

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 MILWAUKEE METROPOLITAN :
 SEWERAGE DISTRICT : Case 262
 : No. 47346
 and : MA-7239
 :
 DISTRICT COUNCIL 48, AFSCME, AFL-CIO :
 and its affiliate LOCAL NO. 366 :
 :

Appearances:

Mr. Alvin R. Ugent, Podell, Ugent & Cross, 611 N. Broadway, Milwaukee,
Mr. Donald L. Schriefer, Senior Staff Attorney, Milwaukee Metropolitan

Wiscon
 Sewera

ARBITRATION AWARD

According to the terms of the 1989-92 collective bargaining agreement between Milwaukee Metropolitan Sewerage District (hereafter the Employer) and District Council 48, AFSCME, AFL-CIO, Local Union No. 366 (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the one-day suspension of Grievant Robert L. Hart. The undersigned was designated arbitrator. Hearing was held at Milwaukee, Wisconsin on September 15, 1992. A stenographic transcript of the proceedings was made and received by the undersigned on October 20, 1992. The parties filed their initial briefs by December 28, 1992 and the Employer advised on January 7, 1993 that it would not file a reply brief. The record herein was therefore closed on January 7, 1993.

ISSUES:

The parties stipulated to the following issues for determination in this case:

- 1) Whether the one-day suspension of the Grievant was for just cause?
- 2) If not, what is the appropriate remedy?

RELEVANT CONTRACT AND WORK RULE PROVISIONS:

PART III

A. GRIEVANCE AND ARBITRATION PROCEDURE.

Only matter involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below.

. . .

3. Just Cause. Any employee in the bargaining unit who is reduced in status, suspended, removed, or discharged, shall have the right to file a grievance as to the just cause of such disciplinary action.

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RELEVANT WORK RULES:

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In order for any group of people to work together safely and efficiently, it is necessary to have a reasonable code of employee conduct. The District over the years has established various rules governing conduct for the benefit of the District, its employees and the communities served. This document contains updated rules of conduct which are to be observed.

Each employee must read and follow the work rules. Additional rules are found in the respective labor agreements and are made by individual departments. The attached rules do not cover all possible situations. However, employees are expected to conduct themselves in a manner which conforms to the other laws and standards of conduct of our society.

Constructive (progressive) disciplinary action will be taken in event of a violation of a general or major work rule and for inappropriate conduct for non-probationary employees. Each violation of these rules will be considered on its own merits depending on the nature of the offense, previous disciplinary actions and notices to the employee, and any aggravating or mitigating circumstances. Except when an offense is "intolerable" as defined by those rules, the purpose of discipline is to prevent future violations. Repeated violations of the same rule or of different rules by an employee will result in more severe discipline. Typical disciplinary stages include: oral warning, written warning, disciplinary suspension without pay, and discharge. Violations of general rules are normally considered minor infractions. An example of progressive discipline involving a general rule is oral warning, written warning, one-day suspension, five-day suspension, ten-day suspension, discharge.

Regular and probationary employees are expected to follow all the rules and their supervisors' instructions. A probationary employee may be terminated at any time during the probationary period for reasons including, but not limited to, failing to follow the rules or supervisor's instructions or for inadequate job performance.

The commission of certain offenses, defined as Major or Intolerable can typically result in discipline as follows subject to mitigating or aggravating circumstances:

MAJOR OFFENSES

1. First offense - written warning
2. Second offense - five working day suspension

3. Third offense - discharge

INTOLERABLE OFFENSES

1. First offense - discharge

. . .

INTOLERABLE OFFENSES

Commission of the following offenses are of such a serious nature that they will result in immediate termination unless the employee can produce sufficient justification or cause. Some of these offenses may also be prosecuted by law.

1. Gross insubordination (defined as refusal to obey a proper order; assault or battery on employer's representative; use of abusive language or conduct in regard to an employer or employer's representative which would undermine discipline; or encouraging other employees to do the same).

. . .

7. Instigation of an assault while on District property or while on duty. Instigation of battery on fellow employees or others while on District property or while on duty. Assault means engaging in conduct which, but for the occurrence of some intervening event, would have resulted in a battery. Examples, without limitation by their statement, include a punch which does not land because the person to be punched fled or avoided the blow or the puncher was restrained.

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FACTS:

Grievant, Robert Lewis Hart, had worked for the Employer as a Field Maintenance Laborer for approximately one and one-half years when the February 6, 1992 incident giving rise to this case occurred. Hart had a clean work record at that time.

Hart's normal duties as a laborer do not include cleaning out sewers, as this work is generally assigned to employees with less seniority than Hart. However, on February 6, 1992, due to absences of other employees, Hart and employee John Schmitz were assigned to a crew led by leadman Gunther, to clean out the sewer lines in the North Water Street area. 1/ This work assignment

1/ Cleaning sewer lines normally involves a crew of three (including one lead-man). The crew takes pieces of equipment, cleaning machines, which they set up on manholes. These machines drag a bucket back and forth

was given to Hart and the others on the morning of February 6th by Supervisor of Field Operations, John Rupnick. Rupnick also apparently assigned Hart's crew to truck number 117. Before leaving this work location (the garage at 25th and Canal Streets), Hart, Gunther and Schmitz checked out truck number 117's operations and found that the "Bumper Buddy" on the truck was not operating properly. 2/ At this point, Hart approached Rupnick and explained that the Bumper Buddy on 117 was not working and Hart asked Rupnick to take a look at the truck. Rupnick did so and determined that truck number 117's Bumper Buddy could not be made operational.

Hart then asked Rupnick if the crew could take truck number 209 which was parked in the garage at that time. It is undisputed 3/ that Rupnick specifically told Hart, Gunther and Schmitz that they could not have truck 209, that they should contact or call him if they needed different equipment and that truck number 209 was being reserved for another crew that had taken another truck in for repairs and that would be going in and out of manholes all day after they returned to the garage with the other repaired truck.

Hart and his crew then left the garage in truck 117 and went to the North Water Street area to clean sewers. Rupnick completed some paperwork and then went out to inspect other work being done. Rupnick returned to the garage at 25th and Canal at approximately 11 a.m.

At the North Water Street worksite, the bucket became lodged in the sewer that Hart, Gunther and Schmitz were cleaning mechanically (as described above in note 1/). Hart and his crew determined that they would need a Bumper Buddy so that one of the crew could enter the sewer and dislodge the bucket. Hart, the only witness who testified on the point, stated that crew leadman Gunther told him (Hart) because it was close to lunch time, to go back to the garage and get truck number 209 if it was there in the garage. Hart and Schmitz then drove truck 117 back to the garage and parked it. They found truck 209 there and they took truck 209 back to their jobsite where Gunther was waiting for them, watching the open manhole (pursuant to the Employer's safety policy). Hart then put on protective clothing (including boots) and the Bumper Buddy and Hart walked down the ladder inside the manhole, freed the cleaning machine's bucket and climbed out of the manhole. Hart then removed the Bumper Buddy and the protective clothing he was wearing except that he kept his hip wader boots on. Hart then drove truck 209 back to the garage at 25th and Canal.

through the sewer line to clean it of any material that may be hindering or blocking the flow in the sewer. If something becomes lodged in the sewer, one of the crew may have to put on protective clothing, including a harness and attach him/herself to a Bumper Buddy and go down into the sewer line to dislodge the object blocking the flow of the sewer. This is a relatively infrequent occurrence for sewer line cleaning crews.

2/ A "Bumper Buddy" is a hoisting device which allows a worker to go safely down manhole steps into the sewer line to perform necessary work. The Bumper Buddy includes a harness which the worker puts on. This harness is attached to a hook and a cable which are attached to a truck. The Bumper Buddy, when operational, can lift the worker out of the manhole if he/she should slip or encounter difficulties requiring immediate evacuation of the sewer/manhole area.

3/ Rupnick testified specifically on this point. Hart confirmed that Rupnick told him that truck number 209 was being held for another crew. No other witnesses to this conversation were called to testify.

On the way into the garage at 25th and Canal streets, Rupnick (who had returned from inspecting some field operations) called over the radio asking who had taken truck 209. Hart responded over the radio in truck 209 that he was bringing 209 right back and that he was at the stoplight on the hill and he would talk to Rupnick upon his return.

Immediately upon his return, Hart went to the office to see Rupnick. Hart was still wearing the dirty boots he had worn when he descended into the manhole that morning. Hart found Rupnick in a large office (approximately 20 feet wide by 30 feet long). Hart stood outside this office in his dirty boots, approximately 30 feet away from Rupnick who was standing at the opposite end of the office near a copy machine and the doorway to Superintendent of Field Operations James Wilfrath's office (which immediately adjoins the large outer office). Hart walked into the outer office about four or five feet and told Rupnick that the reason he had taken truck 209 was because the crew had had a bucket stuck in the hole and they needed to use the Bumper Buddy to get it free before lunch. Hart turned to leave but Rupnick called him back, saying he wanted to talk to Hart. At this point, Hart stated that Rupnick began shouting at him -- "Bobby, let me talk to you for a minute -- let me tell you that you don't run anything here, you don't take trucks without my order. You knew I needed that truck." Rupnick denied shouting at Hart and his version of what was spoken between them was quite different. Rupnick stated that at this point he did not shout but only stated, "Hold it Bob. Come back here. I want to talk to you." Rupnick stated that Hart then turned around. Rupnick stated that he then told Hart that he had made the decision in the morning that 209 was going to be staying in the garage because it was planned to be used by another crew. Rupnick stated that at this point it was Hart who shouted at him; that Hart walked toward Rupnick and shouted that the reason he had taken the truck was because of safety and "nobody dictates safety to me (Hart). Do you have a problem with that?" According to Rupnick, Hart repeated, "Do you have a problem with that," three more times as Hart continued to walk toward Rupnick. Rupnick stated that he did not walk toward Hart at any time; and that he only stood next to Wilfrath's office door near the copy machine while Hart walked the 30 foot length of the outer office shouting "Do you have a problem with that." At this point, when Hart reached him and did not stop coming toward him, Rupnick stated he began backing up through the doorway to Wilfrath's office. At this time Rupnick stated that he could see the red lines in Hart's eyes and that he could feel Hart's breath on his face.

In contrast, Hart stated that when Rupnick called him back into the office, he (Hart) knew that Rupnick was mad, that Rupnick was ready to holler at him, and that when Rupnick began to holler at him, that gave him (Hart) "a chance to yell back." Hart admitted that he walked toward Rupnick but Hart denied that he chased or pushed Rupnick back. Rather, Hart stated, when Rupnick started backing up into Wilfrath's office he (Hart) "just kept going with him."

It is undisputed that when Rupnick and Hart came through Wilfrath's doorway, James (or J.J.) Wilfrath became involved. Wilfrath was sitting behind his desk doing paperwork when he saw Rupnick coming through his doorway looking scared; that Rupnick was backing up into Wilfrath's office with Hart walking toward him shouting "Do you have a problem with that?" Wilfrath admitted that he shouted at Hart several times words to the effect that Hart should back off or leave. Wilfrath stated without contradiction that when Hart failed to back off after Wilfrath hollered at him twice to do so, he (Wilfrath) got up from his desk and stood between Hart and Rupnick facing Hart, and Wilfrath then put his arms around Hart. Hart initially denied that Wilfrath put his arms around him. Hart stated that Wilfrath was "touching" him and said "you got to go. You got to leave." Wilfrath then began moving Hart backward out of the office. Rupnick stated without contradiction that at the point that Wilfrath put himself between he and Hart, Rupnick had backed up against a table

(that was against the back wall of the office) and that he (Rupnick) had no more room to move.

Wilfrath stated that before Rupnick and Hart came through his office doorway he did not hear Rupnick yelling; that he looked up from his work because he heard a commotion and then Rupnick and Hart came through his door; that at this time only Hart was speaking -- that he was hollering "Do you have a problem with that" at Rupnick. Wilfrath stated that Rupnick looked scared and that after he separated Rupnick and Hart, Rupnick stood right behind Wilfrath and apparently stared at Hart as Wilfrath, with his arms around Hart, moved Hart backward out of the office.

Both Wilfrath and Rupnick stated that Hart lunged at Rupnick or tried to get past Wilfrath to get at Rupnick in a menacing way, asking Rupnick "who you staring at." Rupnick stated he was 3 or 4 feet from Hart at the time Hart lunged at him. Wilfrath said that Rupnick was right behind him when Hart lunged.

Hart's testimony conflicts with these statements. Hart stated that Wilfrath told Rupnick to "sit down" after he (Wilfrath) got up from his desk and came between Hart and Rupnick; that at this point, Wilfrath "was telling me to leave and had his arms around me." Hart stated that he kept telling Wilfrath "get your arms off of me, you don't have to touch me." Hart also stated "other people heard me say to him take his arms off of me, hands off of me." Hart stated that he did not lunge at Rupnick at any time. Rather, Hart stated "What I did was I spun and got his arms off of me and was still talking to John (Rupnick). If I would have went for John, JJ (Wilfrath) could not have stopped me. If I really wanted to get somebody, I don't think all of you are going to stop me if you want my opinion of it". Hart also admitted on cross-examination that during this incident with Rupnick he had been "extremely angry;" that he never requested Union representation because he "didn't feel there was a need to from the beginning"; and that Rupnick never told him before this incident took place that Rupnick was going to discipline him (Hart) for taking truck 209.

Wilfrath and Rupnick's versions of this portion of the incident are different from Hart's. They stated that after Hart lunged at Rupnick, Wilfrath told Rupnick to stop looking at Hart, to move away and to sit down. Rupnick then did as Wilfrath had told him. Both Wilfrath and Rupnick stated that it was not until Wilfrath had backed Hart almost all the way out of Wilfrath's office, that Hart told Wilfrath words to the effect, you don't have to put your hands on me anymore, that he (Hart) wasn't going to do anything. Both Wilfrath and Rupnick stated that they believed that Hart was out of control during this incident and that this was out of character for Hart to act this way.

As a result of this incident, James Wilfrath issued Hart a one day suspension for violation of Rule 7, Intolerable Offenses quoted above. In reaching his decision to suspend Hart, Wilfrath took into account Hart's otherwise clean work record and the fact that in his one and one-half years with the Employer, Hart had evinced good work habits and a willingness to learn on the job which Wilfrath found laudable. Hart then filed the instant grievance, contesting his suspension.

The Union offered the testimony of only one witness other than Hart. Shop Steward Dean Dolski stated that before Hart returned with truck number 209, he (Dolski) had seen Rupnick return to the garage from the field and that Rupnick appeared to be "excited" when he asked Dolski and other employees (then in the lunchroom) if they knew where truck number 209 was.

POSITIONS OF THE PARTIES:

Employer

The Employer urged that the discipline of the Grievant for the outrageous and inexcusable conduct he engaged in on February 6th was completely justified and should be sustained. The Employer also compared and analyzed the testimony in detail and observed that the discrepancies between the testimony of the various witnesses should be resolved by crediting the Employer's witnesses. The Employer noted that the Grievant's conduct after he began speaking to Supervisor Rupnick upon his return to the garage with truck number 209 "surpassed all limits of tolerable conduct toward a supervisor." First, when Rupnick had called over the radio for truck 209, Hart had promised to come and explain why he had taken the truck upon his (Hart's) arrival at the garage. After coming into the office in his dirty hip boots, and explaining to Rupnick that he (Hart) had taken truck 209 because the crew needed a Bumper Buddy to enter the manhole on their job assignment, Hart turned to leave. Rupnick ordered Hart to stay where he was and Rupnick then tried to explain to Hart why he had wanted 209 left at the garage. Hart did not let Rupnick speak. Rather, Hart immediately began walking toward Rupnick, the entire length of the 30 foot long office. In testimony, Hart admitted that he was "extremely angry" at this point and that he shouted at Rupnick that the use of truck 209 was a safety issue and that no one was going to dictate Safety to him (Hart). These facts, the Employer contended demonstrated that Hart was out of control on February 6th.

The safety issue, the Employer urged, was a non-issue. The facts showed and Hart knew, pursuant to the Employer's policy, that he would never have to go into a manhole without a Bumper Buddy. Also, on February 6th before Hart's crew left the garage, Rupnick had specifically told Hart and his crew that he (Rupnick) would find Hart's crew a truck with an operational Bumper Buddy if they called in for one that day. Thus, in the Employer's view, Hart's safety assertions were not even relevant to the situation.

After having crossed the 30 foot long office toward Rupnick while shouting and in a state of extreme anger, Hart claimed he merely followed Rupnick into the adjacent office where Mr. Wilfrath was sitting. This, the Employer asserted is not credible evidence given the circumstances as well as, Hart's admission regarding his state of mind and Mr. Wilfrath's testimony. Furthermore, Hart's denial that he attempted to lunge at Rupnick after Wilfrath took hold of Hart and began to push him out of the office should not be credited, the Employer urged. Hart admitted that Wilfrath shouted at Hart twice to "back off", that Wilfrath then got between Hart and Rupnick and physically took hold of Hart and pushed Hart out of the office. Hart also admitted that at this point he was still "talking" to Rupnick but that he had only attempted to spin around to get free from Wilfrath's hold, and that he never lunged at Rupnick. These admissions by Hart as well as Rupnick and Wilfrath's testimony in contradiction of Hart's demonstrate that Hart's recollection of the incident is not reliable.

Thus, the Employer contended that Hart's first assault of Rupnick occurred when Hart backed Rupnick into Wilfrath's office and refused to back off despite Wilfrath's orders to do so. The second assault occurred when Hart attempted to lunge past Wilfrath toward Rupnick as Wilfrath was trying to push Hart out of his office. In addition, Hart's menacing conduct toward Rupnick while shouting repeatedly at Rupnick, "you got a problem with that," Hart's refusal to back off despite Wilfrath's orders that he do so, constituted abusive conduct, all of which violated Work Rules 1 and 7, in the Employer's view.

The Employer argued that Wilfrath would have been able to hear Rupnick had Rupnick hollered at Hart before Hart backed Rupnick into Wilfrath's office. Therefore, Hart's claim that Rupnick shouted first (somehow justifying Hart's later conduct) is incredible because Wilfrath did not hear Rupnick shouting. Furthermore, the Employer asserted that even if Rupnick shouted at Hart first

as Hart claimed, this could not excuse Hart's conduct. Rupnick could not be faulted for being angry or excited about Hart's apparent disregard of Rupnick's instructions and orders. Even if Rupnick had spoken the words Hart claimed he spoke, these words were entirely understandable and appropriate in the circumstances. Thus, the Employer contended, the Union's argument that Rupnick somehow provoked Hart was "unworthy of belief and irrelevant."

Finally, the Employer asserted that the Union's argument that because Hart was denied Union representation during his confrontation with Rupnick, that the discipline should therefore be cancelled, was "wholly contrived". In this regard, the Employer observed that Hart never requested such representation; that Hart lost control of himself almost immediately and did not allow Rupnick to get a word in thereafter; that Rupnick was not disciplining Hart at the time Hart lost his temper and that even if Rupnick had been orally disciplining Hart, Hart would not have been entitled to a Union representative at such a time under the case law. The Employer also observed that the proper remedy for failing to grant Union representation is filing a grievance or prohibited practice, not engaging in abusive and threatening conduct toward a supervisor as Hart had done.

In all the circumstances of this case, the Employer requested that the grievance be denied and dismissed in its entirety.

Union:

The Union's account of the facts surrounding the argument were at odds with the Employer's account thereof. The Union asserted that Hart told Rupnick that Leadman Gunther had ordered him to get truck number 209 during the argument between Hart and Rupnick; that Rupnick was the first to shout and he hollered at Hart words to the effect that Hart was not to take trucks without his (Rupnick's) order; and that thereafter, Hart began to holler back at Rupnick. Finally, the Union observed that Hart denied that he ever struck or made contact with Rupnick or that he threatened to do so on February 6th.

The Union argued that Supervisor Rupnick caused the argument between himself and the Grievant; that Rupnick called Hart into the office with the intention of telling Hart off and "chewing him out" for taking a truck from the shop on February 6, 1992 without Rupnick's permission. The Union asserted that at the point that Rupnick began criticizing Hart's conduct, Hart was entitled to have a Union representative present and that if such a representative had been provided to Hart, the argument between Rupnick and Hart would never have occurred. Therefore, because Rupnick "violated the law", by refusing to allow Hart to have Union representation, the suspension issued to Hart should be cancelled.

The Union also contended that leadperson Gunther was in part responsible for Hart being disciplined; that Gunther had ordered Hart to get truck number 209; that Gunther could have contacted Rupnick or Rupnick could have contacted Gunther to clear the use of the truck but neither of them did so; and that the crew needed truck 209 because of safety reasons.

In addition, the Union asserted that Hart had "violated no rule." The Union observed that the Company charged Hart with a violation of Rule 7, "Intolerable Offenses" for "assaulting" Rupnick. The Union urged that the facts of record failed to show that Hart had assaulted Rupnick; and that Rupnick had "no right" to give Hart oral discipline on February 6th. The Union contended that because Rupnick "knew he was angry and was going to chew out the Grievant, he should have held his anger in check . . . and allowed the Grievant to obtain union representation." Therefore, the Union sought that the grievance be sustained, that Hart's record be expunged and that he be made

whole for all lost wages and benefits.

DISCUSSION:

Although the facts surrounding the incident of February 6th are disputed in part, there are several undisputed facts and admissions of the Grievant which tend to support the conclusion that Rupnick and Wilfrath's versions of the February 6th incident should be credited over Hart's. Notably, Hart admitted that Rupnick told him that truck number 209 was being reserved for another crew on February 6th. Hart also failed to affirmatively state that he told Rupnick (during their confrontation) that leadman Gunther had ordered him (Hart) to get and use truck 209 on February 6th. In addition, there was no evidence submitted by the Union to show that Rupnick moved toward Hart during their confrontation. Rather, the evidence clearly showed that Hart strode thirty feet and more toward Rupnick and that Rupnick's response to this was to back up, away from Hart. Furthermore, contrary to the Union's assertions in its brief that Hart was in control of himself on February 6th, Hart admitted on cross-examination that he was "extremely angry" during his confrontation with Rupnick. James Wilfrath's testimony that he twice called to Hart to "back off" and that Hart did not do so, causing Wilfrath to place himself between Hart and Rupnick, stands essentially undisputed on this record. Thus, the record showed that Hart was angry and out of control on February 6th. It is also significant that Wilfrath, an innocent bystander during the incident, failed to corroborate Hart's statements that he (Hart) repeatedly asked Wilfrath to get his "hands off me." Although Hart stated others heard him say this, the Union proffered no testimony to bolster Hart's testimony on this point. Based upon the record in this case, I credit Rupnick and Wilfrath's testimony regarding what occurred between Hart and Rupnick on February 6th.

Having credited Wilfrath and Rupnick's statements regarding what occurred on February 6th, I turn to the question whether Hart's actions of February 6th constituted an "assault" under Rule 7. This rule defines assault as ". . . engaging in conduct which, but for the occurrence of some intervening event would have resulted in a battery."

As a legal matter, an "assault" is any unexcused intentional act that creates in another person (the victim), a reasonable apprehension or fear that immediate harmful or offensive contact will occur. Apprehension is not the same as fear. If a contact would be such that a reasonable person would want to avoid it and if there is a reasonable basis for believing that the contact will occur, then the victim is said to have suffered "apprehension" whether or not the victim was, in fact, afraid. In addition, as a legal matter, a "battery" is the completion of the act that caused the apprehension if it is intentional and is unexcused and if it results in harm or it physically offends the victim. However, the contact need not result in a physical injury for battery to have occurred and the contact need not be with the body but may be with anything attached to it (e.g., a hat or other item of clothing, a purse or a chain or an automobile in which the victim is sitting).

In the circumstances of this case, it is undisputed that Hart crossed a 30-foot room, hollering at Rupnick, "Do you have a problem with that?" Even assuming that Rupnick made the statements that Hart stated he made to Hart prior to Hart's becoming "extremely angry", I do not find that these statements, which Hart attributed to Rupnick, would privilege Hart's words and actions thereafter. Rupnick's alleged statements, whether shouted or spoken -- that Hart did not run anything; that Hart should not take trucks without Rupnick's order, and that Hart knew that Rupnick needed truck 209 -- were factual, not abusive or provocative. However, Hart's actions after Rupnick's alleged comments were threatening and could reasonably have caused Rupnick to be apprehensive that Hart intended to harm him. In this regard, I note that

Hart strode across a 30-foot room toward Rupnick in his dirty boots, shouting all the way; that Hart continued to walk toward Rupnick while Rupnick backed up into Wilfrath's office; that Hart continued to walk toward Rupnick despite Wilfrath's orders for Hart to "back off"; that only after Wilfrath stood between Hart and Rupnick did Hart stop walking toward Rupnick. Hart's actions could reasonably cause apprehension in Rupnick or any reasonable person, thus constituting an assault in legal items.

The question arises whether Hart's actions rose to the level of assault as defined by Work Rule 7. I note that both Rupnick and Wilfrath stated that they believed that but for Wilfrath's intervention, Hart would have made contact with Rupnick or an item connected with him. Because intent to do harm is not generally necessary for assault, the measure of whether Hart might have made contact is necessarily subjective and must be found in Rupnick's reactions and statements as judged against a reasonable person standard. Even assuming Hart's testimony were credited that he spun around in an effort to get free of Wilfrath's hold on him and did not lunge at Rupnick, I question why Hart would spin around if he had no intent to frighten or touch Rupnick. Hart's assertion of control over Wilfrath in this way could reasonably have appeared to Rupnick to be an attempt to free himself from Wilfrath's control so that Hart could make contact with Rupnick. In the circumstances of this case, I find that Hart clearly violated Work Rule 7.

Having found that that Rupnick could have been reasonably apprehensive that Hart would make contact with him and that Rupnick could have reasonably believed that but for Wilfrath's intervention Hart would have made some unexcused, intentional contact with Rupnick, 4/ it remains to determine whether the punishment of a one day suspension was suitable. Wilfrath's explanation that he gave Hart a one day suspension rather than discharging him (as Wilfrath could have done pursuant to Work Rule 7, Intolerable Offenses) was based upon objective facts such as Hart's prior work record and his motivation for work, but not upon any arbitrary, capricious or discriminatory factors. In these circumstances, I will not disturb the Employer's imposition of a penalty less than the maximum allowed. Therefore, I issue the following

AWARD

The one-day suspension of the Grievant was for just cause. The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of February, 1993.

By _____
Sharon A. Gallagher, Arbitrator

4/ The fact that later on in the grievance process, the Employer raised the notion that Hart's conduct also violated Work Rule 1 has not been considered herein in reaching this Award.