BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LA CROSSE CITY EMPLOYEES LOCAL 180, BUILDING SERVICE EMPLOYEE'S INTERNATIONAL UNION	Case 244 No. 49034 MA-7803
and	
CITY OF LA CROSSE	

Appearances:

Mr. James G. Birnbaum, Davis, Birnbaum, Marcou, Seymour & Colgan, Attorneys at Law, 2025 South Avenue, Suite 200, P.O. Box 1297, La Crosse, Wisconsin 54602-1297, appearing on behalf of La Crosse City Employees Local 180, Building Service Employee's International Union, referred to below as the Union.

Mr. Peter B. Kisken, Assistant City Attorney, City of La Crosse, 400 La Crosse Street, La Crosse, Wisconsin 54601-3396, appearing on behalf of the City of La Crosse, referred to below as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the City agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of John Woods, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on November 17 and November 30, 1993, in La Crosse, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by January 20, 1994.

ISSUES

The parties stipulated the following issues for decision:

> Did the City have just or proper cause to discharge the Grievant?
>
> If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

RECOGNITION

. . .

WHEREAS, the City recognizes Local 180 as the exclusive bargaining agent for all employees of the City of La Crosse exclusive of all department heads, supervisors, craft and confidential employees, members of the La Crosse Professional Police Association, non-supervisory bargaining unit; La Crosse Professional Policeman's supervisory bargaining unit; Local 127 International Association of Fire Fighters, Amalgamated Transit Union Local 519, Airport Crash, Rescue and Security employees; all crossing guards, and all temporary, seasonal employees who are employed less than 120 calendar days in a calendar year.

. . .

ARTICLE 19

RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the City of La Crosse and the direction of the work force, including but not limited to the right to . . . discipline or discharge for proper cause . . . are vested exclusively in Management . . .

ARTICLE 20

LIMITATION ON DISCIPLINARY ACTIONS

. . .

D. The City shall not warn, suspend, demote, and/or discipline or discharge any employee except for just cause . . .

BACKGROUND

The grievance challenging the Grievant's termination is dated March 4, 1993. 1/ The Grievant had been employed as a full-time Janitor at the La Crosse Center (the Center) for roughly three years as of his discharge. The Center is a facility used for hosting conventions, concerts, wedding receptions and other

1/ References to dates are to 1993, unless otherwise noted.

events. It serves as the home court for a professional basketball team. The Center employs roughly thirteen full-time employes and four hundred and fifty part-time employes to host the various events and to provide necessary set-up and maintenance services. Full-time maintenance employes are members of the bargaining unit represented by the Union. The unit status of the part-time employes is a continuing dispute between the parties.

Joy Sattler is employed as a part-time maintenance employe at the Center, and wrote the following letter, dated February 15, to the Mayor of La Crosse:

> . . . While I have tolerated a lot, I can no longer take the almost daily sexual harassment that is directed toward me and others while performing my duties at the La Crosse Center.
>
> Specifically, (the Grievant), one of my supervisors and work coordinators, has made it impossible for me to effectively do my job. He is clearly an unhappy man who uses abusive language almost every time I am around him. On many occasions I am afraid to approach him concerning job related issues because of his verbally abusive character.
>
> On February 13, 1993, (the Grievant) in a lengthy angry outburst was cursing about his superiors, naming; you, Glenn Walinski and Tom Zielke in a derogatory manner. He did this in the presence of his subordinates, the chief of security and Sandy from Personnel. He vented his anger at us and continually yelled the words, "Fuck you and Jesus Christ". I felt that the use of curse words was directed at myself as he knows I am a Christian and am offended by the use of such language. It was not once that he cursed, but in a continuous manner. His uncontrolled actions were such that I was unable to report to him my job status for the evening. This is one specific incident but it is true to the character that he demonstrates on a daily basis. In fact one woman quit after working only two nights. I am told that she quit due to the vulgar language she was subjected to.
>
> Additionally, actions by Mr. Clem Bott directed toward me and others were clearly sexually harassment (sic). Recently I went to get paper products stored in a closet within one of the men's restrooms. The running light was out in the restroom so I did not proceed and reported it to Mr. Bott. When I told him I did not go in because I could not verify if someone might have been in there, he replied, "Why not, you might have enjoyed it!" He has also used sexually implied language toward

> another female employee. This was done in front of me and I was embarrassed and disgusted with this unprofessional behavior . . .

This letter set in motion the events culminating in the Grievant's discharge.

Glenn Walinski, the Center's Director, issued the Grievant a notice of suspension dated February 19, which reads thus:

> This is to officially notify you that you are hereby suspended with pay pending the results of an investigation of your conduct. This suspension is effective at 11:00 p.m., February 19, 1993.
>
> A serious charge of sexual harassment misconduct has been made against you by a co-worker. There are additional allegations of misconduct involving the use of foul and offensive language while at work.
>
> Because these allegations are serious, the La Crosse Center believes it best that you be separated from complaining co-workers until a thorough investigation can occur.
>
> You are hereby instructed not to contact or discuss this matter with any employee of the La Crosse Center (except your union representative).
>
> You are hereby ordered to appear in my office at 3:00 p.m. on Wednesday, February 24, 1993 at which time I will provide you with a report of my investigation.

A meeting did take place on February 24. The Grievant attended with various Union representatives, as did Walinski and various City representatives including James Geissner, the City's Personnel Director. The City kept notes of that meeting. Those notes state the purpose of the meeting was discussed thus:

> Jim stated that this was an investigation meeting. (The Grievant) stated he would stand mute and ask for legal counsel; not knowing what is happening, how can be (sic) defend himself. Jim stated there is no criminal activity or criminal charges, this is employer/employee related. Jim asked if (the Grievant) would cooperate. (The Grievant) asked what would happen if he didn't. Jim said he would be fired. (The Grievant) said he would cooperated (sic).

The notes show that the meeting covered, among other points, "the activity and conversation of 2/13/93"; whether the Grievant's brother had been on Center premises; that "co-workers thought (the Grievant) has come to work with alcohol on his breath"; whether the Grievant had contacted other employes at their homes concerning work related issues; that "people have noticed mood swings" in the Grievant; whether the Grievant "is presently having a relationship with an employee"; whether Sattler's allegations were true; whether the Grievant was "an unhappy/angry person"; and whether the Grievant had, through his conduct

and language, intimidated co-workers.

On March 4, Walinski issued the Grievant a notice of termination which reads thus:

. . .

> The decision to terminate your employment was one that was not made in haste but was the result of a thoughtful review of your job performance over the past two (2) years and specifically the incident of February 13, 1993. The investigation report dated March 4, 1993, is attached and contains the detailed documentation of your unacceptable behavior. Your job performance has simply been unacceptable. Your treatment of co-employees and the general public in an abusive fashion cannot be tolerated in a public building. As a public employee you have failed to perform your duties in a professional manner and as a result several co-employees are afraid of you and in fact have terminated their employment with the La Crosse Center because of your abusive behavior over a protracted period of time.
>
> You have been warned on several occasions to change your abusive behavior and your actions have continued.

Attached to the notice was a document headed "Investigation Report" which consisted of Walinski's written conclusions and sixteen attachments. The "SUMMARY" and "CONCLUSIONS" sections of the report read thus:

SUMMARY

> In summary, the report identifies numerous examples of inappropriate and abusive behavior including:
>
> - unprovoked verbal outbursts at co-employees
> - the use of threatening and vulgar language in the performance of your job
> - behavior that has resulted in the strong belief by co-employees that you are dangerous and are capable of physically harming them
> - the use of a "jail experience" story to intimidate co-employees
> - the questioning of a co-employee's belief in God in an attempt to mock her religious beliefs
> - the repeated violent yelling and screaming with animated hand motions either pointing in the direction of City Hall and/or other authority figures
> - the lack of cooperation with co-employees when you were requested to give direction, and instead you said, "Don't know, don't care".
> - the use of profanity when dealing with customers of La Crosse Center
> - the failure to assist customers in their requests for service
> - the use of threatening remarks in describing the physical plant of the La Crosse Center. In this

case you indicated you had a solution for "this fucking place, one good nuclear device will fix this place."

- the use of the "I shot a man" story in an attempt to intimidate co-employees
- untruthfulness in the investigation of the February 13th incident involving your verbal outburst when you used the following language: "They can't close this building." "That fucking asshole Mayor says he is going to close this building." "They can't close this fucking building because Mary E. left the City the money." "Fuck you and Jesus Christ, too." This language was used in front of several co-employees including Ms. Joy Sattler. Ms. Sandra Schuster-Lee heard parts of the outburst including the "Fuck you" comment.
- untruthfulness in the investigation of the alleged harassment of a female fellow employee regarding her religious beliefs. In this incident, you verbally harassed Ms. Joy Sattler about her religious beliefs. You used the following language: "Do you really believe there is a God who can part the waters?"
- untruthfulness regarding the presence of a person identified and introduced by yourself as your brother. In this incident you categorically denied ever having you (sic) brother in the La Crosse Center at any time. You used the word "never" when denying the incident. The following witnesses have indicated that you did, in fact, introduce your brother to them while in the La Crosse Center break room or the arena: Glen Walinski, Joy Sattler and Tom Zielke.

CONCLUSIONS

> You have been warned on several occasions about your verbal and abusive outbursts and the presence of alcohol within your system while at work. Specifically, you were told that if your behavior problems were alcohol related, you should seek help from the Employee Assistance Program. You have consistently denied that you have been abusive and/or have an alcohol related problem.
>
> During your probationary period you reported to work in a drunken stage and were sent home. Following this incident you were warned that a repeat of this incident would result in your dismissal. While management has not observed your drunkenness at work since then, it is true that several co-employee's (sic) have noticed a heavy smell of alcohol on your breath.
>
> In conclusion, your behavior has been unacceptable and will no longer be tolerated. Several hard working productive employees have quit their employment at the La Crosse Center rather than work along side of you. Others have indicated an unwillingness to work the same shift as you, so management has had to reassign them.

. . .

The attachments included the City's and the Center's work rules, the City's and the Union's sexual harassment policies, and thirteen written statements authored by various City employes.

The City's work rules include the following provisions:

> Violation of departmental rules which may be in addition to general rules may be reason for disciplinary action.
>
> Discipline, for purposes of the above general work rules may be:
>
> 1. Personal discussion of violation
> 2. Written warning
> 3. Suspension
> 4. Discharge
>
> Where progressive discipline would not be in the best interest of the City management, or the infraction may be a violation of public policy, discipline could be immediate suspension or discharge.

The Center's rules include the following provisions:

> Violation of any of the following rules will be sufficient grounds for disciplinary action ranging from reprimand to immediate discharge, depending upon the seriousness of the offense in judgement of the

management.

. . .

8. Assaulting, threatening, intimidating, coercing, or interfacing (sic) with employees.

. . .

10. The making or publishing of false, vicious, malicious statements concerning any employee, any member of supervision, the company or its products.

11. Abusive language to supervision, other employees, or the general public.

. . .

13. Immoral conduct or indecency.

. . .

The Center maintains written forms headed "DISCIPLINARY REPORT" to document discipline. The form has entries for "Verbal Warning," "Written Notice," "Number of Notices," "Suspension without pay," and termination. Prior to February 19, the City had not formally disciplined the Grievant.

The balance of the background will be set forth as an overview of witness testimony.

Joy Sattler

Sattler has worked as a part-time maintenance employe of the Center since 1991. She stated the Grievant has been "very difficult to work for . . . from day one." She noted that on her first day working a day shift, he disparaged her religious beliefs, implying to her that the Bible was all lies. She stated she responded she believed in the literal truth of the Bible and left him. This was, she acknowledged, the only time he mocked her religious views. She noted he swore profusely. His conduct was so intimidating that she considered quitting to avoid contact with him. His conduct on February 13 led her to report him. She testified that she entered the break room area on that evening at the close of her shift and found he was violently angry. The word "fuck" peppered his language as he yelled a diatribe against the Mayor and the Center generally. She noted he made a reference to the affect that a bomb should hit the Center. He did state that the City representatives had spoken of closing the Center. He also stated the Mayor and other officials should be taken care of. She stated he seemed to direct his remarks to everyone and to no one in particular. No other employes spoke to him during his outburst. The break room, she noted, is primarily used by employes for work breaks, but can also be used by the public during Center events.

Sattler acknowledged that she knows Walinski well. Walinski once worked in her husband's business, and refers to Sattler as "mom." Her son and daughter have also worked for the Center during Walinski's tenure as Director. She noted she approached Tom Zielke, who supervised her and the Grievant, regarding the Grievant's use of profanity. She believed the Grievant would respond by toning his language down briefly, but would then revert to his prior

vulgar ways. Sattler believed that alcohol accounted for the Grievant's erratic behavior. She based this belief on his conduct and never smelled alcohol on his breath.

Sandy Schuster-Lee

Schuster-Lee is employed by the Center as an Administrative Assistant. She entered the break room area on February 13 with the head of Center Security, and heard the Grievant yelling and swearing profusely. She stated she believes she holds some disciplinary authority over Center employes. She advised Walinski of the incident, but upon learning from him that he was aware of it, took no further action. She did prepare the following written statement about the incident:

> I walked into the break room on Saturday, February 13th, at approximately 10:45 p.m. I passed through the break room going to the security room to check on the fire panel. As I entered the break room (the Grievant) was hollering and swearing. I heard parts of the conversation, but overwhelmingly I heard the word f__. He was saying 'they stole Mary's money' 'they can't close this building'. He sounded very angry and within a two minute span swore profucely (sic).

Patrick Tauschek

Tauschek is a student at UW-La Crosse and has worked roughly two years as a part-time maintenance employe at the Center. He has worked with the Grievant on several occasions. He noted that early in his employment, the Grievant approached an exhibitor to determine the exhibitor's needs. Upon learning the exhibitor needed a table and some chairs, the Grievant turned and questioned out loud why the exhibitor couldn't get their own "fucking" chairs. Tauschek stated the Grievant did not make this remark to anyone in particular and may have said it loud enough for the exhibitor to hear. Tauschek said he did not mind working with the Grievant at first, but learned the Grievant would gossip about employes when the employes were not present. Zielke approached Tauschek concerning the complaints leveled against the Grievant in 1993, and asked Tauschek to write about his experience with the Grievant. Tauschek's statement reads thus:

. . .

> (The Grievant) deserves some credit. He does do what is asked of him, but as soon as he is out of sight of certain employees, negativity seems to ooze out from his mouth . . . I'm sorry that this incident has come down to this. He is a good worker. But I feel and so do others who are employed here that (the Grievant) is hard to work with. He's cruel and unkind. I think it's his nature. He should seek some help . . .

Tauschek described a walk-out of part-time employes, and the Grievant's role in it thus:

> I was asked to leave early after working only a couple of hours during a third shift. I found out later that there was quite a bit of work to do. The rest of the crew apparently decided to walk out on him because he had told other employees they could leave . . . He checked our cards and decided who could stay on and who should leave . . .

The work environment had, in Tauschek's opinion, relaxed since the Grievant's discharge.

Peter Franck

Franck is also a UW-La Crosse student who works at the Center as a part-time maintenance employe. Franck has worked with the Grievant, and testified he had not really had problems with him. He felt the Grievant was a hard worker who was quite intense about his job. He noted the Grievant's constant use of profanity did bother him, particularly when exhibitors were in the area. He was unsure whether exhibitors have actually heard the Grievant swear. He noted that late in 1992, Zielke called the full-time and part-time employes together and warned the employes not to use profanity during Center events. He was not certain that the Grievant attended this meeting. The Grievant did, Franck testified, reduce his use of profanity after this meeting. Franck noted that the Grievant had, on one evening, sent two part-time employes home apparently because each had logged overtime the Grievant felt should have been given to full-time employes. Franck and the remaining part-time employes walked off the job in protest of the Grievant's conduct. Franck also noted that he had smelled alcohol on the Grievant's breath on perhaps three to four occasions. Franck did

not, however, observe the Grievant acting as if impaired by alcohol. In the written statement he authored for the City, he summarized his conclusions on working with the Grievant thus:

> (The Grievant) is the hardest working full timer at the La Crosse Center. I have no doubt about that. It's just that for me, it creates too much stress and tension and I don't look forward coming to work when I know I have to work with him.

Dan Pierce

Pierce is another UW-La Crosse student who works part-time at the Center. Pierce presently works as a High Beam Rigger, performing stage set-up and maintenance. He once worked in the maintenance department, but asked not to continue doing such work. In the summer of 1991, he and the Grievant were installing the basketball floor for the Center. While doing so, Pierce and the Grievant were pulling cables, and the cable puller jammed. Pierce could not get it unjammed. He testified that the Grievant yelled at him to hurry up, referring to him as a "fucking college punk" or a "fucking idiot," adding that he would prefer calling his "fucking daughter in" to work rather than working with Pierce. After this incident, Pierce refused maintenance work if it involved working with the Grievant. He noted the Grievant swore profusely, but he did not believe the Grievant swore in the presence of exhibitors. Pierce acknowledged he is interested in full-time employment in Center administration.

Vivian Timmons

Timmons, on January 8, 1993, was employed as a clerical in the Personnel Office of the City Hall. She testified that the Grievant came into the office she was working in on that day, and demanded to see his personnel file. She noted he was very upset, and accompanied his demand with yelling and swearing. She noted she has had to deal with upset employes before, but had never seen anyone as upset as the Grievant. His conduct frightened her sufficiently that she asked how she could contact the Police Department if he returned. He did not return that day, and she did not contact the Police Department during or after his appearance.

Tom Zielke

Zielke has worked as a Building Supervisor and an Assistant Building Supervisor at the Center for about twelve years. While Clemett Bott served as Building Supervisor, Zielke served as his Assistant. Prior to that, he worked in the Maintenance Department in a position represented by the Union.

Zielke noted that on February 13, Sattler approached him and informed him the Grievant was behaving wildly. Zielke went to the break room, and the Grievant left, muttering. Zielke noted he could hear the Grievant yelling as he approached the break room. He approached the Grievant, and asked him what the problem was. The Grievant responded that the Mayor was the problem, and that the Mayor wanted to close the Center down. The Mayor is Zielke's father. Zielke tried to calm the Grievant down, and told him he could talk about the incident the next day. He stated the Grievant was quite upset, but responded to him in a cooperative fashion, and returned to work. Zielke did not feel he could discipline an employe who had not punched in to work, and did not discipline the Grievant for his conduct on February 13.

After February 13, Walinski directed him to obtain the statements of part-time employes regarding their work experience with the Grievant. Walinski also asked Zielke whether the Grievant had been warned about his use of obscene language. Zielke responded in a memo to Walinski dated February 24, which reads thus:

> In November, 1992, I hired a female part-time employee to work maintenance at the Center. She had worked only two days and then did not report for work again when she was scheduled. I tried calling her and could not reach her by phone. Finally, her father called and said she is not going to work at the Center because of the language and the remarks used by Center employees. Glenn and I decided to talk to the maintenance crew about the language used. The following day, I started talking to each shift that came on and told them that there will be no more bad language used anywhere at the Center at any time. I know I talked to all the full time employees and most of the part time, including stage hands.

Zielke stated the Grievant did attend a meeting at which he counseled employes not to use obscene language after they had punched in.

Zielke noted that the Center had, for years, used part-time employes to perform work also performed by full-time employes. The Center's use of part-time employes became an issue primarily because of the Grievant. The Grievant filed two grievances concerning the Center's use of part-time employes, and on one occasion, sent several part-time employes home because he felt they were performing work which should have been performed by full-time employes. That action led to a walk-out of other part-time employes because they did not feel they could handle the work load without the help of the employes whom the Grievant had sent home. Zielke told the Grievant he was not authorized to do this, but did not discipline him.

Zielke affirmed that part-time employes had complained about working with the Grievant. He noted that some had asserted the Grievant smelled of alcohol, but Zielke was never able to confirm the validity of these assertions. He felt the Grievant was moody, and made other workers uncomfortable, but was a good worker. He affirmed that swearing, prior to November of 1992, was not uncommon among Center workers. He confirmed that one of the female workers had said "fuck you" in response to a job assignment Zielke gave her. Zielke took this as a joke, and did not discipline the worker.

Glenn Walinski

Walinski became interim Director of the Center in March of 1990, and became the Center's permanent Director in January of 1992.

Walinski was responsible for the investigation of the Grievant's conduct. His conclusions of that investigation, noted above, convinced him that the disciplinary decision he faced was to employ progressive discipline or to terminate the Grievant summarily. He opted for the latter, concluding the morale of other employes and damage to the Center's reputation mandated that choice. That the Grievant categorically denied all of the allegations leveled at him during the February 24 meeting also played a role in this decision. Walinski felt the Grievant's inability to acknowledge any fault in the incidents then at issue indicated it was unlikely he could change his behavior.

Walinski was at the Center on February 13, but did not witness the Grievant's outburst. He did, however, meet Schuster-Lee and Zielke, who informed him of the incident.

Walinski acknowledged that the Grievant has been the Union's main advocate regarding the use of part-time employes. Walinski was aware of the two grievances filed by the Grievant regarding part-time employes, and acknowledged that the Grievant had challenged the Center's use of part-time employes on occasions other than those covered by the grievances. Walinski also acknowledged that the Grievant had played a significant role in the investigation of one of the Center's managers. The Manager of the Center's concessions had disposed of an old ice-making machine through a private sale, rather than turning the equipment over to the City for disposal at a public auction. The Grievant brought this matter and other complaints regarding the conduct of Center management to the attention of the Center's Board of Directors, without involving Walinski. The Board investigated the matter, and ultimately decided to change its operating procedures regarding the disposal of unneeded equipment. The Board member the Grievant had contacted asked the Grievant to refer any future concerns on Center management to Walinski.

Walinski was aware that the City had, during collective bargaining for a successor to the 1991 labor agreement, made a proposal which would have moved represented Center employes into other bargaining units, effectively eliminating the unit of Center employes. This proposal was not sought by the Center, Walinski noted, and in any event does not reflect any desire by the City or the Center to discriminate against the union or any of its members.

Clemett Bott

Bott retired from City service in May, after roughly thirteen years of employment. At the time of his retirement, he was the Center's Building Supervisor. Bott summarized the Grievant's work performance thus: "When he was properly supervised, he did his job OK . . . real good." He characterized the Grievant as a "high average" employe. Bott noted he never formally disciplined the Grievant. He did note the Grievant was profane, and that he once had to take him aside and counsel him to "cool it" regarding the use of "boisterous" language. That incident occurred in October of 1992. Bott felt the Grievant was open to supervision, and perhaps unduly deferential to him as a supervisor.

Bott acknowledged that the use of vulgar language was not uncommon at the Center, and included Center management. He noted it was perhaps not the most desirable work environment if an employe was "a practicing Christian." Bott stated that Walinski and other employes had once played a practical joke on him which involved sending him for a T-shirt into a storage closet in which a nude woman was waiting. Bott testified he got the T-shirt and returned to a chorus of laughter. Bott also testified that Walinski had, in the employe break room, referred to the Union as a collection of "scumbuckets." He stated he was aware of the walk-out of part-time employes, and that he thought the part-time employes should have been fired. Sattler's complaint against him resulted in his being suspended, with pay, for one week. This incident led Bott to request early retirement. He denied holding any bias toward City management. Geissner had, for example, been "very fair" to him, and he characterized the Personnel Director as "extremely competent."

The Grievant

The Grievant noted he had not been disciplined prior to his suspension. He did acknowledge that during his probation period, he reported for work after having a couple of beers. He stated that Zielke asked him if he was capable of working, and that he responded he could. Zielke did take him to Walinski's office, where Walinski read him a prepared statement, and informed him that if he never again reported for work after consuming alcohol, the statement would not leave Walinski's office. The Grievant stated he finished his shift.

The Grievant stated he was an active Union member, and that he took a special interest in the Center's usage of part-time employes. This usage violates the Recognition clause, the Grievant testified, as manifested by the fact that some part-time employes have two to three years of service with the City. The Grievant noted that the use of profanity was common at the Center, including Center management.

Prior to 1993, the Grievant worked primarily during the day. In November of 1993, the Grievant began to be scheduled more often for night work. He worked from 11:00 p.m. until 7:00 p.m. on the four work days preceding February 13, and was scheduled for the same shift on February 13 through February 16. He stated that prior to his shift on February 13, he had attended a hearing on the grievances involving the Center's use of part-time employes. During that hearing, City representatives suggested that if the grievances were further processed, the City might close the Center. He reported to work "very much" upset by this. The Grievant noted that he came into the break room around 10:30 p.m., and spoke to another employe about the City's position concerning the grievances. He acknowledged raising his voice, and that he may have used profanity. He denied that he said "fuck you" and "fuck Jesus Christ too" to Sattler. He noted he did not learn that the City objected to his conduct on February 13 until he was suspended on February 19.

He noted that he came into the February 24 meeting unaware of what the City was charging him with. He feared the City was charging him with sexual harassment, but denied there being any foundation for such a charge. He was not given a copy of the City's accusations against him until March 4, when the City provided him with a copy of Walinski's investigation report and asked him and the Union to respond. He stated the Union studied the document for about twenty minutes, then responded it could not meaningfully respond to the charges without further study. The City then issued him his notice of termination.

The Grievant denied causing the walk-out of part-time employes. He stated Bott asked him how many employes he needed the evening of the walk-out, and that he responded he did not need as many as had reported for work. Bott suggested sending those he did not need home, and the Grievant did so. The walk-out, the Grievant stated, was unprovoked. While acknowledging he used profanity, the Grievant denied mocking Sattler or her religious beliefs, and denied having outbursts against fellow employes. He acknowledged relating to a part-time employe that he had shot a man, but denied doing so to intimidate or impress the part-timer. Rather, he did so to describe his respect for the persuasive abilities of attorneys. The shooting, the Grievant stated, resulted in a finding of a violation of a civil ordinance. The Grievant also denied any outburst involving Timmons on January 8.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The City's Initial Brief

After a review of the factual background, the City asserts that it "has established through evidence adduced at this hearing that (the Grievant) violated the La Crosse Center rules and regulations through his habit of using vulgar, obscene and abusive language at the workplace." The City contends that the testimony of Sattler, Schuster-Lee, Tauschek, Franck, Pierce, and Timmons amply demonstrate that the Grievant's abusive and profane conduct was a disruptive force at the Center. Zielke's testimony establishes, the City contends, that the Grievant had been warned "that he was to stop using vulgar and obscene language at any location at the work place or he would be subject to discharge." Walinski's testimony establishes, according to the City, the significance of Center rules on the image the Center presents to clients and the care with which the City applied its rules to the Grievant.

The City argues that "(t)his is a a case in which all of the seven tests of just cause . . . clearly exist." The Grievant was forewarned of the disciplinary consequences of his conduct, but "blatantly ignored this warning," according to the City. The City then asserts that its rules "prohibiting abusive language to other employees or the general public is reasonably related to the efficient operation of the . . . Center, particularly in light of its primary goal of courtesy towards the public." The City then argues that Walinski made an effort to discover whether the Grievant had violated City rules, and then "fairly and objectively" conducted an investigation which "produced overwhelming evidence of guilt." Noting that "(t)here is no evidence to the contrary", the City concludes that it applied its rules even-handedly, since it would have discharged any employe for disregarding "a supervisor's warning" as the Grievant did. That the degree of discipline is reasonably related to the seriousness of the offense is demonstrated, the City argues, "by the overwhelming evidence of (the Grievant's) blatant disregard for the rule against abusive language."

The City dismisses the Union's claim that "antiunion discrimination" was involved in the discharge, arguing that the claim is "based upon mere surmise, inference and conjecture." The record contains, the City concludes, "no evidence indicating that the employee was discharged . . . because of his participation in protected union activities." The City also dismisses the Union's claim that the use of profanity at the Center "was nothing more than normal shop talk." The evidence demonstrates, the City asserts, that the Grievant's language was unacceptably obscene, vulgar and abusive under any standard.

The City concludes that the Union has been able to prove no abuse of discretion by the City, and argues that the grievance should be denied.

The Union's Initial Brief

After a review of the factual background, the Union argues that the grievance poses a "remarkable" case since the discharge followed shortly after the Grievant had complained to the Center Board about the wrongful conduct of a supervisory employe; the discharge manifests a "substantial record of anti-Union animus pervading the . . . Center which culminates in the discharge of the most . . . vocal Union member at the . . . Center; the conduct underlying the discharge is unremarkable given the workplace environment at the Center; and the conduct underlying the grievance "should not have resulted in the grievant's termination of employment."

More specifically, the Union argues that the events of February 13 cannot warrant discharge. It is, the Union contends, unclear that Zielke warned the Grievant against the use of the term "fuck". Beyond that, the Union argues that if the Grievant was so warned, the warning was limited to "on the clock" use of the term, and the Grievant had yet to punch in on February 13, when he used the term, and did so "not in a public area, but in an area for the purpose of employee gathering." The Union then argues that testimony demonstrates the Center "is hardly an environment permeated only with the King's English." That supervisory employes were aware of the Grievant's outburst, but did not counsel him in any way at the time demonstrates, the Union concludes, that the discipline was not rooted in a City concern for the Grievant's use of language. The outburst was, the Union contends, understandable in light of the difficult collective bargaining going on at the time. The Union, reviewing the record, asserts "(t)here simply has to be anther motive" for the discharge than that articulated by the City.

The Union characterizes the City's use of the testimony of part-time

employes as an attempt "(t)o bolster the City's flagrantly weak position concerning February 13, 1993." The Union argues that testimony is biased, dated and sufficient only to show that the Grievant was a hard worker who openly challenged the City's management. The City's failure to act against Bott for Sattler's allegations demonstrates, according to the Union, the City's selective concern for those allegations, and further highlights the need to question the motivation underlying the discipline.

The Union then specifically challenges the City's allegation that the Grievant "used obscenity or profanity in the presence of exhibitors." The part-time employes who testified on this point did not, the Union argues, relate any incident in which an exhibitor actually heard the Grievant. That the City did not produce testimony from exhibitors, coupled with compliments received from exhibitors regarding the Grievant demonstrates, the Union argues, that this allegation cannot support the discharge. The Union similarly dismisses allegations that the Grievant reported to work with alcohol on his breath, and demonstrated "abusive behavior" in the personnel office on January 8. The Union argues the former allegation is, at best, stale, and did not affect the Grievant's completion of his probation period. The latter allegation, the Union asserts, was never brought to the Union's or the Grievant's attention prior to his discharge.

The slim evidence supporting these allegations demonstrates, the Union contends, that "there has to be another reason for why they want to discharge the grievant." The record demonstrates, the Union argues, that "the real reason for why (the Grievant) was fired" was the City's desire "to bust the Union regarding Civic Center employees." The Union concludes its analysis of the factual basis for this assertion thus:

> In searching for an explanation for why the City would seek to discharge any employee for using the word "fuck" and for attempting to do so without one shred of evidence of progressive discipline, one does not have to look further than the City's anti-Union animus at the Civic Center. (The Grievant) was fired simply because he was aggressive in asserting collective bargaining rights.

That the Grievant complained to the Board about the conduct of a Center supervisor and had the City's investigative conclusions on that complaint placed in his personnel files underscores, according to the Union, that the Grievant's discharge was not based on his work performance.

Even if the City's motivation for the discipline was not tainted, the Union argues that its failure to follow progressive discipline renders the discharge improper. The Union contends that the City failed to properly promulgate rules governing the use of obscene language; honored the rule it did promulgate "more in its breach than in its adherence"; neither warned employes generally about the use of obscene language nor warned the Grievant specifically; failed to issue any prior discipline to the Grievant before discharging him; and failed to address allegedly obscene conduct by other employes.

The Union concludes that the Grievant must be reinstated to his former position, and made whole for lost wages and benefits. If the City wishes to change "the climate and the common law of the work place at the Civic Center" then it should, according to the Union, do so by a general instruction to all represented employes not "in a disciplinary environment on the most visible Union employee."

The City's Reply Brief

The City argues contends that "(w)hat the union asks this arbitrator to accept as proof of . . . anti-union activity falls desperately short of hard evidence that the grievant's discharge directly resulted from his union activity." Arbitral precedent requires "clear proof" to sustain a charge like the Union's, and the City asserts that the Grievant's advocacy or the City's attitude toward it are not, without more, sufficient to support the charge. More specifically, the City challenges the Union's attempt to introduce "(u)nsupported hearsay" related to a mediation into the record; notes that the Union has failed to show any other employe has been affected by the allegedly "anti-union" climate at the Center; argues that the Union "has failed to present evidence showing a connection between the grievant's union activities and his termination; and asserts that the Union has failed to show the City was in any way angered by the Grievant's "union activity."

The February 13 incident was, according to the City, not "an isolated incident" but "only one example of a long history of abusive behavior by the grievant towards . . . every employee who testified." The City argues that the Grievant made co-employees so uneasy that one employe quit, and another asked never to work with the Grievant again.

The City argues that Zielke's, Bott's and Sattler's testimony establish that the Grievant was aware that he should stop using the word "fuck." That other employes may have used the term is irrelevant here, according to the City, since the Grievant's use of the term was unparalleled:

> The grievant used the word "fuck" in every sentence in front of other employees, exhibitors and the public, sometimes screaming it across the hall . . . The union falls far short of establishing that this was common workplace language.

The City contends that its general and departmental rules were known to the Grievant, and provided that progressive discipline can be waived where it was not in the City's best interest or where the underlying conduct "may be a violation of public policy." Since the Grievant had been warned, and since there "is no reason to believe that 'one more chance' would improve the grievant's conduct" the City concludes that it properly "applied the exception to the progressive disciplinary process."

The City concludes that it "has established that (the Grievant's) misconduct warranted termination and . . . that the contractual prerequisites were observed in substance as well as in form." The grievance must, the City argues, be denied.

The Union's Reply Brief

The Union characterizes the City's case as one which "seeks to sustain the dismissal of a Union member for pure speech, engaged in off-duty, resulting in purely subjective comments of disapproval by individuals with a motive to lie, conduct (language) which is common in the work place, for which the grievant has never been previously disciplined, for which he has never received notice of impending disciplinary action and which is seriously tainted by issues of anti-Union animus and whistle blowing retaliation." This result is, the Union argues, unsustainable.

The Union specifically challenges that City's use of an "abuse of discretion" standard. The Union contends this standard is unfounded in the contract; poorly founded in arbitral or judicial authority; and irrelevant to the case since the evidence will not even support the discipline under this standard.

Contending "the uncontroverted record is that the City failed to follow its own rules" the Union concludes that the City failed to afford the Grievant any procedural due process. More specifically, the Union argues that the City failed to generally warn the Grievant that the use of profane language violated City rules and failed to specifically warn the Grievant that his use of such language could result in discipline. Noting that the workplace environment at the Center was less than pristine, the Union concludes that the "Center is not one of those places" in which "one could imagine . . . the use of obscenities . . . (giving) rise to discipline or discharge."

The Union concludes by requesting "that the grievance be granted and that the grievant be reinstated and made whole."

DISCUSSION

The issue is stipulated, referring to "just" or "proper" cause to reflect the use of each word in Articles 19 and 20. That the contract refers to "just

cause" and to "proper cause" does not introduce ambiguity into the standard governing the discharge: "The term 'just cause' is generally held to be synonymous with 'cause,''proper cause,' or 'reasonable cause.'" 2/

The Employer contends the discharge can withstand scrutiny under the seven standards articulated by Arbitrator Daugherty. 3/ The Union has not used those standards in its argument, and I am reluctant to imply those standards into the parties' agreement in the absence of a stipulation. Essentially, a just cause analysis consists of two elements. First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed for the conduct reasonably reflects that interest.

Before applying the just cause standard to the facts, it is necessary to address certain prefatory points. The Union has asserted that the discharge was motivated by anti-Union hostility. This assertion has contractual and statutory ramifications. Whether articulated as a contractual or as a statutory matter, addressing the assertion poses issues broader than those necessarily posed by the just cause analysis. If taken as a statutory issue, for example, the City's discharge could be based on valid business reasons but susceptible to being overturned if based "in-part" on anti-union hostility. 4/ The underlying motive of the discharge is, however, directly posed only if the reasons for the discharge withstand a just cause analysis. If the stated basis for the discharge cannot withstand a just cause analysis, the "in-part" analysis is dicta. Unless a finding of anti-Union hostility has remedial implications, addressing the allegation is secondary to addressing the validity of the reasons for the discharge. The Union could have directly posed the statutory issue by filing a complaint of prohibited practice rather than a grievance. Thus, the anti-union hostility argument will be addressed only if the stated reasons for the discharge can withstand a just cause analysis. This assures that the grievance is resolved on the narrowest basis possible.

Similar considerations apply to the Union's contention that the Grievant was discharged to punish him for calling attention to the actions of Center management. This point is secondary to a determination of the validity of the stated reasons for the discharge.

The first element of the just cause analysis is whether the City has established the existence of conduct by the Grievant in which it has a disciplinary interest. The conduct the City based the discharge on is stated in the March 4 memo. That memo states fourteen areas of conduct supporting the discharge.

The first area of conduct is "unprovoked verbal outbursts at co-employees." Tauschek, Franck and Pierce each testified credibly that the Grievant, with little or no provocation, directed outbursts, typically obscene, at them or at other employes. Pierce's testimony is the most stark. The Grievant's reference to him as a "fucking idiot," among other things, drove Pierce from maintenance work. There is no reason to doubt the credibility of his account. That Pierce turned maintenance work down is undisputed. There is

---

2/ Hill & Sinicropi, Management Rights, (BNA, 1986) at 99.

3/ See, Enterprise Wire Co., 46 LA 359 (Daugherty, 1966).

4/ The "in-part" test was applied by the Wisconsin Supreme Court to cases arising under the Municipal Employment Relations Act in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967), and is discussed at length in Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

no apparent basis to account for this other than his displeasure with the Grievant. Beyond this, his account of the Grievant's work record was balanced. He freely acknowledged that the Grievant was a good worker. This balanced account lends credence to his testimony. Franck's and Tauschek's accounts do not detail outbursts directed specifically at them. Rather, their accounts are of outbursts directed to the world in general. Tauschek objected to the Grievant's disparaging of an employe outside of the employe's presence. In each instance there is no reason to doubt their credibility. Each offered an honest appraisal of the Grievant's work performance, and stopped short of disparaging either the Grievant's work performance or his conduct in the presence of exhibitors. Each viewed him, at worst, as a bitter or troubled man. The City can persuasively claim a disciplinary interest in the conduct noted by these witnesses. The February 13 outburst is addressed below.

The second area of conduct is the "use of threatening and vulgar language". The witnesses noted above all credibly noted the Grievant swore profusely. There is no reason to doubt this. The Grievant acknowledged he swore often, and balked only at the level of the swearing and at whether he used threatening language on February 13. Tauschek noted that the Grievant had made oblique reference to the use of a nuclear device. Sattler noted that the Grievant used the bomb analogy during his February 13 outburst. That different witnesses with no contact with each other related similar accounts covering different instances credibly indicates the Grievant mixed threatening metaphors with his vulgarity. The Grievant's testimony does not rebut this. Rather, it indicates he cannot recall the use of such metaphors. In sum, the record will support the assertion that the Grievant routinely used obscene language and on occasion mixed threatening metaphors with it.

The next area of conduct isolated by the City is the "strong belief" of "co-employees" that the Grievant is capable of harming them. That Sattler was intimidated by the Grievant is apparent. The reasonableness of her belief is, however, not so apparent. Neither Bott nor Zielke was intimidated by the Grievant. Each regarded him as intense, but Bott regarded the Grievant as, if anything, too deferential. Zielke approached the Grievant immediately after his February 13 outburst, and found him moody but approachable. He directed him to work and the Grievant responded. The part-time employes were uncomfortable with the Grievant, but this discomfort flowed from a number of sources, including the inevitable differences in interests between students who serve as part-time maintenance employes and a full-time Janitor. Sattler's fear of the Grievant has, on this record, no proven basis. Her own account leaves unclear what was "violent" in the Grievant's conduct. The only detail she offered of the Grievant's "violent" conduct was the February 13 incident. Her subjective fear of the Grievant's intensity may not be groundless, but an employe under a just cause standard has both the right and the duty to be judged on their conduct,

not on another's beliefs unrooted in their conduct. That Sattler's allegations against Bott resulted in an investigation but no City action affords further basis to doubt the objective basis of her stated beliefs.

The "jail experience" allegation stands as uncorroborated hearsay. It is not proven that the incident actually occurred or that the Grievant related such a story to intimidate another employe.

The alleged mocking of Sattler's religious beliefs is unproven. Under Sattler's account, the incident occurred the first time she worked a day shift with the Grievant. It is, by her own account, the only time he mocked her beliefs. It is impossible to tell from her account whether or not the Grievant was mocking her. Even without regard to the Grievant's denial of the incident, it is not clear from Sattler's account that the Grievant did anything more than oppose her views or use sarcasm to voice that opposition. The City has not persuasively demonstrated any disciplinary interest in such conduct. The "fuck you and Jesus Christ" statement is tied not to Sattler's stated religious beliefs, but to the February 13 outburst, which is further discussed below.

The "repeated violent yelling and screaming" refers to the February 13 outburst, which is discussed below.

The "lack of cooperation" cited by Walinski has no proven basis. The Grievant testified, without contradiction, that the "Don't know, don't care" statement was related to Sattler's statement to the Grievant that another employe had used too many towels. No City disciplinary interest is apparent in that exchange.

The City has not proven that the Grievant used profanity when dealing with Center customers. Tauschek's, Franck's and Pierce's testimony demonstrate that the Grievant used profanity in areas in which exhibitors were present. That testimony does not establish a single incident in which an exhibitor actually heard the language. None of the testifying witnesses stated that the Grievant actually directed profane language to a Center customer. Sattler did relate one incident in which the Grievant joked, in the break room in the presence of two exhibitors, that he had been warned to stop using obscene language. Under her account, the exhibitors were amused, not offended. Beyond this, it must be noted that the use of vulgarity at the Center was not uncommon.

There is no persuasive record evidence that the Grievant failed to assist Center customers. The City's witnesses who observed the Grievant's work contradict this assertion. The Grievant was generally regarded as a solid, if intense, worker.

The Grievant's alleged use of "threatening remarks" in describing the Center is addressed below as part of the discussion of the February 13 incident.

The City has no proven disciplinary interest in the Grievant's use of the "I shot a man" story. The Grievant acknowledged that he related a story to an employe about a shooting which resulted in an ordinance violation. He denied he did this to intimidate the employe. The employe who supplied a written statement on the point to Walinski did not testify. The statement itself is enigmatic: "I also am sometimes nervous when I around (sic) (the Grievant) ever since he told me he shot a man and didn't show any signs of regret while telling me the story." That an employe could be intimidated by such a story can be granted, as can the City's disciplinary interest in such intimidation. The record here, however, is too weak to conclude that intimidation occurred.

The next area of conduct highlights the February 13 outburst. Under any view of the facts, the Grievant was out of control and obscene throughout that outburst. Sattler and Schuster-Lee testified the Grievant used "fuck" at a decibel level and at a frequency neither had ever heard. Zielke heard the Grievant yelling from a considerable distance. The Grievant acknowledges he swore, but was unwilling or unable to confirm he swore to the degree and amount testified to by Sattler and Schuster-Lee. The Union has generally contended there are issues of credibility involved in this incident. The record does not support this assertion. Even fully crediting the Grievant's account, there is no basis to doubt he was obscene to a point unprecedented even by the Center's standards, and mixed threatening metaphors with those obscenities. That the Grievant had yet to punch in at the time of the outburst cannot detract from the fact that he dominated the break room area, causing a disruption which affected several employes who were "on the clock."

The March 4 memo then challenges the Grievant's truthfulness in the investigation of Sattler's allegations. The City has not proven any disciplinary interest in the statement attributed to the Grievant. Beyond this, the Grievant's "untruthfulness" is, at best, tenuously proven. The weakest part of the Grievant's testimony at hearing was his tendency to deny the occurrence of any event arguably adverse to his interest. Acknowledging the validity of the City's perception of this during its investigation does not, however, add credibility to that investigation. The City summoned the Grievant into an investigatory meeting without describing what it was investigating other than to imply potentially criminal acts were involved, then demanded his cooperation on pain of discharge. The subsequent questioning was, at a minimum, far reaching and unfocused. That the Grievant was less than forthcoming is, against this background, not necessarily remarkable. The City has proven no disciplinary interest in this area of conduct.

The Grievant's alleged untruthfulness "regarding the presence" at the Center of "a person identified and introduced by yourself as your brother" has no proven basis.

Viewing the City's list of conduct for which it disciplined the Grievant, it has proven only that the Grievant was involved in outbursts using obscene language regarding fellow employes, and created, on February 13, an outburst using obscene and threatening language which disrupted the break area. The Grievant's conduct did cause discomfort among several employes. This is the extent of the conduct the City has proven a disciplinary interest in.

The second element to the just cause analysis questions whether the discharge reasonably reflected the City's disciplinary interest in the above noted conduct. There is no dispute that the General City rules establish a four step progressive discipline system, and that the Grievant had not, prior to February 19, received any formal discipline. Walinski testified that his investigation convinced him progressive discipline was not appropriate in the Grievant's case. Under the system established by the General City Work Rules, this conclusion is appropriate if progressive discipline "would not be in the best interest of the City management" or if "the infraction may be a violation of public policy." The parties' various procedural and substantive arguments thus can be focused on whether Walinski's conclusion not to use progressive discipline reasonably reflected the City's disciplinary interest in the Grievant's conduct.

The City has not demonstrated the existence of any public policy or management interest in the Grievant's conduct beyond his individual behavior. The issue becomes, then, whether the Grievant's conduct was so aggravated that immediate discharge was warranted, or whether that conduct was not amenable to modification in response to progressive discipline.

The conduct proven by the City in which it has a disciplinary interest has not been proven to be sufficiently aggravated to warrant summary termination. Examination of this must start with the February 13 outburst. As noted above, the Grievant was disruptive and abusively obscene. The Union has intimated this is protected speech, but whatever the Constitution may require, it is not typically accepted employment behavior to yell obscenities, mixed with violent metaphors, at no one in particular. The Grievant yelled at the risk of offending the sensibilities of his audience, some of whom were on duty.

Even with this as background, the outburst cannot be persuasively viewed as warranting immediate discharge. The outburst was not random or unprovoked. It is apparent the parties' relationship on the Center's use of part-time employes is strained. That the City made a proposal in bargaining which would have eliminated all unit positions at the Center underscores the degree of strain involved. Whatever the status of then-ongoing mediation was, it is apparent from both City and Union witnesses that the Grievant's anger was rooted in City pronouncements that the Union's pursuit of pending grievances could result in the closing of the Center. That the Grievant and other unit members could be angered or concerned by this pronouncement is apparent.

Beyond this, the conduct of City representatives underscores that the City did not view the February 13 conduct to warrant immediate discharge. Zielke spoke to the Grievant and assigned him to work, neither fearing for the safety of other employes nor believing he could discipline the Grievant for what he saw as off-duty conduct. Schuster-Lee believed she had disciplinary authority, yet saw no need to act beyond informing Walinski of the incident. Walinski did not act until February 19, and then acted only to initiate an investigation which treated the events of February 13 not as actionable in themselves, but as a basis for further inquiry. The Grievant worked February 13, 14, 15 and 16, and had February 17 and 18 off before learning on February 19 that he was suspended. This is irreconcilable to a view that his outburst of February 13, standing alone, warranted discharge.

Nor has it been demonstrated that the February 13 outburst was the "straw that broke the camel's back." Of the fourteen articulated bases for the discharge, three involve February 13 and nine are totally or partially unproven. The remaining two are problematic. Tauschek stated the incident he could recall concerning the Grievant's use of obscenity in the presence of exhibitors occurred in the Spring of 1992. Franck could not precisely date any of his concerns with the Grievant's conduct. Pierce quit doing maintenance work, due to the Grievant's conduct, in 1991. The proven allegations are, then, disjointed and remote in time.

The City related other sources of concern in the March 4 memo, but none of them resulted in discipline. The various intimations of the Grievant's use of alcohol were investigated by Zielke, who found no proof to support them. Walinski and Zielke did smell alcohol on the Grievant's breath during his probation period, yet the Grievant was permitted to work that evening and passed his probation period. Timmons was intimidated by the Grievant, but no one discussed the incident with him or attempted to discipline him. Walinski's memo asserts "several hard working productive employees have quit their employment at the . . . Center rather than work along side of you." This assertion is primarily unproven. Pierce's situation has been discussed. There is no evidence the "female" referred to in Zielke's February 24 memo worked with or near the Grievant. In sum, it is impossible to view the events of February 13 as the culmination of a series of related events in which the Grievant behaved improperly. Rather, it appears the events of February 13 provoked Sattler's letter. Sattler's letter provoked an investigation in which any of the City's concerns with the Grievant which could be documented were

assembled and used to ground the discharge.

The City has not been able to demonstrate the Grievant's conduct is not amenable to progressive discipline. That the City has never tried undercuts its contention that doing so would be fruitless. Beyond this, witness testimony undercuts the City's contention. Bott testified that the Grievant responded to supervision. This testimony cannot be dismissed as biased by Bott's attitude toward his former employer. He acknowledged his distaste for Sattler's accusation, but does not appear to extend that distaste to the City generally. He has a high opinion of the City's Personnel Director, for example. Beyond this, his conclusions of the Grievant's work record were balanced, reflecting something other than cheer-leading for the Grievant. Zielke also indicated the Grievant was responsive to supervision. On the evening of February 13, the Grievant responded to Zielke's attempts to calm him, and to deflect his grievance based concerns from the work at hand. Even by Sattler's account, whatever disapproval the Grievant voiced regarding her religious beliefs ended when she let it be known she was firm in those beliefs. In short, what evidence there is on the Grievant's amenability to supervision indicates that he would respond to progressive discipline. If it is true, as Sattler and Zielke feared, that the Grievant would revert to vulgar outbursts after counseling, then progressive discipline would, in four steps, provide the final answer.

In sum, the City has not proven either that the February 13 outburst was so aggravated that it warranted summary discharge or that it stood as the culmination of a series of events warranting discharge. Nor will the record support the conclusion that the Grievant is not amenable to modifying his conduct through the imposition of progressive discipline. The City has thus not demonstrated that the sanction of discharge reasonably reflects its disciplinary interest in the Grievant's conduct. The City has, then, failed to demonstrate just or proper cause for the discharge.

The City had not, prior to March 4, formally disciplined the Grievant. Under its progressive discipline system, his conduct on February 13, even viewed in light of prior outbursts, warrants no more than a "Personal discussion of violation." That the City has failed to discipline the Grievant for past problems affords no basis, on this record, to make up for this omission by jumping him beyond the first step of the four step system of progressive discipline. Thus, the City can, with just cause, counsel the Grievant against the use of obscenity or threatening language and against outbursts directed at or toward fellow employes. The City can further counsel the Grievant about the disciplinary consequences of such conduct. This exhausts the City's disciplinary interest in the conduct proven on this record.

The award entered below states the extent of the City's interest in the Grievant's conduct, and states a general make whole remedy. The parties have not argued remedial issues, and thus no extended discussion of the remedy is appropriate here. It should, however, be noted that the Union's assertion of anti-Union hostility does not have any remedial implications on this record. If the City acted based on such hostility, it did so only to the extent it refused to apply progressive discipline to the Grievant. The Award entered below fully addresses that point as a matter of remedy. As the City has pointed out, the Grievant's activism does not serve to cloak with propriety misconduct which has no relation to the assertion of protected rights.

AWARD

The City did not have just or proper cause to discharge the Grievant.

As the remedy appropriate to the City's violation of Articles 19 and 20, the City shall make the Grievant whole by reinstating him to the position he

would have held but for his discharge on March 4, 1993, and by compensating the Grievant for the wages and benefits he would have earned but for the discharge. The City may, under its progressive discipline system, conduct a "Personal discussion of violation" with the Grievant at which it may address his use of vulgar language, his outbursts against fellow employes, his conduct on February 13, 1993, and may also address with him the disciplinary consequences of conduct not conforming to City work rules. The City shall expunge any reference to his suspension or discharge from his personnel file(s), and shall amend his personnel file(s) to reflect only the "Personal discussion of violation" noted above.

To address any uncertainty in the implementation of this Award, I shall retain jurisdiction over this matter for a period of not less than forty-five days from the date of issuance of this Award.

Dated at Madison, Wisconsin, this 11th day of April, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/mb
0411RM44.A