BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between TEAMSTERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 43 and CITY OF LAKE GENEVA	Case 31 No. 45792 MA-6754 Jeri Grabbert grievance dated 5-2-91

Appearances:

Mr. John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North River Center Drive, Suite 202, Milwaukee, WI 53212, appearing on behalf of the Union.

Mr. Robert W. Mulcahy, with Mr. John J. Prentice on the brief, Michael, Best & Friedrich, 100 East Wisconsin Avenue, Milwaukee, WI 53202-4108, appearing on behalf of the City.

ARBITRATION AWARD

The parties requested the Wisconsin Employment Relations Commission to designate an Arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' 1990-91 Office Employees unit Agreement (herein Agreement). The undersigned Arbitrator was so designated by the Commission.

The parties presented their evidence and arguments to the Arbitrator at a hearing at Lake Geneva City Hall on September 26, 1991. A transcript was made of the proceedings and distributed. The parties submitted post-hearing briefs the last of which was received by the Arbitrator on December 12, 1991, marking the close of the hearing.

ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the City violate the Agreement by its one-day suspension of the Grievant?

2. If so, what shall the remedy be?

FACTUAL BACKGROUND

The facts of this case are largely undisputed.

The Grievant, Jeri Grabbert, has been employed for several years as the City's Bookkeeper/Accountant, a position which she has held on a full-time non-probationary basis at all times material to this proceeding. Grievant's immediate supervisor is the Office Supervisor, Linda Lemmen. Lemmen was promoted to that newly-created supervisory position in October of 1990 after working for several years as a co-worker of equal rank with Grievant and other office employes. Grievant is also supervised in some respects by Business Administrator, Gordon Ellis. Among Grievant's duties are operating the City's automated accounting system on a personal computer and providing assistance to other employes with computer-related questions and problems.

The office employes generally work from 8:30 AM to 5 PM. However, on April 16, Grievant was scheduled to begin and end work a half-hour early to allow her time to travel to a 6:00 PM weekly class located some 45 minutes away from City Hall. Lemmen also had a class to attend on that evening, but was scheduled to work until 5.

At 12:50 PM, Grievant was working on her computer. At that time Lemmen informed Grievant that she needed to use Grievant's computer to process payroll data at least to the extent necessary to generate a payroll check needed by a particular employe. Grievant told Lemmen that a hard disk drive backup procedure needed to be performed on her computer that day, as well. Both the payroll work and the backup procedure could only be done on Grievant's computer. The two agreed that Lemmen would begin the payroll work at 1:00 PM and that she would be finished with it by 4:00 PM at which time Grievant would do the backup. Grievant told Lemmen at that time that she was not sure how long the backup procedure would take because neither the City's tape backup unit (which routinely backed up Grievant's 70 megabyte hard drive in 3-5 minutes) nor the high density floppy disk drive on Grievant's computer (which had take about 30 minutes and 12 high-density diskettes to back up Grievant's hard drive before being supplanted by the tape backup unit) were not available/functional. Grievant therefore had to do the backup for the first time ever on her low density floppy disk drive and low density diskettes. Grievant testified that she told Lemmen in the 12:50 conversation that she was not certain that she could complete the backup by her quitting time that day and that the two agreed that Lemmen would complete it if it was not finished by Grievant's quitting time. Lemmen's testimony made no reference to Grievant concerns at 12:50 PM about whether she would have time to finish or to an agreement at that time that Lemmen would finish the backup if necessary, but Lemmen was not recalled to the stand to rebut those aspects of Grievant's testimony.

Grievant turned over the computer to Lemmen at about 1:05 PM. While Lemmen was doing the payroll work, Grievant worked at Lemmen's desk and began assembling and formatting low density diskettes on another computer. Sometime later, (3:15 PM according to Grievant, 3:45

PM according to Lemmen) Grievant told Lemmen that she was not sure how many low density diskettes would be needed to complete the backup and that she was not sure she had enough diskettes to complete the job. Lemmen referred Grievant to two additional boxes of diskettes, one of which turned out to be usable and one of which turned out unusable for the low density backup. All told, Grievant assembled 26 diskettes to use for the backup. Lemmen turned the computer over to Grievant at about 3:40 PM at which time Grievant began the backup procedure. By 4:20 PM Grievant had successfully used 22 diskettes without completing the backup, and there was no way Grievant knew of to determine how close to completed the backup procedure was. Three of the remaining four diskettes generated error messages and proved unusable, such that Grievant had used up all of the available usable low density diskettes when she punched out at 4:31 PM. At that point, according to Lemmen,

> . . . she [Grievant] was ready to leave, and in this order: She number one, punched out; number two, told me that she was not finished with her backup and that she had run out of disks. And I asked her, "Well, what do I do now?" And she said, "You'll have to get more disks and format them." And I said, "I haven't done formatting in a long time. I don't know how. I don't remember how." And she said, "Well, that's your problem. Gordon told me that you know all there is to know around the office. That's why you got the big five thousand dollar raise." And she left the office.

[Tr.54-46] Grievant, described that interaction as follows:

> I told Linda that the diskettes were all gone and the backup wasn't complete or they were all used up and the backup wasn't complete and that she would have to buy more diskettes and format them to finish the backup. . . . She said, "I don't even know how to format a diskette." . . . I said, "Well, Gordon told me you know how to do everything up here. I figured that's what your five thousand dollars was for."

[Tr.45-46] By both accounts, Lemmen did not ask Grievant to remain at work and Grievant left the office after that interaction. The interaction occurred within earshot of and was heard by two other office employes under Lemmen's immediate supervision. No member of the public was present in the office area at the time.

After Grievant left, Lemmen asked another office employe whether she remembered how to format floppy diskettes, and the employe said she thought she could help. Lemmen then walked to the nearby office supply store, purchased an additional supply of floppy disks, and returned to the office. The other employe then showed Lemmen how to format, in approximately 2-3 minutes. Lemmen then proceeded with the formatting and ultimately completed the backup by

5:30 PM. As a result, Lemmen was late for her nighttime college course.

The next day, April 17, after conferring with Ellis regarding how to proceed and regarding whether the Agreement permitted a suspension to be imposed in the without a prior written warning notice being in effect, Lemmen issued the following memorandum to Grievant:

> This is a letter of reprimand for your inappropriate actions and comments yesterday, April 16, 1991 at 4:30 P.M. wherein you
>
> -Failed to complete your back-up work
> -Left City Hall without adequately assisting me in completing the back-up work
> -Comments that I consider inappropriate regarding my promotion and raise
> -Created tension in the office in front of other office workers.
>
> At this time I would like to point out to you that you are responsible for the data processing functions for the City and all work entailed regarding the bookkeeping position. According to your job description, you are in charge of back-up procedures. You should make sure that you have adequate supplies on hand as well as keeping your records up to date. If there is a problem with faulty machinery, including computers, you should inform me as your supervisor and I will see that every measure is taken to insure that records are not lost or back-ups are not detained. Your job description also requires "the ability to get along with others".
>
> Insubordination of this type would not be permitted in any other business establishment and it will not be tolerated by me. I will recommend a minimum of a one-day suspension without pay to the Personnel Committee to be scheduled at my convenience. During this suspension I request that you think of whether you would like to be part of the team effort or continue fighting the system as indicated yesterday. A meeting will be scheduled on April 22nd at 5:30 P.M. to discuss your unacceptable behavior with the Personnel Committee. You and your union representative are invited to be present at that meeting should you wish to do so.
>
> No further violations will be tolerated. A future incident may result in further discipline up to and including discharge.

The Personnel Committee met on April 22 at which time they heard from City Labor Relations Counsel Robert Mulcahy and Lemmen as well as from Union President Charles

Schwanke and Grievant. Grievant and the Union were thereafter informed that the Personnel Committee "felt the one-day suspension without pay was reasonable considering the facts presented and hoped that there would be no future incidents. They recommend that Linda present the possibility of counseling to Jeri."

Lemmen then wrote Grievant an April 26, 1991 memorandum (with a copy to Schwanke and various City officials) as follows:

> Please be informed that May 1, 1991 (Wednesday) will be your day off without pay per my letter of April 17, 1991.
>
> As a follow-up to the Personnel Committee Meeting held this week the Personnel Committee suggested that I advise you that under the insurance policy for the City you are entitled to some employee counseling. This may be a helpful suggestion which you should explore. The policy provides up to 30 days of coverage at City expense. Please check with WPS prior to commencing this counseling.
>
> In the event we do not hear from you within the next week, we will presume that you are not interested in any type of counseling program regarding these matters.

Grievant subsequently wrote Lemmen and the Personnel Committee asking for clarification of the above reference to 30 days of coverage at City expense after learning from WPS that the City's policy paid 90% of outpatient counseling expenses up to a $1,000 maximum and paid for up to 30 days of inpatient mental health treatment up to a maximum of $7,000. Grievant apparently received no reply to that request for clarification and has not communicated further with the City on the subject of possible counseling.

On May 2, 1991, Grievant filed the grievance giving rise to this proceeding. In it, Grievant alleges violation of 26.01(e), stating her complaint as follows:

> I am grieving the one day suspension for the following reasons:
>
> 1. No warning notice was received prior to the suspension as required by Article 26.01.
>
> 2. The suspension was without just cause based on the facts that Linda Lemmen was aware at 12:50 P.M. on Tuesday April 16, 1991 that she may have needed to complete the backup since I get off work at 4:30 on Tuesdays and that she was also aware at 3:15

> P.M. on that same date that the supplies on hand may not have been adequate to complete the backup.

Lemmen issued her response to the grievance on May 7, 1991, as follows:

> Your grievance dated May 2, 1991 is denied.
>
> You were given a one-day suspension without pay on May 1, 1991 due to acts of insubordination on your part. No warning notice is required to be given in this case.
>
> The fact that the back-up work was not completed was cited but was not the reason for the suspension.
>
> In this instance, your poor attitude, uncooperativness and rude comments were considered as insubordinate and resulted in this disciplinary measure.

There followed an exchange of letters between Schwanke and the City's Mayor, Spyro Condos. Schwanke contended that the City was not adhering to the steps of the Grievance procedure as outlined in the Agreement and offered to proceed to the arbitration step, Step 3. Mayor Condos replied as follows:

> The Personnel Committee has already provided an opportunity for discussion with both you, Ms. Grabbert and the City Council on April 22, 1991. This approach was Step 2 according to the contract and this approach allowed for more opportunities for discussion than the current contract language implies. Also recall that a previous warning was given in writing on November 29, 1990 and Ms. Grabbert was verbally reminded that the City felt she had a total disrespect for authority.
>
> Under Article 26.01(d) and (e) no warning notice of a hearing is required. Please proceed if you so desire to petition the WERC.

The instant arbitration proceeding ensued. As part of its case, the City presented testimony from Lemmen to the effect that April 16 was not the first instance of problems in the office with Grievant's work attitude. In support of that assertion, Lemmen referred to Exhibit 11, a November 29, 1990 memorandum from City Mayor Condos to Grievant with the only copy noted going to Schwanke, which read as follows:

> Linda Lemmen has been requested to assist you in getting the 1991 budget book completed. You should realize Mrs. Lemmen is your immediate supervisor and management does have the right to assign whoever it wants to achieve its overall goals.
>
> You were previously asked (in writing) on November 1st to select a reasonable date for the completion of this project. You, in writing, stated November 9th would be a more reasonable target date. Based upon this target date, Mrs. Lemmen contacted the printer and gave them a date for delivery.
>
> November 9th passed and you then indicated you would have this task completed by Noon today. This morning, Linda was told you would not have the task completed. Mrs. Lemmen then asked Mr. Ellis what also could be done. He asked Linda to call Marlyn Glass at home and have her come in to cover the front desk area and that would allow Linda to assist you. You then refused to let Linda work on the project.
>
> Linda Lemmen is hereby directed to work with you and Mr. Schwanke has concurred with this directive although the City does not need his permission to run City matters.

By all accounts, Exhibit 11 was sent by the Mayor after Lemmen offered to help Grievant produce a high priority budget book document when it appeared that that document was not going to be produced by Grievant in a timely fashion. When Grievant did not readily accept Lemmen's offer of assistance, a meeting was held among all concerned, including Grievant, Schwanke, Lemmen, and Mayor Condos to discuss the situation. The Mayor issued Exhibit 11 following that meeting. Lemmen testified that the Mayor found it necessary to send that memo "Because [Grievant's] conduct was such that she refused to let me help her." [Tr.19] In her testimony as a part of the Union's case, Grievant denied refusing to let Lemmen help her prepare the budget book, though she acknowledged that she preferred, if possible, to do all of the work herself and to work overtime as necessary to complete it on time. Grievant says she responded to Lemmen's offer simply by asking, "Can management do union work?" to which Lemmen responded "I don't know," turned and walked out, returning later with Gordon Ellis to pursue the matter further. Eventually the matter was discussed at the meeting with the Mayor and Schwanke, and the Mayor wrote the memo confirming the results of the meeting. After receiving the memo directing her to allow Lemmen to work with her on the project, Grievant complied.

Over Union objection, Counsel for the City was permitted to ask Lemmen whether Exhibit 11 was considered to be a letter of discipline. She answered, "No, I don't believe this was a letter of discipline. This was a directive from the Mayor to her in essence telling her to let me help her." [Tr.20]. Grievant testified that she did not consider Exhibit 11 to be disciplinary; that the

City never told her that it was disciplinary; that she does not agree with everything stated in the letter; and that she would have grieved the letter had she viewed it as disciplinary. [Tr.36-37] Although Exhibit 11 was not separately copied to anyone identified as a Union Steward, Grievant testified that she herself is a Union steward. [Tr.55]

PORTIONS OF THE AGREEMENT

ARTICLE 2. MANAGEMENT RIGHTS

2.01 Except as otherwise provided in this agreement . . . all powers, rights, authority, and responsibilities customarily executed solely by management are hereby retained. Such rights include but are not limited to the following: . . .

d. To discipline or discharge employees for just cause;

. . .

ARTICLE 6. GRIEVANCE AND ARBITRATION

6.01 Grievance steps: . . . .

6.02 A decision of an arbitrator shall be limited to the subject matter of the grievance and should be restricted solely to an interpretation of the agreement. The arbitrator shall not modify, add to, or delete from the expressed terms of the agreement. . . .

. . .

ARTICLE 26. DISCHARGE

26.01 The employer shall not discharge nor suspend any full-time employee, except probationary employees, without cause. The employer agrees that prior to discharge or to suspension, it shall give at least one (1) warning notice of the complaint against the employee to the employee in writing and a copy of the same to the local union and job steward. Except that no warning notice need be given to an employee before he/she is discharged for the following causes:

a. dishonesty or theft;
b. being under the influence of intoxicants or drugs;

c. recklessness resulting in serious accident while on duty;
d. fighting or insulting other persons while on duty;
e. insubordination.

The warning notices herein provided shall not remain in effect for more than twelve months from the date of said warning notice.

26.02 Discharge will be by proper written notice to the employee and the local union affected.

POSITION OF THE EMPLOYER

Grievant was suspended for one day without pay as a result of her unprofessional and insubordinate conduct on April 16, 1991. Grievant is responsible to back up computerized accounting files and to provide assistance to co-workers in solving computer problems. She also is responsible for making sure she has enough supplies to do her job and either to acquire those supplies or to take reasonable steps to alert supervision or other personnel when additional supplies are going to be needed. On the day in question, Grievant failed to maintain the necessary supplies to do her job, failed to complete the backup of the accounting files, failed to assist co-workers in solving computer problems, and made inappropriate and insubordinate comments to her supervisor in the presence of co-workers. Grievant's misconduct in those regards exposed the City to the risk of loss of important computer files. Any unusual circumstances contributing to Grievant's misconduct resulted from Grievant's own negligence. In view of Grievant's prior difficulty with Ms. Lemmen, Grievant's misconduct clearly constituted insubordination and was cause for the one-day suspension imposed.

The Union's assertion that Sec. 26.01 permits discharges but not suspensions in cases of insubordination or of the other listed offenses must be rejected because it produces a harsh, absurd or nonsensical result which the parties could not have intended. The Union's argument would require the City either to have discharged Grievant or to have limited its disciplinary response for her insubordination to issuance of a warning notice. Such a result would be absurd or nonsensical at best. If the conduct is serious enough that the parties have agreed that the City could impose discharge without issuance of a prior written warning, and since discharge has been characterized as the capital punishment of labor law, it is only reasonable and logical that the City should also be permitted to impose a lesser penalty without issuance of a prior written warning, as well. Thus, in Halstead Industries, 90 LA 387 (1987, Stephens) the arbitrator concluded, under language similar to Sec. 26.01, that the employer in that case was not precluded from imposing suspensions without a prior written warning for those listed offenses as to which agreement language expressly provided that the employer need not have issued a prior written warning in order to impose the penalty of discharge. There as here the parties established two separate penalty schemes: one for the listed offenses as to which no progressive discipline is required; and the other for all other offenses as to which at least one warning notice prior to suspension or discharge is required. In

such a dichotomous arrangement, the City has the right to suspend as well as discharge for a listed offense, such that there has been no procedural violation of the prior notice language in Sec. 26.01 in this case.

For all of those reasons, the grievance should be denied in all respects.

POSITION OF THE UNION

Section 26.01 clearly states that the City, prior to discharge or suspension, must give at least one written "warning notice of the complaint against the employee" to the employe, with a copy to the Local Union and the job steward. The only exceptions to the warning notice requirement are "discharges" in cases of insubordination and certain other listed offenses. If the parties had intended that "discharges or suspensions" for the listed offenses were both exceptions to the warning notice requirement, they would surely have so provided using the same sort of terms as they had earlier in the Section. Because they did not, the Arbitrator must give effect to the plain meaning of the language as it appears, even if the result is harsh or not intended by one of the parties. Citing, Elkouri and Elkouri, How Arbitration Works 348-350 (BNA, 4 ed., 1985). In any event, here the plain language makes sense. It requires that any time a suspension is contemplated the discipline must have been progressive in nature, i.e., it must be preceded by an unexpired warning letter, regardless of the offense involved. Only where the offense is so serious that the employer imposes immediate discharge for one of the listed offenses is the City free of the contractual prior warning notice requirement.

Grievant had not received any written discipline within the 12 month period prior to the April 16 incident. While Exhibit 11 was apparently in Grievant's file, memorializing the City's position that she was to allow Lemmen to assist with finishing budget responsibilities, that letter does not appear to be disciplinary in nature, no one told Grievant it was a letter of discipline, and Union steward was not shown to have been copied with that letter. Thus, Grievant testified that she did not grieve Exhibit 11 because she was not aware that it was disciplinary in nature.

For those reasons, the suspension cannot stand.

In any event, Grievant's behavior was not serious enough to warrant a suspension, especially when the circumstances of the day in question are considered. While Grievant could have chosen more appropriate language, she was not abusive, crude or slanderous toward the supervisor, and given their mutually-unfriendly relationship, the language used by Grievant should not have surprised the supervisor.

Grievant left at her normal, scheduled quitting time for the day in question. Lemmen could not have required Grievant to stay beyond that time without first having cleared the overtime with higher authority. It is therefore not proper for the City to fault Grievant for leaving work when she did.

The circumstances of the day were very unusual. Grievant was without both the tape backup unit and the high-density floppy disk drive, requiring the backup to be performed for the first time on a low-density floppy disk drive as to which Grievant had no experience on which to judge the time and number of diskettes needed to complete the task. Indeed, Grievant had alerted Lemmen that she was not sure she could finish the backup task in the time available. Grievant gathered all available diskettes and did her best in the work time she had available. Diskette purchasing is not listed in Grievant's detailed job description and is not among her responsibilities.

Therefore, the only possible basis for discipline was the verbal exchange, and that was not such as would warrant a one-day suspension and the loss of $70 in pay. The Union therefore requests that the grievance be sustained; that the Arbitrator find the one-day suspension to be beyond that allowed by the contract, or otherwise unjustified; and that the grievant be made whole for all losses associated with the suspension.

DISCUSSION

The City's right "to suspend, demote, discharge and take other disciplinary action against employees for just cause" is recognized in Sec. 2.01 of the Agreement Management Rights article.

Section 26.01, although is titled only "Discharge," contains various references to suspensions as well as to discharges. It provides that both discharges and suspensions of full-time non-probationary employes are subject to a general cause standard. In addition to the requirements of a cause standard, it superimposes the additional procedural requirement--whether or not such would otherwise be required in the circumstances of the case under under a general cause standard--that a prior written "warning notice of the complaint against the employee" have been given to the employe, Union and steward within the preceding 12 months. It makes that notice requirement applicable "prior to discharge or to suspension . . . Except that no warning notice need be given to an employe before he/she is discharged for the following causes: . . ." including "insubordination."

This case calls for an interpretation of Section 26.01 to determine the scope of the above-quoted "except . . ." clause. As the Arbitrator interprets it, that clause means just what it says. It excepts from the warning notice requirement only situations in which the employe "is discharged" for one or more of the listed causes.

The Arbitrator has carefully reviewed and considered the facts and reasoning set forth in the Halstead Industries award, cited by the City. The agreement in the Halstead case expressly provided that "Failure or refusal to comply with the [employer's plant] rules shall be cause for the disciplinary action specified in the rules subject to provisions of Section 4 of this Article relating to Warning Notices." Section 4 provided as follows:

> After an employee's probationary period has been completed, the Employer may discharge an employee only for just cause and/or violation of the Plant Rules. After completion of the probationary period, all employes must be given at least one (1) warning notice of the Employer's complaint against the employee, in writing, excepting that no warning notice need be given to an employee before discharge if cause of such discharge is [various listed offenses]. Discharge or suspension must be by proper written notice sent to the employee's last known address and a copy of said discharge or suspension shall be mailed to the Union. Warning notices shall have no force or effect after six (6) months from the date thereof for purposes of discharge or suspension.

Halstead Industries, 90 LA at 388-9. Arbitrator Elvis C. Stephens interpreted that language to mean:

> For probationary employees, the employer can discharge at will. Once the employee has served the probationary period, the employer must have just cause, or show a violation of the plant rules to discharge an employee. However, prior to discharge a warning notice must be given employees, except for certain named types of offenses. Where warning notices must be given prior to discharge, they must be not more than six months old to support the discharge. Also, where such warning notices are part of the three step progressive discipline as shown in the penalty part of the Plant Rules) they must be no more than six months old to support the next step of suspension. For those offenses which list the penalty as "Warning to Discharge," no such notice is required for a penalty less than discharge, e.g., a warning or a suspension.

90 LA at 390 [emphasis added].

The City's assertion that Sec. 26.01 should be interpreted the same as is stated in the last sentence above is without merit, due to material differences in the agreement language in the two cases. As expressly noted by Arbitrator Stephens, "The first part of Section 4 states that the employer "may discharge" an employee for just cause or violation of plant rules. It does not refer to suspension." 90 LA at 398. In contrast, in the first parts of Sec. 26.01, both the general reference to a cause standard and the prior warning requirement itself are addressed expressly to both discharges and suspensions. It could fairly be reasoned that the Halstead parties intended their Sec. 4 language to superimpose a warning notice requirement onto the penalties specified in the plant rules only in cases of discharge for an offense listed in Sec. 4, such that suspensions for

violations of plant rules permitting penalties of "warning to discharge" were not subject to the warning notice requirement. However, it cannot be similarly reasoned in this case that the parties intended their Sec. 26.01 language to permit suspensions for the offenses listed in Sec. 26.01 without a prior warning notice being in effect. For here the parties chose language in Sec. 26.01 that clearly applied portions of that Section including the prior notice requirement to both discharges and suspensions. It is only in the "except . . . " clause defining exceptions to the prior-warning-notice-in-effect requirement for suspensions and discharges that the parties have limited the language they used only to situations "before he/she is discharged" for the listed causes. The parties' earlier references to both "discharge" and "suspension" clearly, unequivocally and persuasively show that the subsequent reference to "discharged" alone in the "Except. . ." clause was intended to make the "Except . . . " language applicable only to discharges for the listed offenses and not to suspensions. To read the language as the City proposes would be to add the words "or suspended" to exception clause. That would be an exercise of authority in excess of the Arbitrator's expressly limited Agreement interpretation role as set forth in Agreement Sec. 6.02.

It is entirely appropriate to bind the parties to the clear and unambiguous meaning conveyed by the language they have agreed upon. Moreover, the Arbitrator is not persuaded that the parties' scheme as interpreted above is so absurd or nonsensical as to negate any possibility that the parties could have intended such an arrangement. As interpreted above, the warning notice language prohibits suspensions absent the requisite written warning notice in effect, while protecting the City's right to discharge for very serious offenses without having to meet the written warning notice requirement. In all cases of discharge and suspension of full-time non-probationary employes, however, the Section subjects the City's actions to arbitral review under the general cause standard, as well. Proof that an employe's misconduct falls within one of the listed offenses, alone, will not suffice to establish that the imposition of a discharge met the requirements of the cause standard. Other conventional cause standard considerations, such as whether the penalty of discharge was proportionate to the offense committed would also be relevant. Proof that the offense for which the employe was discharged was one of those listed in Sec. 26.01 merely relieves the City of what would otherwise be a requirement that a prior warning notice be in effect. The City must also meet the remaining requirements of the cause standard generally. In that context, the Arbitrator does not find the interpretation given herein to Sec. 26.01 to be absurd or nonsensical. If the City considers the arrangement clearly described in the language it has agreed upon to be harsh or unreasonable, its relief must come at the bargaining table, and not by an addition of language to the Agreement by the Arbitrator.

The City has not squarely argued either at the hearing or in its brief that Grievant had a warning notice in effect within the meaning of Sec. 26.01 as of the April 16, 1991 incident in question. Nevertheless, the City has made references to the fact that Exhibit 11 was issued to Grievant with a copy to Schwanke in November of 1990. It is therefore necessary to determine whether that memorandum constituted a Sec. 26.01 warning notice in effect on April 16 1991.

The Mayor's May 16, 1991 letter to Schwanke during the processing of the grievance referred to that memorandum as "a previous warning . . . given in writing on November 29, 1990." However, at the hearing the only sworn testimony offered on the subject by the City was Lemmen's testimony that, "No, I don't believe this was a letter of discipline. This was a directive from the Mayor to her in essence telling her to let me help her." [Tr.20] The Arbitrator finds it appropriate to bind the City to the answer it adduced from its only witness on that question. Furthermore, Lemmen's testimony is firmly supported by the fact that the concluding sentence of Exhibit 11 states that "Linda Lemmen is hereby directed to work with [Grievant]" and characterizes the memorandum as a "directive" being issued with the concurrence of the Union. Conspicuously absent are any of the conventional words of warning such as were present in the concluding sentence of Lemmen's April 17, 1991 memorandum in this matter. The facts that the November meeting and memorandum were held and issued in response to Grievant having raised a question about whether the Agreement precluded Lemmen from performing what Grievant initially thought was "union work" further support the conclusion that Exhibit 11 was a written work directive being issued with the Union's concurrence to the effect that the Agreement does not bar Lemmen's participation in the work in question. Accordingly, the Arbitrator concludes that Exhibit 11 was not intended to be and did not constitute a Sec. 26.01 warning notice.

The instant suspension therefore violated Sec. 26.01 because that Section, as interpreted above, prohibits suspensions even for insubordination or other listed offenses, where a prior warning notice is not in effect within the meaning of that Section.

The Arbitrator is nonetheless persuaded that what Grievant said to Lemmen as Grievant was leaving work on April 16, in the context in which it occurred, would have constituted just cause for the issuance of a written warning notice in April of 1991. While the circumstances that developed on the day in question were unusual, and while the relationship between Grievant and Lemmen may have been mutually non-friendly, neither of those factors nor any other cited by the Union herein justified the snide, uncooperative and personally-disrespectful response Grievant gave Lemmen regarding the situation as it had come to be at Grievant's quitting time on the day in question.

Therefore, although the Arbitrator has ordered the suspension removed from Grievant's record and that Grievant be made whole for lost pay, he has also provided that the disciplinary action not be wholly set aside, but only reduced to an identically-dated written warning notice citing Grievant for, as Lemmen carefully limited and described it in her grievance answer, Grievant's "poor attitude, uncooperativeness and rude comments" to her supervisor in the presence of other employes on April 16, 1991.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. The City violated the Agreement by its one-day suspension of the Grievant. Section 26.01 prohibited the City from suspending Grievant, even for insubordination, because there was no prior written warning notice in effect within the meaning of that Section. The City nevertheless had just cause in the circumstances to issue a written warning notice citing Grievant for insubordination on April 16, 1991.

2. By way of remedy, the suspension is hereby reduced to a written warning notice which shall be deemed to have been issued to Grievant, the Union, and the Union steward on April 17, 1991, and which shall be deemed to cite Grievant for her "poor attitude, uncooperativeness and rude comments" toward her supervisor, Linda Lemmen, in the presence of other employes on April 16, 1991, and which shall further be deemed to warn Grievant that "No further violations will be tolerated. A future incident may result in further discipline up to and including discharge." The City shall immediately remove the suspension from Grievant's record and remove the suspension-related documents from her file and shall insert a copy of this award in place of that/those document(s) in Grievant's file. The City shall also immediately make Grievant whole for the pay she lost by reason of the one-day suspension at issue in this case.

Dated at Shorewood, Wisconsin this 4th day of March, 1992.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator