

IN THE MATTER OF THE ARBITRATION BETWEEN  
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PUBLIC SCHOOL EMPLOYEES OF	)	
***** SCHOOL DISTRICT,	)	ARBITRATOR'S OPINION
	)	AND AWARD
UNION,	)	
	)	
and	)	*****
	)	TERMINATION GRIEVANCE
***** SCHOOL DISTRICT *****,	)	
	)	
EMPLOYER.	)	
_____	)	

BEFORE: JOSEPH W. DUFFY  
ARBITRATOR  
PO BOX 12217  
SEATTLE, WA 98102-0217

REPRESENTING  
THE UNION: DAVID G. FLEMING  
STAFF ATTORNEY  
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REPRESENTING  
THE EMPLOYER: CRAIG W. HANSON  
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HEARING HELD: JANUARY 30, 2008  
\*\*\*\*\*, WA

## OPINION

### Introduction

Public School Employees of \*\*\*\*\* School District, an affiliate of Public School Employees of Washington (“union” or “PSE”), serves as exclusive bargaining representative for a bargaining unit of classified employees employed by \*\*\*\*\* School District (“employer” or “\*SD”). The union and the employer (“parties”) submitted this dispute to arbitration under the terms of their September 1, 2005 - August 31, 2008 collective bargaining agreement (“Agreement”), a copy of which they introduced at the hearing as an exhibit. (J1) The parties selected me to arbitrate this dispute by mutual agreement.

At the hearing, the parties agreed that the grievance is properly before me for a final and binding decision on the merits. The parties also agreed that I should retain jurisdiction to aid in the implementation of the remedy, should that be necessary.

Both parties had a full opportunity to call witnesses, to submit documents into evidence and to make arguments. Witnesses were sworn under oath and subject to cross-examination by the opposing party. The parties submitted one joint exhibit (J1), six employer exhibits (E1-E6) and four union exhibits (U1-U4) into the record. A total of six witnesses, including the grievant, \*\*\*\*\*, testified at the hearing. The attorneys did an excellent job of presenting the respective cases. At the close of the hearing the parties elected to submit post-hearing briefs by simultaneous submission to me and to each other postmarked or submitted electronically by February 27, 2008. I received the last brief and closed the record on February 28, 2008.

### Issue for Decision

At the hearing, the parties each submitted a proposed issue statement, and when they could not agree they left it to me to frame the issue. The employer submitted the following issue statement:

1. On October 1, 2007 did the grievant falsely verify in writing that preschool student S. V. had been off-loaded from a school bus when in fact that preschool student had not been off-loaded from a school bus?
2. If so, what is the required consequence regarding the grievant’s employment with the \*\*\*\*\* School District?

The union proposed the following issue statement:

Did the District violate the Agreement when it terminated the grievant, \*\*\*\*\*? If so, what is the remedy?

Ordinarily, I prefer to adopt an issue statement that relates the dispute to an alleged violation of the applicable contract rather than incorporating facts and arguments of the parties into the issue statement. Therefore, I have adopted the union's proposed issue statement.

#### The Agreement

The Agreement contains the following provisions:

**Section 11.4.1.** The District may discipline or discharge any employee subject to this Agreement for justifiable cause. Questions on the issue of "justifiable cause" shall be resolved in accordance with the grievance procedure unless otherwise provided. (J1, p. 21)

**Step Three. Grievance-Arbitration** ....The scope of the arbitrator's authority shall be limited to grievances arising from specific provisions of the Agreement, and the arbitrator shall be without authority to add to, subtract from, or alter any of the terms of this Agreement. The arbitrator shall be without power or authority to make any decision which requires the commission of an act prohibited by law. (J1, p. 27)

#### Background

The grievant, \*\*\*\*\*, went to work for the \*SD approximately twelve years ago. She worked as a Paraeducator in J\*\*\*\*\*'s early childhood classroom at \*\*\*\*\* Elementary Pre-School. The children in the early childhood classrooms are three to five years old.

Previously, the grievant had been a parent volunteer in her child's classroom.

The grievant's performance evaluations show that she has consistently been rated "meets expectations" and has received favorable comments on her performance. The following are typical of the comments made in the evaluations about her work:

\*\*\*\*\* is a highly skilled and capable special education para. She works as a team member and independently when given specific goals and objectives to work on with/for the children. She works well with her teacher and the ECEAP para in the classroom.

\*\*\*\*\* has been working on fulfilling the core competencies since 2001, and needs to complete these before the start of next school year.

Each year it becomes more difficult to find something for which \*\*\*\*\* has not already received praise. She knows all the expectations of her job and goes beyond. She anticipates needs of children and the teacher. She is always flexible and ready to begin something new or different as soon as it is brought to her attention. \*\*\*\*\* is a highly dedicated employee who strives to meet the needs of

the program. She has excellent organizational abilities and is a well respected by all who work with her.

...She can be relied upon to follow directions and meet deadlines....We are very proud to have \*\*\*\*\* as a member of the ECE team.

\*\*\*\*\* is a dedicated and giving co-worker. She is extremely kind and handles all types of students with skill and consistency....She gives a great deal of herself as she goes far beyond her scheduled job responsibilities. She shows a real concern for all students in and outside the classroom.

\*\*\*\*\* has taken that extra step this year by teaching herself sign language. Its use has been a great addition to the classroom and a benefit to others on her team....  
(U3)

J\*\*\*\*\* has worked with the grievant in the classroom for twelve years. \*\*\*\*\* described the grievant as an extremely skilled, valued and dedicated employee. She testified that the grievant has taken every available opportunity to receive training in order to improve her skills. She testified that the grievant has created forms and methods to help with the record keeping that is an important part of the school program. The grievant has, for example, developed forms for checking in the children and checking them out at the end of the day. (U1, U2; see also U4)

\*SD has experienced problems with young children being left on school buses. The children missed their stops usually because they were asleep and the Bus Drivers didn't notice the children on the bus. (E1) The \*SD Transportation Director, \*\*\*\*\*, testified that the Superintendent directed her to find a way to increase accountability and prevent this problem from recurring.

The grievant testified that in early 2007 she and other Paraeducators were directed by \*\*\*\*\*, the Director of Early Childhood Education, to "walk the bus" after the children disembarked at the school in order to double check that no children remained on the bus. The Bus Drivers already had responsibility to "walk the bus" at the end of a run, and concerns arose that the Paraeducators were being asked to supervise the Drivers. \*\*\*\*\* testified that as soon as she learned that Paraeducators had been told to walk the buses, she directed that the practice be stopped. She testified that the Paraeducators and the Drivers are in the same bargaining unit and cannot be required to supervise each other. The grievant testified that the practice of Paraeducators walking the buses continued for about two weeks after it was instituted.

On April 27, 2007, \*\*\*\*\* and \*\*\*\*\* called a meeting at the \*SD offices. Many, but not all, of the Drivers who drive primarily pre-school runs attended the meeting. The grievant attended the meeting voluntarily on her day off. \*\*\*\*\* testified that the administrators informed those who attended the meeting that leaving a child on the bus will result in termination.

The minutes taken at the April 27 meeting reflect that the following policy and procedure was adopted:

1. Drivers check off each student during loading at pickup, they hand over check off form [E5] to the ECE staff at the preschool
2. ECE staff checks off as students depart from the bus and are received by the preschool staff.
3. Vice versa at the end of the day.
4. Forms returned to transportation books at the end of the day.
5. 1 copy distributed to school staff and other copies turned in to transportation every THURSDAY. (E2)

The minutes also include the statement in bold type: “Needed: Accountability from both sides (Transportation and ECE Programs) Misplaced Students: Not Tolerated!”

\*SD developed a form (E5) that Drivers used to note the names of the children picked up and to check off each name. Drivers then provided the form to the Paraeducators at the school and the Paraeducators were to check off each child as the child got off the bus. \*SD believed that the procedure and the form provided a double check that would greatly reduce the possibility of leaving a child on the bus. (E3)

Later, \*SD formalized the bus check off procedure in a memo dated May 1, 2007 and in a Staff Handbook that was distributed to staff at the beginning of the 2007-2008 school year. (E3, E4) The Staff Handbook incorporates the May 1, 2007 memo that reads in part as follows:

As safety and security of students is one of our primary goals, we have established documentation guidelines for pick up and delivery of students to the preschool, ECEAP and Head Start programs....

Attached is a copy of the Bus *Check Off List* that was put in place last year and will continue to be utilized for the remainder of the 2006-07 school year. The drivers and early childhood staff will be accountable for documenting student pick-up and drop-off by initialing that the event has occurred....

The following guidelines are to be followed when filling out the forms:

**Pick up from home and drop off at school:**

1. The driver will verify that the student has entered the bus and will check and initial the Day On column.

2. The teacher/assistant will verify that the student off-loads at the school site and will check and initial the Day Off column as the children depart the bus and before leaving the bus area.
3. The driver will walk the bus at the school site to verify no student is remaining on board. If the early childhood staff notices that a driver is not walking the bus, a friendly reminder is appropriate. If the driver does not walk the bus, it is to be reported to the Transportation Director immediately.... (E4)

On October 1, 2007, which was the eleventh day of the new school year, the grievant went outside the building at around 11:55 a.m. to meet the three buses carrying children for the afternoon session. The buses carried children who attended both J\*\*\*\*\*'s classroom and N\*\*\*\*\*'s neighboring classroom. Ordinarily, the grievant would be concerned only with checking in the children for her (J\*\*\*\*\*'s) classroom. The grievant testified that she makes sure the children use the handrail when exiting the bus and that they step over the curb on their way to the classroom. She testified that Mr. \*\*\*\*\*, the Driver of the third bus, gave her the check off form. The grievant testified that she noticed that names were listed on the form but the Driver had not checked off the children in the "Monday AM On" column. (E5)

The grievant testified that while she was in the process of checking in the children from the buses, someone told her that the Teacher in the adjoining classroom, N\*\*\*\*\*, could not come out to check in her children. The grievant testified that some of the children for N\*\*\*\*\*'s class had already left the bus. She testified that she asked Mr. \*\*\*\*\* if all the children on the list for N\*\*\*\*\*'s class were off the bus and he told her they were. The grievant knew Mr. \*\*\*\*\* because he had been the Bus Driver for her child in previous years and she trusted him. The grievant then initialed the checkoff form and returned it to the driver. She testified she also assumed Mr. \*\*\*\*\* would walk his bus before leaving the school.

Unfortunately, one child from N\*\*\*\*\*'s class, "S", remained on the bus. Mr. \*\*\*\*\* ordinarily was allowed to take his bus home and since he was off duty after dropping the children at \*\*\*\*\* he went home after leaving the school. He parked the bus and went into his home and later returned to find the child on the bus. He drove back to the school and returned the child to the classroom at about 2:00 p.m., approximately two hours after the drop off time.

School procedures require that when an enrolled student does not appear for school, the school calls the parents within thirty minutes. This procedure was not followed on October 1 in

N\*\*\*\*\*'s classroom and no call regarding "S's" absence occurred. (The grievant did not have responsibility to make this call because the grievant did not work in N\*\*\*\*\*'s classroom.)

\*SD offered Mr. \*\*\*\*\* the option of resigning or being terminated for leaving the child on the bus and he elected to resign.

On October 2, 2007, Mr. \*\*\*\*\*, the \*SD Director of Human Resources, met with the grievant. In that meeting the grievant acknowledged that she initialed the checkoff form without verifying that "S" had left the bus. She also acknowledged that she knew the policy and procedure for filling out the form and checking in the students. Following that meeting, \*SD gave the grievant notice of termination for falsifying the record related to receiving the student at the school. (E6)

The union filed a grievance over the termination and when the parties could not resolve the dispute in the grievance procedure, this arbitration followed.

### Discussion

#### The Just Cause Standard

The Agreement provides that the employer may discipline or discharge an employee for justifiable cause. The parties did not define justifiable cause, which is not uncommon in collective bargaining agreements. The terms just cause, justifiable cause and sufficient cause, as well as other similar terms, often are used interchangeably in the collective bargaining context. The terms have developed a specific meaning in labor arbitration based on numerous arbitration decisions issued over many years under many different collective bargaining agreements in a wide range of industries and employment settings.

Arbitration decisions often refer to the "seven tests" of just cause developed by Arbitrator Carroll R. Daugherty. (see *Enterprise Wire Co.*, 46LA359; Daugherty:1966; *Moore's Seafood Products, Inc.*, 50LA83; Daugherty:1968) The seven tests have been widely used and also criticized. (see *1989 Proceedings of the National Academy of Arbitrators*, Chapter 3, p.23) Leading arbitrators have taken issue with mechanical or automatic application of the seven tests except where the parties have specifically agreed on that approach.

In a 1947 arbitration decision, Arbitrator Harry Platt made the following observation about cause as applied by labor arbitrators in termination cases:

It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a questions and, therefore, perhaps the best he can do is to decide what reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just. (*Riley Stoker Corp.*, 7L.A.764; Platt:1947)

Generally, a common understanding has developed in the field of labor/management relations that just cause requires: 1.) Notice to the grievant of the rules to be followed and the consequences of non-compliance; 2.) Proof that the grievant engaged in the alleged misconduct; 3.) Procedural regularity in the investigation of the misconduct, and; 4.) Reasonable and even-handed application of discipline, including progressive discipline when appropriate. (see Hill & Sinicropi, *Remedies in Arbitration, 2nd Ed.* (BNA Books; 1991) p.137-145) I have, therefore, considered the facts of this case against the just cause standard as that term is commonly understood in the field of labor/management relations.

#### Summary Discharge without Progressive Discipline

Employers have the authority to establish reasonable work performance standards. In doing so, employers sometimes designate certain kinds of misconduct as "cardinal sins" for which an employee can be terminated for the first offense.

Under a just cause standard, labor arbitrators generally expect that employers will apply progressive discipline prior to termination. The concept of progressive discipline is based on the premise that an employee's conduct can be improved and corrected over time through the application of escalating penalties. Progressive discipline gives the employee an opportunity to understand the seriousness of the performance problem and to reflect on the need for and the method for correcting the problem. Employers and employees both benefit from the rehabilitation and retention of employees through the use of corrective action.

At the same time, certain acts of misconduct represent such a severe problem that immediate discharge without corrective action is justified. Intoxication on duty presents a clear example of the kind of behavior that usually justifies immediate discharge. Deciding where the line should be drawn between misconduct that justifies immediate discharge and misconduct that is subject to progressive discipline can be difficult, and reasonable people may disagree about where that line should fall in particular cases.

Labor arbitrators generally hold that employers must apply progressive discipline except in cases of the most extreme behavior that breaches the fundamental understanding on which the employment relationship between the employer and the employee is based. Stated another way, summary discharge is justified if the employer's legitimate management interests cannot be protected by applying lesser discipline because: 1.) The employee's past record shows that the unsatisfactory conduct will continue, or; 2.) The most stringent form of discipline is needed to protect the system of work rules, or; 3.) Continued employment of this employee would inevitably interfere with the successful operation of the business. (Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 85 Duke Law Journal 594 (1985), as quoted in St. Antoine, *The Common Law of the Workplace*, 2<sup>nd</sup> Ed., p. 186 (BNA Books; 2005))

Therefore, in examining the facts of this case, an important question to ask is whether the grievant's conduct on October 1, 2007 represented such an extreme breach of the employment relationship that progressive discipline need not be applied.

For \*SD, the safety of children is paramount and the union agrees with that basic principle. \*SD wanted to be sure that measures had been taken to prevent the possibility of children being left on buses. For obvious reasons, leaving a small child alone on a school bus is traumatic for the child and could lead to extreme danger for the child and significant liability for \*SD. The need for preventive action by \*SD to avoid leaving children alone on school buses cannot be questioned.

The employer contends that it communicated a "Zero Tolerance" policy on leaving children on buses. \*SD argues that the grievant knew of this policy and knew that she could be terminated for the first offense if she did not properly check in children arriving on school buses.

Zero tolerance policies are often problematic for three principal reasons. First, zero tolerance policies focus only on the rule violation and do not take into account other factors such as the employee's work record and length of service. A negotiated just cause standard ordinarily

requires not only proof of the violation but also requires consideration of whether the severity of the disciplinary action is reasonably related to the seriousness of the proven offense(s) and the employee's prior record. Second, zero tolerance policies often do not uniformly result in terminations. Employers often make exceptions and use lesser discipline to deal with some violations of the policy. Thus, employees receive a mixed message concerning the consequences of violating a zero tolerance policy. Third, employers often fail to communicate the policy as a zero tolerance policy and fail to communicate the fact that discharge will be the result for every rule violation.

Ms. \*\*\*\*\* testified credibly that she told the people who attended the April 27 meeting words to the effect that "if you want to work for \*SD don't leave children on the bus." I find, however, that the memo that describes the check in policy and procedure does not refer to a zero tolerance policy or clearly threaten termination for failure to follow the policy. In addition, \*SD did not practice zero tolerance in the case of Bus Driver S\*\*\*\*\* in October 2007, as \*SD suspended her rather than terminating her after she checked off a student on the form as having exited the bus at the school, but then found the child on the bus at the next stop. \*SD issued a suspension rather than a termination because the child was never left alone and unattended on the bus.

Testimony at the hearing showed that that Drivers who have left children alone and unattended on buses have been either terminated or allowed to resign. Ms. \*\*\*\*\* testified that Drivers who have runs that cover more than one school have sometimes failed to notice that a student didn't get off at the student's school and remained on the bus at the next stop. In those situations where the child has never been left alone or unattended the Drivers received a suspension rather than termination. (E1) (The record contains no evidence on past involvement of Paraeducators in other incidents in which children have been left on school buses.)

The grievant forthrightly admitted that she knew that she was supposed to verify that each child had exited the bus. Certain mitigating factors are present here, however. First, the grievant would not ordinarily have been responsible for "S" since he attended the other classroom and the staff from that classroom had responsibility for him and would ordinarily check him in from the school bus. Second, some of the students for N\*\*\*\*\*'s classroom had already left the bus when the grievant was asked to deal with N\*\*\*\*\*'s children. Third, the grievant not only had to be concerned about checking the children off on a form, but she also had

to watch them as they got off the bus, stepped over the curb and walked to the classroom to be sure that they didn't fall or wander off. Because the children are three to five years of age and school had only been in session for a short time, the children required more monitoring than they might have if they had been older or if they had been in school longer. Also, many of the children have special needs, thus requiring more attention. In addition, children also arrive at the same time by other means than the school bus, such as parent drop off, which adds another distraction.<sup>1</sup> Fourth, the grievant knew the Bus Driver and had a good relationship with him. She believed that she could rely on his assurance that all the children were off the bus. The Bus Driver failed in his responsibilities to check that all students were off the bus. Fifth, although \*SD characterizes the grievant's conduct as falsification of a record, the evidence does not support the conclusion that the grievant checked "S" off on the form with the intent to deceive anyone. She believed that she made an accurate entry based on what the Bus Driver told her.

Employers often argue that to set aside a termination is to grant clemency and clemency is within the sole discretion of the employer. Mitigation and clemency are two different things, however. Arbitrators have the authority under a just cause standard to modify discipline that is not reasonably proportionate to the offense involved and the grievant's past record. (see St. Antoine, *The Common Law of the Workplace*, 2d Ed. (BNA Books; 2005), p. 184; Elkouri & Elkouri, *How Arbitration Works*, 6<sup>th</sup> Ed. (BNA Books: 2003), p. 963) I find that the grievant's long service, her clean record, her positive performance evaluations and the circumstances related to the events of October 1, 2007 are significant mitigating factors.

In my judgment, the grievant's record shows that she is unlikely to repeat the unsatisfactory conduct. Therefore, the problems associated with her role in this incident can be corrected by a lesser form of discipline than discharge. Imposing a less stringent form of discipline on the Paraeducator than the discipline imposed on the Driver is consistent with the circumstances and will not undermine the work rules that the employer has established. The grievant has been a positive contributor to \*SD for many years and her record shows that she could be one again.

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<sup>1</sup> In the brief, \*SD argued that the grievant had indicated to J\*\*\*\*\* that the grievant "has had difficulty establishing a consistent routine for handling her busing with her students." (U4, p. 4) \*SD sees this as evidence that the grievant should have been more alert on October 1 because "she had difficulty in establishing a consistent routine for handling her busing with her students." My reading of J\*\*\*\*\*'s quoted comment, however, is that J\*\*\*\*\* meant that N\*\*\*\*\* was having difficulty establishing a consistent routine, not the grievant.

## Conclusion

Based on the entire record submitted by the parties, I find that \*SD did not have justifiable cause to terminate the grievant's employment. Therefore, the appropriate remedy is to reduce the termination to a three-day unpaid suspension, to reinstate the grievant to the position she held at the time of her termination and to make the grievant whole for lost wages and benefits, including seniority.

IN THE MATTER OF THE ARBITRATION BETWEEN

PUBLIC SCHOOL EMPLOYEES OF )  
\*\*\*\*\* SCHOOL DISTRICT, ) ARBITRATOR'S  
 ) AWARD  
UNION, )  
 )  
and ) \*\*\*\*\*  
 ) TERMINATION GRIEVANCE  
\*\*\*\*\* SCHOOL DISTRICT \*\*\*\*\* )  
 )  
EMPLOYER. )  
\_\_\_\_\_ )

For the reasons set forth in the Opinion that accompanies this Award, the grievance must be and it is sustained. The employer shall:

1. Reduce the termination to a three-day unpaid suspension, and;
2. Reinstatement the grievant to the position she held at the time of her termination, and;
3. Make the grievant whole for lost wages and benefits, including seniority.

I will retain jurisdiction for a period of sixty (60) days from the date of this Award for the sole purpose of aiding the parties in the implementation of the remedy. Either party may unilaterally invoke jurisdiction during the sixty-day period and once jurisdiction is invoked I will retain jurisdiction until the remedy issue is resolved either by agreement of the parties or by a ruling from me.

Dated this 27<sup>th</sup> Day of March 2008

\_\_\_\_\_  
Joseph W. Duffy  
Arbitrator