BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DISTRICT COUNCIL 48,
AFSCME, LOCAL 587

and

MILWAUKEE AREA VOCATIONAL, TECHNICAL,
and ADULT EDUCATION DISTRICT
(MILWAUKEE AREA TECHNICAL COLLEGE)

Case 465
No. 55265
MA-9956

(Sandy Iwanski Suspension Grievance)

Appearances:

Ms. Carolyn Delery, Podell, Ugent, Haney & Delery, S.C., 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202, appeared on behalf of the Union.

Mr. William Roden, General Counsel, Milwaukee Area Technical College, 700 West State Street, Milwaukee, Wisconsin 53233-1443, appeared on behalf of MATC.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and MATC or the Employer, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on September 12, 1997 in Milwaukee, Wisconsin. After the hearing the parties filed briefs, whereupon the record was closed on March 9, 1998. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. Having reviewed the record and arguments in this case, the undersigned finds the following issue appropriate for purposes of deciding this dispute:

Did the Employer have just cause to impose a written warning and a two-day suspension on the grievant, Sandy Iwanski? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

The parties' 1995-98 collective bargaining agreement contains the following pertinent provision:

Article III – Management Rights

The Board retains and reserves the sole right to manage its affairs in accordance with all applicable laws and legal requirements, except as limited by the specific provisions of this Agreement. Included in this responsibility, but not limited thereto, is the right to:

. . .

i. For just cause, suspend, discharge, demote, or take other disciplinary action.

BACKGROUND

Grievant Sandy Iwanski has been employed as a food service worker at MATC's downtown campus since 1990. She is a part-time employe, working about 25 hours a week. Food service workers at MATC can be assigned to a number of different (food service) areas. Iwanski's primary assignment is that of cashier. Iwanski was disciplined for two incidents which occurred at work in late October, 1996. Her discipline is the subject of this case. Prior to October, 1996, Iwanski had not been disciplined by the Employer.

The cashiers at MATC sit on chairs. The employes who use those chairs consider some chairs better than others. The cashiers have historically vied among themselves for the "best" chairs and claimed them as their own.

In 1994, the Employer had just one chair with back support; the other chairs were basically bar stools that did not have back support. The employe who got to use the chair with back support was Vergie Simpson. Since Simpson got that chair, Iwanski had to use a chair that did not have back support. Sometime in 1994, Iwanski went to her supervisor, Jan Stipes, and requested a chair with back support. This request was accompanied by a medical statement from her doctor which indicated that Iwanski had

"chronic lumbar (back) pain" and that "the patient needs chair with support." Stipes responded to Iwanski's request by indicating she would get a chair for Iwanski with back support. A new chair with back support was ordered and subsequently delivered to the workplace. When it arrived, Iwanski thought the new chair would be hers. She was mistaken. The new chair was given to Simpson and Iwanski was given Simpson's old chair. Although this chair switch gave Iwanski a chair with back support, she was irritated she did not get the new chair.

Between 1994 and 1996, the Employer replaced all the cashier chairs that did not have back support with chairs that did have back support. Even after this change, though, the cashiers still considered some chairs better than others and vied among themselves for the "best" chairs. The winner of this daily battle for the "best" chairs depended on who was working that day or who came into work the earliest.

In September, 1996, Iwanski transferred from the food court to the cafeteria, where she again worked with Vergie Simpson. Simpson's work shift started at 6 a.m. and Iwanski's shift started at 10 a.m. Each day when Simpson started her shift, she would select a chair to sit in for the duration of her shift. Iwanski felt that Simpson took the "good" chair each day and left her with the "bad" chair. This greatly irritated Iwanski.

In mid-October, 1996, 1/ Iwanski went to the Food Service Director, Patrick Schrader, and told him she had lower back pain. Schrader responded that he would order a new chair, which he subsequently did. The record does not indicate when this new chair arrived.

1/ All dates hereinafter identified occurred in 1996.

It is against this backdrop that the following events unfolded.

FACTS

On October 25, Iwanski was assigned the duty of breaking down the salad bar. She was angry and upset over being given this assignment because she thought it was not part of her job. Food Service Director Schrader noticed that Iwanski was complaining about this assignment, approached her, and said "he hoped we can resolve your situation." Iwanski responded by saying "Stay away from me. I'm mad and I'm going to stay mad." Schrader then responded "Be careful what you say", to which Iwanski responded "I plan on being careful." Schrader testified that based on the sarcasm in her voice, her body

language and demeanor, and knowing she was angry, he interpreted Iwanski's statements to him as a threat.

On October 28, Iwanski reported to work at her regular time. When she did so, Vergie Simpson had, as usual, already claimed the chair that Iwanski considered the "good" chair. On that particular day though, Simpson happened to be away from her cashier station when Iwanski reported to work. Iwanski then went over to Simpson's cashier station and took the chair that Simpson had been using. In doing so, Iwanski knew that Simpson would object to her taking that chair.

Iwanski did the same thing for the next two days. Specifically, after she reported to work, she went over to Simpson's cashier station and took the chair that Simpson had been using. On both days, Simpson happened to be away from her cashier station when this occurred.

On October 31, Iwanski reported to work and switched chairs with Simpson as she had been doing for the past three days. This day though, Simpson caught her in the act. When she did so, Simpson demanded to know why Iwanski had taken her chair. Iwanski responded that her back hurt and that she needed that particular chair. Simpson was not satisfied with this response and went into supervisor Debra Lofton's office and complained that Iwanski had taken her chair. Lofton immediately convened a meeting with Iwanski and Simpson to try to resolve the chair dispute. After hearing from both Iwanski and Simpson, Lofton decided that Simpson was entitled to pick the chair she wanted since she (Simpson) came into work before Iwanski did. Lofton then directed Iwanski to return the disputed chair to Simpson. Lofton's decision infuriated Iwanski who yelled something at Lofton in an angry tone of voice. Exactly what was yelled is disputed. Lofton testified that Iwanski yelled "damn you, damn Patrick, I'm sick of you both" and stormed out of the office. Helen Allen, a food service worker who was outside Lofton's office at the time of the incident, testified that Iwanski yelled "damn you, damn Patrick" and then stormed out of the office. Iwanski admitted she was upset and frustrated when she left Lofton's office, but she denied threatening anyone or cursing her supervisors. She testified she told Lofton "That's it. I'm sick of you, I'm sick of Patrick, and you're damn right something is going to be done about it."

Lofton then called Food Service Director Schrader and told him what had just happened. In doing so, she repeated the exact words Iwanski had just used. Lofton asked Schrader to deal with the stituation because she had to leave work to deal with a family emergency that had just arisen.

Schrader immediately decided to convene a meeting with Iwanski. He wanted a union representative to be present at this meeting so he first called Alvina Johnson, the union steward in the food court, but she was unavailable. Schrader then called the office of Local 587, but no one was in the office at the time.

Schrader then went to the cafeteria looking for Iwanski. Upon getting there, he saw that Iwanski, who was very agitated, was engaged in a heated conversation with another employe. He also saw that two other employes who were close by, Simpson and Helen Allen, were both upset. Simpson told Schrader she was concerned for her personal well-being. Schrader also saw that students were beginning to come into the cafeteria for the noon hour rush.

After assessing the situation just described, Schrader called Iwanski into Lofton's office for what turned out to be a very short meeting. In this meeting, Schrader told Iwanski he was sending her home for the rest of the day. He told her to return to work the next day for a meeting at which a union representative would be present. Schrader did not ask Iwanski for her side of the story during this short meeting.

The next day, November 1, this meeting was not held because Iwanski called in sick.

In the days that followed, Lofton and Schrader conducted an investigation of the October 31 incident. Their investigation consisted of interviewing employes Simpson, Helen Allen and Christine Johnson; all were food service workers who were working in the cafeteria on October 31. On November 7, Schrader met with Joanne Haglund, Vice-President of Local 587 and its chief steward, and Iwanski. During this meeting, Iwanski told Schrader her side of both the October 25 and October 31 incidents.

On November 20, Schrader met again with Haglund and Iwanski. When he did so, he gave Iwanski the following memo:

Date: November 20, 1996

To: Sandy Iwanski

From: Patrick Schrader

Re: Discipline, Suspension, & Written Warning

On October 25, 1996 – I, Patrick Schrader, was speaking to you as you were breaking down the Salad Bar, I said to you that I felt we could resolve the issue that you had. You in turn threatened me and said, "To stay out of my way and don't come near me. I'm mad and I am going to stay mad for some time." At this time I told you to be very careful of what you said. You said, "I plan on being very careful." I personally interpreted this as a threat.

This letter and report are to inform you that your actions on October 31, 1996 were unacceptable. Without asking a fellow employee if you could use a chair. You removed this chair and treated it as if it was your personal property. When you and this fellow employee, Vergie Simpson, went to talk to the supervisor, Debra Lofton, you in your own words blew up. You then proceeded to swear at a supervisor saying, "Damn you and damn Patrick – I'm sick of both of you." You then stormed out of the office. **UNDER NO CIRCUMSTANCES** will cursing a supervisor be tolerated.

On this day, around 10:30 a.m., I brought you in the office in the kitchen and dismissed you from the workplace because of your on-going insubordination, demeanor, and body language that was both challenging and aggressive.

November 7, 1996 you came into the office when Debra was on the phone and asked her if the meeting was scheduled for this day. Debra said, "I believe so." You said, "It better be – It better not be canceled." In the week prior to the October 31 incident, your demeanor and attitude have been unacceptable in the work place. You were suspended for one (1) day on October 31. You are being suspended for one (1) additional day, that day being November 21, 1996. This means you have a two (2) day suspension for both threatening a supervisor and swearing at a supervisor.

Please be advised that any additional incidents involving these types of infractions will result in disciplinary action up to and including termination. Also be advised, if you are experiencing any personal problems the College has an Employee Assistance Program.

c: Labor Relations
L587
Human Resources
Jo Ann Haglund

Iwanski grieved the discipline referenced above, and the grievance was ultimately appealed to arbitration.

The record indicates that since Schrader became Food Service Director in 1994, he has disciplined six employes. The discipline these employes received is as follows: in three instances the employe received a counseling letter; in one instance the employe received a verbal reprimand; in one instance the employe received a written reprimand; and in one instance the employe received a five-day suspension. None of these instances involved a factual situation where the employe used abusive language to a supervisor.

POSITIONS OF THE PARTIES

The Union's position is that the Employer did not have just cause to discipline the grievant. It makes the following arguments to support this contention. First, the Union raises a due process argument that the Employer failed to conduct a proper investigation in this case. The Union contends the Employer's investigation into the October 31 incident was not fair or complete because Schrader never asked Iwanski for her side of the story before imposing discipline. Second, the Union asserts that Iwanski was not insubordinate because she never refused to carry out a management order or directive. According to the Union, "the only action that the grievant took on her behalf was to switch chairs" with Simpson. With regard to Iwanski's verbal outburst to Lofton on October 31, the Union characterizes it as a statement that she was going to take the (chair) matter up with the Union. Third, the Union argues in the alternative that even if Iwanski was insubordinate, the reason is because she was provoked by the Employer 's action. According to the Union, the Employer failed to accommodate the grievant by assigning her a particular chair with good back support. It avers that Schrader knew about Iwanski's disability of lower back pain, but did nothing to accommodate her disability. As the Union sees it, the Employer's "lack of action created the circumstances for this incident". Said another way, the Union believes that the grievant's outburst "was a direct result of the Employer's unfair treatment." The Union further characterizes the grievant's reaction here as "normal". Fourth, the Union contends that the grievant was treated unequally by the Employer. It notes in this regard that in three other instances where supervisor Schrader imposed discipline, the discipline imposed was just a counseling letter. According to the Union, the circumstances present in this case are somewhat similar to those where just a counseling letter was issued, so the Employer should have treated Iwanski similarly. The Union avers that since Iwanski did not receive just a counseling letter, she was subjected to disparate treatment. Finally, the Union argues that by suspending the grievant, the Employer did not follow progressive discipline as it should have. It notes in this regard that prior to the incidents involved here, the grievant had not been previously disciplined. The Union argues that if discipline was warranted here, it should have been a verbal reprimand – not a written warning and a

suspension. The Union views a suspension in this case as harsh and excessive. The Union notes that where employers fail to follow progressive discipline, arbitrators have not hesitated to overturn the discipline imposed. It asks the arbitrator to do likewise here. The Union therefore asks that the grievance be sustained, the discipline overturned, and Iwanski made whole for the days she was suspended.

The Employer's position is that it had just cause to suspend the grievant. It makes the following arguments to support this contention. First, the Employer contends that Iwanski was insubordinate on October 31, 1996 when she "damned" her two supervisors in an angry tone of voice and stormed out of Lofton's office after Lofton had decided to let another employe (Simpson) use the chair that Iwanski wanted to use. To support this premise, it cites the testimony of supervisors Schrader and Lofton to that effect, as well as the testimony of eyewitness Helen Allen. In the Employer's view, none of them had a reason to fabricate their account of the incident, so their testimony should be credited instead of the grievant's. The Employer also asserts that nothing in the record establishes that Lofton and Schrader were out to get the grievant or tried to provoke her. It also notes that Lofton did not swear at Iwanski, nor did she raise her voice with her. The Employer submits that an employe's displeasure with his/her supervisor or displeasure with a supervisor's decision does not warrant the use of abusive language. According to the Employer, the grievant has a history of displaying anger toward her co-workers and supervisors, and in this instance she used abusive language to express her anger. The Employer avers this response was totally unacceptable and inappropriate and cannot be tolerated by management. Next, with regard to the level of discipline which was imposed, the Employer believes that the suspension which was imposed here was appropriate under the circumstances for the following reasons. First, it submits that the reason Schrader sent the grievant home on October 31 was because he had safety concerns for both his employes and the students. It notes that at the time Iwanski was very agitated, and Schrader was attempting to diffuse the situation and reduce the potential for violence in the workplace. Second, it notes that suspension is a common penalty for insubordination. It cites numerous arbitration awards wherein arbitrators have upheld suspensions or discharges for insubordination. The Employer asks the arbitrator to not overturn the discipline which it imposed here. Finally, the Employer argues that the Union failed to show that the level of discipline which the Employer imposed here (i.e. a written warning and suspension) was discriminatory or constituted disparate treatment. In its view, none of the other incidents where employes have been disciplined by the Employer involve a factual situation like this one where an employe swore at her supervisors. The Employer therefore contends that the grievance should be denied and the discipline upheld.

DISCUSSION

Article III, i, of the parties' labor agreement contains what is commonly known as a "just cause" provision. It provides that the Employer will not discipline an employe without just cause. What happened here is that the grievant was suspended for two days and given a written warning by the Employer. Given this disciplinary action, the obvious question to be answered here is whether the Employer had just cause for doing so.

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

As just noted, the first part of a just cause analysis requires a determination of the grievant's wrongdoing. Attention is now turned to making that call.

Iwanski's written warning and suspension notice indicates she was suspended for her conduct on October 25 and 31, 1996. It charges that on those two days she was insubordinate towards supervisors Schrader and Lofton, respectively.

"Insubordination" is defined in *Robert's Dictionary of Industrial Relations* as: "A worker's refusal or failure to obey a management directive" and/or "the use of objectionable language or abusive behavior towards supervisors". Under this definition, either type of conduct can qualify as insubordination. In this case, the charges against Iwanski involve the latter type of conduct, not the former. Employers have a legitimate and justifiable interest with preventing employes from using objectionable language towards supervisors or verbally abusing them. Such conduct is obviously detrimental to the working environment since it undercuts the authority of supervisors.

That said, the focus now turns to the facts involved. In the discussion which follows, I will address the events of October 25 and 31 separately.

Schrader's account of what Iwanski said to him on October 25 was not disputed by Iwanski at the hearing. That being so, the following exchange is undisputed. Schrader, knowing that Iwanski was angry over being assigned the task of breaking down the salad bar, walked up to her and said "he hoped we can resolve your situation." Iwanski responded by saying: "Stay away from me. I'm mad and going to stay mad." Schrader then responded: "Be careful what you say", to which Iwanski responded "I plan on being careful."

In reviewing Iwanski's words, it is noted at the outset that it is difficult to determine the subjective intent behind statements with absolute certainty. Different people express themselves differently, and even the meaning of a clear statement may be distorted by a poor choice of words. However, the fact that one cannot know what a person really meant does not mean that words have no consequences. People are held to intend by their words what a reasonable person, under all of the circumstances, would understand them to have meant. In this case, Iwanski's words do not contain any direct or explicit threats. Nevertheless Schrader interpreted them to indirectly or implicitly be a threat. He testified that his interpretation was based on the sarcasm in Iwanski's voice, her demeanor and body language, and the fact that he (Schrader) knew she was angry over being given the assignment of breaking down the salad bar. Given this context and the word-to-the-wise manner in which Iwanski's words were said, I find that Schrader's interpretation of Iwanski's comments as an implicit threat was understandable and justified. Implicitly threatening a supervisor is inappropriate workplace conduct, and no employer can be expected to tolerate it.

Having so found, attention is now turned to the October 31 incident. I begin by reviewing the following undisputed facts. There is a history of conflict between Iwanski and Simpson concerning the cashier chairs. The two employes have long vied over who gets to use which chair. It is against that backdrop that on four straight days at the end of October, 1996, Iwanski took the chair that Simpson had already claimed. On October 31, Simpson caught Iwanski taking her chair. She went and complained to supervisor Lofton about it, who immediately convened a meeting with those two employes to try and resolve the chair dispute. After Lofton listened to both Iwanski and Simpson explain why they should get the chair in question, Lofton sided with Simpson and directed that Simpson get the chair in question. This decision infuriated Iwanski who then yelled something at Lofton.

What Iwanski said is disputed. Lofton testified Iwanski yelled "damn you, damn Patrick. I'm sick of you both." Iwanski testified she said "That's it. I'm sick of you, I'm sick of Patrick, and you're damn right something is going to be done about it." These accounts obviously differ, so it is necessary to decide which one to credit.

After weighing this conflicting testimony, I credit Lofton's account for the following reasons. First, immediately after Iwanski stormed out of her office, Lofton called Schrader and recounted to him the exact words Iwanski had just used. Thus, her account to Schrader was done contemporaneous with its occurrence. Second, Lofton's account of what Iwanski said was corroborated by Helen Allen, an employe who happened to be outside of Lofton's office at the time and heard what was said. The testimony of Lofton and Allen was consistent that Iwanski yelled "damn you, damn Patrick." Third, no proof was offered why either Lofton or Allen would testify falsely

against Iwanski. As a result, there is no reason noted in the record for either of them to fabricate their account of what Iwanski said. In contrast though, Iwanski is the disciplined employe and thus has something to gain by failing to remember the exact words said.

The Union offers several defenses for Iwanski's conduct which it believes should excuse her actions. The first is that the Employer failed to conduct a proper investigation to determine what happened. According to the Union, the Employer's investigation into the incidents was flawed because Schrader never asked Iwanski for her side of the story before he disciplined her. The problem with this contention is that it is not supported by the facts. The record indicates that Iwanski told Schrader her side of both incidents at their November 7 meeting. That being so, Schrader heard from Iwanski before he issued his written warning/suspension notice on November 20.

Another Union defense is that even if Iwanski was insubordinate, this was because the Employer's "lack of action created the circumstances for this incident." As the Union sees it, the Employer failed to accommodate the grievant by assigning her a chair with back support. In my view, this argument would have merit if the chair that Iwanski had to use each day was one without back support. However, the fact of the matter is that the chair that Iwanski had to use each day did have back support. That being the case, this argument, like the one noted in the preceding paragraph, is simply not supported by the facts.

Still another Union defense is that Iwanski was provoked by management officials on October 25 and October 31, so management should be responsible for the grievant's verbal outburst. The problem with this contention is that the record evidence does not establish any such provocation. On both October 25 and 31, supervisors Schrader and Lofton spoke civilly to Iwanski. Neither raised their voice to her or spoke in an angry tone. Also, insofar as the record shows, neither supervisor purposely tried to "jerk her chain" or "push her button". Consequently, no provocation has been shown.

Having found that none of the Union's defenses excuse the grievant's conduct on October 25 or 31, the next question is whether that conduct warranted discipline. I find that it did. Iwanski's abusive language to Lofton on October 31, like her indirect threat to Schrader on October 25, was not appropriate workplace conduct. Notwithstanding the Union's contention to the contrary, there was nothing "normal" about it.

The second part of a just cause analysis requires that the Employer establish that the penalty imposed was contractually appropriate. Based on the following rationale, I conclude that the written warning and two-day suspension Iwanski received was contractually appropriate under the circumstances. First, contrary to the Union's contention, nothing in Article III, i, requires that a counseling letter or verbal warning had

to be issued in this particular case. Many labor agreements specify a particular sequence which must be followed by the Employer when it imposes discipline. For example, some contracts provide that a verbal warning be imposed first, then a written warning, then a suspension, etc. However, this contract does not contain such language. That being so, it follows that the Employer can impose whatever discipline it believes is appropriate under the circumstance and will pass muster if challenged under the just cause provision. Second, there is nothing in the record indicating that other employes engaged in similar conduct and were not disciplined or were not disciplined as severely as Iwanski. In my view, none of the other cases where employes have been disciplined involve a factual situation like that present here. As a result, it is held that Iwanski was not subjected to disparate treatment in terms of the punishment imposed. Finally, the Union implies that Iwanski was disciplined for threatening to go to the Union over the chair dispute. I find nothing in the record to support such a conclusion. Accordingly then, it is held that the penalty which the Employer imposed here (i.e. a written warning and a two-day suspension) was not excessive, disproportionate to the offense, or an abuse of management discretion, but rather was reasonably related to the seriousness of her proven misconduct. The Employer therefore had just cause to impose a written warning and a two-day suspension on the grievant.

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

AWARD

That the Employer had just cause to impose a written warning and a two-day suspension on the grievant, Sandy Iwanski. Therefore, the grievance is denied.

Dated at the City of Madison, Wisconsin this 1st day of July, 1998.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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