

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 150, AFL-CIO, CLC

and

HARRY M. STEVENS MAINTENANCE
SERVICES, INC.

Case 1
No. 51164
A-5247

Appearances:

Mr. Thadd Hryniewiecki, Business Representative, Service Employees International Union, Local 150, AFL-CIO, CLC, appearing on behalf of the Union.
Catalano & Sparber, Attorneys at Law, by Mr. Neil Sparber, appearing on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the Company or Employer, respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on October 13, 1994, in Milwaukee, Wisconsin. The parties filed briefs in the matter which were received by December 19, 1994. Based on the entire record, I issue the following Award.

ISSUE

The parties stipulated to the following issue:

Was Michael Rushak discharged for just cause? If not, what is the remedy?

PERTINENT CONTRACT PROVISION

The parties' 1994-96 collective bargaining agreement contains the following pertinent provision:

ARTICLE VI - GENERAL PROVISIONS

. . .

Section 4. No employee shall be terminated except for just cause, unless the employee has not completed his/her probationary period which shall be thirty (30) calendar days from date of hire. The Employer shall use the following procedure (except in cases where the employee has been accused of theft, drinking on the job, fighting or blatant safety violations) when implementing discipline and discharge:

1. First offense in any one (1) year = verbal counseling
2. Second offense in any one (1) year = written warning
3. Third offense in any one (1) year = three (3) day
suspension without pay
4. Fourth offense in any one (1) year = discharge

FACTS

The Company operates a cleaning service. Among the sites it cleans are the Bradley Center and County Stadium in Milwaukee. The Union is the exclusive bargaining representative for all custodial employees employed by the Company. Grievant Michael Rushak started his employment with the Company as a seasonal employee. He worked during the 1993 Milwaukee Brewers baseball season as an events manager. This job involved cleaning up debris and spills. After the baseball season ended, he went to work for the Company at the Bradley Center as a custodial leadperson. He quit that job shortly before Thanksgiving, 1993. In mid-December, 1993, the Company's site manager at County Stadium, David Korol, offered him a full-time office cleaner position at County Stadium. Rushak accepted the position and began cleaning the Milwaukee Brewers offices shortly before Christmas, 1993. He was employed in that capacity about a month until his discharge on January 25, 1994.

A week or two after he started working at County Stadium, Rushak was involved in an incident wherein he called a woman who works for the Brewers a "bitch." Afterwards, Korol apologized to an official of the Brewers on behalf of both Rushak and the Company. Korol then

admonished Rushak not to do it again. This verbal admonishment was the only discipline imposed for the matter.

Rushak cleaned offices on the second shift with Karen Musha. Musha has worked for the Company for about four and one-half years, the last two and one-half as lead worker of the office cleaners. As lead worker, Musha is responsible for ensuring that all the offices at County Stadium are cleaned properly. As a result, she oversaw the cleaning work Rushak performed. Like Rushak, Musha was in the bargaining unit.

On the evening of January 24, 1994, the regular vacuum cleaners were being repaired, so Korol brought an old vacuum cleaner from his home to use to clean the offices. Rushak ended up using this old vacuum. He had problems with this vacuum all night because the bag was broken and it did not pick up the rock salt in the offices' plush carpet. Rushak complained to Musha about the vacuum and told her that he could not pick up the rock salt with it, to which Musha responded that it was important that the rock salt get picked up by any means available, including sweeping or picking it up by hand. Rushak ended up doing just that, namely sweeping part of the offices with a broom and picking up rock salt by hand.

Rushak left after his shift ended. After he left, Musha inspected the areas Rushak had cleaned. Upon doing so, Musha felt that one particular area, namely the dining room, had not been cleaned properly. She then cleaned it to her satisfaction.

On the morning of January 25, 1994, Musha telephoned Korol and told him that Rushak had left a mess in the dining room which she had cleaned up after he left. Korol replied that he would meet with Musha and Rushak the following day to discuss the matter. After the phone call ended, Korol filled out a form the Company uses to document written warnings. Therein, Korol wrote up Rushak for substandard cleaning work on January 24, 1994. Korol left this completed but unsigned write-up on his desk.

That afternoon, both Musha and Rushak reported for work as scheduled. Before starting work, both went to Korol's office although Korol was not there at the time. While they were in Korol's office, Musha asked Rushak why he had not finished cleaning the dining room the previous night. This question perturbed Rushak and he responded irately that he had cleaned the dining room. Musha and Rushak then verbally sparred back and forth about whether Rushak had or had not cleaned the dining room the previous night. Musha testified that during this verbal exchange, Rushak became so agitated that he hit the wall with enough force that it caused pictures to fall off the wall. Rushak denied hitting the wall or causing pictures to fall off the wall. At some point during this verbal exchange, Rushak saw the incident report/write-up on Korol's desk that referenced him and the cleaning of the dining room the previous evening. When Rushak saw the write-up, he became angrier. Rushak testified at the hearing that the reason he became more agitated after seeing the write-up was that Korol had written him up without asking for his side of the story. Rushak then took the write-up off Korol's desk, stuffed it in his pocket, and left the

room.

Rushak and Musha next encountered each other when they punched the time clock. As they did so, Rushak told Musha that he would not work with her. After this comment, the two went their separate ways again.

Musha and Rushak then cleaned separate offices. Since Musha was lead worker, she carried keys to all the offices. Rushak did not have any keys. As a result, Musha had to unlock the various doors for Rushak. When Musha unlocked one door for Rushak, she told him that she would check that office after he was finished to ensure that it was properly cleaned. This comment irritated Rushak who replied that Musha did not have to check his work. As the two went their separate ways again, Rushak's parting comment to Musha was: "You'd better enjoy your last day, you snot-nosed bitch." Rushak testified at the hearing that the reason he called Musha a "bitch" was because he felt she was following him from room to room and harassing him.

Musha and Rushak encountered each other again in Bud Selig's office. As they had done previously, they verbally sparred back and forth. This time the topic was whether or not it was part of Rushak's job to push Selig's chair back under his desk after the room had been cleaned. Following their verbal exchange, the two parted company again.

Shortly afterwards, Musha and Rushak saw each other in the hallway. Each verbally taunted the other, but the record does not indicate what was said in their short verbal exchange.

What happened next is disputed. There were no eyewitnesses to the incident other than those involved.

Musha, a woman of average size, testified that Rushak then ran down the hall towards her with his hand in a fist. As he was doing so, she asked him rhetorically: "What are you going to do, hit me?" Musha testified that when Rushak reached her he did just that, specifically hitting her in the shoulder. Musha testified that the force of the blow caused her to fall to the floor and her glasses to fly off her face.

Rushak testified that Musha came out of the women's rest room where she had been smoking marijuana and charged down the hallway towards him. Rushak, who is considerably larger and heavier than Musha, testified he held out his arm to fend her off and protect himself. Rushak testified that Musha ran into his extended arm and that this caused her to collapse on the floor. Rushak admitted that Musha ended up on the floor, but he testified he did not purposely knock her down.

After Musha got up off the floor, she told Rushak that she was going to call Korol and tell him what had just happened, to which Rushak replied "go ahead." She and Rushak then walked off together to a phone and called Korol at his home.

Although it is disputed who made the call, it is undisputed that both Musha and Rushak talked with Korol during the subsequent phone call. Musha talked first and Rushak was second. Each heard what the other told Korol about the incident.

Musha told Korol that Rushak had pushed her down causing her glasses to fly off and had called her a "snot-nosed bitch." After hearing Musha's account of the incident, Korol asked Musha to turn the phone over to Rushak, which she did. Korol then asked Rushak for his account of what had just happened. Rushak admitted to Korol that he had pushed Musha down which caused her glasses to fly off her face. He further told Korol that he could not work with her. Rushak never told Korol during this phone call that Musha was the aggressor in their altercation. Korol then told Rushak to clock out and go home, which he did.

The next day, January 26, 1994, Rushak called Korol at work. During this phone call Korol discharged Rushak. Korol told Rushak he was fired for pushing Musha down the previous night. Korol also told Rushak that no matter how angry he was with Musha that night, he should not have pushed her down as he did. Rushak then responded that if he lost his job over the incident, he thought Musha should lose hers as well. Korol replied that he was not going to fire Musha because she was a dependable long-term employe. At no point during this phone call did Rushak tell Korol that Musha was the aggressor in their altercation, or that Musha had smoked marijuana on the job.

The next day, Rushak went to County Stadium and talked with Chuck Ward about his discharge. Ward does not work for the Harry M. Stevens (HMS) Company; he works for the Milwaukee Brewers as the Director of Stadium Operations. Rushak testified that his purpose in going over Korol's head and talking with Ward was to "spill the beans" on the activities of HMS (cleaning) employes. Rushak testified he told Ward that HMS (cleaning) employes smoked marijuana and drank beer at the Stadium and left the Stadium during working hours without authorization.

The Union filed a grievance over Rushak's discharge which was processed to arbitration.

At the hearing Musha admitted she had smoked marijuana on the job. She testified she did not smoke marijuana on the job though the night of the incident with Rushak (January 25, 1994).

POSITIONS OF THE PARTIES

The Union's position is that the Company did not have just cause to discharge the grievant. The Union contends the Company has to prove that the grievant did what he was charged with doing, namely pushing Musha down. In the Union's view, the Company did not substantiate this charge. It notes in this regard that the grievant admitted that Musha ended up on the floor. Given

this admission, the Union believes the question is how that happened -- was it the result of being pushed (as Musha contends) or was it the result of her running into Rushak's extended arm (as Rushak contends). The Union notes that these stories differ and there were no eyewitnesses to the incident other than those involved. The Union infers that Rushak's account of the incident should be credited over Musha's. To support this premise, the Union calls the arbitrator's attention to the fact that Musha admitted at the hearing that she has smoked marijuana on the job. The Union speculates that given this admission, Musha may have been under the influence of marijuana the night of the incident with Rushak and not in control of her faculties. The Union also submits that Musha may have fabricated the entire incident with Rushak. Finally, the Union asserts in the alternative that no matter how the incident happened, Musha was difficult to work with and provoked Rushak on the night in question by yelling at him. The Union therefore requests that the grievant be reinstated with a traditional make-whole remedy.

The Company's position is that it had just cause to discharge the grievant. According to the Company, it proved that the grievant did what he was charged with doing, namely pushing Musha down with such force that it caused her glasses to fly off her face. To support this premise, it cites both Musha's testimony to that effect and Korol's testimony that Rushak admitted doing it during their phone call immediately after the incident happened. In the Company's view, their account of the incident is far more believable than Rushak's and thus their testimony should be credited instead of his. With regard to the level of discipline which was imposed, the Company believes termination was appropriate under the circumstances. It notes in this regard that the grievant was a short-term employe. The Company therefore contends that the grievance should be denied and the discharge upheld.

DISCUSSION

Article VI, Section 4 of the parties' labor agreement contains what is commonly known as a "just cause" provision. It requires that the Company have just cause to discharge employes. What happened here is that an employe, namely the grievant, was discharged by the Company. Given this disciplinary action, the obvious question to be answered here is whether the Company had just cause for doing so.

As is normally the case, the term "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely-understood and applied analytical framework has been developed over the years through the so-called common law of labor arbitration. That analytical framework consists of two basic questions: the first is whether the Company demonstrated the misconduct of the employe and the second, assuming this showing of wrongdoing is made, is whether the Company established that the discipline imposed was contractually appropriate.

As just noted, the first part of a just cause analysis requires a determination of the

grievant's wrongdoing. In making their overall case concerning the grievant's alleged wrongdoing, the Company reviewed the events of both January 24 and 25. The events that occurred on those two dates though are separate and distinct. When the Employer discharged the grievant, it made no reference whatsoever to the events of January 24. This of course means that the Employer did not rely on the events of that date (i.e. January 24) as the basis for the grievant's discharge. Instead, the Employer only cited what happened on January 25. Since the Employer relied exclusively on the events of January 25 to justify the grievant's discharge, the undersigned will do likewise. Accordingly, attention is turned to the events of that date.

It is undisputed that on the evening of January 25, 1994, there was an incident between Rushak and Musha wherein Musha was knocked to the ground with enough force that her glasses flew off her face. What is disputed is who caused it to happen. In other words, who was the aggressor? Musha and Rushak each point a finger, so to speak, at the other and contend they were the aggressor. Musha testified that after she and Rushak exchanged words in the hallway, Rushak ran down the hall toward her with his hand in a fist and hit her in the shoulder. Rushak testified that Musha came out of a rest room where she had been smoking marijuana and charged down the hall towards him; that he held out his arm to fend her off and protect himself; and that Musha ran into his extended forearm which caused her to fall down. Obviously, their testimony conflicts over who was the aggressor and cannot be reconciled.

After weighing the conflicting testimony concerning who was the aggressor, the undersigned credits Musha's account for the following reasons. First, Musha's account of the incident was corroborated in part by what Rushak himself told Korol in their phone call immediately after the incident. Specifically, Rushak told Korol that he had pushed Musha down. This statement, together with Musha's account, certainly led Korol to believe that Rushak was the aggressor and this is why Korol asked him (rather than Musha) to clock out and go home. The clear inference of Rushak's being sent home that night was that Korol viewed him as being the aggressor. If he was not the aggressor that night and was, as he testified, just trying to fend off Musha's charge, it is logical to assume that he would have said something to this effect to Korol. However, Rushak did not say anything to Korol to that effect in either of their phone calls on January 25 or 26. Specifically, Rushak never told Korol that Musha was the aggressor. As a result, the first time the Employer heard Rushak's contention that Musha was the aggressor in the January 25 incident was at the hearing. Obviously, Rushak's failure to mention this until the hearing undercuts his story because it gives the appearance of having been concocted for the hearing. Second, Musha's credibility as a witness was strengthened, not harmed, by her admission at the hearing that she had on previous occasions smoked marijuana on the job. Generally speaking, employees are loath to admit to engaging in prohibited conduct at work because they know there may be adverse consequences to them as a result. That being so, it was probably tempting to Musha to deny that she smoked marijuana at work. However, she did not do so. While there may be adverse consequences to Musha for making this admission, it greatly enhanced her credibility here. Third, the undersigned finds it hard to believe that Musha would try to physically assault Rushak (as he so testified) since he was considerably larger and heavier

than her. It would have been just plain dumb for Musha to attack Rushak because given his advantage in size, he could no doubt have inflicted far more damage on her than vice versa. Given the foregoing then, the undersigned credits Musha's testimony which establishes that Rushak attacked her and physically knocked her to the ground.

Having held that Rushak did what he was accused of doing (namely knocking Musha to the ground), the next question is whether this conduct warranted discipline. Arbitrators generally hold that such conduct constitutes misconduct and cause for discipline. In accordance with this accepted view, the undersigned finds likewise. The fact that Musha and Rushak had

argued constantly all evening and exchanged taunts just before Musha was knocked to the ground does not excuse or justify Rushak's actions. Whatever was said, Rushak's physically knocking Musha down was both inappropriate and intolerable.

The second part of a just cause analysis requires that the Company establish that the penalty imposed was contractually appropriate. Said another way, the punishment must fit the crime. Based on the following rationale, I conclude discharge was appropriate under the circumstances. First, while the normal progressive disciplinary sequence is for employes to receive warnings and suspensions prior to discharge, that does not mean that all discipline must follow this sequence. Some offenses are so serious they are grounds for summary discharge even if the employe has not been previously disciplined. Such is the case here because the parties have contractually agreed in Article VI, Section 4 that progressive discipline does not apply in certain situations, one of which is fighting. The grievant's conduct here can easily be categorized as fighting. This of course means that since the grievant engaged in fighting, the Company did not have to impose progressive discipline prior to discharge; instead, it could discharge immediately. Next, nothing in the record indicates that the grievant was subjected to disparate treatment in terms of the punishment imposed. While the grievant was fired and Musha was not, there is a logical and nondiscriminatory reason for this. The reason is that, as previously noted, the grievant was the aggressor in the incident and Musha was not. Simply put, she was the victim. That being the case, Rushak and Musha do not jointly share responsibility for what happened. Instead, the grievant alone bears responsibility for Musha being knocked to the floor. Finally, it cannot be overlooked that the grievant was an extremely short-term employe. In some disciplinary cases an employe's length of service with an employer serves as a mitigating factor. Here, though, it does not because the grievant worked for the Company just a short period of time. Accordingly, then, it is held that the severity of the discipline imposed here (i.e., discharge) was neither disproportionate to the offense nor an abuse of management discretion, but was reasonably related to the seriousness of the grievant's proven misconduct. The Company therefore had just cause to discharge the grievant.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That Michael Rushak was discharged for just cause. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 6th day of March, 1995.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator