In The Matter of Arbitration Between

WEST CHESTER AREA SCHOOL DISTRICT	:
	:
"District"/"Employer"	:
	:
And	:
	:
WEST CHESTER AREA SSP	:
	:
"Association"/"Union"	:
	:
	:

This case arose when the District terminated Alie Koroma ("Grievant"). The Union seeks the Grievant's reinstatement with full back pay.

Throughout this arbitration proceeding, Annemarie Dwyer, Esquire has represented the Association. The District has been represented by Bonnie A. Young, Esquire. Counsel for both parties submitted extensive post-hearing briefs.

FACTS

The District's school system includes Rustin High School ("Rustin"). The Union represents employees who work for the District, including Custodians. The District and Association are parties to a Collective Bargaining Agreement ("CBA").

In August 2018, the District hired the Grievant to work at Rustin as a full-time, third-shift Custodian. The Grievant's regular working hours were from 12:00 midnight to 8:30 a.m. The Grievant, like all Custodians at Rustin, was assigned a closet to store his cleaning cart, supplies, mops and brooms.

On January 3, 2019[1], while still in his probationary period, the Grievant was discovered to be sleeping on the job. In response, Wayne Birster ("Birster"), the Manager of Facilities and Operations for the District, issued a Memorandum of Corrective Action ("MCA") recommending that the Grievant be terminated. Instead, the District suspended the Grievant for four days without pay and placed him on notice that any further instances of sleeping on the job could result in termination of employment.

Several months later, on April 23, the Grievant was working his regular overnight shift. According to Birster, early that morning he discovered the Grievant sound asleep in the closet to which he was assigned. In sharp contrast, the Grievant contends that when Birster came to his closet he was fully awake.

Birster said nothing to the Grievant that morning about sleeping on the job. Later that same day, however, he did tell Miguel Fletcha ("Fletcha"), the Head Custodian at Rustin, that he had found the Grievant sleeping in his closet.

[1]All dates are in 2019 unless otherwise noted.

On the following day, April 24, the Grievant was again working his regular overnight shift. According to Fletcha, early that morning he discovered the Grievant sound asleep in his closet. In sharp contrast, the Grievant contends that when Fletcha came to his closet he was fully awake.

Fletcha said nothing to the Grievant that morning about sleeping on the job. later that same day, however, he told Birster that he had found the Grievant sleeping in his closet.

On April 24, Birster issued an MCA recommending the Grievant's immediate termination. On May 2, a Loudermill hearing was held, during which the Grievant had a Union Representative present. Jeffrey Ulmer, Director of Human Resources for the District, ran that hearing. According to Ulmer, the Grievant then apologized and did not deny sleeping on the job. In sharp contrast, the Grievant contends that he then did deny sleeping on the job on either April 23 or April 24.

Following the Loudermill meeting, Dr. James Stanlon, the Superintendent of Schools, recommended that the Grievant be terminated. The Board of Education subsequently approved that recommendation and the Grievant was terminated. The instant grievance resulted.

POSITION OF THE DISTRICT

When the testimony and record evidence are considered in their totality, the District has clearly satisfied its burden of proof and established just cause to terminate the Grievant from the custodial position he had held for only nine months. His discharge was also consistent with Section 5-514 of the School Code ("Code").

The Grievant's employment as a Custodian for the District was overshadowed by the fact that he thought it was appropriate to sleep on the job. He did so on three separate occasions within the nine months he was employed.

The Grievant also failed to respond to progressive discipline. He was given a second chance when found sleeping as a probationary employee. He was then suspended without pay for four days and was notified in writing that further instances of sleeping on the job would lead to his termination. For the Grievant to then sleep on the job again just 90 days later – on two consecutive nights – is unacceptable workplace conduct and warrants termination.

The Grievant's explanation that Birster, Fletcha and Ulmer all lied about the circumstances leading to his termination makes no sense. The unequivocal testimony of these three District witnesses completely contradicts the Grievant's fanciful story that he was not sleeping in his closet on April 23 and 24, but rather was sitting on a block of paper towels, with the lights on,

drinking coffee and talking with others. The Grievant's testimony paints him in a negative light and is self-serving lies of a former employee attempting to disparage his employer in a desperate attempt to save his job.

Importantly, the Grievant offered absolutely no explanation of why these three District witnesses, who bore the Grievant no ill-will, would lie about the events leading up to his termination. The Grievant's story simply makes no sense and it is of tremendous consequence that he accepts no responsibility for sleeping on the job. Instead, he has pointed the finger at his Employer and called everyone a liar. This is insubordinate behavior that should not be accepted by the District or this Arbitrator.

Finally, termination is the appropriate penalty for the Grievant's offenses. It is a time honored arbitrable principle that once just cause is found for some disciplinary action, the penalty is generally within the province of management unless it is arbitrary and capricious.

For all these reasons, the Arbitrator must deny the grievance in its entirety.

POSITION OF THE ASSOCIATION

The District suspended and terminated the Grievant without the just cause required by the CBA.

As the Contract does not define what constitutes just cause for discipline, the Arbitrator may apply the well-established Seven Tests of Just Cause[2]. In order to find just cause for dismissal, all these seven factors must be examined, and if any one of the factors is not satisfied then just cause cannot be found.

The District failed to meet several of these Seven Tests when discharging the Grievant, including the final three. The District also failed to prove misconduct that rose to the level required by the Code for dismissal, specifically, incompetency, intemperance,

[2] The Seven Tests of Just Cause are as follows:

(1) Whether the employee was forewarned by the employer of the possible disciplinary consequences of his conduct;
(2) Whether the employer rule or order was reasonably related to the orderly, efficient and safe operation of the business and reasonable expectations regarding employee performance;
(3) Whether the employer attempted to determine if a rule or order was in fact violated prior to disciplining the employee;
(4) Whether the investigation was conducted fairly and objectively;
(5) Whether there was substantial evidence or proof of the employee's violation;
(6) Whether rules and penalties are applied even-handedly to all employees; and
(7) Whether the discipline was proportional to the proven offense and the employee's work record.

neglect of duty, or a violation of any of the laws of the Commonwealth of Pennsylvania.

The District failed to produce substantial evidence or proof that the Grievant was sleeping on either April 23 or 24. Although the District alleges that the Grievant was sleeping on the floor of his closet, it did not substantiate this allegation through evidence at the hearing. In addition, the Grievant has consistently and credibly denied any allegations that he was sleeping on the job at any time.

The District witnesses' accounts of these incidents were unpersuasive and failed to prove that the Grievant engaged in the alleged misconduct. For his part, the Grievant not only denies sleeping in his closet on either April 23 or 24, he offered a credible explanation of the incidents in his testimony. The Grievant's explanations are far more credible than those given by Birster or Fletcha concerning the events of those nights. Moreover, on both nights neither Birster nor Fletcha confronted the Grievant about allegedly sleeping on the job.

As to the District's failure to apply penalties even-handedly to all employees, the District has conceded that it was aware of another custodian, Lee Boyer, sleeping on the job, and Boyer was not disciplined when found sleeping. While the District has attempted to distinguish between terminating the Grievant and giving no discipline to Boyer for committing the same offense by

claiming that Boyer was close to retirement, this does not absolve the District from responsibility to treat all employees the same.

In addition to the just cause protection contained in the parties' CBA, Section 514 of the Code limits the circumstances under which employees may be terminated. Section 514 gives districts the right to remove employees only for "incompetency, intemperance, neglect of duty, violation of any of the School Laws of this Commonwealth, or any improper conduct." The Grievant committed none of these offenses.

Even if the Arbitrator finds some wrongdoing by the Grievant, he must further find that the discipline administered by the District is not reasonably related to the seriousness of the proven offenses, and the Grievant's work record. Although the Grievant was employed by the District for only a short time, he quickly became a well-respected and reliable employee who met or exceeded the District's expectations.

The Grievant was a team player who took on additional work on several occasions without being asked to do so when his co-workers were absent. He even went so far as to rent a car for 11 days to make sure he arrived at work on time while his own car was being repaired. The Grievant also took the initiative to clean areas, such as the break room, when they were not up to his high standard of cleanliness, even though it is not part of his assigned area. The Grievant was on a number of occasions complemented for his

work, and his March 2019 Performance Evaluation rated him as "consistent performance of objectives and standards" or "exceeds expectations of objectives and standards" in every category.

In sum, any discipline of the Grievant was without just cause. To the extent the Arbitrator deems some level of discipline appropriate, however, he can and should modify the District's punishment to impose the level of discipline commensurate with the Grievant's proven conduct.

OPINION

The first question before me is whether the District has met its burden of establishing that the Grievant was sleeping in his assigned closet during his overnight shifts of April 23 and/or 24, 2019. Absent the District carrying this burden, just cause cannot exist for any discipline whatsoever of the Grievant.

As to what did or did not occur on April 23 and 24, there is no way to reconcile the testimony of the two men who accused the Grievant of being asleep on consecutive nights, namely Manager of Facilities and Operations Birster and Head Custodian Fletcha, with the testimony of the Grievant. This is not a situation where there is ambiguity as to whether the Grievant was sleeping or only had his eyes shut and was briefly "dozing". To the contrary, Birster testified that on April 23, and Fletcha testified that on April 24, the Grievant was fully asleep in his closet with the lights

out, exhibiting clear and unmistakable signs of being in that state. In sharp contrast, the Grievant testified that on both occasions he exhibited no signs of sleep whatsoever, but rather was fully awake and engaged in alert conversation with Birster and Fletcha upon their arrival at his closet. In short, a classic credibility dispute here exists.

As to whose testimony I should credit, the Association skillfully and forcefully stresses several reasons why I should credit the Grievant. The Union correctly notes there is no photographic evidence, as sometimes exists in cases of this type, of the Grievant sleeping. If further stresses that on neither April 23 nor 24 was the Grievant confronted about sleeping on duty, a significant omission. The Union also emphasizes that the Grievant had a history of doing work well, both assigned and unassigned, and had shortly before being terminated received a positive evaluation from the District.

While individually and collectively these arguments do have appeal, I nonetheless am persuaded by the District that I must credit the testimony of Birster and Fletcha over that of the Grievant. The only way I could credit the testimony of the Grievant over those two men is to find that both Birster and Fletcha were deliberately testifying untruthfully. There is, however, no reason advanced as to why either Birster or Fletcha would individually provide false testimony against the Grievant. It is

even more difficult to understand why these two men would engage in a vicious conspiracy to present false testimony, about two different incidents, in order to bring about the Grievant's improper termination. Neither man had a negative relationship with the Grievant, as acknowledged by the Grievant himself.

Accordingly, based on my crediting the testimony of both Birster and Fletcha over that of the Grievant concerning the events of April 23 and 24, I determine that the District has met its burden of establishing that the Grievant was asleep on the job on the early mornings of both of those days. It follows quickly that the District has also carried its burden of establishing that just cause existed for it to discipline the Grievant. It is well established that sleeping on the job is a serious offense subject to discipline.

The question then becomes whether there was just cause for the District to impose upon the Grievant the level of discipline it did, specifically the penalty of termination. As argued by the Association, this is not a matter to be taken lightly, as termination is indeed the "capital punishment" of labor relations.

On this question, the Association has once again forcefully presented several strong arguments. It has extensively documented the Grievant's strengths as an employee. It has stressed times when he took the initiative to perform unassigned extra work, and when he went above and beyond to make sure he performed his own

work exceptionally well. The Association also accurately stresses that the Grievant had received a positive employee evaluation only shortly before he was terminated. The Association further contends that the Grievant's termination made him a victim of disparate treatment.

Notwithstanding all of the above, I again find the arguments of the District to be more compelling. The Grievant was a short-term employee. He was previously disciplined for sleeping on duty while a probationary employee, a circumstance that obviously could have resulted in his termination. At that time, the Grievant was placed on notice that further incidents of sleeping on the job could subject him to termination. In these circumstances, I cannot find that the District exceeded its reasonable authority by deciding that the Grievant should be terminated for not one, but two, further incidents of sleeping on the job. This is particularly true since these incidents were on back-to-back nights.

I further agree with the District that the Grievant was not subjected to disparate treatment when terminated. It is true, as the Association correctly emphasizes, that the District had previously found another custodian, Lee Boyer, to be sleeping on the job, and it did not terminate him. The Association is further correct that one of the principles of just cause is that an

employer must apply its policies and rules evenhandedly to all employees.

Nonetheless, for purposes of how the District responded to the situations involving Boyer and the Grievant, these two men were not similarly situated. Boyer was a 30-year employee on the edge of retirement who had never previously been disciplined, had never previously been shown leniency by the District, and had never been given a "final warning". In sharp contrast, the Grievant was an employee of only nine months seniority who had previously been disciplined for sleeping on the job and had then received a warning about the consequences of doing so in the future.

Neither is this a situation where there are compelling reasons to grant the Grievant leniency. As previously noted, the Grievant had already been given a "break" back in January 2019 when he was not terminated after then found sleeping while still a probationary employee.

In the final analysis, the evidence establishes that the Grievant was a good employee with one fatal flaw: he had difficulty staying awake in the early morning hours of the overnight shift. Unfortunately, the Grievant was hired to work that overnight shift, and it was therefore an essential element of his job that he remain awake and working during these early morning hours. That the Grievant proved unable to do so, on three occasions, within a short

period of time, compels the conclusion that he is not well suited for the job for which the District hired him.

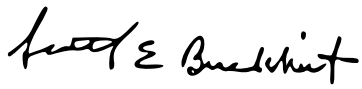
Accordingly, notwithstanding the Association making every possible argument to the contrary, I am compelled to find that just cause did exist for the Grievant's termination[3]. I therefore must and will deny the grievance in its entirety.

[3] I also find that the Grievant's termination was not inconsistent with the School Code. Falling asleep at work on three nights within a nine-month period, two of them consecutive nights, surely qualifies as falling under the umbrella of "incompetency, ...neglect of duty...or other improper conduct."

AWARD

The grievance is denied.

Signed this 29th day of April 2021.



SCOTT E. BUCHHEIT, ARBITRATOR