BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 150 and UNICARE HOMES, INC. d/b/a JACKSON CENTER NURSING HOME	Case 17 No. 51965 A-5318

Appearances:

Mr. Thadd M. Hryniewiecki, Union Representative, Local 150, Service Employees International Union, 6427 West Capitol Drive, Milwaukee, Wisconsin 53216-2198, for the Labor Organization.

Atty. C. William Isaacson, Senior Labor Counsel, UniCare Homes, Inc. d/b/a Jackson Center Nursing Home, 105 West Michigan Street, Milwaukee, Wisconsin 53203, for the Employer.

ARBITRATION AWARD

The Service Employees International Union Local 150 and Unicare Health Facilities, Inc., d/b/a Jackson Center Nursing Home, 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 Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute over the meaning and interpretation of the terms of the agreement relating to discipline and discharge.
The Commission appointed Stuart D. Levitan, a member of its staff to hear and decide the grievance. Hearing on the matter was held on May 30, 1995, in Milwaukee, Wisconsin. The hearing was not transcribed, and the parties filed briefs by June 23, 1995.

ISSUE

Did the employer violate the collective bargaining agreement when it terminated Robert Eubanks?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE XI - DISCHARGE AND DISCIPLINE

> Section 1 - The Employer may discharge or suspend an employee for "just cause", but in respect to discharge, shall give warning of the complaint against such employee to the employee, in writing and a copy of the same to the Union, except that no warning notice need be given to an employee if the cause of such discharge is verbal or physical abuse of residents or staff (or failure to report such witnessed abuse); discourtesy; neglect of duty; destruction, abuse, or theft of facility, resident, or employee property; dishonesty affecting the facility; intoxication on the premises or on-premise possession of intoxicating beverages; persistent garnishments; unethical conduct; falsification and/or breach of confidentiality regarding employee data or other records; conduct adversely affecting the health and welfare of residents; punching a time card for another employee; violation of the Resident Bill of Rights; conviction of a felony; failing to report unavailability for work at least one (1) hour before his/her starting time; or other breach of a handbook Class III offense. However, no action shall be taken if the employee can show to the satisfaction of the Employer that his/her failure to notify the Employer due to an illness or other emergency physically prevented him/her from doing so. The Union will be notified as soon as possible after a member is discharged.
>
> . . .
>
> The safe and efficient operation of the facility requires that all employees comply with our work rules. These rules are designed to maintain a safe and pleasant environment for residents, visitors and staff.
>
> The purpose of the Discipline Procedure is to correct improper employee behavior by the use of the least severe penalty possible, consistent with the employee's offense.

OTHER RELEVANT PROVISIONS

The employer has promulgated an Employee Handbook which sets policies affecting all employes "except in those circumstances where a union contract takes precedence." As to discipline for non-introductory employees, the Handbook provides as follows:

EMPLOYEE DISCIPLINE PROCEDURE
(FOR NON-INTRODUCTORY EMPLOYEES)

The safe and efficient operation of the facility requires that all employees comply with our work rules. These rules are designed to maintain a safe and pleasant environment for residents, visitors and staff.

The purpose of the Discipline Procedure is to correct improper employee behavior by the use of the least severe penalty possible, consistent with the employee's offense. Employees will be subject to disciplinary penalty for violations of employer work rules. The right to fair and impartial discipline does not establish any actual or implied contract of employment with the employer.

Prior to imposing any disciplinary penalty, your supervisor will investigate to determine whether a work rule has been violated. You will ordinarily be afforded an opportunity to tell your side of the story to your supervisor before any final discipline is applied. In serious circumstances, an employee may be suspended pending investigation. The penalties available to management are specified herein. If you believe you have been unfairly disciplined, you may utilize the "Employee Complaint Resolution Procedure" provided in this handbook.

The following are the disciplinary penalties for non-introductory employees, in order of severity:

1. **First Notice:** An initial notice outlining the improper conduct, its consequence(s), and a warning against repeated violations. A copy of this notice is recorded in the personnel file.

2. **Second Notice:** More serious than the first notice, this penalty is also recorded in the personnel file.

3. **Final Notice:** The final notice against the work-rule violations which does not impose financial loss on an employee. This is documented in the employee personnel file.

4. **Suspension Without Pay:** This severe penalty can last up to five (5) scheduled work days. It is the last step before discharge and is recorded in the personnel file.

5. **Discharge from Employment:** This is the last step and the employee's employment is terminated.

Work rules, and the penalties associated with their violations, are grouped into three (3) general categories as follows:

Class I: These are normally lesser breaches of policy which can be simply corrected without serious disciplinary measures. Supervisors will issue a first notice to employees for minor violations with an emphasis on correcting the behavior.

Class II: These are violations which necessitate immediate disciplinary action in the form of a final written notice for the first offense. Because Class II infractions are more serious, the first and second notice steps are skipped.

Class III: These are serious violations of facility rules or employee misconduct which justify immediate discharge without regard to the employee's length of service or prior conduct.

In all classes, the list of offenses are not all inclusive. Employees can be disciplined for any lawful reason under circumstances the company deems appropriate. Employment is always at will.

GROUPS OF OFFENSES AND ASSOCIATED PENALTIES

CLASS I OFFENSES: Examples of these offenses include, **but are not limited to:** (other offenses may also merit these penalties)

1. Failure to comply with employer uniform or name tag policy.

2. Disruptive or unruly behavior or unreasonable noise on facility premises.

3. Creating or contributing to unsanitary conditions.

4. Improper or wasteful use of equipment and/or supplies.

5. Minor infraction of facility safety rules.

6. Minor disrespect to any supervisor.

7. Not attending a mandatory in-service.

8. Punching someone else's time card or having someone punch yours for time worked.

9. Smelling of alcohol, but not impaired. (Employee will be sent home.)

10. Failure to follow proper call-in procedures.

11. Working unauthorized overtime.

Penalties for Class I Offenses:

First Offense: First Notice.

Second Offense: Second Notice.

Third Offense: Final Notice.

Fourth Offense: Suspension without pay.

Fifth Offense: Discharge.

CLASS II OFFENSES: Examples of these offenses include, **but are not limited to:** (other offenses may also merit these penalties)

1. Smoking in an unauthorized area.

2. Improper documentation of resident medical records.

3. Horseplay or misconduct which does not result in damage to property or injury to any person.

4. Verbal abuse or serious discourtesy to any other employee, supervisor, or any other individual in the facility.

5. Sexual harassment of any employee or supervisor. (Can be Class III offense.)

6. Serious disrespect to any supervisor.

7. Being away from duty station without authorization.

8. Failure to report to the supervisor an on-the-job accident or injury.

9. Inconsiderate care of any resident of the facility not considered by the management to be abuse.

10. Soliciting monetary contributions or distributing non-work related materials in patient care areas.

11. Interfering with or purposeful distraction of another employee in the performance of his/her work.

12. Eating food prepared and intended for residents.

13. Use of profane, obscene, vulgar or abusive language. (Such language used toward a resident is considered abuse, therefore is considered a Class III offense.)

14. Receipt of a gift, loan, or compensation from a resident or resident's family member.

15. Minor violation of resident's rights.

16. Minor medication error.

17. Violation of a facility safety rule.

18. Use of resident's personal property (radio, TV, phone, etc.)

19. Willful failure to perform job duties.

Penalties for Class II Offenses:

First Offense: Final Notice.

Second Offense: Suspension without pay.

Third Offense: Discharge from employment.

CLASS III OFFENSES: An employee will be subject to immediate discharge for **some offenses.** Other offenses may merit discharge. Examples of these offenses include, but are not limited to: (emphasis in original)

1. Verbal, mental, physical, or sexual abuse of any resident of the facility, family member, visitor, or fellow employee, or neglect or mistreatment of any resident of the facility.

2. Theft, damage, or destruction of property of employer, resident, visitor, or other employee of the facility.

3. Falsification of any document, including the employee's employment application; punching someone else's time card or having someone punch yours for time not worked.

4. Disorderly conduct on facility property resulting in injury to any individual, or fighting on company premises.

5. Unauthorized removal of records or unauthorized giving of confidential information.

6. Drinking or possession of alcoholic beverages, use or possession of drugs, or being under the influence of drugs or alcohol while on company property.

7. Sleeping during working hours.

8. Being in possession or bringing in weapons on facility property (e.g., guns, knives, etc.)

9. Failing to report immediately to a supervisor an incident of abuse, neglect, or mistreatment witnessed by an employee or of which an employee has knowledge.

10. Insubordination; refusal to perform a task as ordered.

11. Serious disrespect to any supervisor in the presence of

others.

12. Serious violation of a resident's rights.

13. Serious medication error that could or does result in harm to a resident.

14. Serious violation of a safety rule.

15. No call/no show.

BACKGROUND

The grievant, Robert Eubanks, was a Residential Living Aide at Jackson Center for approximately one year prior to his discharge on November 21, 1994. 1/

The events which resulted in Eubanks' discharge began on November 7, when Human Resources Coordinator James Wright undertook an investigation of alleged patient abuse by another aide, Terry Wilson, said to have occurred on November 6, during the shift on which Eubanks was assigned. After being unsuccessful in his first attempt to reach Eubanks, Wright finally spoke to him on November 9; on November 10, he memorialized this conversation as follows:

> I James Wright spoke to Robert Eubanks by phone the evening of 11-9-94 approx. 2300 hrs. Robert stated he was in the area the morning of 11-6-94 when he witnessed Terry Wilson intervene a behavior problem involving Phil Otto. Robert stated he was standing at the 3rd fl. nurses station at about 5:30 am when Phil Otto began hitting other res. Terry stepted (sic) in between, and redirected Phil to his room. Robert stated Terry escorted Phil to his room door-way and turned and walked to nurses station. 2/

In part on the basis of Eubanks' oral statement, the employer cleared Wilson of the allegation of patient abuse. Eubanks, however, failed to submit a written statement as asked for by Wright. On November 10, Wright suspended Eubanks for five days (November 10, 11, 14, 15, 16), and issued the following Disciplinary Action Report:

> Specify work rule, policy, standard, etc., violated Class III #10 pg 29 Insubordination; refusal to perform a task as ordered.
>
> Describe what happened Employee was asked to submit a statement concerning an incident he witnessed which was being investigated. Employee clearly stated he understood what was being asked of

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1/ Unless otherwise indicated, all dates are 1994.

2/ Otto is a resident, not an employe.

him. Employee did not comply with request.

The section asking about prior disciplinary action in the employe's file within the preceding 18 months was blank. 3/ In the area for employe comment, Eubanks wrote as follows:

> I didn't get my statement in when he asked me. I had his statement on the following night.

Notwithstanding his disagreement with the discipline, Eubanks did not grieve the five-day suspension. Subsequently 4/, Eubanks called Wright to discuss the suspension. During that conversation, Eubanks said, "this is bullshit," at which time Wright hung up.

On November 14, Wright sent to Eubanks the following notice, via certified mail:

> This letter is to inform you of a reinstatement meeting which will be held regarding the reinstatement of your employment with Jackson Center.
>
> This reinstatement meeting is scheduled for Nov. 18, 1994, at 1:30 p.m. Failure to appear at this meeting will result in further disciplinary action.

Eubanks testified he did not receive this correspondence until November 19. A postal return receipt, bearing what appears to be Eubank's signature, states as date of delivery November 18. The receipt does not show time of day.

Eubanks met on November 21 with Wright and Senior Residential Service Director Hughie Robinson; union steward Lily Todd was also present at Eubanks' request. Wright testified that such a "reinstatement meeting," was unique, in that other returning employes simply reported back to work when their suspension was over. Wright testified that his plan was to discuss Eubanks's

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3/ At hearing, the Employer produced a Disciplinary Action Report dated May 11, 1994, alleging a violation as follows: "Class I offenses: #1. Failure to follow policies and procedures not otherwise addressed in this code of conduct.'" In the employe handbook promulgated by the Employer, a Class I #11 offense is defined as "working unauthorized overtime." The events described in the May 11 disciplinary report have nothing to do with unauthorized overtime.

4/ There is some confusion as to the date of this phone call. My notes show that Wright testified the conversation occurred on November 11; the employer's brief gives the date as November 14.

non-compliance with the request for a statement about the alleged abuse situation, reinstate him, and issue a Final Notice for the earlier phone conversation incident.

During the meeting, however, Eubanks used some profanity. Wright's sworn testimony was, "he again said, 'this is bullshit.' Something to the effect, 'fuck this shit.'" Wright later elaborated, testifying that Eubanks specifically directed the words, "fuck this shit, stupid ass shit," directly at him. Robinson's testimony agreed with Wright's more detailed recollection. Eubanks initially testified that, "really, I didn't say anything," which he later modified to acknowledging that he said, "that's bullshit." He denied, however, saying the words, "fuck this shit, stupid ass shit." Union steward Todd testified that Eubanks may have said something which she didn't quite hear, but she was sure it wasn't what the employer alleged.

Upon Eubanks making his comments, Robinson and Wright stopped the meeting, conferred in the hallway, and notified Eubanks he was suspended pending investigation. That day, they caused to be issued two Disciplinary Action Reports, as follows:

> 1. Date of Violation 11-14-94
>
> Specify work rule, policy, standard, etc., violated #6 pg. 28 Serious disrespect to any supervisor. Class II
>
> Describe what happened During phone conversation employee used the term "Bullshit" when addressing Human Resources Coordinator.
>
> Disciplinary action being taken Final Notice
>
> Date of Violation 11-21-94
>
> 2. Specify work rule, policy, standard, etc., violated #11, pg. 29, Class III Serious disrespect to any supervisor in the presence of others.
>
> Describe what happened Employee was called in today to be re-instated to employment and addressed about the disrespect during a phone conversation on 11-14-94. While sitting in H.R. Office, employee started using profanity saying "fuck this shit," "stupid ass shit." Others persons present Hughie Robinson & Lillie Todd.
>
> Disciplinary Action Taken Suspension without pay Pending Investigation

Also on November 21, Jackson Center Administrator Mary Jo Wirth and Robinson issued

the following letter to Eubanks:

> This letter is to inform you that after further investigation of the incident that took place on 11/14/94, it has been determined that you are in violation of the class 3 number 11 (Serious disrespect of a supervisor in the presence of others).
>
> The result of our investigation shows that the above violation did in fact take place. Therefore, the facility is terminating your employment due to this class 3 offense effective Monday, November 21, 1994.
>
> Upon receiving this letter you will need to contact Hughie Robinson, Residential Services Director concerning setting up an appointment (during regularly schedule business hours) to receive any personal belongings.
>
> Any payroll checks due to you will be mailed to you. Terminated employees are not allowed to visit with residents or employees on facility grounds. Failure to comply will result in police intervention.

Eubanks and the union grieved the discharge on November 22. On December 9, Wirth issued the following correspondence:

> I have carefully reviewed the grievance of Robert Eubanks and (another employe not involved in this proceeding). Because I have found the evidence to be overwhelming in each case I have determined that a denial of each grievance is in order.

On December 21, the union filed a request with the WERC for grievance arbitration.

THE PARTIES' POSITIONS

In support of its position that the grievance should be sustained and the discharge overturned, the union argues as follows:

> Neither of the grievant's alleged misdeeds -- his failure to submit a written statement as part of an investigation of another employe, or his alleged use of abusive language -- justify discharge.
>
> While employes should cooperate fully in all investigations of

alleged patient abuse, the grievant's actions did not constitute insubordination as the employer has alleged. The grievant gave a verbal statement. Although the grievant's busy work schedule caused him to forget initially to reduce the statement to writing, he did prepare such a statement in a timely manner, only to forget to bring it in. By the time he brought the statement in on November 10, 1994, he was already suspended. and could only leave the statement under a supervisor's door. The employer cannot prove insubordination because the grievant did not refuse to comply with the request for a written statement; the grievant was merely unable to give the statement in the time frame the employer had requested. It was not, nor could it be, proved that the grievant did not write a statement. The fact that the employer does not have the said statement is irrelevant. The grievant never grieved the suspension arising from these events because he felt he was in error in not submitting a written statement to his supervisor in a timely manner. Further, the employer's need for the written statement was reduced, given that the grievant's verbal statement had already been adequate to exonerate the person charged with the abuse.

Nor is the allegation about using abusive language towards a supervisor in the presence of others grounds for discharge. Although using profanity is not condoned, it is part and parcel of the American vernacular. The employer's allegations as to what the grievant said in the meeting are refuted by the grievant and his witness. Regardless, the employer discharged the grievant for a comment made on an earlier date, in a telephone conversation with the supervisor which was not in the presence of any others.

Arbitrators have frequently ruled to reduce or even totally eliminate penalties for using profanity either to or in front of supervisors; even if it is assumed that the grievant used profanity, it did not rise to the level of a dischargeable offense. This case involves an over-reactive supervisor, a shoddy investigation and a knee-jerk response.

The employer did not have just cause to discharge the grievant. The grievance should be sustained, and the grievant returned to work and made whole.

In support of its position that the grievance should be denied, the employer asserts and avers as follows:

No credible evidence disputes that, in the context of an employment-related meeting with supervisors, the grievant made comments which were vulgar, discourteous, inappropriate and abusive. The union's claim that this language was not directed at any individual is untenable in that it was said as the grievant faced two supervisors who were attempting to lead him to see severe failure in his duty as an employe.

The grievant demonstrated a complete lack of appreciation of the responsibility of a nursing home employe, shirking a crucial responsibility by steadfastly refusing to submit a written report on what he knew of alleged abuse. It is inconceivable that any employer would not terminate an employe with such a record of conduct and retorts to supervisors.

The discharge was the culmination of a series of events, including the grievant's failure to provide the required statement; vulgarity at a supervisor in a telephone conversation, and the stream of vulgarity in the meeting. Termination was richly deserved, and the contractual requirement of just cause met.

No evidence supports the union's claim of an effort to get the grievant with false allegations. Nor is there any evidence of extenuating circumstances.

The totality of the facts are against the grievant, including an on-going disregard of his duty in regard to an abuse situation. To reinstate this grievant would send the message that any attitude or vulgarity is acceptable and no one will lose the job no matter how poorly he fulfills his care duties or talks to his supervisors. Why should any helpless resident have to run the risk of an individual who really could not be bothered to report on what he knew about abuse? To return him to work would be an outrage!

The parties mutually waived the filing of reply briefs.

DISCUSSION

Robert Eubanks twice showed serious disrespect to supervisor James Wright. The question before me is whether, pursuant to the terms of the collective bargaining agreement, those incidents, either individually or collectively, justify discharge.

The collective bargaining agreement allows the employer to suspend or discharge "for 'just cause.'" The agreement also provides for a warning notice prior to discharge, except in the case of a handbook Class III offense. The agreement also explicitly provides for corrective, progressive discipline through "the use of the least severe penalty possible, consistent with the employee's offense." The handbook, incorporated by reference, re-states this policy.

The handbook deals with "serious disrespect to any supervisor" in two categories. If done "in the presence of others," it is a Class III offense; otherwise, it is a Class II matter. For Class II offenses, the first offense triggers a Final Notice; the second, a suspension without pay; the third, discharge. The introductory paragraph for Class II states that employes "will be subject to immediate discharge for **some offenses.** Other offenses may merit discharge." (emphasis in original)

Taking the provisions of the collective bargaining agreement and the employe handbook in conjunction, I conclude that all discipline is subject to the just cause standard, as is explicitly acknowledged by the employer in its brief; that the employer has committed to a policy of corrective, progressive discipline; that the first instance of a Class II offense triggers a final notice, and that some, but not all, instances of Class III offenses provoke discharge.

In assessing whether the employer had just cause in this instance, I have reviewed all the cases which the advocates have cited to me, as follows:

In Kraemer & Sons, Inc., 81 LA 821 (1983), the arbitrator reinstated, without back pay, a union steward who was profanely abusive to a supervisor in the presence of others. In that case, however, the supervisor himself, and other employes, frequently, even routinely, used profane language. Further, the supervisor had never warned the grievant about the possible consequences of his insulting conduct. These two conditions distinguish Kraemer & Sons from the case before me, where there is no testimony as to widespread profanity at the nursing home, and the consequences of serious disrespect to a supervisor in the presence of others are explicitly stated.

In White Engines, Inc., 80 LA 1038 (McCurry, 1983), the arbitrator reduced from three days to two a suspension for profane and abusive language directed at a supervisor. The arbitrator found that the discipline was disproportionately heavy compared to another instance of discipline for a similar instance, and was contrary to the implied policy of progressive discipline. Here, there is no evidence as to comparative offenses and punishments, but there is an explicit policy of progressive discipline.

In Ozalid Corp., 80 LA 1061 (Denson, 1983), the arbitrator converted a discharge to a six-month disciplinary suspension. Because the grievance involved the interpretation of a "last chance" agreement, rather than the initial profanity-related grievance, I find this case not on point.

In Amex Nickle Refining Co., Inc., 80 LA 344 (Milenz), the arbitrator cleared the grievant of allegations of physical abuse and threats to a supervisor, but found that he had engaged in foul and abusive language toward the supervisor, an offense the arbitrator described as "very serious," and one that has lead to appropriate termination for a first offense. Because the discharge imposed was so wildly disproportionate to other instances of discipline for related offenses, the arbitrator reduced the discharge to a five-month disciplinary suspension without pay. Again, in the case before me, there is no evidence to establish that the employer had imposed lesser penalties on other employes for like offenses.

In Jewish Hosp. & Med. Center of Brooklyn, 80 LA 1126 (Talmadge, 1983), the arbitrator sustained the grievance and reversed a one-day suspension of an employe who was charged with insubordination for telling his supervisor, "Oh! Mr. Velez, be quiet!" Given the difference between the general category of insubordination and the extremely specific offense with which the instant grievant is charged, and the fairly wide gap between what the Jewish Hospital grievant said and "fuck this shit, stupid ass shit," I do not find this case particularly persuasive.

In Hastings Mfg. Co., 26 LA 713 (Howlett, 1956), the arbitrator made the grievant whole and reduced a one-week disciplinary lay-off to a warning, the penalty contractually provided for the first offense of "uttering vile, obscene and provocative remarks." Because the award uses dashes instead of the grievant's words, and because of the explicit warning/one day suspension/one week suspension/discharge progression contractually provided for, I cannot find this case particularly persuasive either.

In FSC Paper Corp., 65 LA 25 (Marshall, 1975), the arbitrator reduced a discharge to a two-week disciplinary layoff for an employe who told his foreman, "fuck you." The arbitrator found that the normal disciplinary progression was verbal, written, suspension and only then termination; that the employe was a hypersensitive person who was not informed of certain production problems, and believed that other employes were making him the butt of an obscene gesture; that the employe was then recovering from the recent removal of part of his stomach; that the foreman himself "helped to provoke" the grievant by the blasphemous directive to "keep your ------ hands off" certain equipment, and that the encounter took place away from other employes.

In St. Regis Paper Co., 75 LA 819 (Rezler, 1980), the arbitrator reduced a discharge to a nine-month disciplinary suspension for an employe whose five episodes of insubordination in a 20-minute period culminated in his removal from the premises by the police. The arbitrator found that, "despite his clean past record," the grievant deserved discharge "if not for a procedural error" made by the employer, namely that the supervisor "failed to forewarn him of the grave consequences of his disobedient behavior." In the case before me, however, the discipline for certain misconduct is explicitly stated and finely calibrated, and well known to employes. Further, as a practical matter, it would be impossible for a supervisor to anticipate a profane outburst and warn of its consequences.

In Marion Power Shovel, Co., Inc., 69 LA 339 (McDermott, 1977), the arbitrator reduced a discharge to an 11-month unpaid suspension for an employe who committed acts of insubordination, coupled with directing an obscenity at a supervisor. The arbitrator found that the employe had been developing a serious problem or poor work habits over time, and that the employer's practice of issuing only verbal warnings had likely had "the effect of lulling the employe into a false sense of security," especially given the collective bargaining agreement's provisions for progressive discipline. The arbitrator further found that the grievant was suffering from a mental illness, which, when "coupled with failure of the Company to follow the corrective disciplinary procedure provided for in the contract, … makes discharge an unreasonable penalty." In arbitral case law, this certainly stands as a very pro-grievant decision. Given the unique circumstances which differentiate these cases, however -- the grievant's mental illness, and the employer's failure to comply with the agreement's disciplinary provisions -- I am not completely sure how directly on-point this case is.

In Basic Magnesia, Inc., 69 LA 737 (Manson, 1977) the arbitrator removed from the grievant's file a written warning which had been issued for angry "conduct and attitude toward warehouse foreman," in a workplace occupied by "very manly men." Given the abysmal quality of this award -- replete with references to matters outside the record, and arbitral musings on citizenship and the psychological relationship between the supervisor and the grievant -- I cannot find this award at all persuasive in the matter before me.

In Washington IGA Foodliner, 78 LA 391 (O'Reilly, 1982), the arbitrator reduced a discharge to a five-month suspension for an employe who had a public, loud and ultimately profane argument with her supervisor. The arbitrator found that the employer had not complied with the collective bargaining agreement's requirement's mandate that employes be provided with a copy of corrective actions taken, that a supervisor had made rude and improper sexual jokes and comments at the grievant, and that the grievant had performed her job in a relatively acceptable manner for most of her nine years' tenure. Given that the arbitrator really did not explain his actions, other than a generic reference to the discussion and findings, it is hard to know what this case stands for, other than significant tolerance by an arbitrator.

In Elastomeric Products, 94 LA 610 (Cantor, 1990), the arbitrator sustained the discharge of an employe who, in the arbitrator's words, "was or became loud, aggressive, wild and socially irrational. She would scream and growl. She would show body English of extreme dissatisfaction. She consistently showed her hostility, laughing when one object of her dislike had been hurt and projected her attitude by imagining in her talk harm and violent retaliation." Clearly, the behavior of the Elastomeric grievant was so wildly beyond the pale of acceptable workplace behavior that the actions of the grievant before me appears inconsequential by comparison.

In Stanley G. Flagg & Co., 90 LA 1176 (Valentine, 1988), the arbitrator sustained the discharge of an employe who, referring to a barrel-like container he was carrying, said to a female co-worker, in an aggressive and belligerent manner, "you know what I ought to do with this

fucking thing? I ought to put it over your fucking head." The arbitrator, also noting the grievant's 17 offenses within a 27-month period, applied the *Dougherty* "seven factors" test and concluded the discharge was appropriate. Again, if this case stands for what level of offenses is required to establish just cause, the instant grievant looks good in comparison.

In Rockwell International, 88 LA 418 (Scholtz, 1986), an arbitrator sustained the discharge of an employe, upon receiving some criticism of his welding work-product, twice told two supervisors, "go fuck yourself," refused to surrender his employe badge, and, after the badge was taken, went into the supervisor's office and retook it. Noting that the offenses took place over a period of several minutes, which should have given the employe time to cool off, the arbitrator described this as "the most egregious case of blatant insubordination …'the Ultimo' of insubordination," and determined that the employer "clearly" had just cause to terminate for insubordination. I note the abusive language was aggressively and explicitly directed at supervisors, instead of merely being altered in their presence.

In Montebello Container Corp., 85 LA 1011 (Kaufman, 1985), the arbitrator sustained the discharge of an employe who called his supervisor "puto," which the award defined as the Spanish term for "queer … faggot of some sort," or "the equivalent of calling someone an asshole." The arbitrator determined the term was scurrilous, insulting and insubordinate and "undoubtedly … subject to disciplinary action." However, the arbitrator specifically declined to determine whether the name-calling itself justified discharge, due to the grievant's overall woeful work record, which the employer explicitly relied on in issuing the discharge.

In Marshalltown Trowel Co., 73 LA 764 (Smith, 1979), the arbitrator sustained the discharge of an employe who twice called the company President "an asshole." Noting the grievant's extensive disciplinary record for absenteeism, and an incident wherein he called the plant superintendent "a moron," the arbitrator, explicitly factoring in the grievant's past behavior, denied the grievance.

In Robertson Can Co., 81 LA 569 (Morgan, 1983), the arbitrator sustained a grievance and returned to work, but without back pay, an employe who had been discharged for rushing up to a supervisor, thrusting his fist and index finger in his face and shouting, "If Holt wants me as a f---ing committeeman, then he can have me as a f---ing committeeman and you'll have a f---ing grievance over it." The arbitrator found that the comment came in the union/management context, rather than in the employe/supervisor context; that there was neither physical contact nor its threat; that the grievant had a 17-year history with the company with only one disciplinary notice (for absenteeism); that the supervisor himself had used similar epithets on occasion, and that, "whether we like it or not … there has been a vast change in the use and public acceptance of vulgar language," so that "what would have been opprobrious language even a few years ago is now commonly used in the entertainment field such as the theater and movie industry."

In Burton Mfg.Co., 82 LA 1228 (Holley, 1984), the arbitrator sustained a grievance and

reinstated, but without back pay, an employe who called his supervisor "asshole," and the company president "son of a bitch," and asked to meet the supervisor "anywhere, anytime." The arbitrator found that prior alleged incidents of discipline had not been documented.

In National Gypsum Co., 74 LA 7 (Ray, 1980), the arbitrator sustained a grievance and reduced from a discharge to a disciplinary lay-off without pay for an employe who twice told his supervisor "fuck you," after the supervisor told him he would "fire his ass" if he was caught smoking again in the no-smoking area. The arbitrator found as mitigating factors the fact that the grievant had not previously used abusive language toward a supervisor; that the grievant had not previously been warned or otherwise disciplined; that the grievant was not really threatening the supervisor, and that the outburst was in "a situation which did not involve his work performance." In the case before me, the grievant had used abusive language in a telephone conversation with the supervisor, if not necessarily directed at the supervisor, and the grievant had only recently been suspended.

In Mead Packaging Co., 74 LA 881 (Ziskind, 1980), the arbitrator sustained a grievance and reduced a discharge to a three-day suspension for an employe who made an obscene hand gesture at his supervisor. The arbitrator found as mitigating factors the facts that there was substantial frustration and confusion on the production line the morning in question, that all participants, including supervisors, engaged in profanity, and that there was no permanent breach of good working relations.

In TRW, Inc., 76 LA 782 (Feldman, 1981), the arbitrator sustained a grievance and modified a termination into a suspension for an employe who, in a disciplinary meeting called to discuss her abusive and threatening tirade of the day before, "used the word 'fucker,' 'mother fucker,' 'bastard,' 'son-of-a-bitch' and all other choice words of the English language directed toward the Company and Company management." The arbitrator determined that the grievant "used the defense of discrimination as an afterthought in her defense of her termination and to cloud the issue of her insubordinate conduct which certainly took place," but found that, as a twelve-year employe, she was "well trained, able to comprehend her work duties and needful of gainful employment, especially under these times of economic stress." He concluded that "it appears in this file that there is sufficient evidence so as to mitigate the termination into a suspension."

In PRC Systems Services Co., 76 LA 1058 (Saracino, 1981), the arbitrator reduced a termination to a one-month disciplinary suspension for an employe who was arguably insubordinate. Because the facts of this case are not on point, and because the arbitrator relied so mechanistically on the *Dougherty* seven-factors test, I find this case unworthy of serious consideration. I also disregard Mobil Oil Corp., 87 LA 837 (Koven, 1986), because its facts are so inapposite.

In Everfresh Inc., 99 LA 1038 (Allen, 1992), the arbitrator found that just cause did not

exist to discharge an employe who yelled, "I'll take care of you and make you pay," where words were uncertain and ambiguous, grievant never physically attacked supervisor or intended him physical harm, and grievant's further comment, "I'll take him out" was not addressed to or heard by supervisor. The arbitrator returned the grievant to work without back pay. In the instant case, there are no allegations of such threatening comments, which I find somewhat less ambiguous than did Arbitrator Allen.

In Warren Assemblies Inc., 92 LA 521 (Roumell, 1989), the arbitrator reduced a discharge to a ten-day suspension for an employe who told a supervisor, "leave me the fuck alone. You are a little bitch," which the arbitrator found was said in response to provocation by the supervisor (namely excessive and unwarranted discipline.) Though the collective bargaining agreement stated that "fighting, use of abusive language or threatening physical violence to a supervisor" was a Class II offense, for which "the penalty … shall be AUTOMATIC DISCHARGE," (emphasis in original), the arbitrator found that "the rules for Class II Offenses suggests that the Company does follow corrective discipline," also referred to as progressive discipline. The arbitrator held that "though this would be a violation of Rule F, a Class II Offense, it does not mean under the just cause standard that this would be grounds for automatic discharge," because "again, the just cause standard would apply." Because of the relationship between supplemental rules and the underlying collective bargaining agreement, and the concept of an employe's response to a supervisor's provocation, I find this case very useful in analyzing the grievance before me.

In the case before me, certainly there was no provocation raising to the level of the improper discharge to which the Warren Assemblies grievant was responding. However, there was a situation which helps explain Eubanks' behavior.

The situation is this: On November 21, Eubanks has been away from work since the end of his shift on November 9, representing five work days. That suspension was occasioned because, while he gave an oral statement which the employer accepted as helping to dispel an accusation of patient abuse against another employe, he failed to submit a written statement in a timely manner. Now, having accepted that suspension without grievance, Eubanks is called in to a unique "reinstatement meeting," and told repeatedly about his responsibilities to the system. He feels his supervisors are lecturing him as one would a child. Annoyed, frustrated, defensive, embarrassed, he utters some abusive profanity.

I accept the employer's statement about what it was Eubanks said. But while I believe the phrases, "fuck this shit … stupid ass shit," were spoken in the presence of supervisors, I do not believe they were spoken to supervisors. Their mere utterance in the presence of supervisors and the union steward may well have constituted disrespect, even serious disrespect; but it was far short of the direct, hostile, accusatory abuse featured in many of the cases discussed above.

There are other factors in the employer's case which trouble me. The first is the discharge

letter of November 21, which explicitly states that the precipitating event was "the incident that took place on 11/14/94." 5/ That incident was the telephone conversation between Eubanks and Wright; clearly, there was no one else present during that incident. By definition, "the incident that took place on 11/14/94" could not constitute a Class III, # 11 offense; indeed, Wright testified that his response to the November 14 phone call was to issue a Final Notice to Eubanks for a Class II, #6 offense.

It is axiomatic that employes have a right to know the specific charge against them. As of November 21, Eubanks was notified that he was discharged for the incident of November 14. But the November 14 incident was not one which properly subjected Eubanks to discharge. No evidence at hearing, and no argument in the company's brief acknowledges that error.

The November 14 incident also figures in another aspect of the employer's case which I find extremely troublesome, namely the Disciplinary Action Report/Final Notice which this incident triggered.

It is noteworthy that that Report for the November 14 incident was not prepared until November 21, a full week after its occurrence, and three days after the date on which the "reinstatement meeting" was to occur. Wright testified he was going to issue the Final Notice discipline upon Eubanks' reinstatement; as stated in the employer's brief, Wright "was going to discipline Mr. Eubanks with a final notice for serious disrespect to a supervisor as a result of the telephone conversation and that he was planning to re-instate him." But that reinstatement was originally scheduled to take place on November 18; it was only Eubanks' failure to appear that pushed the meeting back to November 21. If the employer intended to issue this discipline upon Eubanks' reinstatement, the Disciplinary Action Report should have been prepared in time for November 18. Moreover, one could assume that, had the employer made a contemporaneous decision that the November 14 incident justified discipline (i.e., prior to the writing of the Report on November 21), the Report would have been prepared much earlier than it was. Finally, I note that the Report bears the signature of Lillie Todd, who was present at the November 21 meeting.

I am not saying that the employer only prepared the Report for the November 14 incident after the November 21 meeting broke up after Eubanks' profane comments. But there is nothing in the record to indicate that that is not what happened.

I am also troubled by the way the employer justified the discharge as "the culmination of a series of events," namely the failure to provide the written statement, the November 14 incident,

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5/ As noted above, there is conflicting testimony and evidence as to whether the conversation occurred on November 11 (Wright's testimony) or November 14 (the documentary evidence). For the sake of clarity, I will refer to the incident as having occurred on November 14.

and the November 21 incident. It is true that an important aspect of measuring just cause is an assessment of the employe's relevant performance and disciplinary record. However, I believe the employer is applying this important concept inappropriately, specifically as the employer relies on the grievant's failure to submit the written statement. The employer disciplined the grievant with a five-day suspension for that event; it cannot punish him again for the same offense.

I also find misleading the way the employer describes the grievant's failure to submit that written statement, particularly the question, "Why should any helpless resident have to run the risk of an individual who really could not be bothered to report on what he knew about abuse? To return him to work would be an outrage!"

Of course, as the employer knows, the grievant did orally report what he knew, in a manner of sufficient credibility and detail that the employer relied on the grievant's report in reaction to the situation. And the employer also knows there was no abuse, but rather an unfounded allegation. Certainly, Eubanks should have submitted a written statement in a more timely manner. But the facts of the incident simply do not justify the tone or terms of the employer's argument.

Finally, I measure this series of incidents against those in the cases which both parties have cited to me, and find that it falls substantially short of the sort of abusive and threatening situations which arbitrators have found to justify discharge.

The concept of "just cause" requires that the employe be aware of the consequences of an action, and that the action alleged actually have occurred. But above all else, just cause requires a legitimizing link between offense and punishment. There is no such link here between the grievant's actions and the employer's response. The termination was without just cause.

Clearly, however, some level of punishment is justified. The grievant was disrespectful to his supervisor in the phone call of November 14, and did show serious disrespect to a supervisor in the presence of others at the meeting of November 21. The handbook which the employer promulgated provides for a maximum suspension without pay of five days.

Accordingly, on the basis of the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained. The employer shall reinstate the grievant with back pay, minus a five-day suspension and the value of any other income which the grievant would not have received but for his discharge. I shall retain jurisdiction for 45 days to resolve any disputes which may arise in the implementation of this award.

Dated at Madison, Wisconsin, this 22nd day of September, 1995.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator