In the Matters of Arbitration Between

ATHENS AREA EDUCATIONAL SUPPORT PROFESSIONAL ASSOCIATION,	:	
Association	:	Grievance #14-15-03
- and -	:	
ATHENS AREA SCHOOL DISTRICT,	:	Grievance #14-15-04
District	:	

OPINION AND AWARD

I. HISTORY OF THE CASE

By letter dated May 6, 2015, the undersigned was notified of my selection by the parties to arbitrate the above grievances. A hearing was held at the District's Administrative Office, 401 West Frederick Street, Athens, Pennsylvania, on July 30, 2015. James T. Rague, Esquire, represented the Association. John G. Audi, Esquire, and Patrick J. Barrett, III, Esquire, served as counsel for the District. In addition to the two individual Grievants, , Association President, and , PSEA UniServ Representative, were present on behalf of the Association. , Acting Superintendent, , Business Manager, , Director of Buildings and Grounds, and , Payroll Coordinator, were present on behalf of the District.

Both parties were given a full opportunity to present any testimonial or documentary evidence that they wished. Following the hearing, counsel indicated that they would present their

closing arguments orally. After both concluded their presentations, the record was closed, and the matter is now before me for final disposition.

II. ISSUES PRESENTED

The initial issue I am to determine is whether the letters dated September 11, 2014, addressed to the Grievants , constituted written disciplines. If I decide that in the affirmative, I must then address whether just cause existed for such action by the District. If I determine that the District did, in fact, violate the collective bargaining agreement in the issuance of these letters, I am to craft the appropriate remedy. If I determine that the letters did not, in fact, constitute written disciplines, I must decide if they are to be removed from the Grievants' personnel files.

III. POSITIONS OF THE PARTIES

The District asserts that the letters in question do not rise to the level of discipline, as alleged by the Association. Their author had no intention that these be disciplinary in nature. It believes that the Grievants thought these were disciplinary simply because they were placed in their personnel files. The District further asserts that the first element of just cause is whether the employee had notice that his or her conduct would be violative of a condition or standard held by the employer and, therefore, merit discipline. It is the obligation of the employer to give such notice and that was the purpose of these letters. It strongly argues that, as the employer, it has the

absolute right to keep these type of notices in individuals' personnel files. Therefore, the grievances should be denied.

The Association believes that these letters constituted written disciplines and that no just cause existed for this action by the District. It argues that the letters, in fact, were disciplinary because they referred to "drastic improvement" and "further disciplinary action" (emphasis added). The Grievants were working to the best of their ability under short-staffed conditions and were singled out. No other employees received such letters, which the District classifies as "notice." Just cause did not exist for the issuance of the letters. Therefore, the grievances should be sustained and the letters removed from the Grievants' personnel files.

IV. OPINION

Both parties have presented their evidence and arguments in a thorough and comprehensive manner. It is clear arbitrational law and practice that in a discipline case, the burden of proof rests with the employer to demonstrate that it had just cause to justify the action or actions which it took. If I do, in fact, determine that the letters in question constituted disciplines, both parties have presented arguments based on the concept of "just cause." This is not an easily quantified term and voluminous articles, case decisions and text writers have sought to give it an appropriate definition. Discipline and Discharge in Arbitration, published by the American Bar Association Section of Employment Law, Norman Brand, Editor-in-Chief, pages 29-92, contains a detailed discussion of the concept. In summary, the editor notes that "... no single formulation of the just cause concept has received exclusive acceptance. Just cause

continues to be a flexible concept that takes specific shape only in the context of the facts it addresses." Discipline and Discharge in Arbitration, page 35. I am guided by the Commonwealth Court of Pennsylvania's seven factor test, affirmed in International Brotherhood of Fireman & Oilers v. Township of Falls, 688 A.2d 269 (Pa. Cmwlth. 1997), as follows:

> ... This Court set forth seven factors to be considered in determining the existence of 'just cause' for discipline: (1) Did the employer give the employee forewarning of the possible disciplinary consequences of his or her conduct?; (2) Was the employer's rule or order reasonably related to the orderly, efficient and safe operation of its business and the performance that the employer might properly expect of the employee?; (3) Did the employer make an effort to determine whether the employee in fact violated its rule or order?' (4) Was the employer's investigation conducted fairly and objectively?; (5) Did the employer obtain substantial evidence of the employee's violation?; (6) Has the employer applied its rules and penalties even-handedly to all employees?; and (7) Was the degree of imposed discipline reasonably related to the seriousness of the offense and the employee's work record? Where any of the above factors is not satisfied, just cause for discipline does not exist. Id. 688 A.2d at 271.

In addition, I endorse the United State Supreme Court's statement, in Steelworkers vs. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), that: "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem." (Emphasis added). I will apply these legal guidelines to the facts before me.

In determining whether the September 11, 2014, letters in question (District Exhibit 2) constituted discipline and, if so, whether just cause existed, the background surrounding them is important. Mr. has been a custodian with the District for approximately 15 years. Normal

staffing at SRU is four (4) custodians. In September 2014, only two (2) custodians staffed the building, he and . On September 10, 2014, the two Grievants were working. At approximately 9:30 p.m., shortly after Mr. worked through his break and then sat down, Mr. and Mrs. came to the building. Neither was critical of his work.

The following evening, Ms. and Mr. attended a meeting with Mr. and Mrs. At this meeting, they were presented with the letters in question. Mr. did not agree with the text of his letter. He testified he had just sat down, as he had worked through his scheduled break. He even asked Mrs. to check the cameras in the building to verify that he had worked through his scheduled break. As to the use of cell phones referred to in the letter, he testified that he was never told he could not use his cell phone in the building. He stated that custodians use them regularly to contact each other. As to use of the computer, the District had emailed him on occasion. Mr. did not understand the letter to be criticizing his work. As to the cell phone prohibition, it was notice of what he was to do in the future. In referring to the letter, he stated "I feel if it's going in my file, it's discipline."

Ms. also a Grievant, has worked for the District for sixteen (16) years. She has worked in SRU for the past four (4) years. She confirmed Mr. 's testimony that they had worked through the scheduled 8:00 p.m. break. He told her his legs were hurting, and she told him to sit down for a few minutes. That is when Mr. came into the building. She confirmed that Mr. , or no one else for that matter, said that they were not cleaning the building properly. She confirmed that the custodians were working short handed and that they were performing to the best of their ability. When asked if she believed that the letter was

disciplinary, she said "Kind of." She further confirmed Mr. 's testimony as to utilization of cell phones and the computer. She said that in her opinion, her letter of September 11, 2014, was a notice of what should or should not be done in the future.

, the Director of Buildings and Grounds for sixteen (16) years and the author of the letters in question, testified for the District. He stated that the administration had concerns about the building and that is what prompted her letters, which contained the concerns of the building Principal. At the meeting with the Grievants, he and Mrs went over in detail what the concerns were and what improvements they expected to be made. When asked if this was disciplinary, he stated "Not at all." Mr. testified that the letters were merely documentation of the meeting. He further acknowledged that there was short staffing in the building and had advised the Grievants to "Do what you can." He explained that the District was concerned about individuals taking too lengthy breaks and that "team cleaning" was not efficient and did not provide the necessary level of cleaning. Again, he was asked whether these letters were disciplines and he stated "Not at all." On cross examination, he acknowledged that cell phones could be used in emergency situations but what the District really wanted to exclude was personal usage. Work usage was okay. There was no evidence presented which showed that Grievants' use of cell phones was personal in nature. Mr. said he expected to see improvement if the individuals ceased team cleaning and did their individual areas. He stated that if they did not cease team cleaning, there would be discipline.

The question of whether the letters constitute written discipline and, therefore, are subject to the just cause test to justify their issuance, is a very close one. After careful consideration, I find that they are not disciplinary in nature.

Both letters contain the statement that if the expectations set forth therein are not met, the Grievants will be "reassigned" and receive "further disciplinary action." While this language could be read to indicate that the letters themselves are disciplinary in nature and that failure to meet the expectations will result in "further" disciplinary action, I believe that the more appropriate interpretation in this case is that "further disciplinary action" refers to discipline in addition to the "reassignment." There are a number of factors which lead me to this conclusion.

The District itself, through the testimony of the author of the letters, stated clearly that it did not intend or consider these to be disciplinary in nature. Mr. 's reason for considering his letter to be a discipline was that it was going to be placed in his personnel file. Ms. ' testimony as to whether she felt the letter was a discipline was "kind of." She also testified that it was her opinion that her letter was a notice of what should or should not be done in the future. I feel that both Ms. and Mr. were totally honest and straightforward in their testimony, and they should be commended for that. However, the evidence presented brings me to the conclusion that the letters were not intended to be written disciplines and, in fact, were not.

Since I have determined that the letters were not disciplinary in nature, I have no reason to direct the District to remove them from the Grievants' personnel files. It is not improper for an employer to memorialize its expectations of employees. However, Ms. and Mr. should not be singled out in this regard, and the District should follow this practice concerning its

specific expectations of individual employees. As these letters are not disciplinary, the District may not consider or use them as a basis or foundation for any future discipline concerning either Ms. , and Mr.). I further direct that the District place a copy of this Award with the September 11, 2014, letters in Ms. and Mr. s personnel files, so that as long as these letters remain in their files, it will be clear that they are not to be considered disciplinary in nature.

The grievance is denied.

Richard M. Goldberg, Esquire
Arbitrator

Date: OCTOBER 6, 2015