

**CASE: OPPERWALL #4**

**AMERICAN ARBITRATION ASSOCIATION**

In the Matter of the Arbitration between:

**UNION**

Union,

and

**UNIVERSITY,**

Employer,

**VOLUNTARY LABOR ARBITRATION**

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## **ARBITRATION OPINION AND AWARD**

An arbitration hearing was held on September 3, 1998, at the University.

The record was closed on October 14, 1998 after receipt of the parties' post-hearing briefs.

### **ISSUE**

Did the Employer discharge Ken TEA for Union activity, in violation of Article 10, Section A, paragraph 36 of the parties' collective bargaining agreement?

### **BACKGROUND**

Ken TEA was employed in a regular Custodian II position from September 16, 1997 until his employment was terminated on February 18, 1998. During this time he worked more than 900 hours, but less than 1,040 hours. The parties' collective bargaining agreement provides that employees are probationary employees for their first 1,040 hours of work. It was undisputed that Mr. TEA was still a probationary employee when he was terminated on February 18, 1998.

Article 10, Section A, paragraph 36 of the parties' collective bargaining agreement reads as follows:

"The Union shall represent probationary employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment except discharged or disciplined employees for other than Union activity."

On February 19, 1998, the Union filed a grievance on behalf of Mr. TEA. During the grievance proceedings, the Union asserted that Mr. TEA had been discharged for Union activity. The Employer denied the grievance, and specifically denied that Mr. TEA had been discharged on account of Union activity. The grievance was appealed to arbitration on or about

May 4, 1998.

At the arbitration hearing, additional evidence was presented concerning Mr. TEA's employment history with the Employer. Prior to becoming a regular employee, he had worked as a temporary employee, beginning in 1995. For approximately nine months, from September of 1996 through June of 1997, he had worked in the custodial department. He had then bid on a vacancy for a regular position, but had been bypassed for that job. The Union filed a grievance on his behalf, based on contractual provisions which give temporary employees certain bidding rights. The parties settled that grievance by the Employer hiring Mr. TEA into the regular Custodian II position starting in September of 1997. The settlement included an agreement that if Mr. TEA successfully completed his probationary period, he would be paid one-half of the compensation for the period from June to September when he had been bypassed.

The Union presented evidence that three weeks before Mr. TEA was terminated, he had testified as a witness at another arbitration hearing. The issue in that case was whether temporary employees whom the Employer classified as labor aides were covered under the parties' collective bargaining agreement and should therefore be paid at the contractual pay rates. Mr. TEA was one of three or four former labor aides who testified. He testified that the work he did as a labor aide was the same as what he did later as a regular employee. Mr. TEA explained that he testified for approximately 10 minutes, on the morning of January 29, 1998. He did not need to take time off from work, because he worked the second shift from 4:30 p.m. to 1:00 a.m. That arbitration hearing continued with a second day of hearing on February 20, 1998, and resulted in a decision being issued on May 5, 1998. That decision concluded that the labor aides were covered by the parties' contract, and directed the

parties to negotiate concerning a remedy.

Mr. TEA's position as a regular employee was as a Custodian II. As a regular employee, and previously as a temporary employee, he worked in a number of different buildings around the campus. The Union presented as exhibits notes from three of the building heads in buildings where Mr. TEA had worked. These notes were favorable to Mr. TEA, and described him as a good worker. The building heads are bargaining unit members who worked as group leaders in the various buildings. Favorable notes from several other employees were also presented as exhibits. The Employer pointed out that favorable notes were not presented for several of the buildings where Mr. TEA had worked.

Mr. TEA testified that he had not received any discipline, either as a regular employee or when he was working as a temporary employee. The Employer did not dispute that.

The Employer presented evidence that an incident had occurred on February 10, 1998, between Mr. TEA and the building head at the Physical Plant, Mike PEARS. Melanie TOAST, the Custodial Supervisor, testified that Mike PEARS had come to her on February 11, 1998, and told her that he had felt threatened by an incident which had occurred the previous night. As Ms. TOAST described it, Mr. PEARS had asked Mr. TEA to vacuum some walk-off mats if he finished his other work. Near the end of the shift, Mr. PEARS had reminded Mr. TEA about the mats. According to Ms. TOAST's testimony, Mr. PEARS had reported that Mr. TEA objected to doing the mats, and had raised his voice and clenched his fists. Mr. TEA did vacuum the mats. Neither party called Mr. PEARS as a witness at the arbitration hearing. Mr. TEA testified that he had not raised his voice or clenched his fists.

He thought the incident had been taken care of during a meeting held on February 12, 1998, which involved himself, Local President Jim EGGS, Melanie TOAST, and Brandon JAM.

Ms. TOAST testified that at the February 12, 1998 meeting, they had discussed the February 10 incident, and the fact that Mr. TEA needed to keep working right up until quitting time. She also testified that Mr. TEA told her that he did not want to be moved from building to building. According to Ms. TOAST, the Custodian Its were trained to move into pretty much any of the buildings. She acknowledged that at the February 12, 1998 meeting she did not advise Mr. TEA or Mr. EGGS that Mr. TEA's job was in jeopardy. She explained that the decision to terminate Mr. TEA was not made until after that meeting.

#### **POSITIONS OF THE PARTIES**

It was the Union's position that Mr. TEA was terminated because of his Union activity. His termination occurred less than three weeks after he had testified at an important arbitration hearing. His Union activity also included the grievance he had filed when he had been bypassed earlier for a regular position. The Union pointed to the favorable notes from building heads and co-workers, and the lack of discipline in the Grievant's file.

It was the Employer's position that the Union had not established its burden of showing that the Grievant was terminated for Union activity. Since the Grievant was a probationary employee, the Employer did not have the burden of proving just cause for termination. It was the Employer's position that the Grievant's termination was due to the incident on February 10, 1998, not to any Union activity.

## **DISCUSSION AND DECISION**

The issue in this case is whether Mr. TEA was terminated because of his Union activity. The "just cause" provisions of the parties' contract did not yet apply to Mr. TEA, because he was still a probationary employee. Article 10, Section A, paragraph 36 of the parties' contract protects probationary employees from discharge for Union activity.

The Union presented evidence which raised a question whether Mr. TEA was terminated due to his testimony in the labor aides arbitration case. The Employer responded by presenting evidence to refute the Union's position. It is necessary to consider and weigh the evidence presented by both parties.

The Union asserted that Mr. TEA was the only probationary employee who had testified at the arbitration hearing involving the labor aides. However, the Employer presented evidence that two of the other witnesses at that arbitration hearing, Carole BUTTER and Sandra LAND, had been hired as regular employees on August 11, 1997 and August 18, 1997, respectively. The Employer argued that these two employees would still have been on probation when they testified on January 29, 1998, since they had not completed six months. Neither of these employees was terminated due to their testimony in that arbitration case.

Mr. TEA testified that he felt that Ms. TOAST treated him differently after he testified in the labor aides case. However, Ms. TOAST testified that she was not even aware that he had testified in that case until she learned of it at the hearing in this case on September 3, 1998. Mr. TEA agreed that he never told Ms. TOAST that he was going to testify, and he never asked for time off to testify.

The Union asserted that Mr. TEA had been a key witness in the labor aide case.

The arbitration decision states that Sandra LAND, Carole BUTTER, and Mary DEER testified that the work they did as Custodian IIs was the same as what they had done as labor aides. Mr. TEA's testimony is not specifically mentioned. It appears that the key dispute was not the factual issue of whether the work was the same, but a contract interpretation issue of whether the labor aides were covered by the contract.

The Employer pointed out that the labor aides arbitration case continued with a second day of hearing on February 20, 1998, and that the arbitrator's decision was not issued until May 5, 1998. At the time Mr. TEA was terminated on February 18, 1998, the Employer did not know whether it would win or lose the labor aides case.

Mr. EGGS acknowledged that he was not aware of the Employer disciplining any other employees who had testified in various arbitration cases over the years.

For the reasons discussed above, the Employer disputed and challenged the Union's contention that Mr. TEA's testimony in the arbitration case was the reason for his termination. The Employer also presented evidence concerning the February 10, 1998 incident between Mr. TEA and Mr. PEARS. Neither party called Mr. PEARS to testify at the arbitration hearing. That would be a critical lack if the Employer had the burden of proving just cause for the termination. However, the issue in this case is not whether the Employer had just cause, but whether the Union established that the termination was due to Union activity.

At a minimum, the Employer did show that there was an incident between Mr. TEA and Mr. PEARS which occurred on or about February 10, 1998. The incident was serious enough that it resulted in a meeting involving Mr. TEA, Mr. EGGS, Ms. TOAST, and Mr.

JAM. There was some disagreement concerning exactly what was discussed at that meeting.

It was not disputed agreed that Ms. TOAST had emphasized to Mr. TEA that he needed to follow the directions given him by supervisors.

The Union also argued that Mr. TEA was terminated because he had himself filed a grievance when he had been bypassed for a regular position. Mr. EGGS testified that he thought the Employer had terminated Mr. TEA's employment in order to avoid paying the retroactive compensation which was agreed to as part of the settlement of that grievance. No specific evidence was presented in support of this argument. The argument might have more weight if the February 10, 1998 incident had not occurred. However, in view of the February 10, 1998 incident, it is not necessary to speculate that the Employer had some other ulterior motive for terminating Mr. TEA's employment.

Based upon my review of the evidence presented by both parties, it is my conclusion that the Employer presented sufficient evidence to rebut the Union's contention that Mr. TEA was terminated for Union activity. The Employer was not required to establish just cause for the termination.

The grievance is denied.

DATED: October 28, 1998

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