BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WASHINGTON COUNTY PROFESSIONAL
SOCIAL WORKERS, LOCAL 609, LAW

and

WASHINGTON COUNTY

Case 103
No. 52851
MA-9129

Dan Hammond Suspension

Appearances:

DuRocher, Murphy, Murphy & Schroeder, S.C., 913 Main Street, Post Office Box 1815, Racine, Wisconsin 53401, by Mr. Scott Schroeder, Attorney at Law, appearing on behalf of Washington County Professional Social Workers, Local 609, Labor Association of Wisconsin.

Davis & Kuelthau, S.C., 111 East Kilbourn, Suite 1400, Milwaukee, Wisconsin 53202, by Mr. Roger E. Walsh, and Ms. Mary L. Hubacher, Attorneys at Law, appearing on behalf of Washington County.

ARBITRATION AWARD

Washington County (hereinafter referred to as the Employer) and Local 609, Labor Association of Wisconsin, (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff, to serve as arbitrator of a dispute over the suspension of employee Dan Hammond. The undersigned was so designated. Hearings were held on November 8, 1995 and January 16, 1996 in West Bend, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made of the hearings. The parties submitted post hearing briefs and reply briefs, and the record was closed on May 10, 1995.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the arbitrator makes the following Award.

I. Issue

The parties stipulated that the following issue should be determined herein:

> Did the County have just cause to impose a three day suspension on April 14, 1995?
>
> If not, what is the appropriate remedy?

II. Relevant Contract Language

ARTICLE XXV - MANAGEMENT RIGHTS

Section 25.01. The Association acknowledges the sole right of the County to exercise the power and authority necessary to operate and manage its affairs, but such right must be exercised consistent with the other provisions of the this Agreement and Section 111.70, Wis. Stats. Such powers and authority include, but are not limited to, the following:

. . .

E. To maintain efficiency of County government operations entrusted to it.

. . .

G. To take whatever action is necessary to comply with State and Federal law.

. . .

ARTICLE XXIII - DISCIPLINE

Section 23.01. No employee who has successfully completed his initial probationary period shall be disciplined or discharged without just cause.

ARTICLE XXIV - GRIEVANCE PROCEDURE

Section 24.01 - Definition. A grievance shall be defined as any matter involving the interpretation, application or enforcement of the terms of this Agreement, which may arise between the Employer and an employee, or between the Employer and the Association.

Section 24.02 - Steps in Procedure. All grievances must be submitted in writing within thirty (30) days of their occurrence or within thirty (30) days of the time they are known or would have been known with reasonable diligence on the part of the grievant, whichever is later, but in no event more than one hundred eighty (180) days from the date of the occurrence. All grievances shall be processed in accordance with the following procedure:

Step 1. The employee and/or the Association Stewards

Committee shall present the grievance in writing to the Department Director. The Department Director shall meet with the aggrieved employee and the Association Stewards Committee within five (5) workdays following submission of the written grievance, and shall respond in writing to the aggrieved employee and the Association Stewards Committee within five (5) workdays following such meeting.

Step 2. If a satisfactory settlement is not reached as outlined in Step 1, the Association may appeal the grievance in writing within fifteen (15) workdays following receipt of the Step 1 answer to the Personnel Committee of the County Board. A copy of the grievance and notice of appeal shall be provided to the County Personnel Director. The Personnel Committee shall meet with the aggrieved employee and the Association Stewards Committee within fifteen (15) workdays following receipt of the appeal, and shall respond in writing to the aggrieved employee and the Association within ten (10) workdays following such meeting.

Step 3. Arbitration. If a satisfactory settlement is not reached as outlined in Step 2, the Association may appeal the matter to Arbitration, provided it gives a written notification to the Personnel Committee within thirty (30) calendar days of the date of receipt of the Personnel Committee decision. At the same time of submitting the written notification to the Personnel Committee, the Association shall send a letter to the Chairman of the Wisconsin Employment Relations Commission requesting the Commission to appoint an arbitrator to hear and decide the dispute. The arbitrator shall meet at a mutually agreeable date to review the evidence and take testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the Employer and the Association which shall be final and binding upon both parties. In any arbitration decision, the arbitrator shall neither add to, subtract from, nor modify any of the provisions of this Agreement. The expenses charged by the arbitrator shall be borne equally by the parties.

Section 24.03 - Time Limits. The time limits contained in the grievance procedure may be waived or extended by mutual agreement of the parties.

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III. Excerpts from the 1994-95 Washington County Employee Policy, Procedure and Benefit Manual

DISCIPLINARY ACTION

It is expected that you will work in a competent and conscientious manner which will reflect favorably upon you, your department, and your employer. Instances may occur, however, when an employee has exhibited questionable behavior and corrective action is necessary.

Examples of such factors that could justify corrective action are as follows:

A) Fraud in securing appointments
B) Incompetency (sic)
C) Inefficiency
D) Unauthorized or excessive absences or tardiness
E) Neglect of duty
F) Insubordination or willful misconduct
G) Dishonesty
H) Intoxication due to alcohol or drug abuse on duty
I) Conviction of a felony or misdemeanor under certain circumstances
J) Negligence or willful damage to public property
K) Discourteous treatment of the public or fellow employees
L) Loss of driver's license if required for the job
M) Violation of any lawful order, direction or policy
N) Possession of firearms or other weapons

Types of corrective action may include an oral reprimand, written reprimand, suspension or discharge.

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SEXUAL HARASSMENT

It is the policy of Washington County to provide a work

environment that is free of harassment or discrimination of any kind including sexual harassment.

Sexual harassment is defined by the Equal Employment Opportunity Commission as unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term of an individual's employment.

2. Submission to or rejection of such conduct by an individual is used as the basis for the employment decisions affecting such individual or;

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive working environment.

No employee shall be punished or penalized for rejecting or objecting to behavior that might be considered as sexual harassment including, but not limited to the following examples:

1. Sexual gestures with hands or body movement.

2. Unnecessary and unwanted touching, grabbing, caressing, pinching or brushing up against a person.

3. Staring at a person or looking a person up and down.

4. Whistles, catcalls and sexual references.

5. Repeated pressure on an employee to socialize with or date another individual.

6. Asking personal questions about a person's social or sexual life.

7. Making sexual comments or innuendos (sic), telling jokes or stories of a sexual, demeaning, offensive or insulting nature.

8. Deliberate repeated display of offensive, sexually graphic material which is not necessary for business purposes.

9. Posters, calendars, cartoons, photographs or art work of a sexual, hostile or degrading nature.

10. Granting or withholding pay increases, promotions, job offers or other employment issues based on sex.

Employees have the option of pursuing complaints or dealing with all forms of harassment on a formal or informal basis. Employees represented by a union and covered by a collective bargaining agreement may file complaints through the grievance procedure outlined in the respective contracts. Non-represented employees may utilize the non-represented grievance procedure contained in this Manual.

Employees may wish to bring issues of harassment to management's attention in a less structured fashion. Employees are encouraged to express their concerns to any of the following: their supervisor, department head, manager, a supervisory employee in any other County department or the Personnel Department staff member.

Prior to taking any action on a complaint of harassment, a complete and thorough investigation of the matter should be conducted by a management representative. The investigation should be made on a timely and confidential basis. Persons conducting the review should be objective and nonjudgmental and obtain the necessary facts prior to reaching any conclusions. Individuals needing assistance in conducting the investigation are encouraged to contact the Personnel Department. Following the completion of the investigation, an appropriate course of action will be recommended. The person conducting the review should follow up with the employee making the complaint to advise them of their conclusions. At a minimum, employees found guilty of harassment will be required to stop the inappropriate behavior; however, employees found guilty of harassment may also be disciplined up to and including the termination of their employment.

The investigation of alleged acts of harassment under this section shall be conducted according to the following procedure:

1. Upon the filing of a complaint, whether formal or informal, the responsible management representative shall immediately commence an investigation.

2. The complaint and the investigation are confidential. Only those individuals requiring knowledge of the complaint and the investigation shall be informed.

3. The management representative conducting the investigation shall obtain a complete and clear statement of the alleged acts of harassment from the accuser, names and statements from any witnesses and a clear and complete statement from the alleged harasser.

4. The management representative conducting the investigation shall maintain full documentation during the investigation, including the complaint, all statements, documents, notes and other information relevant to the complaint.

Retaliation and/or reprisal against an employee who files a complaint or anyone assisting in the investigation is in violation of this policy and State and Federal law.

Anyone who engages in or assists in such retaliatory actions will be subject to disciplinary action up to and including termination of employment.

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IV. Background

The County provides general governmental service to the people of Washington County, northwest of Milwaukee. Among the services provided is social work, through the Department of Social Services. The Union is the exclusive bargaining representative for the professional employees of the Department. The grievant, Dan Hammond, is a Social Worker, who has been with the Department since 1977. Prior to the three day suspension which is the subject of this Award, the grievant had received only one act of discipline, an oral reprimand in late May of 1991 for insubordination and the use of profane or abusive language. The reprimand was the result of his use of the term "fucking" in a conversation in the agency lobby, and a subsequent confrontation with his then-supervisor, Laurie Valerious.

The County's Version of Events:

In April of 1995, the grievant received a three day suspension for four alleged incidents, three of them involving Laura Denk, a newly hired Social Worker. The first occurred in late January or early February of that year. According to the County, Denk was sitting in her office a day or two after starting work, when the grievant stopped by her office. Being new, she did not know who he was. He asked if she liked her supervisor, Laurie Valerious. She said that she did, and he responded with a slew of name calling, at one point referring to Valerious as "a fucking bitch". Denk told him that she did not appreciate hearing him say such things about Valerious, but he continued in the same vein, and then left. She went to the office next door and spoke with Ronda Richtmyre, describing the incident and asking who the man was. Richtmyre said it was the grievant, and that there had been a prior incident of him directing abusive language at Valerious.

About a week later, Denk was in the common work area where the copying machine and office supplies are kept, reading some papers. The grievant entered the room and walked over to a county map on the wall. He began to swear very loudly, using the terms "son of a bitch", "God damn it", and "Fuck" over and over again. Denk began to read out loud to drown out the sound of his voice, but he continued to swear. After a few minutes, he turned to her and said "pardon my French". She told him she found his language very offensive, and she left the room. On returning to her office, she mentioned this incident to Richtmyre. She did not mention either of these incidents to her supervisors.

On March 27th, Denk was in an aerobics class at the YMCA. She passed the grievant on the stairs, while he was going up to the running track that circled above the gym, and they exchanged hellos. During the class, she noticed the grievant up on the track staring down at her. She was wearing shorts and a T-shirt at the time. After the class was over, she had someone escort her out of the building because she was nervous about the grievant's behavior.

The next morning, as she and Richtmyre went to break, they passed the grievant in the hall. He said "it was nice to see you with your clothes off last night". Denk did not respond. He followed up saying "did you expect that?" and when she did not answer, he repeated the question. He then said "That was you last night, right?" She said "yes", and she and Richtmyre continued to the break room, and the grievant went to his office. In the break room, Denk was visibly upset, and discussed the incident with Richtmyre, Kathy Westphal and Karen Tews, all of whom agreed that his comments were very inappropriate and that the incident should be reported.

The fourth incident, which did not involve Ms. Denk, took place on a Friday afternoon in late February. Social Workers Sue Thornton, Kathy Haase and Helen Foscato were taking an afternoon break in the break room when the grievant entered and sat down at their

table. He said he had a dirty joke to tell, and Haase said she did not want to hear it. He said he would tell it anyway. Haase told him he should look at the yellow brochure on the bulletin board, a reference to a flyer dealing with sexual harassment. A discussion of sexual harassment ensued, and Thornton observed that people needed to be very careful about what they said in the workplace, lest it be construed as sexual harassment. The grievant suddenly became very angry, leaning over and yelling at Thornton, calling her "a fucking cunt". He seemed out of control, and the women were concerned that he might become violent. He stormed out of the room. Thornton reported the incident to Michael Bloedorn the following Monday, but did not ask that any action be taken against the grievant. Haase and Foscato discussed the incident with another supervisor, but likewise did not seek any action against the grievant.

The Grievant's Version of Events:

While the use of profanity is not uncommon in the workplace, the grievant testified that he had no recollection of telling Denk that Valerious was a "fucking bitch" in late January or early February, nor of any incident around that time involving swearing in Denk's presence in the supply room. The first he heard of these allegations was when Bougneit interviewed him in April. As for the incident in late March, the grievant said he had seen Denk working out at the YMCA the night before, and made a joking reference to that, telling her "it was nice to see you with your clothes on". When she gave him a dirty look, he realized that his comment had offended her and he tried to recover the situation, saying "did you expect that?" She did not respond and he asked if that had been her the night before. She said yes and continued on her way. The grievant meant no offense to Denk, and was not trying to convey any sexual content by his comments. He was shaken after this encounter, because he and other employees had just undergone training on sexual harassment in the workplace, and he understood that Denk was likely to lodge some sort of complaint against him.

Turning to the conversation with Thornton in late February, the grievant denied ever saying he wished to tell the women a dirty joke. He asked if Foscato wanted to hear a joke, and Haase interrupted saying she did not want to hear a dirty joke. He said it wasn't a dirty joke, and Haase said it was sexual harassment. When he asked what she was talking about, Thornton became irate, yelling at him that he had to understand sexual harassment, and slapping her hands on the table and waving her arms. Thornton went on like this for a couple of minutes, and he asked her to stop. After five minutes or so, he asked her to stop again and she said no, that he had to know about sexual harassment, and that it was a dumb male thing. He replied "fuck you, Thornton", and she quieted down. They chatted for a half minute or so, and as he left he told another employee entering the break room, "good luck with these assholes". After leaving the break room, he stopped by another employee's office and mentioned the incident. That employee held up a copy of

the local newspaper, which featured a picture of Thornton's husband on the front page, along with a story about him being forced out as District Attorney by charges of sexual harassment.

Denk went to Valerious after grievant's comments about seeing her with her clothes off. Valerious had Denk and Richtmyre prepare written statements concerning the incident. Denk also mentioned that there had been prior incidents, although she and Valerious did not discuss them in detail at that point. Valerious took the statements to her supervisor, Deputy Director Karen Bougneit, and told her that there had also been other incidents. Bougneit told her to obtain written statements about those incidents as well. After she received the additional statements from Denk, Bougneit and the grievant's immediate supervisor, Mike Bloedorn, interviewed Denk, Richtmyre, Valerious, Westphal and Tews. Bloedorn advised Bougneit of the incident involving Sue Thornton, and the two of them also interviewed Thornton, Kathy Haase and Helen Foscato.

On April 14th, Bougneit and Director Don Ryd met with the grievant to review the allegations against him. He relayed his side of the various events. 1/ Later that day, Ryd issued a memo imposing a three day suspension:

> Agency management recently became aware of certain circumstances pertaining to you and has conducted an investigation. That investigation was conducted by Karen Bougneit and Michael Bloedorn following the guidelines received during training given by the County in March, 1995. You were interviewed on April 14, with a union representative present, as part of that investigation. The following are the conclusions formed and actions taken pertaining to you.
>
> > 1. On March 28, 1995, at 9:05 am., in our agency office you said to a female social worker, "It was nice to see you with your clothes off last night." You then followed by repeatedly asking her "Did you expect that?" These comments were not solicited and were not welcomed by said

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1/ There is a dispute about what he said concerning the March 27th incident. Ryd and Bougneit testified that he admitted saying to Denk "it was nice to see you with your clothes off". The grievant testified that he specifically denied saying "clothes off" and told them he had said "clothes on". He called Ryd later about this. According to Ryd, the grievant called and said he wanted to correct his statement, because he had actually said "clothes on" to Denk, not "clothes off" as she reported. The grievant claims that he told Ryd he was calling to reemphasize his statement from the earlier meeting, that he had said "clothes on" to Denk.

employee.

2. On approximately February 10, 1995, while in the social work work area, while you were looking at a map, you used a series of profanities that continued for 2 or 3 minutes, in the presence of the female social worker identified in point #1 - Your closing comment was, "Excuse my french." These comments were highly offensive and upsetting to the other person.

3. On February 1, 1995, you went into this same female social worker's office and asked how she liked her supervisor. (It should be noted that this was the third day of employment in this agency for this person.) Totally unsolicited, you then made a series of highly derogatory remarks about the supervisor using highly profane and insulting language.

4. On either February 17 or February 24, 1995 in the P.A.C. third floor break room, you encountered three female social workers and you said you wanted to tell them a "dirty" joke. Their response was that they did not want to hear it. Your reaction to being rebuffed was to become visibly angry and behaving in a manner that was interpreted as menacing, and using language that was riddled with profanity and obscenities, and was sexually degrading.

It should be noted that incident #1 took place five days after you received three hours of training on harassment issues, and that you have previously been disciplined (May 31, 1991) for insubordination and the use of profane or abusive language.

Therefore;

1) You are hereby suspended without pay for three days, which shall be April 17, 18 and 19, 1995.
2) You shall refrain from behaviors that contribute to a hostile work environment.
3) You shall refrain from behaviors that may be interpreted as sexual harassment.

4) You shall refrain from using profane and/or abusive language while engaged in any County business.
5) You shall treat other persons, including management staff with courtesy and respect.
6) You shall not engage in any behavior that could be viewed as retaliatory toward any person associated with the incidents listed or this action.
7) It is recommended that you use the Employee Assistance Program, or other source, to receive assistance in the area of anger control and management.

Any additional instances of inappropriate behavior will result in additional disciplinary measures, including termination.

/s/Donald Ryd, Director

The instant grievance was thereafter filed, alleging that the County lacked just cause for a suspension. It was not resolved in the grievance procedure, and was referred to arbitration. Additional facts, as necessary, will be set forth below.

V. Positions of the Parties

A. The County's Initial Brief

The County takes the position that the discipline was amply supported by just cause, and that a three day suspension was a reasonable and proportionate response to the grievant's conduct. Thus the grievance should be denied. The County initially notes that the grievant was well aware that profanity in the workplace and conduct creating a hostile work environment could and would lead to discipline. He had previously been disciplined for the use of profanity, and cannot claim that he was unaware of the rules against it. As for the sexual harassment directed against Ms. Denk, such conduct was specifically prohibited by County policies, which were prominently posted in the work place. Moreover, the grievant, like all other County employees, attended special training on what constitutes sexual harassment within days before making his offensive conduct towards Ms. Denk. Despite the fact that the training stressed that references to people's bodies or clothing were inappropriate, the grievant proceeded to refer to seeing Ms. Denk with her clothes off.

The County avers that there can be no dispute that rules prohibiting profanity and sexual harassment are valid and reasonable, particularly in the context of an agency providing social services to the public. The enforcement of such rules is well within the County's management rights, and in this instance, the County conducted a thorough investigation which proved that the grievant had violated those rules. Once the grievant's comments to Denk were reported, Karen Bougneit undertook an immediate and careful investigation. She obtained written statements from Denk and other witnesses, and met with each witness. The statements of the witnesses confirmed the inappropriate comments regarding seeing Denk with her clothes off, as well as the grievant's reference to Denk's supervisor as a "fucking bitch", and his unprovoked and violent verbal assault on Ms. Thornton in the lunchroom. Although the grievant denied the allegations, the County reasonably concluded that the witness statements established a consistent pattern of conduct and credited their versions over his. Thus the County had substantial evidence of rule violations by the grievant.

The County rejects the grievant's attempt to characterize his extreme profanity as simply "shop talk" of the type that many employees might use. Testimony from other staff members in the Department disclosed that the use of profanity, other than to describe what a client might have said, was very unusual in the Department, and was not acceptable conduct. Certainly there might have been a time in the past when profanity was more common, but the grievant's actions must be viewed in the context of the present day, and the evidence shows that today's standards do not permit the level or type of profanities he employed. Moreover, there is no evidence that it has ever been acceptable to direct such profanities at a co-worker.

The County argues that the choice of a three day suspension was a reasonable and measured response to the grievant's outrageous conduct. While the parties recognize the principle

of progressive discipline, the employer is not required to respond in a lockstep or mechanistic fashion to all misconduct. Here the grievant engaged in four separate offenses -- referring to a supervisor as a "fucking bitch", using a string of profanities in a common area of the office and in the presence of a co-worker who had previously told him she found the language offensive, verbally assaulting another co-worker with violent profanities in another common area, and making obviously offensive and inappropriate sexual references to a co-worker's state of dress. Three of the offenses directly involve profanity. All involve offensive words directed to co-workers. Given the number of incidents and the severity of his conduct, a three day suspension is clearly appropriate. For all of these reasons, the County asks that the grievance be denied.

B. The Association's Initial Brief

The Association takes the position that there is no basis for discipline, and asks that the three day suspension be set aside. Three of the alleged offenses involve the use of profanity in the workplace, and the Association argues that there is no work rule regarding such conduct. Even though the County produced an excerpt from the 1994 and 1995 Policy and Procedures Manual addressing "discourteous treatment of public or fellow employees", it is not clear that the grievant's conduct violated this vague standard. The claim that he used a string of profanities in the supply room does not involve discourtesy in any way. His words were not directed to Denk, nor did they even take account of her presence in the room. When he realized Denk was in the room, he apologized for his language. There is plainly no violation of a work rule in this instance.

Turning to the alleged comment to Denk about Laurie Valerious being a "fucking bitch", the Association agrees that this might represent discourtesy to Valerious, but notes that this statement was not reported until three months after it was supposedly made. The grievant has no recollection of any such discussion with Denk, and denies making any such comment. As for the conversation with Sue Thornton, the grievant admits saying "fuck you, Thornton", but this was in response to a verbal attack by Thornton and the other women. There must be some flexibility in applying the discourtesy rule, to take account of the context in which statements are made. Even Thornton admitted to being upset more by the grievant's apparent anger than by his choice of words. Given this, it is not reasonable to say that the grievant was "discourteous" within the meaning of the policy. Thus, as to three of the four incidents, there is no evidence that the grievant violated any recognized standard or rule.

The claim of sexual harassment did not involve direct discourtesy, in that there was nothing profane or abusive in the grievant's words. The Association also asserts that there was nothing in the grievant's conduct that could reasonably be said to have been intentional sexual harassment. Clearly there was no element of a sexual quid pro quo, nor was there any physical contact or attempt at physical contact. Denk claims he ogled her as she worked out at the YMCA. The Association notes that, even if this had happened, the employees were both off-duty and the County has no control over them, and a hostile work environment cannot be created by off-premises conduct. However, the fact is that the grievant was not wearing his glasses at the

time of this incident, and could not have ogled Denk, simply because he could not have seen her.

Denk also claims that the grievant made a comment the next day, at work, about seeing her with her clothes off the night before. Even if made just as she described it, this single, isolated comment cannot reasonably be construed as sexual harassment or as creating a hostile work environment. He denies having said he saw her with her clothes off, and insists that he said "clothes on". However, he also immediately realized that his comment was inartful, and could see that it had been taken badly by Denk. He awkwardly attempted to recover by saying "did you expect that?" By that time, he was so embarrassed that he then simply gave up and said nothing more. The fact that Denk is very sensitive, and apparently inclined to be offended by the grievant, does not somehow transform his comments on this one occasion into sexual harassment. There is no continuing pattern. The prior interactions with Denk were alleged to involve profanity, but nothing of an overtly sexual nature. There is no attempt to ask her out or socialize with her, much less an effort at seduction. There is no suggestion of sexual favors in return for favorable working conditions. In short, there is nothing to indicate that sexual harassment, in any recognizable form, took place.

The County also attempts to portray the confrontation with Thornton as some form of sexual harassment. This, the Association argues, is completely unsupported. He is alleged to have proposed telling a dirty joke. He denies saying he was going to tell a dirty joke, but even if he did, all of the witnesses agree that once someone raised an objection, he refrained from telling any joke. One witness said he used the word "cunt" to Thornton, but both he and Thornton deny this. In any event, the exchange was ultimately an angry exchange, not a sexually charged exchange. No one present testified to any statement of a sexual nature. It was an argument. Nothing more, and nothing less.

The grievant had little or no notice that his conduct was considered inappropriate. The use of profanity in the workplace is not unusual, and the rule against discourtesy surely does not give him reasonable warning that discipline was a possible response. Other employees who used profanity were not disciplined. His comments to Denk may have been awkward, but no reasonable person could anticipate that a suspension would result from a single instance of a poor choice of words. Finally, even if the grievant had engaged in something that could be characterized as misconduct, the imposition of a three day suspension is clearly excessive. The grievant is a long service employee with a clean disciplinary record, aside from an oral reprimand in 1991. The grievant has been singled out, and used as an example by the County in its response to an unrelated sexual harassment scandal. A three day suspension is grossly out of proportion to his actual conduct and his work record. For all of these reasons, the Association urges that the grievance be granted and the suspension be set aside.

C. The County's Reply Brief

The County dismisses the Association's claim that the grievant did not know of the rule against profanity. The Association admits that he was disciplined for using profanity in 1991. Denk specifically told him she found his use of profanity to describe Valerious offensive. Despite this, and despite the fact that she made her presence in the supply room known to him,

on that later occasion he deliberately used a string of profanities in her presence. Plainly he intended to make her uncomfortable and offend her. His argument that profanity is commonplace is simply contrary to all of the other evidence in the record.

The County also rejects the Association's attempt to portray the grievant as unaware that his comments to Denk were sexual harassment. They took place shortly after he had received training in what constitutes sexual harassment. He was specifically warned by Thornton and the others that he should be careful about his language and comments because of the potential for sexual harassment complaints. He admits that he was concerned about a charge of sexual harassment after his comments to Denk. He obviously knew that his comments constituted sexual harassment.

The County repeats its position that the evidence against the grievant is clear. Even though he claims that he does not recall either the statement that Valerious was a "fucking bitch" or the string of profanities he uttered in the supply room, the testimony of Denk credibly establishes that these incidents took place. The statement about Valerious is credible, given that the grievant had problems with her before Denk started with the County, and in light of the testimony of Richtmyre that Denk reported the incident to her immediately after it took place. Denk's version of the incident in the supply room is believable, since Denk has no motive to lie, and because it is consistent with his prior use of profanities. The incident with Sue Thornton is established by the testimony of three unbiased witnesses, none of whom had any reason to cause trouble for the grievant. Contrary to his self-serving testimony, it is clear that he was the aggressor in this incident, and that the three women were shocked and alarmed by his conduct.

The charge of sexual harassment was likewise proved, and provides a basis for substantial discipline. The grievant was not disciplined for ogling Denk at the YMCA. He was disciplined for his inappropriate comments to her. Whether the comments would be actionable in federal court is irrelevant to the County's right to imposed discipline. They were an obvious violation of a County work rule, and in the context of discipline under the contract, it makes no difference whether they rise to the level of a civil rights violation.

The County argues that the arbitrator should reject the Association's plea to have the penalty set aside or reduced. Leniency is within the province of the employer, not the arbitrator. The question for the arbitrator is whether the penalty assessed by the employer is reasonably related to the conduct, not whether he would have chosen a somewhat different penalty. The

County's decision to suspend the grievant was a reasonable response to his repeated profanity and offensive behavior, and the penalty should not be disturbed.

D. The Association's Reply Brief

The Association notes that the County has utterly failed to explain what in the grievant's behavior constituted sexual harassment. The County's position is totally conclusory, in that it asserts that the existence of a policy, knowledge of the policy by the grievant, and the making of a statement equal a violation of the policy. Yet nothing in the statement violated the policy. Thus there cannot have been sexual harassment.

In the absence of a clear rule against profanity, the County must at a minimum give employees some indication of which levels of profanity are permitted. The record establishes that some profanity is used and tolerated. Again, the grievant cannot be forced to guess when he is crossing the line into a rule violation. Having failed to set any clear standard, the County cannot now attempt to give the grievant and other employees notice by imposing discipline after the fact.

The County's argument that progressive discipline is not an automatic, lockstep procedure is true as far as it goes. However, the employer must at least consider using progressive discipline and the failure to follow the normal progression in this case is not supported by any reasonable cause. The Association suggests that the County's true motive in this case is to set the grievant up for a discharge. Whatever the County's reasoning, the Association urges the arbitrator to abide by the normal standards for discipline and reject the three day suspension.

VI. Discussion

A. Disputed Facts

At the outset, there are certain factual disputes that must be resolved in order to determine whether the grievant actually engaged in misconduct. Denk's version of her encounters with the grievant in her office and in the supply room are largely unrebutted, in that the grievant does not believe he would have said these things but has no recollection of the incidents.

1. Reference to Valerious as a "Fucking Bitch"

The balance of the evidence provides strong support to Denk's version of the discussion. There was a history of animosity between the grievant and Valerious, and thus it is not inconceivable that the grievant would have expressed negative sentiments about her. Indeed, Ryd testified that during the investigation the grievant had been able to recall a conversation in which he said "poor you" when Denk told him that Valerious was her supervisor. That conversation and Denk's version, where the grievant called Valerious a "fucking bitch", are similar in tone if not intensity. Denk's recollection is also generally confirmed by the testimony of Richtmyre, to whom she related the conversation immediately after it happened. Richtmyre recalled that Denk came in

and asked who the grievant was. Richtmyre also recalled a conversation with Denk about comments directed by the grievant towards Valerious, in which she told Denk that she had had similar conversations where the grievant initiated a discussion of Valerious and then said negative things about her. Although Richtmyre could not recall if these were both part of one conversation with Denk, they mesh well with Denk's recollection of the discussion held right after the grievant visited her office. I conclude that the conversation took place as described by Denk, and that the grievant did in fact refer to Valerious as a "fucking bitch".

2. The Incident in the Supply Room

Turning to the incident in the supply room, this comes down to a choice between Denk's recollection and the grievant's lack of recollection. By the time Denk reported this to the Department's management, she clearly felt abused by the grievant as a result of the comments about the YMCA, and it is likely that she felt some degree of animosity towards him. Granting that, it is still an unlikely that she simply invented this incident. If it were an invention, its only purpose could be to cause trouble for the grievant, and the details of the story are not consistent with such a purpose. In particular, Denk reported that the grievant was not swearing at her, and that he said "pardon my French" when he was done cursing. Both of these points serve to somewhat mitigate the grievant's degree of fault, and someone who was making up an incident to compound his problems would have been unlikely to include them.

3. The Incident with Thornton in the Break Room

The starkest factual dispute in the record concerns the confrontation between the grievant and Sue Thornton in the break room in mid to late February. All parties agree that there was a confrontation, but the three female social workers portray it as a case of the grievant suddenly losing control and becoming verbally abusive, while the grievant characterizes it as an unprovoked verbal assault by Thornton. In reviewing the testimony of the three women, their stories are essentially identical as to the overall sequence of events. According to them, the grievant came in and said he wanted to tell an off-color joke. Haase and Foscato recall him saying it was a "dirty" joke, and Thornton remembered him saying a "nasty" joke, but the meaning is the same in all three versions. All agree that Haase said she did not want to hear a dirty joke, that a discussion of sexual harassment ensued, and that in the course of this discussion the grievant abruptly became enraged at Thornton. Thornton testified that she could not recall his exact words, but Haase and Foscato were both sure that he called Thornton a "fucking cunt". All three women recalled being shocked by his words and the intensity of his anger, and being at least somewhat fearful that he might escalate into physical violence.

The grievant denies having ever having used the word "cunt". His recollection is that Thornton became distraught when they began discussing sexual harassment, repeatedly telling him he had to understand what it was, and generally personalizing the issue to him. She went on like this for five minutes, ignoring his entreaty to stop, until he told her "fuck you, Thornton". This

calmed her and they all chatted about other things for 30 seconds or so, until the grievant left the room. He admits having told a man entering the room as he was leaving, "good luck with those assholes".

As between the two versions, the grievant's is more difficult to credit. Given that Thornton was very likely under stress from the impending scandal involving her husband, it is not hard to believe that she might be very sensitive to the issue of sexual harassment and very much on edge, and it is conceivable that she would have reacted strongly and even emotionally to the grievant, just as he described. However, the portion of the grievant's story where he calmed her down by saying "fuck you, Thornton" and then had a pleasant chat with the three women for a half a minute does not ring true. Moreover, crediting the grievant requires me to conclude that all three of the others -- Haase, Foscato and Thornton -- are lying. The differences between their version and the grievant's cannot be attributed to simply being two sides of the same coin. There is nothing in the record to suggest their motive for conspiring against him. There is some reference to past conflicts between Thornton and him, but nothing of any note, and no evidence at all of problems with Haase and Foscato. Foscato testified that the term "fuck" is not uncommon in the workplace, testimony which is helpful to the grievant. Both she and Haase declined an opportunity at the hearing to agree with a leading question by counsel for the County to the effect that the grievant had also told Thornton to "kiss his ass". While all three women mentioned the incident to supervisors on the following Monday, none of them sought to have the grievant disciplined or demanded any specific action from management. In short, there is no evidence of a vendetta against the grievant which would have prompted the other three employees to invent and coordinate their stories.

4. The March 27th Comment to Denk

The only factual dispute concerning the grievant's comments to Denk as she and Richtmyre passed him on March 27th is whether he said it was nice to see her with her clothes off the night before, as she and Richtmyre claim, or that it was nice to see her with her clothes on the night before, as he claims. The overwhelming weight of the evidence supports Denk's version of the conversation. The grievant's claimed statement make no sense whatsoever. The greeting "it was nice to see with your clothes on" is meaningless, since it comments on the usual state of attire when casual acquaintances meet. It could only have meaning if it was intended to suggest that he normally sees her in the evening with her clothes off, an interpretation that neither party urges and which, if adopted, would cause its own set of problems for the grievant. Denk and Richtmyre were both sure that he said "clothes off", and Kathleen Westphal testified that this was the comment they repeated to her in the break room immediately after the incident. Bougneit and Ryd both testified that he initially admitted having said this when they interviewed him, only to retract later in the day, when he called Ryd to correct his statement. The grievant claims that he said during the interview that the statement was "clothes on" and only called Ryd to reiterate this point.

2/ This version is not completely unbelievable, but it is odd that he would call only to address this one point, given the multitude of charges against him and the fact that he claims to have already made his position clear.

Accepting the grievant's version of the statement requires me to find that he phrased his comment in a meaningless way and that at least four and possibly five people subsequently lied in order to attribute a different statement to him, one that is both more coherent and more damning. Even accepting Heinrich's testimony about what was said in the investigatory meeting, and attributing the difference to confusion or malice by both Ryd and Bougneit, Laura

Denk and Ronda Richtmyre have to be lying if I am to conclude that the grievant said "clothes on". In addition, Kathleen Westphal must have lied, or the other two women must have generated their story in the instant after the comment, so that they could report the "clothes off" statement to her when they reached the break room. The more plausible interpretation of the record, and the one that I accept, is that the grievant did tell Denk "It was nice to see you last night with your clothes off" when he encountered here in the hallway on March 27th.

B. Just Cause for Discipline

The Association challenges the County's attempt to discipline the grievant for using profanity in the two encounters with Denk and the argument with Thornton, asserting that the County has no rule against using profanity, and that the use of profanity is fairly common in the workplace. The Association also asserts that the exchange with Denk on March 27th cannot be termed sexual harassment, and thus did not violate any work rule. Each of these is addressed in turn.

1. Profanity

There is no work rule clearly prohibiting the use of profanity. The work rule relied upon by the County is Section K of the disciplinary guidelines, which prohibits "Discourteous treatment of the public or fellow employees." Certainly some uses of profanity would fall within the scope of this rule, and the grievant knows that, since the use of profanity was cited as one of the reasons for his oral reprimand in 1991. Just as certainly, some uses of profanity will fall outside of the rule. The majority of the witnesses said that there was some use of profanity by employees in the Department, and there is no evidence that employees have been advised that any and all uses of profanity are prohibited and will lead to discipline. Saying that there is no across the board rule

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2/ Union President Jeanine Heinrich was present during the meeting with Ryd and Bougneit, and she supported the grievant's claim that he immediately corrected the "clothes off" statement.

against profanity is not the same as saying that there is no limit on its use or that the County must tolerate anything an employee chooses to say. Common sense is a quality that is not evenly distributed across the population, but it would seem the best description of what defines the line separating permissible and impermissible uses of profanity.

In deciding on which side of the line a particular usage falls, a reasonable person would have to consider a range of factors, including the purpose of the usage, the audience for the usage, the words themselves, and the manner in which they are spoken. In other words, for discipline purposes the appropriateness of using a particular profanity depends upon the context. A vulgarity used in discussing politics with a friend on a break may be treated differently than that same word used in a business meeting or a session with a client. Use of a profane term in a reference clearly meant as a joke will yield a different response than calling someone that name during a disagreement. As a practical matter, it is generally understood that some profanities are considered more offensive and vulgar than others. Saying "Hell" or "Damn" in the course of conversation may not be entirely polite, but it will not generate nearly the same response as saying "Motherfucker" or, for that matter, "Cunt".

In this case, the grievant used profanities in a number of contexts and for a number of purposes. His reference to Valerious as a "fucking bitch" was in a private conversation with Denk. It was not directed at Denk, and was used to express the grievant's dislike of Valerious. Using formal discipline to regulate profanity in private conversations is something that, at least at the outset, is difficult to justify. These situations lend themselves more to informal regulation by the other party, who can say that they find use of the term or terms offensive. If, having been so advised, a person continues to use profanities, there would be a heightened employer interest in intervening with discipline. This is because the purpose of the profanity is changed in that case, and its continued usage becomes a discourtesy to the listener. Although Denk did say she did not appreciate the grievant talking about Valerious in that way, her reason was not that she found the profanity offensive, but that she disagreed with his assessment of the supervisor. In any event, he did not repeat the statement after she objected. Given the lack of any blanket prohibition on the use of profanity during working hours, I cannot find that the grievant's insulting reference to Valerious during a private conversation with another worker was grounds for discipline.

The incident in the supply room is somewhat different in character. In that case, the grievant was swearing loudly, apparently using a string of profanities to express frustration at not being able to find what he wanted. Denk testified that she started reading out loud to block out his voice, but he continued for some time. When he stopped and said "Pardon my French", she told him she found his swearing offensive, and she left. The quantity of profanity that Denk described, and the fact that he continued after she started reading out loud, both suggest that whatever his intentions were at the outset, the grievant was ultimately playing to an audience rather than just venting. If she was reading out loud, the grievant should have understood that to be a response to his language, yet he continued. The fact that he said "Pardon my French" only some time after she started reading out loud is also consistent with this theme, attempting to prompt a response from Denk as opposed to being an apology. The Association argues that this was an indication of politeness, but if he was sensitive to the possibility of offending her he could not have ignored the significance of her reading out loud to drown out his language. Overall, his conduct on this occasion leaves the impression that he may have started out expressing frustration, but that he continued his swearing to provoke some type of response from Denk, and that he knew or should have known that his use of coarse language was not welcome. As discussed above, the use of even private profanity in front of a listener who is known to be offended by such language is an act of discourtesy, and the employer has a greater interest in regulating this than it does in regulating private profanity in general. This offense is obviously not on a par with more serious offenses, such as insubordination or fighting, but it does leave the speaker open to the possibility of a disciplinary response.

The incident involving Thornton, Haase and Foscato in the break room is a clear violation of the rule against discourtesy. While he denies having called Thornton a "fucking cunt", the grievant agreed that the term is among the most vulgar and offensive possible, one which has no acceptable context. It was directed at Thornton in a manner clearly designed to insult and intimidate her. This obscenity is gender specific, uniformly considered to degrade and offend

women, and it was used in the context of a gender related issue, sexual harassment. The seriousness of the incident is aggravated by the fact that it was uttered in a violent rage. By any measure, the grievant's conduct towards Thornton was a serious violation of the acceptable norms in virtually any work place, both in the words used and the manner of their use. The County had just cause to use discipline as a response to this confrontation.

2. Sexual Harassment

The Association asserts that the grievant's comment to Denk -- "It was nice to see you with your clothes off last night" -- does not meet the definition of sexual harassment in the work rules. On the contrary, it clearly meets the definition in one, and perhaps two, areas. The definition of sexual harassment in the policy includes:

> 3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive working environment.

The policy contains a non-comprehensive list of examples of behaviors which might constitute sexual harassment. Two of these are:

> 4. Whistles, catcalls and sexual references.
>
> . . .
>
> 7. Making sexual comments or innuendos (sic), telling jokes or stories of a sexual, demeaning, offensive or insulting nature.

A man's reference to seeing a woman with her clothes off the night before carries with it an almost unmistakable sexual overtone. It is not a subtle comment. Whether it is treated as a sexual reference or a sexual innuendo, the effect is the same. The Association's argument that the grievant did not intend any sexual meaning by the comment is not availing, since it is essentially impossible to determine subjective intent. In recognition of this practical problem, a person is presumed to have intended what a reasonable person under all of the circumstances would have understood their words or actions to mean. It is a rebuttable presumption, but it is not rebutted in this record. This was not a joking exchange between two old friends. It was a comment to a woman that the grievant did not know well, and who had previously shown at least some distaste for his conduct. When it became clear that she was offended, the grievant did not take the obvious step of apologizing or clarifying his words. His alleged distress afterwards went more to his concern over a possible complaint than to the likelihood that what he said was offensive.

The Association asserts that federal law requires a pattern of behavior before a hostile environment can be shown in a workplace. Granting the truth of the argument, it misses the point. This is not a suit against the County for allowing a hostile environment to develop. It is an act of discipline designed to prevent a hostile environment from developing. If an employer cannot

impose some measure of discipline under the work rules for a single case of sexually harassing behavior, it is fairly well guaranteed that a pattern will emerge. The work rule forbids conduct which has the effect of creating a hostile environment, and does not require the County to sit by and let the damage be done before acting.

There may be cases in which an employee could defend him or herself against discipline for a first offense by claiming ignorance of the fact that the conduct was inappropriate. Here, however, the grievant had just completed a mandatory training course on what constitutes sexual harassment in the work place. The training was only three days before the comment was made. The comment to Denk is not a borderline statement that only a very sensitive listener would find inappropriate, or that only an expert in the law would see as a problem. A person of normal sensibilities would understand that the comment, directed to someone who was little more than a stranger, would probably cause offense, and they would understand why it would cause offense. 3/ In summary, the grievant's comment to Denk violated the work rule against sexual harassment, he either knew or should have known that it would violate the rule, and he did not take any steps to try to correct the situation. Thus the County had just cause to impose discipline on him.

C. The Appropriate Level of Discipline

The grievant was guilty of misconduct in his sustained use of foul language in Denk's presence, his violent and obscene outburst at Thornton, and his sexually suggestive comment to Denk. His prior disciplinary record consists of a single verbal reprimand for profanity and insubordination four years before these incidents. The County follows a philosophy of corrective discipline, yet imposed a three day suspension, bypassing the use of additional reprimands or a shorter suspension. The Association argues that this unjustifiably violates disciplinary norms.

There is no evidence of the manner in which the progressive discipline system here is administered, but there are certain features which are normally associated with such a plan. Corrective discipline, as the term itself suggests, aims at modifying employee behavior through the use of progressively more severe measures of discipline. This serves the purpose of both putting the employee on notice of what is expected, and allowing him to show improvement before his job is put at risk. It does not promise employees a free bite at the apple, nor does it eliminate the possibility of discipline which is in proportion to the seriousness of an offense. As an illustration, even under a system of progressive discipline, an employee with an otherwise clean record who engages in serious misconduct, such as assault, may be subject to summary discharge.

The grievant in this case is guilty of three infractions. The first of these, using profanities in Denk's presence in a manner that was offensive, is not a serious violation. A reprimand would

3/ Even if the Sexual Harassment policy did not encompass this behavior, the grievant would be subject to discipline under the rule prohibiting discourtesy to other employees.

be an appropriate response. Given his prior discipline for a somewhat similar offense, even a written reprimand might be justified. However, a suspension for this conduct would be wholly inappropriate under a corrective discipline system. The other two offense are much more serious. The comment to Denk was obviously inappropriate and came on the heels of mandatory training about sexual harassment, shortly after the Washington County District Attorney had been forced from public office by charges of sexual harassment. The probable effect of the comment was to humiliate another employee, and it had that effect. The incident with Thornton is even more disturbing, since it not only involves very offensive and degrading language directed at a co-worker, but also carries overtones of violence.

Even though I have discounted discipline for the reference to Valerious as a "fucking bitch", it does serve to confirm a pattern of poor judgment in choice of words and general lack of sensitivity to other employees. Taking the remaining three offenses in combination, it cannot be said that a three day suspension is out of proportion to the grievant's conduct. Since there is no evidence that the County has approached corrective discipline as a lockstep progression from verbal to written to one, three and five day suspensions, and then to discharge, and as there is no evidence of lesser responses to past incidents of verbal assault and sexual harassment, I have concluded that the County did not violate its corrective discipline policy. Accordingly, the grievance is denied.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The County had just cause to impose a three day suspension on the grievant on April 14, 1995. The grievance is denied.

Dated at Racine, Wisconsin this 1st day of July, 1996.

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator