

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

WARREN CONSOLIDATED SCHOOLS,
Employer,

-and-

MICHIGAN AFSCME COUNCIL 25,
LOCAL 1346, AFL-CIO
Union.

AFSCME LOG #: A12474-1346-06 Discharge

OPINION AND AWARD

THE CASE

It appears the grievance in this matter was filed in March 2006. In part, it reads as follows:

STATEMENT OF GRIEVANCE:

List applicable violation: This grievance is based on but not limited to: Unjust termination due to criminal background checks occurring due to current legislation in Lansing. Employee disclosed information on employment app. when hired.

Adjustment required: Return affected employee to work immediately. During 7 years of employment, grievant has dependable, trustworthy & reliable without discipline against him. Make whole in all areas.

It was filed in response to the grievant's termination which was conveyed to him by the Executive Director of Employee Services, by a document dated March 16, 2006. In part, the notice of termination reads as follows:

Re: Termination of Employment

Dear Grievant:

As a result of confirmation and acknowledgment by you at our meeting on February 7, 2006, of your conviction of a felony, the school district is hereby terminating your employment effective **Friday, March 17, 2006.** Please return any District property (e.g. ID badge, keys, etc.) you may

have in your possession. You may give these items to your Union representatives to forward to the Human Resources Department.

The background of this very interesting dispute is well settled and there is little, if any, disagreement regarding the factual scenario.

At the time of his termination the grievant was working in the technical department as an IT technician. He was originally hired in April of 1999. The record establishes that he was a good employee with no prior discipline.

In order to secure employment with the school district, the grievant was required to complete an application for non-instructional employment. He did so on February 15, 1999. To the question "Have you ever been convicted of any crime?", the grievant replied "yes". He explained that in 1989 he was convicted of drug possession. He noted on his application that he was on probation for three years, had monthly testing for cocaine for what appears to be two years. There is no question but that the grievant made a complete disclosure of his prior felony conviction.

In 2005 the legislature passed extensive legislation via various public acts dealing with, *inter alia*, the hiring and continued employment of certified and non-certified personnel who have been convicted of various misdemeanors and felonies. Some offenses were designated listed offenses while others were designated non-listed offenses. The law requires a criminal history and records check for school employees and goes on to dictate actions to be taken in various scenarios, including arraignments and convictions for misdemeanors and felonies. As I indicated, there are two general categories of offenses: listed offenses and non-listed offenses. Different reactions are required by the legislation. For instance, and as it pertains to this dispute, a non-certified employee who was convicted of a non-listed felony would not be prohibited from working for the Employer. However, as the parties have so stated, an employee may be hired or retained if the superintendent of schools and the school board each approve, in writing, the person's hiring or continued employment.

Given that the grievant had previously been convicted of a non-listed felony, which he disclosed and which the Employer was completely aware of, the Employer concluded it was necessary to convene a review meeting. The meeting was held on Tuesday, February 7, 2006. At the meeting, the grievant confirmed what he had already conveyed to the Employer -- that he had a felony conviction. He was placed on leave via communication from the Employer dated February 17, 2006. In part, it reads as follows:

This letter serves as an official communication to review our meeting held on Tuesday, February 7, 2006. The meeting was to discuss with you the appearance of your name on the "School Employee Criminal Conviction Roster".

The purpose of the meeting was to determine the accuracy of the information on the Roster, at which time you confirmed you did have a criminal conviction.

You were placed on a paid administrative leave pending the verification of the information on the Roster. You were directed that you must obtain

an appointment to be fingerprinted within 5 business days of our meeting and provide written confirmation. Information was provided to assist you with obtaining your fingerprints. You may also contact a State Police post to be fingerprinted. Our understanding is that the State Police have been directed by the Governor's office to continue fingerprinting at no charge.

For your information as to the status of the District's release of the list, we have enclosed an e-mail from the Legislative Consultant for Oakland County Schools. If you have any questions, please feel free to contact the Human Resources Department at (586) 698-4106, or your Union representatives.

At some point during this discussion the grievant related that he was going to attempt to get his conviction expunged. Nonetheless, the grievant was terminated effective Friday, March 17, 2006 as conveyed in the March 16, 2006 notice previously displayed. As it turned out, the grievant's record was expunged. The motion was signed by the Judge on April 24, 2006.

Additional aspects of the record will be displayed and analyzed as necessary.

DISCUSSION AND FINDINGS

There was a full and complete hearing with both parties given every opportunity to present any evidence they thought was necessary. In addition, both filed helpful post-hearing briefs. It should be understood that even though I have carefully analyzed the record, it would be impossible and probably inappropriate to mention everything contained therein.

Portions of the Collective Bargaining Agreement read as follows:

ARTICLE 1 – RECOGNITION

* * *

Employees Covered

Pursuant to and in accordance with all applicable provisions of Act 379 of the Public Acts of 1965, as amended, the School Board does hereby recognize the Union as the Sole and Exclusive Representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment for the term of this Agreement of all employees of the School Board included in the Bargaining unit described below:

All non-instructional employees; excluding noon aides, teacher aides, crossing guards, transportation supervisor, assistant transportation supervisor, transportation administrative assistant, supervisor of food service, assistant supervisor of food service, maintenance supervisor, operations supervisor, custodial foremen, supervisors of reproduction room operator and property control clerk, secretaries, and office clerical employees.

* * *

ARTICLE 3 - EFFECT OF AGREEMENT

Section 1

The School Board and the Union mutually agree that the terms and conditions set forth in this Agreement represent the full and complete understanding and commitment between the parties hereto which may be altered, changed, added to, deleted from, or modified only through the voluntary, mutual consent of the School Board and the Union in an amendment hereto which shall be ratified and signed by both parties.

* * *

Section 3

The rights of the School Board to effectively administer the school system are recognized by the Union and shall be administered in accordance with the Agreement.

* * *

ARTICLE 4 - GUARANTEE OF RIGHTS *

Section 3

The School Board agrees that its enforcement of discipline will be fair and for just cause.

* * *

ARTICLE 6 - GRIEVANCE PROCEDURE

Section 6

The arbitrator shall have no power or authority to add to, detract from, alter, or modify the terms of this Agreement; however, the parties agree that he/she has the right to grant a monetary award.

The Employer argues that after the passage of Public Act 131, the Board of Education and the Superintendent of Schools made the decision that any employee who has a confirmed felony conviction (whether or not a listed offense) will not be hired or continued employment with the school district. It argues that as a result, all individuals are treated the same, regardless of age, race, gender, national origin or prior employment. It suggests that this decision was consistent with the prerogatives exclusively reserved to the Board of Education. It argues that the fact that the grievant clearly indicated in his initial employment application that he had a prior felony conviction does not logically lead to the conclusion that such indication required a statutory waiver of the current law. It suggests that the Superintendent of Schools, the Board of Education, or for that matter, the grievant, could not have envisioned that a statute would be enacted some six years after his original employment, that would somehow be waived by his indication of a prior felony conviction. The Employer goes on to argue that the traditional just cause provisions, such as

those contained in the Agreement, are directed at employee conduct, such as acts of insubordination, theft and problems of absenteeism from work, etc. It maintains that these provisions were adopted many years before the current legislation took effect. The Employer admits that the grievant was not separated from his employment for any such acts. It maintains he was terminated due to the fact that he was precluded from continued employment as a result of the Board of Education's and the Superintendent of Schools' decision that the school district would not employ a convicted felon. It maintains that this decision is consistent with state law and cannot be upset by the arbitrator. It argues that I would be substituting my judgment for that of the Board of Education and Superintendent of Schools in regard to convicted felons. It maintains that the grievance cannot be sustained without me exceeding the authority granted by the provisions in the Collective Bargaining Agreement.

The Union argues that the legislation in question did not supersede or replace the parties' Collective Bargaining Agreement's just cause provision as it relates to those individuals who were convicted of a non-listed felony offense. The Union maintains that the legislation in question must be examined and, in doing so, two separate methods of interpretation can be utilized. The first is to focus on the plain meaning of the words and, second, to examine the purpose of the legislation. It points out that the law is very clear on what type of offenses would require immediate termination. In the offense the grievant was previously convicted of, although his record has since been expunged, does not fall into that category. It argues that the legislation does not override prior statutory or bargaining rights. It points to three provisions in the Act which prohibit the application of certain sections, if in conflict with an existing Collective Bargaining Agreement until after the expiration of the Agreement. Further, it argues that the law did not affect at all the collective bargaining rights of those individuals who were convicted of an unlisted felony. The Union maintains that public sector collective bargaining is governed by state law, specifically Public Act 379 of 1965, known as the Public Employee Relations Act or PERA. It maintains that the law in Michigan clearly establishes that PERA prevails over conflicting legislation, charters, and ordinances. It maintains that the courts have sought that, where possible, collisions between conflicting law and PERA should be resolved in a manner which would leave both PERA and the conflicting law intact. However, it argues that if that is not possible, then PERA prevails. It maintains the just cause provision is a result of bargaining sanctioned by PERA and, as such, takes precedence over conflicting state law. The Union maintains that while the current issue is so new that there is no primary legal authority available, secondary authority suggests that just cause contained in the Collective Bargaining Agreement should be followed in cases involving individuals found to have felony convictions other than a listed offense. It argues that the burden is upon the Employer to establish just cause for termination, and in this case, it didn't do so. It maintains that the grievant was an exemplary employee who never received any reprimands or disciplinary actions and followed the Employer's advice of having his record expunged. It points out, however, that that took some time and it wasn't until April 24, 2006 when the judge entered the order subsequent to the grievant's termination of employment on March 17, 2006. The Union requests that I should grant the grievance reinstating the grievant to his former position as an IT technician with full back pay and that he should be made whole for any and all losses, including seniority, fringe benefits and other contractual benefits. It asks that I

retain jurisdiction.

As the arbitrator selected pursuant to the provisions of the Collective Bargaining Agreement to resolve this dispute, I note that my jurisdiction is controlled by the four corners of the Agreement. I do not possess the authority of a judge with general jurisdiction and am well aware of the constraints placed on my authority by Section 6 of Article 6 - Grievance Procedure. While certainly it is my responsibility to interpret and apply the provisions of the Collective Bargaining Agreement, do not have the authority to add to, subtract from, alter or modify the terms of the Agreement.

Before moving on to the specifics of this dispute, it is important to recognize that this Collective Bargaining Agreement is essentially the product of a process, i.e., collective bargaining, which is mandated by state law. I am referring to Public Act 379 of 1965 which modified Public Act 336 of 1947. Public Act 379 of 1965 is known as the Public Employment Relations Act or PERA. As noted from the summary of the record, the Employer has relied upon and the Union has responded to, a batch of legislation which, *inter alia*, deals with the ramifications to be experienced by a non-certified school employee who is convicted of what is referenced as a non-listed offense. That is the specific circumstance in which the grievant finds himself in this dispute. For simplicity, I will refer to the law relied upon by the Employer, which consists of various public acts, as the School Law.

Returning to the Collective Bargaining Agreement, and keeping in mind that it is the product of a procedure created by state law, I note that the language in Section 3 of Article 4 - Guarantee of Rights, provides that the Employer agrees that its enforcement of discipline will be "fair" and for "just cause".

The cause, just cause, proper cause standard, I consider them synonymous, has been utilized by parties to Collective Bargaining Agreements for decades to establish criteria which must be met before discipline -- in this case termination of employment - - can be sustained. Absent a specific express definition of the term just cause, and I have found none in the Agreement nor have I been directed to any, I interpret the term to mean that when judged in light of all the circumstances, the Employer's actions must be reasonable. This means there must be a careful analysis of all relevant factors, including the proven misconduct, length of service, disciplinary record, mitigating factors, rules and regulations, possibility of disparate treatment, etc. The Employer must not only establish conduct it may respond to, but it must also show that its response is appropriate. However, this does not mean that an arbitrator should lightly interfere with management's actions. To do so would be to manage by arbitration which would help neither party.

In analyzing this case, there are several uncontested facts which are important to its resolution. First, the Employer was well aware of the grievant's felony conviction before it hired him as an IT tech. This is not a case wherein the Employer did not have knowledge of the felony conviction until discovered during the criminal records check. Nor is this a case wherein the activity which led to the felony conviction took place after the grievant was hired. In other words, the Employer decided to hire the grievant knowing full well that he had a felony conviction. Second, the record establishes that the grievant was an excellent and exemplary employee. During his approximate six years of employment the grievant did not receive any

significant discipline, if any - at all. The only act that he engaged in, which ultimately led to his termination, was completed before he was hired. Third, the Employer has taken the position that in its application of the School Law as it relates to non-listed felony convictions, it exercises discretion to, in essence, discharge across the board without any consideration of factors related to each individual. Fourth, before the complete utilization of the grievance procedure, the grievant had his felony record expunged. He had not done so at the time of his termination, but clearly did so before the grievance process ended.

It should be obvious that if for the moment we ignored the effect, if any, of the School Law, there is no basis at all for terminating the grievant's employment. He was hired with the Employer having full knowledge of his felony conviction and during his tenure was an excellent employee and did not engage in any conduct which would provide the basis for discipline, nor did any undisclosed conduct which may have taken place before he was hired become known during the time of the grievant's tenure. Absent consideration of the impact, if any, of the School Law, the record does not provide any basis for terminating the grievant's employment.

This, of course, brings us to the impact of the School Law and the Employer's reliance on it, in terminating the grievant's employment. In applying the law, it must be noted that there is no provision which compels the Employer terminate the grievant's employment. There is nothing in the School Law which establishes that an employee, in the circumstances realized by the grievant, cannot be employed by Warren Consolidated Schools. The Employer has suggested that the grievant's employment was terminated because the Employer exercised its discretion, as allowed by the School Law, and determined that the school board and the superintendent would not agree in writing to retain the grievant. For several reasons I find that the Employer's actions violated the Collective Bargaining Agreement and are not mandated by the School Law. Under the particular facts and circumstances of this case, the School Law in question did not insulate the Employer's claimed use of discretion from the application of the standards outlined in the Collective Bargaining Agreement, i.e., that enforcement of discipline "will be fair" and "for just cause."

Stating the proposition in a slightly different way, I find that in the circumstances presented by this dispute the School Law does not trump the Collective Bargaining Agreement which was created pursuant to PERA. Specifically, in the application of the School Law to the facts of this case, there is no inconsistency or conflict between the School Law and PERA by applying the contract provision regarding fairness and just cause to the Employer's exercise of discretion under the School Law.

Section 3 of Article 4 - Guarantee of Rights, is the bargained-for provision which, in essence, establishes law between the parties. As I indicated, it was created pursuant to PERA. While I do agree, as I've stated, if subsequent legislation prohibited the grievant's employment, this dispute would be over. However, I find that is not the case at all. By executing the Collective Bargaining Agreement in question, the Employer agreed to apply the standards in Section 3 of Article 4 to any decision to discipline an employee. Some may suggest that what happened in this case is not discipline, but I disagree. The grievant is losing his employment based on an action that he engaged in prior to his employment. He is being terminated, not because the School Law requires it, but because the Employer

determined that it would respond to the grievant's felony conviction, which it was well aware of when it hired him, by terminating his employment. I consider that discipline.

I recognize that the Employer has argued that under the School Law it has the discretion to determine whether to retain the grievant. In general, I do not disagree. However, I do conclude that the Employer's position of uniformly terminating employees who are not required to be terminated by the School Law without considering the facts and circumstances unique to each employee violates the contract. In essence, the Employer gave up the right to utilize its discretion in an unfettered manner when it negotiated and agreed to the language in Section 3 of Article 4 – Guarantee of Rights. Considering the specific facts in this dispute, it makes no difference whether the Collective Bargaining Agreement preceded the School Law because in relation to the grievant's circumstances and considering the case in the best light for the Employer, all that the School Law did was give it another opportunity to consider the impact of the grievant's felony conviction and to decide to terminate or retain the grievant. The School Law did not create a substantive basis which could be utilized to justify the grievant's termination which was no different than the basis which existed prior to the time the grievant was hired. At that point, the Employer obviously determined that the grievant's felony conviction would not be a problem and hired the grievant. That apparently was a good choice, for he was an excellent employee for several years.

In essence, the enactment of the School Law did nothing more than give the Employer another opportunity to make a decision which it already made when it hired the grievant. However, in exercising that discretion, the Employer had agreed to utilize the standard of fairness and just cause because it existed in the Collective Bargaining Agreement which was negotiated pursuant to another state law, i.e., the Public Employee Relations Act. Importantly, there is no provision that I have found in the School Law, nor have I been directed to any, which establishes that the discretion to be utilized by the Employer in determining whether to retain someone in the grievant's circumstances cannot be set or defined in terms of a provision of a Collective Bargaining Agreement which was negotiated pursuant to another state law, PERA. If I were to reach the conclusion sought by the Employer, I would have to find that as a result of the School Law relied upon by the Employer, a provision of the parties' Collective Bargaining Agreement has become a nullity, which in essence means that in relation to these particular facts, the law under which the contract was negotiated, PERA, has been completely wiped off the books. I'm not prepared to come to that conclusion and would be violating the contract if I did.

Additionally, it is noted that even though the grievant's felony conviction was not eradicated at the time the Employer made its decision, it was eliminated while the grievance process was still viable. I was notified just prior to May 31, 2006 that I had been selected by the parties to arbitrate this dispute. The grievant's record was expunged as of April 24, 2006.

In summary, for the reasons I've outlined above, I find that the Employer's actions have violated the Collective Bargaining Agreement. Given that the School Law did not require that the grievant's employment be terminated; and given that the Employer failed to exercise its discretion as required by the provisions of the Collective Bargaining Agreement which was negotiated pursuant to PERA; and given the fact there is absolutely no basis contained in this record for terminating the grievant's employment for any action or activity

taking place from the date of his hire to the date of his termination; I have no alternative but to find that the grievant must be reinstated forthwith with full back pay and benefits.

AWARD

The grievance is granted. The grievant must be reinstated forthwith with full back pay and benefits with no loss of seniority. He shall be reinstated to the position he held just prior to his termination and be made whole in all aspects. From the back pay award the Employer may take appropriate credits, such as earned income, received by the grievant during the period of his termination which would not have been earned had he remained employed. Assuming that the grievant retains any unemployment compensation that he received during the period and the Employer takes the actions necessary to place the grievant's eligibility in the position it would have been when he started drawing unemployment compensation, if any, unemployment compensation received by the grievant during this period shall also act as a credit against the back pay award.

Given the complexity of this remedy, I will retain jurisdiction for a period of 60 days to help the parties with any calculations they may have issue with.

MARIO CHIESA, Arbitrator

Dated: February 02, 2007

Kristen Clark, Esquire

AFSCME Advocate