of any dispute that might arise, and the attendant consequence for any failure to do so.

Even assuming *arguendo* that the language contained in Section 4-3 is somehow vague, the record is void of any evidence indicating a practice of the parties waiving the timelines for filing grievances.

It is widely held that within the process of employment dispute resolution, there is a strong presumption favoring arbitration. *San Francisco Community College Dist.*, 92 LA 108; also: *State of Minnesota vs. Euclid Berthiaume*, 259 NW 2nd 904; Minn. 1977. Consequently, an employer raising a procedural arbitrability argument normally carries a heavy burden of proof before a grievance will not be decided on its merits. I share the view held by many other arbitrators that the dismissal of a complaint based upon relatively minor procedural flaws is normally counter-productive, and

² The same paragraph contains a similar waiver for failure to appeal a grievance from one step to another.

certainly not the preferable way to resolve disputes that arise in the work place. At the same time however, it is without question that the facts of any case in application to clear and specific language negotiated by the parties and placed into their labor agreement, should not and cannot be ignored. If it is convincingly demonstrated that one side has taken an action (or failed to act) in a manner that is contrary to the plain intent of the bargained grievance procedure – and there is forfeiture language present in the contract – then the reviewing neutral would indeed be remiss in his/her obligations should such evidence be disregarded. Applying this premise to the instant dispute, I must conclude that the Employer has put forth a clear and convincing argument supporting their position that the grievance is not arbitrable.

In defense of the delay, Mr. Schill testified that he was unable to file his complaint within the required period as he had encountered “stalling tactics” on the part of the Administration relative to his data request. Without that information, he claims, he was unable to “build his case” against the District. While the Union successfully demonstrated that the District was less than diligent in fulfilling the Grievant’s request for the tapes,

this fact alone does not nullify their arbitrability objection.³ Mr. Schill, it was shown, was quite familiar with the grievance process and its workings. He had submitted more than one formal complaint in response to actions taken by the Administration relative to his “unprofessional conduct” which was well within the thirty day timeline expressed in Section 4-3-2 (Employer’s Ex. 13). Moreover, during the course of his testimony, under cross-examination, the Grievant acknowledged that there was nothing in the Master Contract to indicate that he was required to have certain information before he could take any formal action.⁴ Simply put, it was incumbent upon him to submit his grievance regarding the alleged Article 7 allegations within the required timelines in order to protect the integrity of his complaint. Indeed, a much different outcome might well have resulted had he done so and thereafter the Employer failed to provide the data requested in a timely manner.

Finally, it is noted that Section 4-1 of the Labor Agreement defines a grievance as being: “....a dispute or disagreement as to the interpretation or application *of any term or terms of this Agreement*” (emphasis added). It

³ The Employer attempted to exonerate themselves by stating that the requested data was in the hands of a “neutral investigator.” There is no question however, but that Ms. Hansen was an agent of the District who secured her services for the purpose of conducting an investigation into the allegations made against Mr. Schill.

⁴ Ultimately, Mr. Schill filed his grievance prior to receiving the requested information from the Employer’s investigator.

has been conceded by the Union that there is nothing in the parties' Contract that addresses discovery issues such as those referenced in the first part of Mr. Schill's written complaint.

Award-

Accordingly, for the reasons set forth above, the grievance is denied.

Respectfully submitted this 7th day of June, 2006.

Jay C. Fogelberg, Neutral Arbitrator