

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

NORTHERN EDUCATIONAL SUPPORT TEAM

and

PHELPS SCHOOL DISTRICT

Case 10  
No. 53213  
MA-9273

Appearances:

Mr. Gene Degner, Director, NTU-Central, appearing on behalf of the Union.

Ms. Lisa J. Wood, Attorney, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Union above are parties to a 1995-97 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discharge grievance of Joseph LaFata.

The undersigned was appointed and held a hearing on January 4, 1996 in Phelps, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on March 19, 1996.

Stipulated Issues

1. Did the Board violate the collective bargaining agreement in discharging Joe LaFata?
2. If so, what is the appropriate remedy?

Relevant Contractual Provisions

ARTICLE XIV - DISCIPLINE

- A. All new employees shall serve a six (6) month probationary period. During such period, they shall not be entitled to just cause for discharge or have access to the grievance procedure. Employees who are terminated or who voluntarily quit and are rehired by the District, shall be considered as new employees.

- B. After serving a six (6) month probationary period, no employee shall be discharged, suspended, disciplined, or receive a written reprimand without just cause. All information forming the basis for disciplinary action shall be made available to the employee and the union, upon request.
- C. All employees shall be entitled to have present a representative of the union when being disciplined.

### Facts

Grievant Joe LaFata had worked for the District for four years as a custodian when he was discharged on August 15, 1995, for reasons characterized by the District at the hearing as insubordination; misrepresentation; refusal to follow policy and the contract; quality of work; and exhibiting inappropriate behavior of a sexual nature.

Virtually all of the evidence is in controversy, and the District introduced testimony of the District's superintendent and of the grievant's immediate supervisor in support of the five items identified as grounds for termination. It is not, however, in dispute that the terms used are those of the District's attorney, and that these descriptions were not used in so many words at the time of discharge. The Union disputes each of the allegations and alleges that the grievant's real offense in the District's eyes was that he was the principal adherent and organizer of the Union, and subsequently its steward. The Union introduced testimony from the grievant, another custodian, and three teachers in support of its view.

The discharge occurred in a meeting lasting approximately 45 minutes, during which District Administrator Tom Strick read to the grievant a list of specific incidents which had been written down by maintenance supervisor Pam Alsteen and which had been typed up for him that day. The list exists in three versions, a fact material to the outcome of this proceeding. The most complete version is dated at its head August 16, 1995 and is signed by Pam Alsteen, with the date of August 16, on the last page. Introduced as Employer's Exhibit 8, this is reproduced in its entirety as follows:

I feel that since I have been head custodian, the problems began.

There was tension between Waller and Joe -- now there is tension between Joe and me.

In my opinion, I feel like Joe has a lot of negative feelings toward me. I find these to be counterproductive.

Example: Joe spent a lot of time in the kitchen.

There was one occasion where I asked him to wash the walls going up the steps from kitchen to top of third floor; three to five minutes later he was back in the kitchen. No one could have washed walls adequately in that amount of time.

Example: I asked Joe to set up for graduation. I had the sixth grade class bring down all the chairs. Asked Joe to set it up by next day, but he did not. Had to have Rick take care of it next morning.

I have made notes of other examples and left them with Dr. Strick and School Board.

I find this behavior to be unnecessary and feel the school suffers because of it.

The lack of care given in these tasks -- I find to be inappropriate. Christmas Vacation -- I told Joe and Rick that we would start at 7:00 but they chose to come in at 6:00.

I was trying to talk to Joe about asbestos and waxing floors. While I was trying to talk to him about these issues, he walked away from me. He talked down at me like I was stupid. He used to laugh about doing it to Waller -- now he's doing it to me.

I am trying very hard to get along. I let them run their own maintenance department the way they see fit. I never question them on any of it.

Feeling tension again. When I first got my position, Joe seemed to be OK with it. Joe, Rick and I talked all the time about what was in the best interest of the school. About a month went by and you could start feeling the tension more and more. That's why I called the meeting to begin with. Then it was OK again for the next two days.

Dr. Strick told me to have a meeting with them once a week. I wish I would have listened. It is hard for me to know how Joe feels.

On two different occasions I did a time study on Joe during the school year. Both times came out to be about four hours out of an

eight hour day. If Rick is honest, he will tell the truth about that.

You can really feel the tension. I called a meeting with them on 1-4-95, because I heard that Rick was mad that I had gotten the head custodian position. I found out that Joe was the one with the bitter feelings. He more or less told me that he wanted me to back down, or should I say give it up. Joe and Rick worked on boilers and put in bathroom sinks. I did all the classrooms on the second and third floor. Don did the first floor.

2/2/95

Joe switched shifts without saying a word. Asked Rick why they changed hours. He said Joe had a union meeting.

3/7/95

Joe went in kitchen while Nellie, Judy and Rick were in there. Stayed in for 1-1/2 hours. Was not to be working in there.

3/8/95

I asked Joe to wash the walls going up the steps from kitchen all the way to third floor. Joe was done in two minutes and went back into kitchen.

3/95

Don and I were talking about cleaning the first floor classrooms. I had no idea that Don had been cleaning classrooms since January. I asked him why he was doing them. He said Joe asked him to do it from now on. Joe never said a word to me.

3/8/95

Dr. Strick told me that I could have Joe work in kitchen instead of changing shifts with Rick in kitchen. Won't stay out of kitchen, so keep him working in there from 11-12. Joe in kitchen at 10:28--35 minutes early. Note: every day he goes in a little bit earlier and earlier.

3/14/95

Joe switched shifts without saying a word. Had to ask Rick where Joe was. He said Joe overslept.

4/10/95

Rick did not come in until 1:30 and left at 4:00. Did not say a word to me about coming in late. I guess he had a doctor's appointment.

4/10/95

Joe called me at home tonight to take vacation pay for tomorrow. Need to find truck.

4/11/95

Joe called me at home again to take another vacation day tomorrow.

4/14/95

Asked Joe to clean window on the inside of classrooms, but did not do so.

Friday, 13th

Snow day was called. Joe left at 7:00.

4/25/95

Joe changed shifts with Rich without saying anything to me. Went in kitchen at 10:00. Went on break three times.

4/13/95

Betty wanted our time cards so she could finish up her payroll. So I filled out Joe's time card. He took six hours off on 4/5/95 and did not fill out green sheet. Dr. Strick said not to pay him until he filled it out. Joe came back from his vacation on the 14th and Betty gave us our checks. He had a fit because he was missing six hours on his check. He was yelling at me, I told Joe to please lower his voice and was trying to tell him why. Debi came out of her office and he was still having a fit.

Dr. Strick was sick so he didn't come in. I kept telling Joe over and over again to change his tone of voice with me and to take it up with Dr. Strick when he came in.

He should have filled out a green sheet when he left early.

4/26/95

I went to grab our mail and was putting it away when Rick came in. He was making these crazy noises and I asked him what he was doing. He replied, "What did you say, you want to give me head."

I was shook, I just walked away. That's all Judy, Joe and Rick talk about.

5/2/95 - Joe in kitchen at 10:10.

5/8/95 - 10:17

5/9/95 - 10:11

5/10/95 - 10:15

5/12/95 - 10:15

5/3/95 - four breaks in morning. In kitchen at 10:10

Came down from cleaning bathrooms from third floor at 1:00 and Joe on break again. finished cleaning girl's bathroom on first floor and all three were sitting in kitchen.

5/12/95

I came down from third floor at 1:00 took out garbage. Joe was on break. He came in and within ten minutes he was back and forth in phone room three times. He did noting (sic) from 1:00 till 2:00 when he left for the day.

5/18/95

Joe took two breaks this morning. One at 7:25 till 7:35. Two at 8:45 to 9:05. That I knew of. Afternoon break at 1:15.

5/18/95

Joe traded shifts with Rick without letting me know.

Joe left 1/2 hour early without saying anything.

5/19/95

I brought back coffee cups in kitchen at 8:45. Rich and Judy were coming back from break. Rick stayed in kitchen till I sent a kid in there to get him so Rick could give the kid back his money. that was at 9:05. Rick went back on break with Judy and Joe at 9:15 to 9:30.

5/19/95 - Joe and Rick both in kitchen early today

5/20/95 - 10:15

5/25/95

Overheard Rick telling Judy that Joe does not even empty the garbage.

5/30 Joe in kitchen - 10:00

5/31 - 10:00

5/31 Rick went on break four times this morning 7:05, 8:30, 9:30

in kitchen at 10:00.

June 1, 1995

Rick came in at 5:45 and left at 2:15. Did not say a word. He should have come in at 10:00 to 6:30. there is no one to clean classroom tonight.

5/31/95

Had to tell Joe to empty the garbage in class rooms and hallways. He has not been keeping up with it. Teachers and I both notice.

6/1/95

Deanie made a remark to me that Joe has not been cleaning her room lately. She told me that Joe spent a lot of time in Bridget's room.

6-5-95

Rick came up to me and said, pam, I'll help you out this summer, I don't want to stand around. I will do what I can for you. I looked at him and said what's gotten into you. He said he was just in a good mood.

6-28-95

Joe and Rick on break at 8:00. Another at 9:30. Went on lunch break at 11:20 to 11:55. Had them set up the gym for school board meeting at 12:45 took them five minutes. They went on break again and came back at 1:25.

7/17/95

I was talking to Don. He told me that Joe was making comments about me again. I guess one of the things he said was ever since I got the head position that I had been playing a Waller.

That's when it occurred to Don that Joe was the one that had the problem. Don told me that he came right out and told Joe that he did not want to get involved in Joe's power struggle. I guess Joe never said another word.

7/18/95

Joe and Rick went on lunch break at 11:50 and came back at 12:35.

7/11/95

Came back from vacation on July 11. Joe and Rick went through a whole pot of coffee by the time I got here at 7:15. They start at 6:00 a.m. I could not see what was done.

7/26/95

Joe and Rick went on lunch break 11:50 and did not come back until 12:30.

8/14/95

First of all, Joe and Rick pick their own summer hours. I asked Joe what time he wanted to start tomorrow. He said 6:00. That was on 6/1/95. Then they just kept coming in at this time. I said to myself that I would see how it works out. Obviously, it did not. I felt for the best interest of the school that we should all work together. So starting on Monday, July 17, we all start working the same shift.

Another example: Joe would walk down the hall, carrying his coffee mug between his legs and moving the mug -- if you know what I mean -- saying screw the pooch, screw the pooch. Or acting like he was having the big O. I found this to be very inappropriate considering this is a school.

In her testimony, Alsteen testified that each of the incidents listed in Employer's Exhibit 8 had happened, that she considered the grievant culpable in all of those which implied by their language improper behavior on his part. 1/ Alsteen admitted, however, that she had never confronted the grievant about a single one of the incidents listed on Employer's Exhibit 8 at the time it happened, but had merely written it down, and had complained to Administrator Strick on several occasions about difficulties with the grievant. Strick also testified, but his testimony was to the effect that the meetings he had held with the grievant and Alsteen did not focus on specific items which Alsteen alleged in Employer's Exhibit 8 and similar documents to constitute improper behavior by the grievant, and focused instead on the general matter of the working relationships in the maintenance department. While Strick averred that he had given clear instructions to the grievant to cooperate with Alsteen, therefore, he too admitted he did not give the grievant any immediate indication of dissatisfaction concerning any of the incidents listed.

It is undisputed that Strick was not given the full account of Alsteen's dissatisfactions with

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1/ The three versions of the complaints against the grievant by Alsteen also admittedly contain material about other employees or which merely describe a situation for which the grievant was not held particularly responsible. Because of the confused and contradictory nature of the evidence presented in this case, I have left the document intact for clarity.



the grievant until on or about the date of discharge, at which time he caused them to be typed up by Secretary Debi Hill. Upon reading them, Strick immediately called a meeting of Alsteen, the grievant, and custodian Rick Buell, during which time he read to the grievant the list of charges, and at the conclusion of the meeting discharged him.

Because of this sequence of events it is relevant that more than one version exists of the concerns raised in writing by Alsteen. A second version, introduced as Union Exhibit 18, appears to be identical to Employer's Exhibit 8 except for an additional blank line towards the bottom of the fourth page of the document, and a signature by Alsteen on the last page which in this instance is dated August 10th, 1995. In her testimony, Alsteen stated she could not explain the date or the difference in the document.

More relevant is the third version of the document, which is dated at its top August 14, 1995, and which differs in significant detail from Employer's Exhibit 8. This document, introduced as Union Exhibit 17, reads in its entirety as follows:

August 14, 1995

I feel that since I have been head custodian, the problems began.

There was tension between Waller and Joe -- now there is tension between Joe and me.

In my opinion, I feel like Joe has a lot of negative feelings toward me. I find these to be counterproductive.

Example: Joe spent a lot of time in the kitchen.

There was one occasion where I asked him to wash the walls going up the steps from kitchen to top of third floor; three to five minutes later he was back in the kitchen. No one could have washed walls adequately in that amount of time.

Example: I asked Joe to set up for graduation. I had the sixth grade class bring down all the chairs. Asked Joe to set it up by next day, but he did not. Had to have Rick take care of it next morning.

I have made notes of other examples and left them with Dr. Strick and School Board.

I find this behavior to be unnecessary and feel the school suffers because of it.

The lack of care given in these tasks -- I find to be inappropriate.

2/22/95

Joe switched shifts without saying a word. Asked Rick why they changed hours. He said Joe had a union meeting.

7/11/95

Came back from vacation on July 11. Joe and Rick went through a whole pot of coffee by the time I got here at 7:15. They start at 6:00 a.m. I could not see what was done.

4/14/95

Asked Joe to clean window on the inside of classrooms, but did not do so.

Friday, 13th

Snow day was called. Joe left at 7:00.

3/7/95

Joe went in kitchen while Nellie, Judy and Rick were in there. Stayed in for 1-1/2 hours. Was not to be working int here.

3/8/95

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Don and I were talking about cleaning the first floor classrooms. I had no idea that Don had been cleaning classrooms since January. I asked him why he was doing them. He said Joe asked him to do it from now on. Joe never said a word to me.

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Joe changed shifts with Rick without saying anything to me. went in kitchen at 10:00. Went on break three times.

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Betty wanted our time cards so she could finish up her payroll. So I filled out Joe's time card. He took six hours off on 4/5/95 and did not fill out green sheet. Dr. Stick (sic) said not to pay him until he filled it out. Joe came back from his vacation on the 14th and Betty gave us our checks. He had a fit because he was missing six hours on his check. He was yelling at me, I told Joe to please lower his voice and was trying to tell him why. Debi came out of her office and he was still having a fit.

Dr. Stick (sic) was sick so he didn't come in. I kept telling Joe over and over again to change his tone of voice with me and to take it up with Dr. Strick when he came in.

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5/19/95 - Joe and Rick both in kitchen early today

5/20/95 - 10:15

In her testimony, Alsteen became confused when presented with the different versions of her complaints, but testified that she was not sure that the last paragraphs of Employer's Exhibit 8 were part of the discussion at the meeting at which the grievant was terminated. Strick testified initially that he received the notes of the incidents on August 16, and met with and fired LaFata on the same day. But Strick admitted that he did not argue with the date of August 15 for the discharge listed on the grievance. Strick testified further that he discussed the allegation of sexually inappropriate behavior (listed in the last paragraph of Employer's Exhibit 8, but not included in Union Exhibit 17) at the meeting at which the grievant was discharged, and indicated that he could not tolerate such behavior in a school and that this was a significant part of the decision to discharge the grievant. Debi Hill, however, testified that she typed the notes on the 15th of August and could not explain the date showing August 14th, but averred that she might not have finished the notes on the day she began them. Hill also testified that she first saw the hand written notes on the 15th and believed the date of the 16th on Employer's Exhibit 8 was an error.

The grievant denied being inattentive to his duties or being otherwise at fault in virtually all

of the incidents listed on any of the three versions of Alsteen's complaints, and further testified that nothing was said at the meeting at which he was discharged concerning any variety of sexual misconduct. He stated that he was given a copy of the document subsequently introduced as Union Exhibit 17 at that meeting, which was dated August 14th and was unsigned. Strick testified that the grievant did not deny any of the allegations made by Alsteen; Rick Buell, also present at the meeting, testified that the grievant did deny some of the allegations, but could not recall which ones.

Alsteen's testimony with respect to the grievant's cleaning performance in particular was essentially co-extensive with Employer's Exhibit 8. Three teachers testified in support of the grievant, all of whom testified to the effect that their personal observation of the grievant's cleaning performance was that it was performed in an exemplary manner and with a good grace. Each of the three teachers denied ever having seen the grievant behave in an insubordinate manner, and two of the three indicated that they had had special needs for building items for their rooms and had found the grievant very helpful at this. One, Rhodene Wolbrink, testified that she had heard herself identified as having complained that LaFata did not clean her room, and indicated that he did his work well but that she might have complained on one occasion that the garbage can was not emptied. All three of the teachers, who included one who has served as president of the teachers' union for more than eight years, testified that they had heard no complaints from other teachers about the quality or quantity of LaFata's work.

It is undisputed that the grievant was heavily involved in the 1991-93 initial organizing and bargaining of the first contract of the Union. During this period the grievant received discipline on several occasions. The first was on February 4, 1992, a one-day suspension for calling in to announce that he would not be at work on the next day, without requesting permission in advance. The remainder were three written notices in his file, on May 13, 1992 for failing to clean certain areas normally cleaned by another custodian after switching shifts with her; on July 7, 1992 for smoking on school grounds; and on October 8, 1992 for poor cleaning performance on that day and for taking excessively long breaks. No further incident of discipline appears in the grievant's file until his discharge in August of 1995.

The Union introduced evidence purporting to demonstrate that Strick was opposed to the formation of the Union and attempted to manipulate the voting list by including all employees other than teachers and administrators in that list, in an effort to obtain a majority against the Union, only to demand that four of the eight be excluded on grounds that they were confidential or supervisory employees after the Union prevailed in the election. The Union introduced numerous documents purporting to demonstrate testy relations between Strick and the Union, which will not be discussed here because they do not affect the outcome of this proceeding. In its reply brief, the District attempted to introduce into the record a decision of Wisconsin's Labor and Industry Review Commission, concerning the grievant's application for unemployment compensation. The Union objected to its introduction by letter dated March 20, 1996. I have previously rejected attempts by unions and employers alike to introduce as probative on the merits of a discharge the findings of unemployment compensation proceedings, in company with many other arbitrators. The parties have bargained here, as in most other contracts, for an independent review of the facts by an arbitrator and I see no reason in this record to depart from my prior practice of declining to

accept such evidence. It will not be considered.

I note that in her testimony concerning the incidents listed in the various accounts of the grievant's alleged wrongdoings, Alsteen testified that as a new supervisor promoted from working along side the grievant but still within the bargaining unit, she was unsure of what to do about his conduct. Both Alsteen and Strick, however, on cross-examination, admitted that when the grievant had been given a clear and specific instruction to perform a particular piece of work at a time specified, he had performed it.

### The District's Position

The District contends that each of the five allegations it makes in general against the grievant is supported by the specific testimony. The District contends that the grievant was insubordinate to his supervisor on numerous occasions in that he refused to take orders from her regarding specific tasks that were within his job description, citing three examples. The District contends that the grievant misrepresented to his supervisor the work he claimed to be doing, by delegating tasks to another employe and allowing the supervisor to believe he was doing the work himself. The District contends that the grievant refused to follow procedures and policies regarding vacation requests and shift changes, as well as the District's smoking policy. The District contends that the grievant's work was of poor quality and that he shirked duties, indicated by a number of instances listed in Alsteen's memoranda. And finally, the District contends that the grievant made inappropriate gestures of a sexual nature in the school in front of school staff and students, citing Employer's Exhibit 8. The District contends that contrary to the position taken by the Union at the arbitration hearing, the District is not obligated to meet every one of the seven tests articulated by Arbitrator Carroll Daugherty, and that more general standards and articulations of the meaning of "just cause" support the District's interpretation. The District contends that the grievant is less credible than the District's witnesses, since he has something to gain by his testimony and they do not. With respect to the penalty, the District contends that the grievant's conduct in general, but particularly his inappropriate behavior of a sexual nature, fully justified discharge. The District further contends that the Union's allegation that the grievant's termination was based on his union activity is unsubstantiated in fact.

In its reply brief, the District contends that the Labor and Industry Review Commission's decision in the matter of the grievant's unemployment compensation should be considered relevant here, and cites extensively from it. The District contends, with respect to its alleged hostility toward the Union, that there is no documentation dated 1993 or later in support of the Union's claim, and that the "staleness" which the Union attaches to the grievant's disciplinary incidents of 1992 should attach also to the claim of Union animosity dating so long before the discharge. With respect to the Union's claim that the District failed a requirement of due process in reaching the decision to discharge, the District argues that the Union overlooks three staff meetings prior to the termination called specifically to discuss problems with the grievant's attitude, communication and cooperation. Only after this, the District contends, was Administrator Strick made aware of Alsteen's journal, and that once he had seen a transcription of these notes, he properly felt he had no alternative but to discharge the grievant, particularly because of the sexually inappropriate behavior listed therein. The District contends that the sheer volume of these incidents justifies

termination, even without the allegation of sexually inappropriate behavior. The District requests that the grievance be denied.

### The Union's Position

The Union contends that the grievant was never given any formal charges as to why he was being terminated, and that the five charges listed by the District are in fact a formulation by the District's attorney at the time of the hearing, not something which the grievant should be called upon to rebut as if they had been given to him earlier. The Union contends that the grievant may have fallen short of the ideal about use of sick leave and smoking on school grounds, and may not have performed some work assignments, but that all of these incidents occur prior to the first collective bargaining agreement. The Union contends that the testimony in the record establishes that any time the grievant was told to do something, he automatically did it from that time forward. The Union contends that the grievant was never given notice of any of the complaints by his later supervisor Alsteen, and was therefore in no position to correct any of the things she told him he was doing wrong. As to the five reasons for discharge given by the District's attorney, the Union contends that nothing the grievant did can be characterized as insubordination within the meaning given by Black's Law Dictionary, which focuses on "refusal to obey some order" and imports "a willful or intentional disregard" of the Employer's reasonable instructions. The Union notes that at page 137 of the transcript, Alsteen testified that the grievant did not refuse to do any work that he was directly told to do. The Union also contends that Strick and Alsteen both admitted that there are no formal policies, procedures, or regulations for anybody to violate. With respect to the allegation of misrepresentation, the Union contends that Black's defines misrepresentation as "an assertion not in accordance with the facts," and contends that there is no instance in the record in which the grievant engaged in such conduct. At most, the Union contends, there is an incident where the grievant and another employe (who was not disciplined) asked a third employe to perform some work which they had been performing previously. No attempt, the Union argues, was made to cover up the fact that the third employe was now performing this work.

With respect to refusal to follow policy in the contract, the Union contends that there were no policies, and that the Union's request for copies of same were ignored by the District. With respect to the quality of the grievant's work, the Union contends that as late as May 25, 1993 there is a letter in the record from Dr. Strick praising the custodians, not excluding the grievant. The Union also points to testimony from Alsteen that there is nothing in the grievant's record to indicate that his work was not done. The Union argues that the only incident identified by Alsteen to this effect was a single incident where he was asked to wash the walls going up the steps from the kitchen, and she felt that he was back from allegedly performing this duty in less time than it could have taken. But Alsteen admitted that she did not talk with the grievant about this, or check the work. Finally with respect to the allegation of inappropriate behavior of a sexual nature, the Union contends that this allegation does not deserve to be addressed here, because as testified to by Strick it was hearsay, and testimony by Alsteen and the grievant indicates that this was not raised by the Employer at the termination meeting. The Union contends that in general the Employer's handling of this matter has demonstrated a failure to give the grievant explicit notice of what is expected of him, after which the grievant is blamed for the consequences. In its reply brief, the

Union contends that the District brief is untrue in its assertion that the District Administrator provided the grievant with five separate and distinct reasons for his termination, because these reasons were compiled by the District's attorney later. The Union contends that the District misrepresents the grievant's delegation of tasks to another employee, contending that the grievant and another employee both agreed that the third employee could clean some rooms, in response to that employee's request for work to do. The Union contends that the fact that the supervisor did not know of this is the supervisor's own fault, because it is part of her job description to know the schedules and duties of employees and to supervise the work. The Union further contends that the one day discipline given to the grievant in 1992 was not for failure to comply with a policy concerning vacation time, because there was no policy to violate, but that there was no effective recourse for the grievant at that time. Similarly, the Union objects to the Employer's characterization of other incidents in which the grievant was alleged not to have followed District policies, on the ground that there were no policies. With respect to the allegation of sexually inappropriate behavior, the Union contends that this is a flagrant violation of due process, and that the record demonstrates that there was no investigation held by the District to determine whether there was any substantial evidence to support this entry in the journal, beginning with its absence from the version of the journal that was used to discharge the grievant in the first place. With respect to this particular allegation, the Union notes that it is customary in arbitration for arbitrators to require a high standard of proof for allegations which carry a stigma and general social disapproval, and that this would certainly be the case for the conduct alleged here. The Union requests that the grievance be sustained and that the grievant be reinstated and made whole for all losses suffered.

### Discussion

There is much in this record to suggest that the grievant falls far short of being a model employee. Nevertheless, the District's utter failure to follow basic principles of good labor relations and good management leave me with no alternative but to return the grievant to work with his full back pay.

Certain types of offenses justify immediate discharge, but most do not. In this instance, the District's characterization of the grievant's alleged offenses into five categories is arbitrary and post-discharge. At the time, the evidence demonstrates, the grievant was merely given an oral rendition of an undifferentiated stack of allegations, most of which were minor and had not been previously disclosed to him at a time when he might have done something about them immediately. There is nothing in the record to demonstrate, in particular, either insubordination or misrepresentation, as those terms are commonly understood in labor relations. Indeed, both Alsteen and Strick admitted in testimony that when the grievant was given a specific and time-based instruction, he performed the work.

Even so, an accumulation of minor incidents may indeed justify discharge. They do not justify discharge when, as here, the Employer has done essentially nothing to attempt to correct those incidents as and when they occur. A basic principle of labor relations is that there should be progressive means for disciplining employees. Here, the District engaged in several minor acts of discipline with the grievant, at a time remote from the discharge and somewhat suspect in its



circumstances because of the evidence that the parties were then engaged in battles over representation and the negotiation of an initial contract, which brought the grievant into conflict with Strick. I need not, however, conclude that anti-union animus played any significant part in Strick's decision to discharge the grievant in 1995, because the procedural failings of that decision mean that the District could not prevail in this matter even without considering such evidence. Simply put, of the various incidents listed by Alsteen, only one could conceivably constitute grounds for immediate discharge -- the allegation of inappropriate behavior of a sexual nature, which will be discussed separately below. Virtually all of the remainder are incidents of a kind or degree which occur every day in one form of employment or another, and which are largely handled by immediate instruction from a supervisor that the work is unacceptable, that the employe has transgressed the accepted principles of employment at that location by conduct stated to be unacceptable on the spot, and so forth. When such offenses are repeated, employers have the full range and tradition of progressive discipline to draw upon, which is frequently enough to persuade the employee to improve. To accumulate months of such incidents without confronting the grievant on any single one of them, and then rely on Strick's allegation that he had warned the grievant adequately by calling meetings about "communication" and similar vaguely stated concerns, exposes the District to the consequences which follow here. Simply put, the District has failed to engage in timely and adequate supervision of the grievant, and has therefore failed to demonstrate that the grievant would not have corrected all of these transgressions following relatively minor discipline, or even clear instructions combined with close observation.

The one type of conduct indicated in any of the District's material which could conceivably warrant immediate discharge is inappropriate behavior of a sexual nature. Here, the problem with the evidence is different: the grievant denies any such conduct, and the persuasiveness of Alsteen's testimony is materially affected by the fact that three different versions of the notes used to discharge the grievant exist, in two of which the date appears to have been the day after his discharge. The Employer's witnesses were so confused as to the course of events which led to the existence of these three documents, and their testimony is so at variance amongst themselves as to whether the grievant was even told of the existence of this charge, that I cannot find that this charge is clearly demonstrated even to have been part of the decision to discharge. This in turn raises questions as to the veracity of the material, since this type of charge is clearly more significant and of more importance than the possible failure to have washed a wall adequately. I can only hold that the District has failed in its burden of proof that the grievant exhibited such behavior, while noting that if such an incident were to occur in the future and credible testimony were to be given as to it, immediate discharge might indeed be appropriate.

For the foregoing reasons, and based on the record as a whole, it is my decision and

#### AWARD

1. That the District did not have just cause to discharge Joseph LaFata.

2. That as remedy, the District shall, forthwith upon receipt of a copy of this Award, reinstate Joseph LaFata to his former position or a substantially equivalent position; shall make him whole for losses suffered by reason of his discharge, by payment to him of a sum of money equal to wages and benefits lost as a result of the Employer's action, less interim earnings, if any; and shall correct its records accordingly.
3. That the undersigned reserves jurisdiction for at least sixty days from the date below, in the event of a dispute concerning the remedy.

Dated at Madison, Wisconsin this 20th day of June, 1996.

By Christopher Honeyman /s/  
Christopher Honeyman, Arbitrator