Case: Opperwall #1

AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION

In the matter of the arbitration between:

AAA Case No. 54 390 01005 03

Log # A8739-1640-03

Employer,

Grievant:

-and-

Issue: Discharge
Arbitrator: Kathleen R. Opperwall

Union.

ARBITRATION OPINION AND AWARD

An arbitration hearing was held on October 23, 2003, in , Michigan with the following persons attending and/or testifying:

On behalf of the Union:

Michael Landsiedel, Union Specialist

On behalf of the Employer:

Steven Reifman, Attorney

The record was closed on November 25, 2003 after receipts of the parties' post-hearing briefs.

ISSUES

1. Was the Grievant covered by the parties' collective bargaining agreement, or was she excluded as a temporary employee?

2. Did the Employer have just cause for the termination of the Grievant's employment?

ISSUE 1: TEMPORARY EMPLOYEE ISSUE

The Employer raised an issue at the arbitration hearing whether the Grievant, , was a temporary employee and therefore not covered by the collective bargaining agreement. The parties agreed to go forward with the arbitration hearing on all issues, and to have the arbitrator address first the issue of whether the Grievant was covered by the collective bargaining agreement.

Ms. was originally hired by the Agency as a part time social service aide, beginning October 5, 1992. She worked in part time positions until March 1, 1998, when she was given the position of "Temporary Full-Time Social Service Aide." Employer Exhibit 3 shows that this temporary employment was to commence on March 1, 1998 and continue for one year, through March 1, 1999. She was assigned to work a maximum of 37.5 hours per week. She continued working at the Agency after March 1, 1999.

Ms. went on a medical leave from December 1999 until September 2000. She testified that she was notified in September of 2000 that she was being laid off because her program was ending. However, she was allowed to bump into another position. She then continued to work full time until she was terminated on May 21, 2003.

Ms. testified that she started paying union dues in 1998 when she became a full time employee, and she was never told she was not part of the bargaining unit.

Article 19, Section 1 of the parties' contract contains the following provision concerning temporary employees:

> "Temporary Employees.
>
> Temporary employment for limited (temporary) periods for specific purposes shall, where possible, be subject to the same conditions which apply to permanent staff. The length of time to be employed shall not exceed one hundred and twenty (120) days and the scope, duties and compensation and conditions of employment shall be clearly defined. In the event that a temporary employee is filling in for a regular employee on a leave of absence, the period may be extended to one year. This policy may be modified for temporary employees with the approval of the Union and the Executive Director."

The evidence indicated that Ms. had worked in the full time position for over 4 years, even after subtracting for the medical leave of absence. This is well beyond the 120 days set forth in Article 19, Section 1. Nor was there any evidence that the Union had approved an extension beyond the normal time limit. This is not a situation of an individual being employed for a limited period for a specific purpose. Rather, Ms. was employed in a regular bargaining unit position for a period of years. It is my conclusion that Ms. 's employment was covered by the collective bargaining agreement.

ISSUE 2: JUST CAUSE

On May 21, 2003 was given a letter which advised her that her employment was being terminated. The letter was signed by , the Executive Director of the . The pertinent portion of the letter reads as follows:

> "According to Chapter II, Section B, Subject 4, #4 of the Policies and Procedures Manual, staff shall not be insubordinate. Employees shall promptly adhere to any lawful directives of a supervisor. According to Article 14, Section 2 of the Line Staff Union Contract, the Executive Director shall have the right to dismiss an employee for just cause.

Therefore, effective today your employment with . has ended."

The Union filed a timely grievance on May 27, 2003. The grievance cited a violation of Article 20 and of Article 14, Section 2. Article 20 and Article 14, Section 2 give the employer the right to dismiss employees for just cause. The remedy requested was that Ms. be made whole. The grievance was appealed to arbitration on July 15, 2003 after the parties were unable to resolve the matter.

At the arbitration hearing, the parties presented evidence concerning the incident which led to Ms. 's termination. Ms. worked with the Agency's early head start program, which was known as the 0-3 Program. The YWCA and the Detroit Urban League were also involved with the 0-3 Program. On May 9, 2003, Ms. received a phone call from a colleague at the Detroit Urban League 0-3 Program, advising her that Value City Stores wanted to make a large donation of goods. The colleague told Ms. that she had also been trying to contact their colleague at the YWCA about the donation, but had been unable to reach her. Ms. was not normally involved in receiving donations for the Agency. Ms. spoke with , another Agency employee who had some experience with receiving donations. They discussed that it was expected to be a large donation, and that the Agency did not have a large enough room for storing the donation.

Ms. also discussed the donation with ., the Deputy Director at the Agency. Ms. told Mr. that because of the storage problem, the donation would be delivered first to the YWCA, and that it would be shared with the YWCA. Mr. authorized Ms. to hire a truck to pick up the donation at Value City Stores.

On Wednesday, May 14, 2003, the 15 program directors of the Agency were holding their regular leadership team meeting at the Agency. Ms. and Mr. advised the

program directors of the expected large donation. A decision was made then, that the program directors would contact their clients and stay late, in order to distribute the donation that day, so it would not need to be stored. Mr. then called Ms and told her to have the donation delivered to the Agency, not the YWCA. However, at that point the truck was either on its way or already at the YWCA. The truck had been hired for four hours. The driver told Ms. that he needed to get the truck back, and did not have time to wait for them to divide the donation so that half could be left at the YWCA and half brought to the Agency. The whole donation was unloaded and brought into the YWCA for storage.

Ms. did not call Mr back to advise him of what had occurred. The program directors stayed at the Agency offices with the clients whom they had contacted, waiting for the donation, which did not arrive.

On Thursday, May 15, 2003, Ms. and another Agency employee, and a parent from the 0-3 Program went over to the YWCA, and sorted through the donation with several YWCA people. However, they did not do an actual inventory of the donation.

On Tuesday, May 20, 2003, Mr. learned that the donation had not been brought to the Agency, but was still at the YWCA. He called Ms. and told her that the donation needed to be delivered to the Agency that day. A truck was sent, and did deliver the remaining boxes to the Agency that day. It was not nearly as large a donation as had been expected. Several witnesses estimated that the amount delivered to the Agency was only approximately 20% of what had been originally delivered to the YWCA.

On Tuesday, May 20, 2003, Ms. also had a heated telephone conversation with the Executive Director of the Agency, . The following day, May 21, 2003, Mr. gave Ms. the letter which advised her that she was being terminated for insubordination.

CONTRACT PROVISONS

Article 14, Section 2 contains the following provisions concerning Dismissal:

"The Executive Director shall have the right to dismiss an employee for just cause. In case of dismissal, the employee or his/her agent is entitled to a written explanation and has the right to appeal through the grievance procedure. The Agency can dismiss professional employees for just cause after giving them a thirty (30) day notice of such action; all other employees will receive a fourteen (14) day notice. In unusual circumstances, the Agency may require a dismissed employee to leave the premises prior to completion of the thirty (30) day or fourteen (14) day notice. In those rare circumstances, dismissed employees would be paid for work already completed on a pro-rated diem basis. The Executive Director shall have the right to dismiss, reprimand or place employees on Provisional Status (a period of time after original probation) not to exceed ninety (90) day(s) to determine whether an employee's performance merits termination or continuation for any of the following reasons:

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C. **Serious Misconduct** – Serious misconduct can result in immediate dismissal. Misconduct is construed as a gross insubordination, official malfeasance or conduct unbecoming an employee. Provisional employees on 'provisional status' have the rights of the Agreement, including full access to the grievance procedure.

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E. In imposing discipline, the Agency will not do so without just cause and will use whenever possible, the rule of progressive discipline. Any employee so disciplined will have access to the grievance procedure."

POSITIONS OF THE PARTIES

It was the Employer's position that it had just cause for terminating Ms. 's employment based upon gross insubordination. Employer argued that Ms. had been insubordinate both by failing to follow Mr. 's specific directive to deliver the donation to the Agency, and second, by the rude and abusive language she used in the telephone conversation with the Executive Director. The Employer emphasized that the mishandling of donations is a very serious issue for a charitable organization, and could result in serious damage to the Agency's reputation and standing in the community.

It was the Union's position that the Employer had not come close to proving insubordination. The Union asked that Ms. be reinstated with full back pay and lost benefits.

DISCUSSION AND DECISION

The issue is whether the Employer had just cause for terminating Ms. 's employment. Article 14, Section 2 of the parties' contract is quoted above at page 6. It provides that the Executive Director has the right to dismiss an employee for just cause. It also provides that the employee or his/her agent is entitled to a written explanation and has the right to appeal through the grievance procedure.

The termination letter which Ms. was given on May 21, 2003 included the following: ". . . staff shall not be insubordinate. Employees shall promptly adhere to any lawful directives of a supervisor." The letter did not give any other explanation.

Subsection C of Article 14, Section 2 provides that employees can be terminated for serious misconduct. Serious misconduct is defined as follows:

> "Misconduct is construed as a gross insubordination, official malfeasance or conduct unbecoming an employee."

The termination letter referred to insubordination, but did not specifically allege gross insubordination.

The first issue is whether Ms. was guilty of gross insubordination by not having the donation delivered to the Agency on May 14, 2003. It is true that on that date Mr. , the Deputy Director, did tell Ms. to have the donation delivered to the Agency. However, that was a change of plans from what was already underway, a delivery of the donation to the YWCA, for later division between the two agencies. The truck driver who was hired to make the delivery to the YWCA testified at the arbitration hearing. He testified that part of the donation

had already been unloaded at the YWCA. When Ms. told him that she needed to deliver half of the donation to the Agency, he told her that he did not have time to do that.

Ms. can be faulted for not calling Mr. back at that point and advising him of the situation. That would have avoided having the program directors and their clients wait all day for a donation which never arrived. It would also have helped prevent rumors and questions concerning what had happened with the donation.

Nonetheless, it is my conclusion that Ms. 's actions on May 14, 2003 did not amount to gross insubordination. She did not have full control of the situation. The delivery to the YWCA was already underway, and the YWCA was expecting to receive half of the donation. The truck driver would not wait while the two agencies divided up the donation. This was not a case of Mr. giving Ms. a clear directive of something which was within her ability, and then having her intentionally disobey that directive.

On May 20, 2003, Mr. did give Ms. a clear directive to have the donation delivered to the Agency that day. Ms. did assist in seeing that the donation was delivered to the Agency on May 20, 2003.

The second issue is whether there was just cause based on insubordination due to the heated discussion between Ms. and the Executive Director on May 20, 2003. At the arbitration hearing, Ms. testified that Ms had "cursed me out" during that phone conversation. The termination letter does not, however, make any reference to this.

, the AFSCME staff representative who participated in processing the grievance, testified that nothing was ever said about Ms. being insubordinate to Ms. over the phone. He testified that he had asked what the insubordination had been, because the termination letter was

vague. He testified that Mr. told him that the insubordination was the failure to deliver the donation to the Agency when Mr. Brown had told her to deliver it to the Agency.

, a Human Resources Assistant at the Agency, testified that she heard the telephone conversation between Ms. and Ms. , because she was in the office when the call was put on the speaker phone. She testified that Ms. did swear at Ms , saying: "Damn it, why are you questioning me." Ms. testified that "damn it" was the "worst it got."

It is my conclusion that this is not sufficient to establish gross insubordination. First, it is significant that Ms. was not given any written explanation that this was the reason for her termination. The parties' contract states that in dismissal cases, the employee is entitled to a written explanation. In addition, the language used ("damn it") was not so serious or abusive as to amount to gross insubordination. It was a heated discussion on both sides.

Ms. testified that Ms. was a good employee, generally speaking, who had used very poor judgment on this incident. Mr. also testified that Ms. was a good employee. There was no evidence that she had any other discipline on her record.

It is my conclusion that the Employer did not establish just cause for the termination of 's employment. She did exercise poor judgment in handling the donation. However, receiving donations was not her normal job, and she had never before been involved with a large donation. Her actions did not rise to the level of gross insubordination. She had been employed for eight years with the Agency, and had a good record with the Agency.

In summary, it is my conclusion that: (1) Ms. was covered by the collective bargaining agreement and, (2) the Employer did not establish just cause for her discharge.

The grievance is granted. The Agency is directed to reinstate Ms. and make her whole for her lost pay and benefits. The Agency can subtract the amount of unemployment benefits or wages received from replacement employment. I will retain jurisdiction for a period of 90 days in case there is a dispute concerning the back pay. If there is a dispute, the parties should contact the American Arbitration Association within this 90-day period.

DATED: December 16, 2003

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Kathleen R. Opperwall, Arbitrator